SOLEMN COMMITMENTS:
FIDUCIARY OBLIGATIONS, TREATY RELATIONSHIPS AND THE FOUNDATIONAL PRINCIPLES OF CROWN-NATIVE RELATIONS IN CANADA

by

Leonard Ian Rotman

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ABSTRACT

This dissertation constructs an alternative framework for the resolution of aboriginal and treaty rights issues in Canadian aboriginal rights jurisprudence. It argues that judicial analyses of aboriginal and treaty rights are premised upon incorrect assumptions about the nature of Crown-Native relations. These incorrect assumptions have resulted in the improper compartmentalisation of aboriginal and treaty rights and, in turn, led to their marginalisation.

The primary goal of the dissertation is to foster a more reasoned and integrated method of analysis by regarding aboriginal and treaty rights in a suitable, culturally-appropriate context. This entails accounting for the unique, or *sui generis*, nature of those rights and integrating individual rights with each other and the larger context of Crown-aboriginal relations. Many of the principles that underlie the basis of contemporary aboriginal rights jurisprudence will also be examined.

It will been maintained that the parties' interaction during the formative years of their relationship was guided by the foundational principles of peace, friendship, and respect. These principles were enshrined in the first formal treaty between the groups. Although Crown-Native relations have changed in many ways since that time, this work contends that these principles should continue to inform contemporary Crown-Native relations and the legal implications that stem therefrom. These foundational principles serve as the basis for the unified, contextual, and culturally-appropriate understanding of aboriginal and treaty rights suggested.

The dissertation is divided into four parts. Part I examines the formative years of Crown-aboriginal relations in North America, from the time of initial contact between Britain and the aboriginal peoples until the period shortly after the conquest of New France. Part II concentrates on the Crown-Native fiduciary relationship that was created during these formative years and the implications of those relations for the parties involved. The third Part of the dissertation is concerned with Crown-Native treaty relations. The concluding Part discusses the nexus between Crown-Native fiduciary and treaty relations to illustrate the inter relatedness of aboriginal and treaty rights issues underlying the theory proposed.

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Solemn Commitments: Fiduciary Obligations, Treaty Relationships, and the Foundational Principles of Crown-Native Relations in Canada

by
Leonard I. Rotman
B.A., LL.B., LL.M., of the Ontario Bar
Assistant Professor, Faculty of Law, University of Alberta

CONTENTS

I. Introduction

> ... [S]ection 35 of the *Constitution Act, 1982* ... gives us a way of viewing the *Charter* that can help to subordinate some of the cleverness and opportunism of legal analysis to the kind of wisdom and integrity that has allowed aboriginal cultures to survive.
>
> The actual words of section 35 are "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The language used is not very specific and is the type that provides a field day for lawyers. However, the context of 1982 is surely enough to tell us that this is not just a codification of case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown. Those courts were bound to legitimate every sovereign act of suppression of aboriginal cultures. That kind of arrangement has nothing to do with justice as conceived by the *Constitution Act, 1982* and by international standards to which Canada is committed. The old rules embodied in precedent are therefore not helpful when it comes to translating the words of section 35 into reality.[1]

Canadian aboriginal rights jurisprudence is at a critical stage in its evolution. Aboriginal and treaty rights currently enjoy a greater degree of notoriety than at any time in their history. Indeed, aboriginal and treaty rights are now generally regarded as matters of national concern. The constitutional recognition and affirmation of these rights in section 35(1) of the *Constitution Act, 1982*[2] has tremendous implications for aboriginal[3] and non-aboriginal peoples in Canada, as well as the Crown.[4] Yet, fifteen years after the repatriation of the Canadian Constitution, the

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[1]N. Lyon, "An Essay on Constitutional Interpretation," (1988), 26 *Osgoode Hall L.J.* 95 at 100-1.

[2]Enacted as Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11.

[3]The terms "aboriginal peoples," "Native peoples," and "indigenous peoples" will be used interchangeably herein to refer to the people who are encompassed within the definition of "aboriginal peoples" in section 35(2) of the *Constitution Act, 1982* -- namely the Indian, Inuit, and Métis peoples of Canada. For a more detailed discussion of these terms, see C. Chartier, '"Indian": An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867,' (1978-79), 43 *Sask. L. Rev.* 37; B. Slattery, "Understanding Aboriginal Rights," (1987), 66 *Can. Bar Rev.* 727 at footnotes 18 and 175; and, generally, C. Bell, "Who Are the Métis People in Section 35(2)?" (1991), 29 *Alta. L. Rev.* 351; P. Chartrand, "'Terms of Division:' Problems of 'Outside-Naming' for Aboriginal People in Canada," (1991), 2:2 *J. Indig. Stud.* 1; T. Isaac, "The Power of Constitutional Language: The Case Against Using 'Aboriginal Peoples' as a Reference for First Nations," (1993), 19 *Queen's L.J.* 415. For various legal definitions, see section 35(2) of the *Constitution Act, 1982*; section 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5; *Re Eskimo*, [1939] 2 D.L.R. 417 (S.C.C.).

Aside from the use of entrenched legal phraseology, such as Indian lands and Indian treaties, where other descriptive terms are used, such as "Indians," they refer specifically to those people and not to the aboriginal peoples of Canada generally.

[4]The use of the term "the Crown" herein refers to the collective sovereign authority in Canada. At various times, "the Crown" was comprised of various combinations of the British and Canadian Crowns. The phrase "the Crown" will be used where it is not necessary to distinguish between specific emanations of the Crown, insofar as there is overlap between the responsibilities and obligations of the various emanations of the Crown towards the

Canadian legal and political establishment has yet to adequately address aboriginal and treaty rights issues.[5]

This dissertation seeks to develop an appropriate conceptual framework for aboriginal and treaty rights analysis. To develop this framework, attention must be paid to the contexts within which aboriginal and treaty rights have existed and continue to exist. Furthermore, care must be taken to recognise the unique, or *sui generis*,[6] nature of aboriginal and treaty rights. To give proper attention to context and the *sui generis* nature of aboriginal and treaty rights necessitates a balancing of European and aboriginal understandings of those rights. To do this, one must recognise the different world views that these cultures possess.

At a basic level, European cultures are said to regard time in a linear fashion -- that is from past to present to future. Aboriginal cultures, meanwhile, tend to view time in a cyclical fashion -- what was past is not over and done with, but repeats itself in the present and future.[7] This dissertation will attempt to balance Crown and aboriginal understandings of aboriginal and treaty rights with their different world views. For example, the examination of the formative years of Crown-aboriginal relations in Chapters I and II will follow a primarily linear process to reflect the historical progression of Crown-Native interaction. However, the discussion of treaties in Chapters VI and VII will consider treaties collectively -- insofar as it will be argued that aboriginal understandings of those treaties are quite consistent throughout the history of the treaty-making process, as are the Crown's representations therein.

In the process of developing a new framework for understanding aboriginal and treaty rights, this dissertation does not attempt to present a complete narrative history of Crown-aboriginal relations in Canada nor does it desire to do so. Rather, selected events and time periods will be examined. These events will be taken primarily from the formative years of Crown-aboriginal relations -- dating from the time of contact between aboriginal peoples and

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aboriginal peoples of Canada. Where specific emanations of the Crown are referred to, such as the British Crown, the federal Crown, or a provincial Crown, those distinctions will be clearly made in the text.

[5]This has occurred in spite of the constitutional conferences created for the purpose of enhancing the understanding of aboriginal and treaty rights by section 35.1 of the *Constitution Act, 1982*. These conferences, held between 1983 and 1987, failed to assist in the definition of aboriginal and treaty rights contained in section 35(1).

[6]The term "*sui generis*" means "unique," or "of their own kind or class." See *Black's Law Dictionary*, Fifth Ed., (St. Paul: West, 1979) at 1286.

[7]See the discussion in Royal Commission on Aboriginal Peoples, "Aboriginal and Non-Aboriginal Approaches to History," in *Report of the Royal Commission on Aboriginal Peoples*, 5 Vols., (Ottawa: Minister of Supply and Services Canada, 1996) Vol. 1, *Looking Forward, Looking Back* at 32-6.

Europeans through to the *Treaty of Niagara* in 1764 -- and the treaty making period extending from the middle of the nineteenth century until the early stages of the twentieth century. The present-day implications of these events will also be a fundamental element of the discussion herein.

(a) Developing an Appropriate Framework

A conceptual framework that provides for reasoned and integrated methods of analysis of aboriginal and treaty rights must account for three elements: the need to regard aboriginal and treaty rights in a suitable context; to understand those rights in a culturally-appropriate manner; and the unification of aboriginal and treaty rights issues with each other and the larger context of Crown-aboriginal relations. While these three elements may appear to be distinct from each other, there is significant overlap among them. As will become evident, each plays an important role in fostering a more appropriate framework for conceptualising aboriginal and treaty rights.

The first element of this framework -- fidelity to context -- has two levels, the microscopic and the macroscopic. The microscopic level entails examining aboriginal and treaty rights in light of the circumstances in which they exist. This line of inquiry accounts both for the bare right and the method of exercising those rights. This entails establishing the existence of the rights, their importance to the communities exercising them, and the various ways in which the rights are used. Relevant considerations include spiritual, sustenance, or economic purposes associated with those rights. The macroscopic level incorporates the broader, or general, history of Crown-Native relations from the time of initial contact between the groups into the contemporary understanding of the rights at stake.[8] The history of Crown-Native relations is a vital element of aboriginal and treaty rights analysis. The modern shape of those rights may be traced to historical Crown-Native interaction. However, while the contemporary exercise of aboriginal and treaty rights draws upon historical aboriginal practices related to their physical and cultural survival, it is

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[8]The word "contact" has been purposely used in place of the more common term "discovery" to describe the meeting of European and aboriginal peoples. This is because of the historical fact that what is now known as North America was occupied by indigenous peoples who inhabited, hunted, fished, trapped, and farmed the land from time immemorial, well before Europeans were aware of the New World or possessed the ability to travel to it. To suggest that any European nation "discovered" North America presupposes that the continent had previously been uninhabited, or, as it is described in legal terminology, *terra nullius* (land belonging to no one). In contrast, "contact" suggests "the reciprocity of discovery that followed upon European initiatives of exploration; as surely as Europeans discovered Indians, Indians discovered Europeans": F. Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest*, (Chapel Hill: University of North Carolina Press, 1975) at 39.

not wedded to those practices.[9] Moreover, simply because aboriginal and treaty rights are rooted in historical practices does not mean that those rights must have been historically recognised by the Crown.[10]

The second element of this analytical framework involves establishing a method for arriving at culturally-appropriate understandings of aboriginal rights. A culturally-appropriate understanding recognises that aboriginal perspectives may not be identical to the Crown's understanding of those same rights. It must, therefore, bring together aboriginal and common law views on the origins and evolution of aboriginal and treaty rights. Each party must be given an equal opportunity to present evidence on their understanding of the rights in question. Insofar as aboriginal cultures are primarily oral, aboriginal peoples must be allowed to present oral evidence relating to their rights in addition to any written documentation that may be provided by them or by the Crown. The courts should be sensitive to the nature of aboriginal oral evidence in their determinations of the weight that it should receive. Admitting such evidence only where it has first been corroborated by physical, written, or expert evidence appears to give the corroboration greater weight than the evidence upon which it is based. This practice also potentially excludes a great deal of evidence where corroboration in these forms is unavailable.

The third element of this framework is the fostering of a unified approach to Canadian aboriginal rights jurisprudence. This unified approach, which involves two processes, contemplates the reconciliation of specific aboriginal and treaty rights with general principles of aboriginal rights jurisprudence and the history of Crown-Native relations. The first element in this

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[9]This assertion entails that aboriginal and treaty rights must not be restricted to the manner in which they were exercised at a particular point in time -- as indicated by the rejection of frozen rights theory in *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 at 397 (S.C.C.) where the court expressly rejected analyses of aboriginal rights that held that those rights had to be exercised according to their historical form and content -- and that those rights are not to be understood only in relation to particular practices. Aboriginal rights ought to be viewed as broad, theoretical constructs from which particular practices, traditions or customs are derived rather than as modern incarnations of pre-contact practices as suggested by Lamer C.J.C. in *R.* v. *Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.). Thus, historical "practices" do not define the modern exercise of an aboriginal or treaty right; rather, they are to be used only as reference points for ascertaining how aboriginal and treaty rights have been exercised in the past. On this point, see L'Heureux-Dubé J.'s discussion of aboriginal rights in *Van der Peet*, *ibid.* at 238.

[10]As the Supreme Court of Canada recently stated in *R.* v. *Coté*, [1996] 4 C.N.L.R. 26 at 48 (S.C.C.):

> ... [T]he fact that a particular practice, custom or tradition continued, in an unextinguished manner, following the arrival of Europeans *but* in the absence of the formal gloss of legal recognition ... should not undermine the constitutional protection accorded to aboriginal peoples. Section 35(1) would fail to achieve its notable purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features

approach is to bring together aboriginal and treaty rights issues that have previously been treated as separate and distinct by the courts. These include matters such as fiduciary obligations, treaty interpretation, and aboriginal self-government. These matters share much in common and greatly influence one another. In addition to bringing together hitherto separate and distinct issues, the unification contemplated herein also entails looking at these issues on microscopic and macroscopic levels. At a microscopic level, the raising of a treaty right, for example, is analysed in the specific context in which that right is, or has been, contemplated and exercised. This entails looking at the treaty and treaty negotiations on which the right is based, the subsequent practices of the group claiming the right and the action or inaction of the Crown vis-à-vis that specific right -- such as its regulation of the right. On a macroscopic level, the treaty right claimed is considered in light of the canons of treaty interpretation developed by the judiciary as well as Crown practices relating to treaty rights generally.

It will be argued in subsequent chapters that Canadian courts' existing methods of analysis of aboriginal and treaty rights ignore each of the above three elements. Rather than engaging in a contextual and culturally-appropriate method of analysis, the courts have separated aboriginal and treaty rights from the circumstances that initially gave rise to them. A prime example of this practice is the recent decision of the Supreme Court of Canada in *R.* v. *Pamajewon*.[11] In *Pamajewon*, the Court held that the claimed right of the Shawanaga and Eagle Lake First Nations to regulate high-stakes gambling activities on their reserves as an incident of self-government was not an exercise of self-government rights because regulating high-stakes gambling was not an aboriginal right traceable to a pre-contact practice.[12] The court's focus on the specific *activity* of regulating gambling rather than the larger *right* of self-government is one indication of how the judiciary has dissected broad rights into their constituent elements and inappropriately characterised each of these elements as a separate right.

There is a significant distinction between an aboriginal or treaty right and a practice that is derived from that larger right. The Supreme Court's compartmentalisation of rights in

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which were fortunate enough to have received the legal recognition and approval of European colonizers.

[11][1996] 4 C.N.L.R. 164 (S.C.C.). For further discussion of the *Pamajewon* case, see L.I. Rotman, "Aboriginal Rights Law, Year in Review: The 1995-96 Term," (1997), 12 *J.L. and Social Pol'y* 34.

[12]Under the test for the establishment of an aboriginal right formulated in *Van der Peet*, *supra* note 9, a claimed right must be traceable to pre-contact practices in order to qualify as a protected aboriginal right under section 35(1) of the *Constitution Act, 1982*.

Pamajewon led it to pare down the broad right to self-government into the right to economic self-determination and, further, to the right to regulate high-stakes gambling. It is submitted, however, that economic self-determination and the regulation of high-stakes gambling are not truly "rights" themselves, but practices flowing from the larger right to self-government. By considering the regulation of high-stakes gambling as a distinct right, the Supreme Court was able to dismiss the appellants' claim by finding that such regulation was not an integral part of the distinctive cultures of either the Shawanaga or Eagle Lake First Nations prior to contact with Europeans. Chief Justice Lamer held that to characterise the appellants' activities as falling under a broad right to manage the use of their reserve lands "would be to cast the Court's inquiry at a level of excessive generality."[13]

One may have a philosophical objection to the appellants' characterisation of the regulation of high-stakes gambling as a part of the right to self-government in *Pamajewon*. It could be asked how far the right of self-government stretches -- does it entail that aboriginal peoples can do whatever they wish in whatever form imaginable? While this dissertation will not venture into a discussion of the extent of aboriginal rights to self-government, or what practices are "acceptable" under a right to self-government, it should be noted that the same principles used by the Supreme Court in *Pamajewon* have had detrimental effects on other rights, such as the right to fish.

In *Van der Peet*, the appellant, a member of the Sto:lo nation, was charged with selling ten salmon for $50 while fishing under the authority of an Indian food fishing licence. In judicial contemplations of the appellant's right to fish, that right was reduced from the broad aboriginal right initially claimed by the plaintiff at trial to a right to fish for a moderate livelihood found by the dissenting judgment of Lambert J.A. at the British Columbia Court of Appeal. That right was then recharacterised as the right to sell fish for $50 by the Supreme Court of Canada and, ultimately, as a right to fish only for food. This method of reducing the scope of rights allows courts to dismiss individual aboriginal claims without having to consider the broader right claimed. It simplifies a court's analysis in the instant case and prevents the creation of a precedent that may be looked to by other aboriginal groups claiming a similar right.[14]

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[13]*Pamajewon*, *supra* note 11 at 172.

[14]On this topic, see C. Bell, "New Directions in the Law of Aboriginal Rights," (1998), *Can. Bar Rev.* (forthcoming).

The judicial tendency to reduce broad aboriginal and treaty rights like self-government or fishing to specific practices in cases such as *Pamajewon* and *Van der Peet* has the effect of divorcing those rights from the larger context of Crown-Native relations from which they originate. It also fails to facilitate a culturally-appropriate interpretation of those rights. Moreover, it ignores the inter relatedness of aboriginal and treaty rights. While it is important to analyse specific issues within the contexts in which they exist -- the microscopic level -- that analysis must also be cognisant of the greater understanding of Crown-aboriginal relations that has its basis in the relationships of the groups from the time of contact -- the macroscopic level. In engaging each of these levels of analysis, the courts ought to be mindful of the need to engage in culturally-appropriate methods of examination.

Contextual analysis has been recognised as an important aspect of Canadian aboriginal rights jurisprudence in a number of decisions.[15] However, the courts' contextualisation of aboriginal and treaty rights has invariably taken place solely at the microscopic level. This is illustrated most profoundly in the case of *Kruger and Manuel* v. *The Queen*, where the Supreme Court stated that "If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to the Band and to that land, and not on any global basis."[16] Subsequent courts have adopted an overly restrictive understanding of Justice Dickson's dictum in *Kruger and Manuel*.[17] While the Court's statement in *Kruger and Manuel* warns against determining aboriginal land entitlements without regard to the context in which the claim is made, it has since been used as a basis for courts to avoid articulating broad principles of aboriginal and treaty rights. This narrow perspective on the dictum in *Kruger and Manuel* entrenches the notion that contextual analysis in Canadian aboriginal rights jurisprudence is to be restricted exclusively to the specific rights in issue.[18] The effect has been to scrutinise individual claims in a contextual vacuum.

Appropriately contextualising aboriginal and treaty rights may only occur by regarding them in light of the specific facts or situations in which they arose and the history of Crown-Native relations generally. One must also pay heed to the broad understanding of Crown-Native

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[15]Note *R.* v. *George* (1966), 55 D.L.R. (2d) 386 (S.C.C.); *Kruger and Manuel* v. *The Queen* (1977), 75 D.L.R. (3d) 434 (S.C.C.); *R.* v. *Sioui* (1990), 70 D.L.R. (4th) 427 (S.C.C.).

[16]*Supra* note 15 at 437.

[17]Refer back to *Pamajewon*, *supra* note 11, as well as *Van der Peet*, *supra* note 9, *R.* v. *Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C.), and *R.* v. *N.T.C. Smokehouse*, [1996] 4 C.N.L.R. 130 (S.C.C.).

[18]See the cases cited *ibid.*, as well as *Coté*, *supra* note 10; *R.* v. *Adams*, [1996] 4 C.N.L.R. 1 (S.C.C.).

interaction, which incorporates the fiduciary relationship between the groups. By adhering to an overly-restrictive interpretation of *Kruger and Manuel*, the courts have created discrete areas of jurisprudence that are deemed to bear no relation to one another. Thus, when courts examine issues relating to aboriginal treaty interpretation, for example, they generally do not account for the Crown's fiduciary duty to aboriginal peoples, even though the two areas are related on a variety of levels. Furthermore, courts do not generally engage in analysis on the macroscopic level of Crown-Native relations since the time of contact when considering aboriginal and treaty rights issues.

These methodological deficiencies are especially apparent in two significant judgments of the Supreme Court of Canada on separate aboriginal rights issues -- *R.* v. *Sioui*,[19] a treaty rights case, and *R.* v. *Sparrow*,[20] which focused upon aboriginal fishing rights. The issues in these two cases were quite distinct. When they are examined together and in the context of Crown-Native relations at large, the fundamental differences between the Supreme Court's decisions indicate the existence of a significant problem in contemporary Canadian aboriginal rights jurisprudence.

In *Sioui*, the Supreme Court found that a 1760 agreement between the Huron Band of the Lorette Indian Reserve and Brigadier General James Murray[21] constituted a treaty. This finding was premised on the notion that the British Crown treated aboriginal nations as autonomous nations capable of entering into sovereign compacts and treaties. The Court initially described relationships between the Crown and aboriginal peoples in the mid-eighteenth century as falling "somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens,"[22] but then stated that relations between France and the aboriginal peoples or between Britain and the aboriginal peoples at that time were "very close to those maintained between sovereign nations."[23] Finally, the Court held that the Europeans' endeavours to obtain the Indians' favour and to secure alliances with them indicated that "the Indian nations were regarded in their relations with the European nations which occupied North

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[19](1990), 70 D.L.R. (4th) 427 (S.C.C.).

[20]*Supra* note 9.

[21]At the time the treaty was signed, General Murray was also Governor of the City and District of Quebec and "the highest ranking British official with whom the Hurons could have conferred": *Sioui*, *supra* note 19 at 439.

[22]*Ibid.* at 437.

[23]*Ibid.* at 448.

America as independent nations."[24] In contrast, in *Sparrow*, the Court's analysis of the applicability of federal regulations to the exercise of traditional aboriginal fishing rights was predicated upon its unquestioned acceptance of the Crown's sovereignty over Canada. As the court stated:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown ...[25]

The *Sioui* and *Sparrow* decisions do not provide any recognition of inconsistency between them, despite being rendered by the Supreme Court one week apart in the spring of 1990. Neither case even makes reference to the other. It could be said that this fact is traceable to the Court dealing with questions of treaty rights in one instance and aboriginal rights in another. Yet one wonders how the Supreme Court could take judicial notice of the fact that aboriginal peoples were treated as independent nations with sovereign or near-sovereign status in 1760 in *Sioui* and then find in *Sparrow* that the aboriginal peoples were entirely subordinated to the Crown's sovereignty -- as apparently evidenced by the *Royal Proclamation of 1763* -- without any discussion of how the Proclamation supports that proposition. On this limited point, the court was dealing with the same issue -- the status of aboriginal peoples vis-à-vis the Crown -- in each case. That the same court could make these statements within such a brief span of time indicates the disjointed understanding of aboriginal and treaty rights that currently exists in Canadian jurisprudence. The situation created by the *Sioui* and *Sparrow* decisions provides an additional impetus to adopt a different jurisprudential approach to these rights.

The difficulties in reconciling the *Sioui* and *Sparrow* decisions demonstrate the inherent limitations in the judiciary's exclusive subscription to microscopic levels of analysis. One cannot harmonise inconsistent statements on a common issue simply by explaining that *Sioui* is a treaty rights case and *Sparrow* is an aboriginal rights case. Although aboriginal and treaty rights maintain an independent existence, as section 35(1) of the *Constitution Act, 1982* recognises, they are also part of the grander scale of Crown-Native relations and should be reconciled accordingly. This macroscopic level of analysis must account for the existence of aboriginal rights, treaty rights, and the Crown's fiduciary duty to the aboriginal peoples that are all contained in section

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[24] *Ibid.*

[25] *Sparrow*, *supra* note 9 at 404.

35(1). It must also account for the history of Crown-Native relations that gave rise to section 35(1). In so doing, it can avoid further replication of the *Sioui* and *Sparrow* divergence on the status of aboriginal peoples vis-à-vis the Crown.

The history of Crown-Native relations will be shown to have been characterised by the principles of peace, friendship, and respect represented in the Two-Row Wampum belt presented by the Iroquois to the Crown at the signing of the *Treaty of Albany* in 1664. These principles, implicitly providing the basis for Crown-Native interaction from contact, explicitly governed Crown-Native relations for over one hundred years. This assertion is founded upon their inclusion in the peace and friendship treaties concluded in the Maritimes in the late seventeenth and eighteenth centuries as well as the Covenant Chain alliance initiated by the *Treaty of Albany*. Although the Crown may not have always lived up to its obligations to the aboriginal peoples, it never repudiated its historical alliances with the aboriginals or the standards on which those alliances were based. It will be argued that these standards remained the basis upon which the Crown treated with the aboriginal peoples into the twentieth century.

The common threads of peace, friendship, and respect derived from historical Crown-Native relations will be shown to be the foundation from which both Crown-Native fiduciary relations and aboriginal treaties arise. Crown-Native relations were continuously modified in response to changing circumstances and the needs of the parties. While these relations may not have remained static, their terms demonstrate that they were designed to be of a lasting nature. The alliances forged between the Crown and aboriginal peoples were formal relations characterised by mutual promises of protection and alliance. The participants relied on the integrity and continuing nature of the agreements and promises made. Furthermore, they regularly renewed their agreements to reiterate their terms and reaffirm the solemnity of their promises. Modern Crown-Native relations therefore ought to be seen as continuations of the relationships of peace, friendship, and respect fostered from contact. The relations between the groups during the formative period dating from the time of initial contact through the *Treaty of Niagara* in 1764 will be argued to have created a fiduciary relationship that is both prospective and retrospective in its application in the peculiar manner of the common law.

While this formative period is not the only basis of Crown-Native fiduciary relations, it is a primary source of the Crown's fiduciary obligations.[26] Thus, the Crown's fiduciary duty to the aboriginal peoples will be argued to have existed far before the first judicial articulation of that duty in *Guerin* v. *R.* in 1984.[27] On this basis, the judicial findings of the Crown's fiduciary duty in *Guerin* and the existence of that duty in section 35(1) of the *Constitution Act, 1982*, as indicated in *Sparrow*, *supra*, are simply modern affirmations of the Crown's duty that is founded in the history of Crown-Native relations.

The primary argument in Part I of the dissertation is that Crown-Native relations from the initial contact between the groups were conducted as relations between independent nations. It is suggested that Crown-Native relations ought to be understood on the basis of Crown *representations* and aboriginal expectations rather than Crown *regard* for aboriginal peoples or British legal theory. This approach differs from traditional judicial accounts of Crown-Native interaction, which portray that interaction as inherently hierarchical, with the aboriginal peoples being at the mercy of the Crown.[28] Contextual analyses of Crown-aboriginal relations demonstrate these traditional assertions to be false.[29] Evidence of the interaction between British colonists and aboriginal peoples indicates that the parties dealt with each other as independent nations.

Saying that British colonists and aboriginal peoples dealt with each other as independent nations does not suggest that the Crown always *regarded* the aboriginals as independent. The manner in which the Crown represented its relations with the aboriginal peoples and the way it regarded their status are separate issues. The Crown's representations to the aboriginal peoples in treaty negotiations are binding at law; the internalised beliefs of its representatives are not.

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[26]As will be discussed, *infra*, and in greater detail in Ch. IV, the Crown's fiduciary obligations are comprised of both general and specific duties which stem from a variety of sources.

[27](1984), 13 D.L.R. (4th) 321 (S.C.C.).

[28]See, for example, *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 (P.C.), aff'g (1887), 13 S.C.R. 577, (1886), 13 O.A.R. 148, (1885), 10 O.R. 196 (Ch.); *R.* v. *Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.); *R.* v. *Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.).

[29]See, for example, M.D. Walters, "*Mohegan Indians* v. *Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," (1995), 33 *Osgoode Hall L.J.* 785; Walters, "The Extension of Colonial Criminal Jurisdiction Over the Aboriginal Peoples of Upper Canada: Reconsidering the *Shawanakiskie* Case (1822-26)," (1996), 46 *U.T.L.J.* 273; W.C. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties," (1994), 43 *U.N.B.L.J.* 241; Wicken, "'Heard it From Our Grandfathers': Mi'kmaq Treaty Tradition and the *Syliboy* Case of 1928,' (1995), 44 *U.N.B.L.J.* 145; J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples," (1995), 33 *Osgoode Hall L.J.* 623.

Consequently, where the Crown represented to the aboriginal peoples that it dealt with them as independent nations, it is legally inconsequential whether the Crown actually regarded the aboriginals as independent.

The portrayal of Crown-aboriginal interaction herein as a nation-to-nation form of relationship is premised upon the nature of the Crown's representations to the aboriginals. These representations suggest that the Crown dealt with the aboriginal peoples as independent nations. Furthermore, the process of treaty-making presumes the independence of the parties.[30] As Jennings has commented, 'Subjects do not sign treaties with their rulers. As the Lords of Trade told commissioners from Massachusetts in 1677, "His Majesty did not think of treating with his own subjects as with foreigners."'[31]

The assertion that the Crown's representations to the aboriginal peoples (and the aboriginals' reliance on those representations) rather than its regard for them ought to shape the understanding of Crown-Native relations is consistent with the doctrine of estoppel by representation. Under this doctrine, where a party makes a misrepresentation -- either by words, conduct, or silence -- to another and the latter relies on that misrepresentation to its detriment, the former is estopped from subsequently acting inconsistently with that misrepresentation.[32] While the Crown may not have regarded the aboriginals as independent peoples and may not have intended to treat with them as such, its representations to the aboriginals stated otherwise. Because of the nature of its continued representations to the aboriginal peoples and the aboriginals' good faith reliance on those representations, the Crown is estopped from claiming that its regard for the aboriginals ought to govern judicial interpretations of Crown-Native relations.

The characterisation of Crown-Native interaction as a nation-to-nation relationship is based predominantly on the early historical interaction between the groups and the agreements

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[30]See R.L. Barsh and J.Y. Henderson, *The Road: Indian Tribes and Political Liberty*, (Berkeley: University of California Press, 1980) at 270; P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government," (1995), 21 *Queen's L.J.* 173 at 197.

[31]F. Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its beginnings to the Lancaster Treaty of 1744*, (New York: Norton, 1984) at 372.

[32]See J.S. Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation*, (Toronto: Carswell, 1900); G.S. Bower and Sir A.K. Turner, *The Law Relating to Estoppel by Representation*, Third Ed., (London: Butterworths, 1977); M. Cababe, *The Principles of Estoppel*, (London: W. Maxwell & Son, 1888) at 45-82; I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, Fourth Ed., (Sydney: Law Book Co., 1990) at 178; *Hopgood* v. *Brown*, [1955] 1 All E.R. 550 at 559

between the parties from the *Treaty of Albany* to the *Treaty of Niagara*. However, recorded accounts of promises made by Crown negotiators during the signing of the post-Confederation numbered treaties suggest that they represented to the aboriginal peoples that those treaties would be nation-to-nation agreements not unlike those signed during the formative years of Crown-Native relations. The speeches of Alexander Morris[33] in the late nineteenth century, and the commissioners of Treaty No. 8 in 1899 and Treaty No. 11 in 1921, like those made by Sir William Johnson[34] in the second half of the eighteenth century, suggest that the Crown treated with the aboriginal peoples as independent nations during this period, even if it did not regard the aboriginal peoples as truly independent. This conclusion is inconsistent, however, with the preponderance of judicial analyses of Crown-Native relations.[35]

Judicial examinations of Crown-aboriginal relations in Canada have tended to focus on the regard British colonial administration had for the aboriginal peoples rather than how it represented its relations with them. Therefore, if a letter from a high-ranking British official at Whitehall suggested that the aboriginal peoples were to be treated as subjects, the courts would cite that letter as evidence indicating that the Crown, in fact, treated the aboriginal peoples as inferiors. While the intentions of colonial administrators at Whitehall are relevant to an analysis of British North American aboriginal policy, they are ancillary to legal analyses of the Crown's obligations arising from its dealings with aboriginal peoples. The focus of the latter is rightfully on the representations made to the aboriginals. For instance, the representations of Sir William Johnson are what enticed the aboriginal peoples with whom he dealt to enter into treaties and other alliances with Britain rather than the written treaties that they may not have understood. Since the aboriginal leaders generally could neither read English nor understand the complex language in which the treaties were drafted, their decisions to sign were based entirely upon Johnson's representations. Moreover, since aboriginal understandings of treaties encompass the entirety of the negotiations leading up to the conclusion of a treaty, Johnson's representations would have

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(C.A.). The analogy to estoppel by representation is made for illustrative purposes only. A more detailed examination of the doctrine is beyond the scope of this work.

[33]Lieutenant-Governor of Manitoba and the North-West Territories and chief negotiator of a number of post-Confederation treaties. See A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based and Other Information Relating Thereto*, (Toronto: Belfords, Clarke, 1880).

[34]Northern Superintendent-General of Indian Affairs from 1755-1774 known as "Warraghiyagey" -- "he who does much business": see O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, (Toronto: McClelland & Stewart, 1992) at 179.

formed an integral part of the agreement in their minds even if they had been able to read and understand the written document.[36]

By separating the analysis of aboriginal and treaty rights from their historical origins, judicial considerations of Crown-aboriginal relations have provided generally unsatisfactory results. The judiciary has painted a false picture of historical Crown-Native relations by focusing on British regard for the aboriginal peoples as opposed to British representations made to them. It may be seen, therefore, that judicial analysis of Crown-Native history has been predicated upon an incomplete and incorrect methodological approach. Recognising the limitations in existing judicial interpretations of historical Crown-aboriginal relations is the first step towards obtaining a contextual and culturally-appropriate method of understanding the contemporary legal implications of Crown-Native relations.

(b) Scope of the Work

The geographical focus of this work essentially mirrors the primary area of responsibility assigned to Sir William Johnson as Northern Superintendent-General of Indian Affairs from 1755-1774.[37] The situation in most of the 13 American colonies was quite different because of the existence of royal charters granted to people such as Lord Baltimore and William Penn and their subsequent purchases of land from the aboriginal peoples in those areas.[38] In what are now the Yukon and Northwest Territories, the circumstances were also different because of the lack of substantive contact between the aboriginal peoples living there and Europeans. In spite of the different situation in these latter areas, the distinction between *representation* and *regard* discussed earlier will be argued to apply equally to those territories in areas where treaties were

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[35]See the references, *supra* note 28.

[36]See the discussion of treaties in Chs. VI and VII.

[37]Which was the Great Lakes-Ohio Valley area, although Johnson was also responsible for all areas north of the Ohio River, which would have included parts of present-day Ontario, Quebec, the Maritimes, Connecticut, Illinois, Indiana, Maine, Massachusetts, Michigan, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, and Vermont.

[38]Note, for example, the royal charters granted in respect of Virginia (1606), Maryland (1632), Connecticut (1662), Rhode Island (1663), New Jersey (1674), Delaware (1674), Pennsylvania (1681), and Massachusetts Bay (1691): see K.M. Narvey, "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company," (1974), 38 *Sask. L. Rev.* 123 at 141.

signed. Where the Crown did treat with peoples in these territories, it will be contended that it did so on the same basis that it treated with aboriginal peoples in other areas of Canada.[39]

The notion that the Crown treated with the aboriginal peoples in the same manner across Canada will be demonstrated by focusing on the representations made by the Crown's representatives to the aboriginal peoples in treaties from the *Treaty of Albany, 1664* to the last of the post-Confederation numbered treaties, Treaty No. 11, in 1921. It will be maintained that the Crown continued to represent the nature of its dealings with aboriginal peoples across Canada as being premised on the same principles of peace, friendship, and respect that grounded the *Treaty of Albany, 1664*. Therefore, while the nature of the Crown's relations with various aboriginal groups may not have been the same as its relations with the Iroquois, the Crown represented its relations with them in the same manner. Furthermore, treaty protocol that had been developed in Crown-Iroquois treaty relations, such as the use of wampum belts, became the basis upon which Britain entered into treaties with other aboriginal groups.[40] For this reason, the early discussion of Crown-Native relations herein focuses primarily upon the Crown's relations with the Iroquois.

This work is not intended to establish a *theory* of fiduciary law, aboriginal rights, or treaty rights. Rather, it is intended to provide a basis for *understanding* those entities. Consequently, the discussion of these matters does not focus specifically on their origins, but how they ought to be understood in light of the unique relationship between the Crown and aboriginal peoples in Canada. The argument for a new approach to aboriginal and treaty rights issues is premised upon the assumption that there is a problem with existing juridical approaches to aboriginal rights jurisprudence generally, which includes aboriginal rights, treaty rights, fiduciary obligations, and issues pertaining to self-government. While examples are drawn from all of these issues – as seen, for example, in the discussion of the *Pamajewon* and *Van der Peet* cases, *supra* -- this work will focus primarily on fiduciary and treaty relations to both illustrate the problems suggested to exist and demonstrate the unified approach discussed earlier.

The line between fiduciary and treaty relations is often blurred, with the result that when looking to treaty relations, one must also consider the implications of fiduciary relations and vice

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[39]This will be demonstrated in Chapter VI, where it will shown that Treaty No. 11, signed in 1921, was represented to the aboriginal peoples on the same basis as earlier treaties dating back to the *Treaty of Albany, 1664*.

[40]Note, for example, the "peace and friendship" treaties signed with the aboriginal peoples in the Maritimes and the 1836 Manitoulin Island treaty negotiated by Sir Francis Bond Head (which is discussed in Chapter VI).

versa. For this reason, when Crown-Native relations are considered, those relations will not be compartmentalised into their strictly fiduciary or treaty components. Such an approach would be inconsistent with the unified approach argued for herein.

The discussion of Crown-Native fiduciary relations in this work is predicated on the presumption that fiduciary relations may exist between equal or unequal parties. While fiduciary relations are often thought to exist only between dominant and subordinate parties, the discussion of fiduciary relations in Chapter IV will demonstrate this assumption to be false. As will be explained in greater detail, while beneficiaries in fiduciary relationships are vulnerable to the actions of their fiduciaries, this vulnerability is a creation of the fiduciary relationship itself and not a pre-requisite for the finding of a fiduciary relationship. At first glance, this debate over whether vulnerability gives rise to fiduciary relations or whether fiduciary relations create vulnerability might appear to be little more than an iteration of the old riddle about the chicken and the egg. However, as Chapter IV will indicate, a deeper examination of the debate over vulnerability reveals the riddle to be more than a matter of purely academic interest.

The consideration of Crown-Native treaties herein also differs from commonly-held understandings of the nature of those agreements. As will be re-emphasised in Chapter VI, the nature of the parties' undertakings in the treaties ought to prevent them from ignoring or unilaterally altering the promises made therein. The treaties are solemn agreements between nations that established the parameters of the parties' relationship. As consensual, negotiated documents, it will be maintained that the treaties may only be altered with the free and informed consent of the treaty signatories. The conclusion to be made from this argument is that the Crown cannot unilaterally alter the promises it made in the treaties, whether by ordinary legislation or constitutional enactment.[41] The significance of this polemic will become particularly apparent in the discussion of the *Natural Resource Transfer Agreement, 1930*'s effect on treaty rights in Chapter VIII.

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[41] As will be elaborated upon in Chapter VI, in addition to creating a protocol for Crown-Native relations, the treaties ought to be viewed as binding the Crown in the manner and form of any future laws it enacted, whether simple legislation or constitutional amendment, that potentially infringed upon treaty rights.

(c) Structuring the Argument

This work revolves entirely around relationships. It is premised upon relationships between people and relationships between events. The initial focus is on historical British-aboriginal interaction and how it gave rise to legal implications, such as fiduciary and treaty obligations, that define modern Crown-Native relations. This relationship created the environment conducive to the conclusion of early alliances between the groups. According to Webber, these Crown-aboriginal relations provided a "normative discourse crossing the Aboriginal/non-Aboriginal divide."[42] Formal treaties between the Crown and the aboriginal peoples also provided parameters for Crown-Native relations.[43] The normative principles arising out of the parties' interaction provided guidelines for their conduct towards each other. They also provided a benchmark against which to measure any departure from an acceptable standard of conduct.[44]

While British-aboriginal relations during these formative years were in a constant state of flux, the general principles by which the parties interacted provide a basis for understanding the nature of Crown-aboriginal relations at that time. These principles provided the primary source of the Crown's fiduciary obligations. Furthermore, they provided a paradigm for the parties' interaction in later years. From this historical basis, temporal connections may properly be made to treaties and other significant events, such as the *Royal Proclamation of 1763*,[45] that have become integral elements of Crown-aboriginal relations.

This dissertation is comprised of four parts. The first part is an analysis of Crown-aboriginal relations from contact through to the period shortly after the *Treaty of Niagara*. It establishes an appropriate framework for the approach to aboriginal and treaty rights discussed earlier. The second part of the dissertation examines Crown-Native fiduciary and treaty relations. It demonstrates that fiduciary obligation is the nexus between seemingly discrete areas of aboriginal rights jurisprudence. The Crown's fiduciary duties to the aboriginal peoples are shown to be of two types. The first type is a general duty arising pursuant to the Crown's historical relationship with the aboriginal peoples. The second type of duty is a specific duty which

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[42]Webber, *supra* note 29 at 628.
[43]Wicken, *supra* note 29 at 150.
[44]Webber, *supra* note 29 at 628-9.

originates out of individual events, such as the signing of a treaty. Both of these forms of fiduciary obligation stem from the representations made by the Crown in historical Crown-Native relations.

Treaties and treaty relations are the subject of the third part of the dissertation. They will be demonstrated to contain both general and specific elements. The general element of treaties is the spirit and intent of the agreements. This spirit and intent pertains both to individual treaties and to the relationship between individual treaties, as seen in the Covenant Chain alliance and the Maritime treaties. The specific elements of treaties, meanwhile, are the rights and obligations contained within individual agreements. While the specific obligations contained within a literal reading of the written treaties are relevant to treaty analysis, treaties should also be understood in light of their spirit and intent, the negotiations surrounding the treaties, the context in which they were signed, and the parties' respective understandings of the agreements -- as indicated by their subsequent conduct and in aboriginal oral history.

The final part of the dissertation focuses on the nexus between Crown-Native fiduciary and treaty relations. It will be argued that the history of Crown-Native relations and the Crown's ensuing fiduciary obligations ought to inform the manner in which treaties are interpreted. The treaties will be argued to be concrete manifestations of individual fiduciary relationships between the Crown and aboriginal peoples. The combined effect of the historical intercourse between the parties and the resultant fiduciary and treaty relations emanating therefrom provide the basis for a *sui generis* approach that should be common to both aboriginal and treaty rights. It is suggested that this approach ought to serve as a paradigm for those rights and their place within the Canadian fabric rather than the microscopic and restrictive approach illustrated by *Pamajewon* and *Van der Peet*.

The conclusion of the dissertation contends that the principles of peace, friendship, and respect that existed at the foundation of Crown-aboriginal relations during their formative years lie at the heart of section 35(1)'s guarantee of aboriginal and treaty rights. As the Supreme Court of Canada stated in *Sparrow*, section 35(1) is "a solemn commitment that must be given meaningful content."[46] It is suggested that the courts may properly fulfill the obligations imposed by section 35(1) by adopting the approach to aboriginal and treaty rights illustrated herein. This

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[45]R.S.C. 1985, App. II, No. 1.

[46]*Supra* note 9 at 408.

argument replicates the assertion underlying this dissertation -- that there is no need to invent a new framework for the appropriate resolution of aboriginal and treaty rights in Canadian jurisprudence. Rather, appropriate resolutions may be obtained simply by returning to the principles of peace, friendship, and respect that exist at the foundation of Crown-Native relations and using them as the basis of contemporary considerations of aboriginal and treaty rights.

II. The Formative Years of Crown-Aboriginal Relations: From Contact to Covenant Chain

> Wee are come to acquaint you that wee are settled on y^e^ North side of Cadarachqui Lake near Tchojachiage where wee plant a tree of peace and open a path for all people, quite to Corlaer's house, where wee desire to have free liberty of trade; wee make a firme league with y^e^ Five Nations and Corlaer and desire to be united in y^e^ Covenant Chain, our hunting places to be one, and to boile in one kettle, eat out of one dish, & with one spoon, and so be one; and because the path to Corlaers house may be open & clear, doe give a drest elke skin to cover y^e^ path to walke upon.
>
> The Five Nations answered them thus: --
>
> We are glad to see you in our country and doe accept of you to be our friends and allies and doe give you a Belt of Wampum as a token thereof that there may be a perpetual peace and friendship between us and our young Indians to hunt together in all love and amity.
>
> Lett this peace be firm and lasting, then shall wee grow old and grey headed together; else y^e^ warr will devour us both.[1]

To understand the contemporary nature of Crown-aboriginal relations, it is necessary to understand their historical development. In this and the following chapter, the history of Crown-Native relations will be portrayed through examinations of selected events: the early history of European-aboriginal interaction; the *Treaty of Albany, 1664*; the Covenant Chain alliance and Maritime Indian treaties; and relations between Britain and the aboriginal peoples after the conquest of New France, as illustrated by the *Royal Proclamation of 1763*[2] and the *Treaty of Niagara, 1764*. The ultimate aim of this endeavour is to provide a foundation for the analysis of Crown-Native relations.

It will be argued, on the strength of the historical events discussed in this and the following chapter, that British-Native relations should be regarded on a nation-to-nation basis. This assertion will be buttressed by the nature of the initial interaction between the groups, in

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[1]"Propositions of the Five Nations to the Commissioners of Indian Affairs," 30 June 1700, as reproduced in E.B O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, 11 vols., (Albany: Weed, Parsons, 1853-61) V at 694-5 [hereinafter "*NYCD*"]. The reference by the Dowaganhaes to "Corlaer" is a term of respect for the English governor of New York. "Corlaer" refers directly to a Dutch governor of New York who was greatly respected by the aboriginal peoples. As explained in "Governor Dongan's Report on the State of the Province, including his Answers to certain Charges against him," as reproduced, *ibid.* III at 395, Arent Van Corlaer was "a Dutchman so beloved of the Indians that in memory of him they call all Governors by that name." See also F. Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its beginnings to the Lancaster Treaty of 1744*, (New York: Norton, 1984) at 56 [hereinafter "*Ambiguous Iroquois Empire*"].

[2]R.S.C. 1985, App. II, No. 1.

which early British traders and colonists were dependent upon the aboriginals for their survival; the creation of mutually beneficial trade relations, military and political alliances; and, later, the development and proliferation of formal treaty relations. It might initially appear that British claims to aboriginal lands would contradict the notion that Britain dealt with the aboriginal peoples on a nation-to-nation basis. However, evidence will be presented to demonstrate that such assertions were ineffective at international law, thus rendering them impotent against the nation-states of the Law of Nations or the aboriginal peoples.[3]

Britain's lack of power relative to the aboriginal peoples initially led Britain to enter into trade and military alliances with the latter. These alliances were premised on maintaining peace, friendship and respect between the groups. These principles are evident throughout the formative years of the Crown-aboriginal relationship -- from contact through to the *Treaty of Niagara* in 1764. Over this period, the solemn and binding nature of Crown-Native relations was created and entrenched. Many alliances between the Crown and aboriginal peoples involving greater numbers of parties and increased obligations and commitments were developed. This practice appeared to reach its zenith in 1764, when some 2,000 aboriginal people from various nations and tribes gathered to treat with Sir William Johnson at Niagara.[4]

Although it is difficult to pinpoint the precise end of this formative period, the *Treaty of Niagara*, being the largest-ever gathering of aboriginal nations to treat with the Crown, denotes a symbolic ending. That is not to suggest that alliances between the Crown and aboriginal peoples based on peace, friendship, and respect ended with the agreements reached at Niagara. Treaties founded upon these same principles continued to be negotiated in the ensuing years. Most immediately, these included ratifications of treaties that had been signed at Niagara.[5] However, as

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[3]For other arguments that question British assertions of title to North American lands, see J.T. Juricek, Jr., *English Territorial Claims in North America to 1660*, unpublished Ph.D. dissertation, University of Chicago, 1970; B. Slattery, *The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of Their Territories*, D. Phil dissertation, Oxford University, 1979, reprinted (Saskatoon: University of Saskatchewan Native Law Centre, 1979) [hereinafter "*Land Rights*"]; G.S. Lester, *The Territorial Rights of the Inuit of the Northwest Territories: A Legal Argument*, unpublished D. Jur. dissertation, Osgoode Hall Law School, 1981; M.D. Walters, "*Mohegan Indians* v. *Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America," (1995), 33 *Osgoode Hall L.J.* 785.

[4]See the discussion of the *Treaty of Niagara* in Ch. III. On the treaty, see J. Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation," (1994), 28 *U.B.C. L. Rev.* 1; Borrows, *Traditions and Treaties: Negotiating the Law on Manitoulin Island*, unpublished D. Jur. dissertation, Osgoode Hall Law School, 1994 at Ch. II; D. Braider, *The Niagara*, (New York: Holt, Rinehart, 1972).

[5]See, for example, "Treaty of Peace concluded with the Delawares by Sir William Johnson," 8 May 1765, as reproduced in *NYCD*, *supra* note 1 VII at 738-40; "Treaty with the Ohio Indians," 13 July 1765, as reproduced, *ibid.* VII at 754-5; *Treaty of Stanwix, 1768*, as reproduced, *ibid.* VIII at 135-7.

suggested in Chapter I, the representations made by Crown delegates such as Alexander Morris and the commissioners for Treaties 8 and 11 suggest that the Crown continued to treat with the aboriginal peoples in this manner into the twentieth century.[6]

This chapter adopts a chronological approach to Crown-aboriginal relations. It focuses initially on Britain's claims to aboriginal lands. This is followed by a discussion of the nature of early interactions between the groups. More formal relations between Britain and the Native peoples comprise the last element of Crown-Native interaction scrutinised in this chapter, culminating in an examination of the *Treaty of Albany*, the Covenant Chain alliance, and the Maritime peace and friendship treaties. These relations -- characterised by the signing of treaties and the creation of the Covenant Chain alliance as lasting bonds that were regularly reaffirmed by the parties -- will be shown to have occupied a central role in Crown-Native intercourse.

(a) British Claims to Aboriginal Lands in North America: A Legal Analysis

The history of British involvement in North American affairs dates back some 500 years to John Cabot's initial voyage to North America at the close of the fifteenth century. Cabot's voyage was sanctioned by King Henry VII in 1496. Henry VII authorised Cabot and his sons to "seeke out, disouver, and finde whatsoeuer isles, countreys, regions or prouinces of the heathen and infidels whatsoeuer they be, and in what part of the world soeuer they be, which before this time have bene vnknownen to all Christians."[7] More importantly, Henry VII granted the Cabots the right to "subdue, occupy and possesse all such townes, cities, castles and isles of them found, which they can subdue, occupy and possesse ..."[8] Henry VII's letters patent came in response to essentially similar grants that had been made by papal decree to Spain and Portugal. These papal decrees, known as bulls, were originally intended to authorise the conquest of enemies of the faith from the Holy Land. However, they were soon used to justify European colonialist incursions into the New World.[9]

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[6]These later treaties will be discussed in Chs. VI and VII.

[7]Letters Patent to John Cabot, 5 March 1496, as reproduced in H.S. Commager, ed., *Documents of American History*, Eighth ed., (New York: Appleton-Century-Crofts, 1968) at 5.

[8]*Ibid.*

[9]See F. Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest*, (Chapel Hill: University of North Carolina Press, 1975) at 4 [hereinafter "*Invasion of America*"]. The authority of the papacy to grant such rights is discussed by M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, (London: Longmans, 1926) at 124:

The papacy had initially granted the exclusive right to conquer and enslave all pagan nations, even those "situated in the remotest parts unknown to us,"[10] to King Alfonso V of Portugal in 1455. Ignoring the exclusivity of this grant, Spain authorised its own New World explorations. When Columbus reached America in 1492, the Holy See was forced to act quickly to reassert its jurisdiction. Rather than having Spain's actions be seen as a direct affront to papal authority, Pope Alexander VI divided the rights granted to Portugal between it and Spain in his 1493 bull *Inter Caetera*.[11] Being snubbed by the papacy once again, England and France sent explorers to the New World on their own initiatives.[12]

The various papal bulls, letters patent, and royal charters issued under papal authority or the decree of European monarchs were almost always ill-defined.[13] The only exception from

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> At the time of the great discoveries, the Popes claimed the power to grant to Christian monarchs the right to acquire territory in the possession of heathens and infidels. This power was based in part on the authority which the Popes had for a long time claimed over things temporal as the Vicars of Christ on earth, in part upon the authority supposed to have been derived from the forged 'Donation of Constantine.' ... By the 'Donation of Constantine,' a document which was forged between the middle of the eighth and the end of the ninth centuries, the Emperor Constantine was supposed to have ceded to Pope Sylvester I the sovereignty not only over Italy and the western regions, but also over all islands.

It should be noted, though, that the authority of the papacy to make such grants was not universally accepted. See, for example, the statements made by the sixteenth century Dominican friar B. de Las Casas in *In Defense of the Indians*, S. Poole, trans. (DeKalb: Northern Illinois Press, 1974) at 62 (Ch. 6):

> The Pope, then, does not have this subject-material (that is, a people or parishioners) among unbelievers who are completely outside the competence of the Church, because he has nothing to do with judging those outside. Therefore he has no actual jurisdiction over these persons. ... Thus, unbelievers who are completely outside the Church are not subject to the Church, nor do they belong to its territory or competence.

See also the reaction of the Peruvian Inca to the pope's authority in this regard, *infra* note 35.

[10]See the bull *Romanus Pontifex*, issued by Pope Nicholas V in 1455, as reproduced in F.G. Davenport, ed., *European Treaties bearing on the History of the United States and its Dependencies to 1648*, (Washington, D.C.: Carnegie Institution, 1917) at 20. Reference may also be made in this regard to Pope Nicholas V's bull, *Dum Diversas*, of 1452, Calixtus III's *Inter Caetera* of 1456, and Sixtus IV's *Aeterni Regis* in 1481.

[11]Dated 4 May 1493, as reproduced in Commager, *supra* note 7 at 2-3.

[12]See J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia*, Ph.D. dissertation, Cambridge University, 1985, reprinted (Saskatoon: University of Saskatchewan Native Law Centre, 1985) at 271-2. England and France were not the only European powers to engaged in such activity, being joined, most notably, by Russia, the Netherlands, and Sweden. See R.A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, (New York: Oxford University Press, 1990) at 119.

[13]The letters patent issued to the Cabots contemplated their ability to lay claim to lands that "they can subdue, occupy and possesse": *supra* note 6. Note, as well, the commission issued to Jean François de La Rocque, Sieur de Roberval, dated 15 January 1541, which granted "full power and authority over those lands *that he shall have been able to acquire for us in this voyage* ...": as quoted in B. Slattery, "Did France Claim Canada Upon

these grants was land already possessed by other Christian nations.[14] The imprecision of these claims was used by European rulers as the basis for their assertions of title to the entirety of continents whose territorial breadth was unknown.[15] Following these formal and abstract declarations of rights over New World territories, the European seafaring nations attempted to reinforce their claims through notions of discovery, conquest, and occupation.[16] These concepts were the creatures of the *jus gentium*, or Law of Nations, a loose grouping of rules and dispute resolution mechanisms. The *jus gentium* was intended to govern controversies between its member-states vis-à-vis their activities in pursuing the acquisition of new territories.

The doctrine of discovery that existed under the Law of Nations was premised upon the notion that a nation obtained title to land by virtue of its "discovery" of land that was *terra nullius* -- uninhabited land belonging to no one. The doctrine of discovery was explained by the eighteenth century French theorist Vattel in the following manner:

> All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. When, therefore, a Nation finds a country *uninhabited* and without an owner, it may lawfully take possession of it, and after it has been given sufficient signs of its intention in this respect, it may not be deprived

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'Discovery'?" in J.M. Bumsted, ed., *Interpreting Canada's Past*, Vol. I, (Toronto: Oxford University Press, 1986) at 15. As Slattery explains at 15:

> Roberval's powers extend only to such lands as he can gain for the crown in the future. By inference, they do not cover lands that remain under the control of independent native peoples or rival European powers. Similar thinking underlies an earlier passage, in which Roberval is authorized 'to decree, prescribe, and order all things that he shall deem to be good, useful, and proper, ... both on sea and land, in places and parts *that shall be reduced to our obedience* ...' The king's domains in the New World were yet to be won.

[14]This fact is evident both in the letters patent issued to Cabot, which only limited his authority to lay claim to lands to those "which before this time have bene unknownen to all Christians," and Roberval's commission, which placed the following limitation on his authority to acquire new territory: "provided nevertheless that this not be land held, occupied, possessed, ruled, or under the subjection and obedience of any princes or potentates, our allies and confederates, and especially of our very dear and beloved brothers, the emperor and the king of Portugal," as quoted in Slattery, *ibid.* at 15. See also the "Charter to Sir Walter Ralegh [*sic*]," 25 March 1584, as reproduced in Commager, *supra* note 7 at 6. This charter only enabled Raleigh to "discover, search, finde out, and view such remote, heathen and barbarous lands, countries, and territories, *not actually possessed of any Christian Prince, nor inhabited by Christian People*" [emphasis added]; W.E. Washburn, *Red Man's Land/White Man's Law: A Study of the Past and Present Status of the American Indian*, (New York: Scribner's, 1971) at 29-30.

[15]See Washburn, *supra* note 14 at 30.

[16]See B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, (Saskatoon: University of Saskatchewan Native Law Centre, 1983) [hereinafter "*Ancestral Lands*"]; Slattery, *Land Rights*, *supra* note 3; Lester, *supra* note 3. Perhaps not coincidentally, the European explorers who acted under the authority of these imprecise grants generally failed to delimit the territorial scope of the claims they made. See A.S. Keller, O.J. Lissitzyn, and F.J. Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800*, (New York: Columbia University Press, 1938) at 53, 131. See also L.C. Green, "Claims to Territory in Colonial America," in L.C. Green and O.P. Dickason, *The Law of Nations and the New World*, (Edmonton: University of Alberta Press, 1989) at 7-17.

> of it by another Nation. In this way navigators setting out upon voyages of discovery and bearing with them a commission from their sovereign, when coming across islands or other *uninhabited* lands, have taken possession of them in the name of their Nation; and this title has usually been respected, provided actual possession has followed shortly after.[17]

Although many European nations initially rested their claims to territory upon discovery, lands in North America were far from *terra nullius* upon their arrival.[18] Those lands were populated by numerous aboriginal nations living in their own territories and governed by their own institutions and laws.[19] Consequently, the only way to have had discovery grant rights to aboriginal lands in North America was for the Europeans to have deemed aboriginal use and possession of those lands as unimportant or not constituting "ownership" in the European definition of the term.[20]

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[17]Vattel, *Les Droits des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, 1758 ed., C.G. Fenwick, trans., (Washington, D.C.: Carnegie Institute, 1916), at 84 (Book I, Ch. XVIII) [Emphasis added]. See also C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, 1764 ed., Vol. II, J.H. Drake, trans., (Oxford: Clarendon Press, 1934), at 147-8 (Ch. III, s. 291): "Islands arisen or discovered in the ocean, and other lands not subject to ownership and sovereignty or uninhabited by any nation, can be occupied and colonies established in them."

[18]This fact was noted by the Spanish theologian F. de Vitoria in *De Indis et De Jure Belli Relictiones*, 1696 ed., E. Nys, ed., J.P. Bate, trans., (Washington, D.C.: Carnegie Institute, 1917) at 138-9 (*De Indis*):

> Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant, as is expressly laid down in the aforementioned passage of the [Justinian] *Institutes*. And so, as the object in question was not without an owner, it does not fall under the title which we are discussing. Although, then, this title, when conjoined with another, can produce some effect here ... yet in and by itself it gives no support to a seizure of the aborigines any more than if it had been they who had discovered us.

See also Lindley, *supra* note 9 at 21-3, where he explains that land is not *terra nullius* where "it is inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards."

[19]See O.P. Dickason, *Canada's First Nations: A History of Founding Peoples From Earliest Times*, (Toronto: McClelland & Stewart, 1992) at 63-83 [hereinafter "*Canada's First Nations*"]; P. Macklem, "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution," (1992), *U.B.C. L. Rev.* Special Edition on Aboriginal Justice 280 at 281: "It is common knowledge that prior to the arrival of European settlers, the Aboriginal peoples of North America had complex and sophisticated forms of economic, social, political and legal organization, including methods and procedures for dealing with misconduct on the part of individuals."

[20]See Williams, Jr., *supra* note 12 at 326:

> The Doctrine of Discovery was nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principle — one culture's argument to support its conquest and colonization of a newly discovered, alien world. ... Europe during the Discovery era refused to recognize any meaningful legal status or rights for indigenous tribal peoples because "heathens" and "infidels" were legally presumed to lack the rational capacity necessary to assume an equal status or to exercise equal rights under the West's medievally derived colonizing law.

Indeed, aboriginal use and possession of their traditional lands was trivialised by a variety of philosophical justifications put forward by European nations, including those based on European religious, moral, and racial

A modified version of the doctrine of discovery that had existed under the *jus gentium* was formulated by Chief Justice John Marshall of the United States Supreme Court in the early American case of *Johnson and Graham's Lessee* v. *M'Intosh*.[21] This version, however, was premised more upon the need to regulate European nations' competing claims to North America than maintaining fidelity to the *jus gentium*'s notion of claiming land that was *terra nullius*:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. ... But, as they were all in pursuit of nearly the same object, it was necessary, *in order to avoid conflicting settlements, and consequent war with each other*, to establish a principle, which all should acknowledge as the law by which the *right of acquisition*, which they all asserted, should be regulated *as between themselves*. 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.[22] [Emphasis added]

As Marshall C.J.'s comments indicate, this form of discovery granted only partial rights to the "discovering" nation. Those rights were valid only against other European governments who were bound by the Law of Nations.[23] Furthermore, this version of discovery required that title be consummated by possession before it granted full rights. Most importantly, it did not give title to the "discovered" lands; it merely gave a pre-emptive right to the discovering nation to acquire title from the Native inhabitants. As the Chief Justice explained:

> The exclusion of all other Europeans, necessarily gave to the nation making the discovery *the sole right of acquiring the soil from the natives*, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.[24] [Emphasis added]

Marshall C.J. later reiterated this principle of discovery in the case of *Worcester* v. *State of Georgia*:

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superiority, theories of natural slavery, and the aboriginals' use of land The legitimacy of these modes of dispossession are not only debated in the modern setting, but were not universally accepted at the time that they were being put forward. See, for example, Vitoria, *supra* note 18; Las Casas, *supra* note 9; A. Gentili, *De Jure Belli Libri Tres*, 1612 ed., J.C. Rolfe, trans., (New York: Oceana, 1964); H. Grotius, *De Jure Belli ac Pacis Libri Tres*, 1646 ed., Vol. II, F.W. Kelsey, trans., (Oxford: Clarendon Press, 1925); Grotius, *De Jure Praedae Commentarius*, 1604 ed., Vol. I, G.L. Williams, trans., (Oxford: Clarendon Press, 1950); S. von Pufendorf, *De Jure Naturae et Gentium Libri Octo*, 1688 ed., Vol. II, C.H. Oldfather and W. A. Oldfather, trans., (Oxford: Clarendon Press, 1934); Wolff, *supra* note 17; I. Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, 1887 ed., W. Hastie, trans., (Clifton, N.J.: Augustus M. Kelley, 1974).

[21] 8 Wheat. 543 (U.S. 1823).

[22] *Ibid.* at 572-3.

[23] This is evident from a straightforward reading of Marshall C.J.'s commentary in *Johnson* v. *M'Intosh* reproduced *supra* note 21. Note also the commentary by J.W. Singer, "Well Settled?: The Increasing Weight of History in American Indian Land Claims," (1994), 28 *Georgia L. Rev.* 481 at 490.

[24] *Ibid.*

> This principle, acknowledged by all Europeans, because it was in the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of *acquiring* the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. *It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession*, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[25] [Emphasis added]

Chief Justice Marshall's modified form of discovery would appear to have been premised upon two factors: the inability to properly describe North American lands as *terra nullius* and the need for some method of moderating competing European claims for the right to obtain title from the Native inhabitants. But, as the Chief Justice made clear, this title by discovery was not the same as the title granted under the principles of discovery sanctioned by the Law of Nations. It was a pre-emptive right, not a complete right. As with the notion of discovery sanctioned by the Law of Nations, however, Marshall C.J.'s modified doctrine of discovery could only have sanctioned rights if aboriginal land rights were deemed inferior to the claims of European nations.[26]

Unlike claims based on discovery, claims arising pursuant to conquest were premised on the belief that a nation could acquire rights to foreign lands by conquering the people occupying them. The key to conquest theory, then, was the act of conquest itself.[27] However, the history of North America reveals that, in spite of significant warring between the aboriginal peoples and Europeans, there was no European "conquest" in North America upon which to justify claims to land.[28] The marginalisation of the aboriginal peoples in North America over a lengthy period of

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[25]6 Pet. 515 at 544 (U.S. 1832). See also the comments by arbitrator M. Huber of the Permanent Court of Arbitration in the *Island of Palmas Case*, (1928), 2 R.I.A.A. 829 at 846:

> ... [D]iscovery alone, without any substantial act, cannot at the present time suffice to prove sovereignty over the Island of Palmas or Miangas. ...
>
> If on the other hand the view is taken that discovery does not constitute a definite title of sovereignty, but only an "inchoate" title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the nineteenth century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region to be discovered.

[26]See the discussion in Slattery, "Aboriginal Sovereignty and Imperial Claims," (1991), 29 *Osgoode Hall L.J.* 681 at 699 [hereinafter "Aboriginal Sovereignty"].

[27]See the decision of the Permanent Court of International Justice in the *Status of Eastern Greenland Case* (1933), 3 World Court Reports 151 at 171-2.

[28]See Hon. A.C. Hamilton, *A New Partnership*, (Ottawa: Minister of Public Works and Government Services Canada, 1995) at 6; N.J. Newton, "Compensation, Reparations, & Restitution: Indian Property Claims in the United States," (1994), 28 *Georgia L. Rev.* 453 at 458.

time by the process of European settlement does not constitute a conquest under conquest theory. Nevertheless, conquest theory continued to be used to validate the dispossession of the aboriginal peoples. This is hardly surprising, insofar as it was in the best interests of the European nations laying claim to aboriginal lands to rationalise their dispossession of the aboriginal peoples.[29]

The obvious premise underlying the theory that European occupation of aboriginal lands engendered rights to those lands is that European laws and customs are inherently superior to those belonging to the aboriginal peoples. However, a major problem with this "occupation theory" is that British law did not sanction the effects claimed thereunder. Rather, under the common law doctrine of continuity, the laws of a settled or conquered nation remain until such time as the occupying or conquering nation explicitly alters or abrogates them.[30] Insofar as no explicit action was taken by Britain with respect to pre-existing aboriginal laws, mere occupation may not be used to demonstrate the existence of a valid Crown title to land in Canada under English common law. Although some other forms of justification existed for the dispossession of the aboriginal peoples under colonial regimes -- both under the *jus gentium*[31] and via symbolic acts[32] -- discovery, conquest, and occupation were the primary means used by European nations

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[29]See the commentary in Jennings, *Ambiguous Iroquois Empire*, *supra* note 1 at 4.

[30]See *Campbell* v. *Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 (K.B.); *Re Southern Rhodesia*, [1919] A.C. 211 at 233 (P.C.); *Amodu Tijani* v. *The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 407 (P.C.); *Oyekan* v. *Adele*, [1957] 2 All E.R. 785 at 788 (P.C.); B. Slattery, "The Doctrine of Continuity," in Slattery, *Ancestral Lands*, *supra* note 16 at 10-11.

[31]Other such justifications included settlement, which was quite similar to occupation, *prescription*, under which a right to land arose from the neglect of the previous "owner" to maintain its rights to the land, and *usucaption*, which held that ownership of land was obtained by way of lengthy, uninterrupted possession of lands that had formerly belonged to another and had been abandoned, or presumed abandoned. See Wolff, *supra* note 17 at 184-5 (Ch. III, s. 357); Vattel, *supra* note 17 at 156 (Book II, Ch. XI).

Prescription and usucaption are interrelated in that prescription sanctions the loss of the previous owner's land rights, whereas usucaption grants subsequent claimants ownership rights against all others, including the previous owner. The title obtained from prescription and usucaption is a derivative title, in that another person or group had a previous claim to the land, rather than either an original title to land or what has been described as immemorial prescription, namely a person's title to land based on that title being held for as long as can be remembered. On the latter point, see Wolff, *ibid.*, at 186 (Ch. III, s. 360). Immemorial prescription could not be legitimised as a basis of European title to lands in North America since prior aboriginal use and possession of such lands was too easily documented and, therefore, was not implemented. See also O.P. Dickason, "*Jus Gentium* Takes on New Meanings," in Green and Dickason, *supra* note 16 at 249:

> Continuous use and possession of land "from time immemorial" as a basis for title dates back to Roman times, when jurists considered it to be a self-evident rule of natural law. It was recognized in Justinian's code, and continued under feudalism in common law. But it interfered with the politics of expansion and so was circumvented during the Age of Discovery.

[32]On the use of symbolic acts, see Lindley, *supra* note 9; F.A. Von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law," (1935), 29 *Am. J. Int'l Law* 448; Keller, et al, *supra* note 16; J. Simsarian, "The Acquisition of Legal Title to Terra Nullius," (1938), 53 *Pol. Sci. Q.* 111; M.S.

seeking to establish colonies in North America.[33] As the above discussion illustrates, none of these can demonstrate the existence of a valid title to North American lands.

While the aboriginal peoples may have been generally amenable to sharing their lands and resources with the Europeans,[34] that does not entail that they were willing to submit to the authority of foreign monarchs. As Lindley indicates, 'The Peruvian Inca ... when, hearing of the Pope and his commission, to the Spaniards for the first time, told Pizarro that the Pope "must be crazy to talk of giving away countries which do not belong to him."'[35] In return for sharing the land, the aboriginal peoples generally expected that the Europeans would reciprocate. This is indicated by the statement of the Onondaga and Cayuga Indians to the Governors of New York and Virginia on 2 August 1684:

> Your Sachim is a great Sachim and we are but a small people, when the English came to Manhatans that is N. York, Aragiske, which is now called Virginia, and to Jaquokranægare now called Maryland, they were but a small people and we a great people, and finding they were good people we gave them land and treated them civilly, and now since you are a great people and we but a small, you will protect us from the French, which if you do not, we shall lose all our hunting and Bevers, The French will have all the Bevers, and are angry with us for bringing any to you.[36]

In extending their generosity to the Europeans and entering into alliances with them, the aboriginals steadfastly maintained that those alliances did not render them subject to the Europeans' authority. Throughout their dealing with the European colonising nations, the aboriginal peoples consistently proclaimed their autonomy:

McDougal, H.D. Lasswell, and I.A. Vlasic, *Law and Public Order in Space*, (New Haven: Yale University Press, 1963); Juricek, *supra* note 3; L.C. Green, "Claims to Territory in Colonial America," in Green and Dickason, *supra* note 16.

[33]The fact that these principles were authorised by the Law of Nations, which had established coercive, though non-binding, conventions to regulate its members' interaction, should not be surprising. See T.J. Christian, "Introduction," in Green and Dickason, *supra* note 16 at x: "Indeed, it would be odd if international law did not authorize the expansionist activities of the leading, colonial powers, for the law of nations was little more than a self-serving, crystallization of state practice. One might be forgiven for concluding that a legal analysis of questions of this magnitude is predictably circular, for if it was done it was lawful."

[34]See J.R. Miller, "Introduction," in Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada*, (Toronto: University of Toronto Press, 1991) at ix [hereinafter "*Sweet Promises*"]:

> Indigenous religion, shaped by the need to distribute widely resources that often were scarce, placed a premium on sharing. ... The ethical imperative to share made it difficult for Canada's native peoples to refuse the Europeans' demands for part of their fish, a share of the furs they took, assistance in exploring and mapping the land and waterways, and, somewhat later, military aid.

[35]See Lindley, *supra* note 9 at 127.

[36]"Proposition of the Onondaga and Cayuga Indians," 2 August 1684, as reproduced in *NYCD*, *supra* note 1 III at 417.

> Wee have putt our selves under the great Sachim Charles that lives over the great lake, and we do give you Two White Drest Dear Skins to be sent to the great Sachim Charles That he may write upon them, and putt a great Redd Seale to them ... And you great man of Virginia, meaning the Lord Effingham Governr of Virginia ... lett your freind that lives over the great lake know that we are a ffree people uniting our selves to what sachem we please, and do give you one beavor skinn.[37]

That the aboriginal peoples considered themselves independent actors notwithstanding their alliances with particular European nations is indicated in the statement of the Ojibway Chief Minavavana to English trader Alexander Henry at Michilimackinac in 1761, "Englishman, although you have conquered the French, you have not yet conquered us. We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none."[38]

The failure of the European nations to satisfy the requirements of the doctrines of discovery, conquest, or occupation was not the only problem surrounding their use. The various practices that the Europeans engaged in existed under the auspices of the *jus gentium*. However, the aboriginal peoples were neither a part of the group of nations that generated the governing rules of the Law of Nations nor were they recognised as "nations" under it. Consequently, the doctrines of discovery, conquest, or occupation were not valid against the aboriginals. Logically, the *jus gentium* could bind only those nations that subscribed to its principles or who were intended to be bound by them. It is difficult to sustain an argument that the indigenous nations "lost" title to their lands by the invocation of customs and practices that they were unfamiliar with and did not recognise, but that were legitimised by a vague body of law that did not recognise their status as nations.[39]

On this same point, it should be indicated that the European nations making these claims generally paid little or no attention to the similar assertions made by their competitors where it

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[37]*Ibid.* at 418.

[38]D.V. Jones, *License for Empire: Colonialism by Treaty in Early America*, (Chicago: University of Chicago Press, 1982) at 71, citing A. Henry, *Travels and Adventures in Canada and the Indian Territories between the Years 1760 and 1776*, (New York: I. Riley, 1809) at 44.

[39]See *Worcester*, *supra* note 25 at 543; S.J. Anaya, "The Rights of Indigenous Peoples and International Law in Historical and Contemporary Practice," (1989), Harvard Indian Law Symposium 191 at 205:

> ... Indian nations and other indigenous peoples, not qualifying as states, could not participate in the shaping of international law nor could they look to it to affirm the rights that had once been deemed to inhere in them by natural or divine law. States, on the other hand, both shaped the rules of international law and enjoyed rights under it independently of natural law considerations. It followed that states could create doctrine to affirm and perfect their claims

was against their interests to do so.[40] If Britain was not willing to concede to other European nations the benefit of the sort of claims to title that it made on its own behalf, it would appear equally plausible that the other European nations would not recognise Britain's claims on the basis of these same acts.[41] For all of the reasons discussed, it would appear that the credence given to the various claims made by Britain and other European nations has been misplaced.

(b) The Historical Bases of British-Aboriginal Relations

Britain's actions in voyaging to North America, laying claims to indigenous lands, and later establishing trading posts, military installations, and colonial settlements were based on a number of factors. Commentators have rooted Britain's actions in evangelicalism;[42] the need to

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over indigenous territories as a matter of international law without regard to the rights of the indigenous inhabitants.

[40]See Slattery, "Aboriginal Sovereignty," *supra* note 26 at 688-9.

[41]See Washburn, *supra* note 14 at 32-3:

> Neither Spain nor Portugal was willing at first to concede rights to others within the monopolies fixed by the line [dividing authority to conquer the New World between Spain and Portugal], but other European powers were unwilling to recognize that they might be barred. Hence, the area came to be excluded, at first by oral agreement and later by treaty arrangement, from the effect of European peace settlements. The phenomenon of "no peace beyond the line," as it was known, was not allowed to break the peace that might exist on the European side of the line. The special legal and moral character of acts committed in the area thus set aside suggests that the European monarchs realized that their territorial claims in the newly discovered areas had little basis in law or morality and could be increased, diminished, or surrendered, as expedient, without seriously threatening the vital interests of the mother country.

See also Washburn, *ibid.* generally, at 31-3.

[42]See, for example, R. Hakluyt, *Discourse on Western Planting* (1584), in C. Deane, ed., *Documentary History of the State of Maine*, (Cambridge, 1877) II 7 ff., as cited in K.E. Knorr, *British Colonial Theories, 1570-1850*, (Toronto: University of Toronto Press, 1944) at 28 [hereinafter "Hakluyt"]:

> Seeinge that the people of that parte of America ... are idolaters ... it remayneth to be thoroughly weyed and considered by what meanes and by whome this most godly and Christian work may be perfourmed of inlarginge the glorious gospell of Christe. ... Nowe the Kinges and Queenes of England have the name of Defendours of the Faithe. By which title I thinke they are not onely chardged to mayneteyne and patronize the faithe of Christe, but also to inlarge and advaunce the same.

See also G. Malynes, *Consuetudo*, (London, 1656) at 166, as cited in Knorr, *ibid.* at 29:

> That it is not enough to discover countries, and leave them without plantation ... but it is the Part of Princes to see Plantations made, for two maine reasons, That is, to convert the inhabitants or neighbours to Christianity ...

preclude other European nations from establishing colonies;[43] the search for a Northwest Passage to Asia and India;[44] the need to distribute surplus British population;[45] as well as strategic[46] and financial[47] considerations. Whatever the driving force may have been, upon the first European explorations of North America, it was quickly realised that there was an abundance of natural resources that could be profitably harvested and exported back to the mother countries. Vast quantities of cod and other fish existed off the eastern coast of the continent.[48] Giant timbers for use in shipbuilding and other industries were plentiful.[49] Small trading posts and settlements were

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[43]As expressed by Hakluyt, *ibid.* at 95, as cited in Knorr, *ibid.* at 38: "That spedie plantinge in divers fitt places is moste necessarie upon these laste luchye westerne discoveries, for feare of the danger of being prevented by other nations which have the like intention ..."

[44]See Knorr, *ibid.* at 32-4, especially at 33; Hakluyt, *ibid.* at 108, as cited in Knorr, *ibid.* at 34: "... [T]hat by these colonies the north west passage may easily, quickly, and perfectly be searched oute as well by river and overlande as by sea."

[45]See, for example, G.L. Beer, *Origins of the British Colonial System*, (New York: Macmillan, 1908); D.B. Quinn, *Explorers and Colonies: America, 1500-1625*, (London: Hambledon Press, 1990) at 167-8 [hereinafter "*Explorers and Colonies*"].

[46]See Knorr, *supra* note 42 at 37:

> According to contemporary English opinion Spain's power rested mainly on the metallic basis of the treasure she received from her American Empire. Hence, the English concluded that to cut this stream of wealth which constantly replenished her coffers, was to hit Spain in the most decisive spot. Naval and military action against Spain would be made practicable by the possession of bases in America.

See also Hakluyt, *ibid.* at 45, as cited in Knorr, *ibid.* at 37: "That thos voyadge will be a greate bridle to the Indies of the Kinge of Spaine ... for wee shoulde not onely often tymes indaunger his flete in the returne thereof, but also in fewe yeres put him in hazarde in loosinge some parte of Nova Hispania." See also Hakluyt, *ibid.* at 55, 59; C. Shammas, "English Commercial Development and American Colonization," in K.R. Andrews, N.P. Canny, and P.E.H. Hair, eds., *The Westward Enterprise: English Activities in Ireland, the Atlantic, and America 1480-1650*, (Liverpool: Liverpool University Press, 1978) at 153-4.

[47]Note, for example, the comments by Sir Francis Bacon about the basis of Britain's entry into the North American colonisation frenzy, as quoted in Knorr, *supra* note 42 at 31: "It cannot be affirmed, if we speak ingeniously that it was the propagation of the Christian faith that was the ... [motive] ... of the discovery, entry, and plantation of the New World; but gold and silver, and temporal profit and glory." See also Quinn, *Explorers and Colonies*, *supra* note 45 at 167; Quinn, *England and the Discovery of America, 1481-1620*, (New York: Knopf, 1974) at 289-90, 485-7 [hereinafter "*England and the Discovery of America*"].

[48]J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, Revised Edition (Toronto: University of Toronto Press, 1991) at 16 [hereinafter "*Skyscrapers*"].

[49]See Quinn, *Explorers and Colonies*, *supra* note 45 at 157-8; Quinn, *England and the Discovery of America*, *supra* note 47 at 485-6:

> Both westerners and Londoners expected certain advantages from the timber resources of America. Westerners looked for pitch, tar, turpentine, masts, and the chances of shipbuilding on the spot once a colony was established (the very first product of the Maine colony of 1607-8 was a ship); the Londoners were concerned with clapboard for wainscot, staves for barrels (wine trade), cedar for fine cabinetmaking, use of the forests for smelting iron (either local iron or ore brought from England as ballast), and making glass and potash for soap -- all activities which

established to capitalise on these resources. As a result of engaging in the dry fishery -- cleaning and drying fish on shore on racks rather than using salt to cure the fish on board their ships (known as the "green fishery") -- European fishermen began to have greater contact with the aboriginal peoples.[50]

The contact between European fishermen and aboriginal peoples eventually led to mutually-beneficial trade. The aboriginals exchanged furs for manufactured goods, clothing, and trinkets. Trade was not an uncommon practice for the aboriginal peoples. They had a long-established history of trade and commerce among each other prior to the arrival of the Europeans.[51] The creation of trade relations with the Europeans was a logical extension of their previous trade practices. Meanwhile, to the Europeans, trade with the aboriginals was a lucrative sideline to their resource harvesting. To both the aboriginals and the Europeans, the creation of trade relations was a blessing. The aboriginals were pleased with their ability to obtain European goods for what they viewed as worthless and plentiful pelts that were often traded after having being used as clothing. The Europeans, meanwhile, were quite content to exchange abundant knives, kettles, beads, mirrors, and cheap blankets for valuable furs.[52]

Relations between Europeans and aboriginal peoples during the immediate, post-contact period of the early sixteenth century were based heavily on trade. European trade practices soon changed from the exploitation of resources such as fish and timber to the acquisition of furs to satisfy the new demand for beaver pelts in Europe.[53] European desires for beaver fur, particularly for use in men's hats, spawned a huge industry in Europe and the New World.[54] The Europeans' craving for beaver pelts and the aboriginals' adeptness at processing[55] and procuring them,

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were becoming increasingly expensive at home as English timber was used up in increasing quantities.

[50]See Miller, *Skyscrapers*, *supra* note 48 at 16.

[51]See *ibid.* at 9-10.

[52]*Ibid.* at 26.

[53]*Ibid.* at 16-17: "Occasional visits of fishermen produced meetings; meetings led to barter of tools and clothing for furs; and out of these encounters grew the second major Canadian economy of the European era, the fur trade."

[54]See B.G. Trigger, "The Jesuits and the Fur Trade," in Miller, *Sweet Promises*, *supra* note 34 at 5; Miller, *Skyscrapers*, *supra* note 48 at 32; A.W. Trelease, *Indian Affairs in Colonial New York: The Seventeenth Century*, (Ithaca: Cornell University Press, 1960) at vii.

[55]The aboriginals "processed" the pelts by wearing the beaver fur next to their skin in garments made of several pelts attached by leather thongs. After a year as a garment, the soft part of the pelt was all that was left as the long, coarse hairs had been worn away through abrasion, sweat, smoke, and heat encountered during the year's use as a garment. See Miller, *Skyscrapers*, *supra* note 48 at 32.

especially during the winter when the pelts were thickest,[56] provided an alliance that would serve the interests of all parties for some time to come.[57] It also initiated a drastic change in the nature of British-aboriginal relations.

The new British-aboriginal partnerships that developed around the beaver trade resulted in the creation of British trading posts and settlements. With the increased British presence in North America came an expanded rivalry between British and French traders. This British-French rivalry expanded the trading associations between the British and the aboriginals to include significant military and political elements. These military and political alliances were instrumental in the British conquest of New France in 1760-61. Later, they facilitated the consolidation of British North America after the conquest.[58] These initial trading partnerships between Britain and the aboriginal peoples were, therefore, key elements in the development of British-aboriginal relations. Indeed, there was a continual progression in the scope and intensity of British-aboriginal relations from the time of contact that had been spurred on initially by trade.

To capitalise on the tremendous wealth that North America had to offer, it was necessary for Britain to establish some physical presence, whether that be by creating small trading outposts, as was characteristic of France's practice, or by founding colonial settlements. In order to establish this presence, the cooperation of the aboriginal peoples was indispensable.[59] Britain and other European nations were numerically and militarily inferior to the aboriginal peoples until well into the eighteenth century.[60] Moreover, early European settlers in North America had to combat the problems caused by their general lack of familiarity with their new surroundings. The British were entirely unfamiliar with the presence or location of waterbeds. They also knew little of

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[56]These winter pelts, called *castor gras d'hiver* (greasy winter beaver) by the French, were the most valuable to the Europeans, but also the most difficult to obtain, as the beavers spent the winters in the protection of their lodges. However, as Miller explains, *ibid.* at 33, the aboriginal peoples possessed the knowledge of how to obtain them:

> Naturally, the Indians, who for centuries had been catching the beaver for fur and meat, knew how to reach the ponds where lodges were to be found, how to locate the entrances, and how to destroy the structures so as to get at the inhabitants. Consequently, the Indians were essential to taking the *castor gras d'hiver* in its prime, just as they were to its proper processing. A trade in the beaver pelts that furriers craved in seventeenth-century Europe was simply impossible without the cooperation of the indigenous North Americans. Europeans who came in search of prime furs needed the native population's knowledge, skills, and cooperation.

[57]This alliance is discussed, *infra*.

[58]These aspects will be discussed in Ch. III.

[59]See Jennings, *Ambiguous Iroquois Empire*, *supra* note 1 at 367.

[60]See Miller, *Skyscrapers*, *supra* note 48 at 269.

North American vegetation, such as potatoes and corn, that did not exist in Europe. It was not feasible for the British to rely on provisions from home for their sustenance because of the great distance between Europe and North America. Consequently, they had to rely on the benevolence of the Indian nations they encountered for survival.[61] As Jennings details:

> The necessity for native alliance was not merely a matter of armed manpower; it was desirable and indeed indispensable because of massive European ignorance. To the European who lacked woodcraft, knew not the native trails, and imagined gothic horrors in every copse, the familiar hunting parks of the Indians were lethal wilderness. The European "settlers," who knew nothing of tillage methods in America and were often revolted at the labor of farming, depended on Indian gardens for subsistence between the deliveries of cargoes from overseas.[62]

The aboriginal peoples were accommodating of these early British intrusions upon their lands.[63] The aboriginal peoples shared their food with the new arrivals and assisted the British in exploring and adapting to their new surroundings.[64] The aboriginals instructed the British in how to plant and cook new crops.[65] The aboriginals also shared their knowledge relating to such necessities as clothing, shelter, modes of transportation, and medicine:

> Besides items of food, the settlers borrowed Indian buckskin clothing and Indian canoes, snowshoes, and toboggans. Iroquois-style moccasins survive today. ... White pioneers and explorers survived in the wilderness because they mastered Indian techniques of building shelters in the woods or making utensils, weapons, or tools fashioned from wood. ... Indian medical cures and skills, many of them lost with the passage of time, have also been of considerable value to those colonials who knew how to use them effectively. Indians had an almost astonishing number of remedies for toothaches, gangrene, ulcers, backaches, headaches, rheumatism, weak or sore eyes, and other complaints. They were also able to perform primitive surgery when required, and their medicine men, sometimes called conjurers, were not far behind modern physicians as successful practitioners in certain areas of psychiatry.[66]

In addition to sharing their food and knowledge, the aboriginal peoples shared their lands with the newcomers. The munificence of the aboriginal peoples enabled the British settlers to

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[61]In 1898, Alexander Brown wrote the following account of the assistance provided to British settlers in the Virginia colony by the aboriginal peoples in the fall of 1607, as quoted in Washburn, *supra* note 14 at 34-5: "All accounts agree that for some reason the Indians did daily relieve them for some weeks with corn and flesh. The supplies brought from England had been nearly exhausted; the colonists had been too sick to attend to their gardens properly, and this act of the Indians was regarded as a divine providence at that time ..."

[62]Jennings, *Invasion of America*, *supra* note 9 at 33. Dependence upon the Indians for survival was not an exclusively British characteristic. W.J. Eccles noted in *The Canadian Frontier, 1534-1760*, (New York: Histories of the American Frontier, 1969) at 24, that the French were far more dependent upon the Indians than the Indians were upon the French.

[63]See Washburn, *supra* note 14 at 33.

[64]As Miller explains in *Skyscrapers*, *supra* note 48 at 43, "... [W]ithout the Indian, the canoe, maize, and other products of the indigenous society, none of the great exploratory trips would have got much further than Lachine."

[65]W.R. Jacobs, *Dispossessing the American Indian: Indians and Whites on the Colonial Frontier*, (New York: Charles Scribner's Sons, 1972) at 160.

[66]*Ibid.* at 161.

survive in unfamiliar surroundings until they could become self-sufficient. Once the British became acclimatised to their new surroundings, they commenced more formal trade relations with the Indians. Unlike the French, the British were not content to base their alliances with aboriginal groups on oral agreements.[67] Instead, the British concluded a variety of friendship treaties and alliances with the aboriginals.

In addition to establishing trade relations, Britain was equally interested in establishing permanent colonies in North America. The origins of British colonialist desires in North America have been traced by Shammas back to the 1560s.[68] While British ambition to establish colonies in North America did exist in the initial stages of their relations with the aboriginal peoples, it was not until the seventeenth century that serious colonisation attempts began.[69] In contrast, France placed its primary emphasis on pure economic exploitation until the eighteenth century.[70]

A number of royal charters[71] for North American colonies were granted by British monarchs between 1632 and 1691.[72] The development of the mercantile system resulted in an even greater desire to establish British colonies in North America.[73] Mercantilism was a

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[67]Dickason, *Canada's First Nations*, *supra* note 19 at 177.

[68]Shammas, *supra* note 46 at 151. In *Explorers and Colonies*, *supra* note 45 at 141, Quinn suggests that "It was not until the 1570s that a small group of enthusiasts for North American colonization appeared."

[69]Quinn, *Explorers and Colonies*, *supra* note 45 at 321.

[70]The consistently small population of New France attests to the fact that France was generally far more interested in trade in North American goods through the establishment of New World trading outposts than in establishing and settling permanent North American colonies. See Miller, "Introduction," in Miller, *Sweet Promises*, *supra* note 34 at x; C.J. Jaenen, "French Sovereignty and Native Nationhood during the French Régime," in Miller, *ibid.* at 20: "The French came in the first instance in search of walrus, whale, and cod, then of fabulous similar to those found by the Spaniards in Central and South America, and of the route to the exotic Orient. None of these necessitated extensive settlement."; O.P. Dickason, "Amerindians between French and English in Nova Scotia, 1713-1763," in Miller, *ibid.* at 47 [hereinafter "Amerindians"]: "The fur trade upon which their colony was economically based, meant capitalizing on the hunting skills of the indigenous population rather than competing over territorial rights; coupled with the smallness of the French population, that had meant that land had never become an issue in New France."; Miller, *Skyscrapers*, *supra* note 48 at 56: "A commercial New France was a colony with low population, a colony that bore lightly on the land and its native inhabitants."; see also Miller, *ibid.* at 44.

[71]These royal charters began with the charter issued to the Cabots, continued with those later given to other explorers such as Raleigh and Gilbert, and continued into the seventeenth century with charters issued to individuals and private companies, such as the charter granted by James I to the Virginia Company on 10 April 1606, as reproduced in Commager, *supra* note 7 at 8-10. This charter authorised the incorporation of the Plymouth Company and the London Company, the latter having established the first permanent English colony in America, comprised of 120 settlers, on 14 May 1607.

[72]Including those granted over Maryland (1632), Connecticut (1662), Rhode Island (1663), Rupert's Land (1670), New Jersey (1674), Delaware (1674), Pennsylvania (1681), and Massachusetts Bay (1691): see K.M. Narvey, "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company," (1974), 38 *Sask. L. Rev.* 123 at 141.

[73]J. Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763*, (Ottawa: Research Branch, Indian and Northern Affairs Canada, 1981) at 9.

vertically-integrated, but closed, economy in which a nation would have guaranteed supplies of raw materials, the means of production of finished goods, and markets for the consumption of these goods within the confines of its own territories.[74] The need to develop a closed economy stemmed from the collapse of the integrated European economy that had been characteristic of the medieval period. Colonisation provided the only secure means of assuring the availability of resources and markets in the wake of European competition for empire.[75]

While Britain wanted to establish North American colonies, numerous and powerful aboriginal nations provided significant potential opposition. In order to achieve its objectives, Britain had to enlist the assistance of the aboriginal peoples. The tremendous military disparity between the British and aboriginal peoples in the initial stages of their interaction rendered it impossible for Britain to forcibly remove the aboriginals from their lands. The early British colonies that emerged in North America were established with the consent, if not the cooperation, of the aboriginal peoples.[76]

The strategic importance of the aboriginal peoples in North America was a fact not lost to Britain and France. Meanwhile, the aboriginals were well aware of the role they played. The

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[74]Knorr explains the reason for the rise of mercantilism *supra* note 42 at 101:

> In consequence of keen competition and protectionist practices, European markets had become increasingly precarious and the mother country found in the "natural" market of the plantations (as contrasted with the "artificial" trade in Europe) a dependable and permanent outlet for its manufactures. There the metropolis would enjoy a monopolist position and could be without fear of being undersold by rival nations. Instead of competing in the contracting European market, England would "create" and "make" exclusive markets overseas and in order to get the business of "clothing new Nations" it would be expedient even to increase this colonial market by territorial expansion.

[75]*Ibid.* at 127-8.

[76]See, for example, R.S. Grumet, *Historic Contact: Indian People and Colonists in Today's Northeastern United States in the Sixteenth Through Eighteenth Centuries*, (Norman, Okla.: University of Oklahoma Press, 1995) at 443-4; M. Jackson, "The Articulation of Native Rights in Canadian Law," (1984), 18 *U.B.C. L. Rev.* 255 at 257-8:

> It was through the process of consensual treaty-making, in which Indian tribes were recognized as independent nations, that the terms of European settlement and the tribes' continued occupation of their hunting territories were mutually agreed. The basic principle which emerged was that, save for lands that were unoccupied ... the consent of the Indian tribes was a prerequisite to the occupation of lands used by the tribes. ... That the principle of consent lay at the heart both of the substance of Indian rights and the procedures by which such rights were acquired by the European settlers is clearly expressed in some of the later Charters of the English colonies in North America. The Rhode Island Charter of 1663 indicates that the petitioners, upon arriving in America, settled amidst certain Indians, "who, are the most potent princes and people of that country The petitioners are now seized and possessed, by purchase and consent of the said natives, to their full content."

aboriginal peoples were crucial to the existence and proliferation of trade and the early economic development of North America.[77] Indians were more than merely trappers who traded pelts with the Europeans. They also controlled fur trade routes, acted as liaisons between Indian trappers and European traders, supplied provisions, built canoes, acted as navigators, guides, and interpreters, and provided transportation.[78] The fur trade created a situation in which both European and aboriginal became dependent upon one another through a division of labour:

> The Indians would not have allowed European fur traders to come in large numbers to take the furs and process them themselves. In any event, conducting the fur trade principally with European labour would have proved so prohibitively expensive that the commerce would quickly have been abandoned. It made much more sense, to both the indigenous harvesters of fur and the foreign purchasers of pelts, to practise a division of labour in the fur trade. The Indians collected the furs in large quantities and brought them to the European. The Europeans, for the most part, purchased furs gathered by others and transported them to overseas markets. This arrangement made the commerce in fur symbiotic: each party to the exchange of pelts needed the other.[79]

The aboriginal peoples' role in the fur trade was representative of the role they played in their other relationships with the British. Aboriginal nations' positions as middlemen in trade between other aboriginal tribes and the British, particularly that of the Haudenosaunee (people of the longhouse), also known as the Five (later Six) Nations Confederacy of Iroquois,[80] was replicated in British-aboriginal political and military relationships.[81]

Both the British and French in North America realised that they could entrench themselves in particular geographic areas without the necessity of continuous warfare with their European competitors by enlisting powerful aboriginal allies occupying strategic positions.[82] Early British

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[77]Miller, *Skyscrapers*, *supra* note 48 at 17.

[78]See, for example, E.E. Rich, "Trade Habits and Economic Motivation among the Indians of North America," in Miller, *Sweet Promises*, *supra* note 34 at 158:

> ... [B]ehind the direct contacts with European traders there spread a network of Indian middlemen who rapidly reached across North America, taking European goods inland and bringing furs out. To a large extent these Indian traders dictated the pattern of European expansion into the continent, and they influenced the character of the European trade even when they could not confine it.

See also Miller, *Skyscrapers*, *supra* note 48 at 36-7; H.A. Innis, *The Fur Trade in Canada: An Introduction to Canadian Economics*, (Toronto: University of Toronto Press, 1956); W.J. Eccles, "A Belated Review of Harold Adams Innis's *The Fur Trade in Canada*," in Bumsted, *supra* note 13; A.J. Ray, *Indians in the Fur Trade*, (Toronto: University of Toronto Press, 1974), R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*, (Cambridge: Cambridge University Press, 1991) at 94-141.

[79]Miller, *Skyscrapers*, *supra* note 48 at 31-2.

[80]Comprised of the Mohawk, Oneida, Onondaga, Seneca, Cayuga, and, later, Tuscarora, nations.

[81]Refer to the discussion in Ch. III.

[82]See White, *supra* note 78 at 223-4.

alliances with the Iroquois were a prime example of this practice.[83] These alliances foreshadowed the historical turn of events that culminated in the conquest of New France by Britain in the second half of the eighteenth century. If one European nation could establish and later strengthen its ties with the aboriginals peoples while excluding its European rivals, it could gain a position of military and economic superiority vis-à-vis its colonial competitors.[84]

Britain realised that aboriginal alliances -- and with them the benefits of enhanced trade as well as the furtherance of its imperialist goals -- could not be acquired by force. Rather, the British had to gain the trust and respect of the aboriginal nations. Britain entered into agreements with the aboriginals on terms that reinforced the relations between the groups. The alliances that Britain forged with the aboriginals provided it with the ability to engage in profitable trade while furthering its ambitions of empire through the establishment and maintenance of colonies in North America. These alliances also proved to be beneficial to the aboriginal peoples, enabling them to acquire new tools and goods for a variety of purposes.[85] Britain's representations to the aboriginal peoples in its early alliances with them suggests that it dealt with them as autonomous nations.[86] The terms of friendship and alliance giving rise to the *Treaty of Albany, 1664* bear this out.[87]

(c) The *Treaty of Albany, 1664*

The *Treaty of Albany, 1664* is one of the earliest, and most noteworthy, examples of how Britain treated with the aboriginal peoples as autonomous nations.[88] At the time the treaty was

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[83]R.N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs," (1989), 69 *Boston Univ. L. Rev.* 329 at 337.

[84]See White, *supra* note 78 at 223-268; refer also to the earlier discussion of Crown-Native trade relations and British notions of mercantilism.

[85]Dickason, "Amerindians," *supra* note 70 at 57; Jennings, *Ambiguous Iroquois Empire*, *supra* note 1 at 80-1.

[86]See B.H. Wildsmith, "Treaty Responsibilities: A Co-Relational Model," (1992), *U.B.C. L. Rev.* Special Edition on Aboriginal Justice 324 at 330-1; J.Y. Henderson, "Empowering Treaty Federalism," (1994), 58 *Sask. L. Rev.* 241.

[87]Note, as well, the special clause relating to trade included in the *Treaty of Albany*. Iroquois trade with the Dutch had been an integral aspect of their alliance. For the British to engage the Iroquois' friendship in as firm and solemn a manner as the Dutch had, it was incumbent upon the British to maintain good trade relations with the Iroquois.

[88]As P.C. Williams points out in *The Chain*, unpublished LL.M. thesis, Osgoode Hall Law School, 1982 at 13, the treaty refers to the Indian treaty signatories as both "princes" and "sachems".

signed, the Iroquois were more numerous and powerful than the British in North America.[89] Previously, the Iroquois had been powerful allies of the Dutch in New Netherland. By 1664, the Iroquois had become catalysts in the struggle between Britain and France for economic and military pre-eminence in North America.[90] When the Iroquois agreed to terms with Britain, the Iroquois sought a continuation of the relationship they had enjoyed with the Dutch.[91] Under the terms of the *Treaty of Albany*, the Iroquois were to receive "such wares and commodities from the English for the future, as heretofore they had from the Dutch." The treaty also provided for separate British and Iroquois jurisdiction in criminal matters involving their own citizens and promised British military assistance to the Iroquois against certain Indian enemies of the latter.[92]

The written text of the Treaty of Albany reads as follows:

> ARTICLES made and agreed upon the 24th day of September 1664 in Fort Albany between Ohgehando, Shanarage, Soachoenighta, Sachamackas of ye Maques; Anaweed Conkeeherat Tweasserany, Aschanoondah, Sachamakas of the Synicks, on the one part; and Colonell George Cartwright, in the behalf of Colonell Nicolls Governour under his Royall Highnesse the Duke of Yorke of all his territoryes in America, on the other part, as followeth, viz.t --
>
> 1 Imprimis. It is agreed that the Indian Princes above named and their subjects, shall have all such wares and commodities from the English for the future, as heretofore they had from the Dutch.
>
> 2. That if any English Dutch or Indian (under the proteccôn of the English) do any wrong injury or violence to any of ye said Princes or their Subjects in any sort whatever, if they complaine to the Governor at New Yorke, or to the Officer in Chiefe at Albany, if the person so offending can be discovered, that person shall receive condigne punishmt and all due satisfaccôn shall be given; and the like shall be done for all other English Plantations.
>
> 3. That if any Indian belonging to any of the Sachims aforesaid do any wrong injury or damage to the English, Dutch, or Indians under the proteccôn of the English, if complaint be made to ye Sachims and the person be discovered who did the injury, then the person so offending shall be

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[89]*Ibid.* at 210.

[90]See Jackson, *supra* note 76 at 258.

[91]See Trelease, *supra* note 54 at 228. Iroquois' relations with the Dutch had progressed from early non-aggression pacts to trading relationships to a mutual assistance pact: see Jennings, *Ambiguous Iroquois Empire*, *supra* note 1 at 55. That is not to say that the parties regarded each other warmly; rather they entered into this alliance because they needed each other: see *ibid.*

[92]"Articles between Col. Cartwright and the New York Indians," 24 September 1664, as reproduced in *NYCD*, *supra* note 1 III at 67-8. Williams, *supra* note 88 at 97, makes the analogy between the *Treaty of Albany*'s criminal jurisdiction provisions -- that where a citizen from one nation harms a citizen from the other, the offender's citizenship determines criminal jurisdiction -- and modern provisions for diplomatic immunity.

punished and all just satisfaccôn shall be given to any of His Ma[ties] subjects in any Colony or other English Plantacôn in America.

4. The Indians at Wamping and Espachomy and all below the Manhatans, as also all those that have submitted themselves under the proteccôn of His Ma[tie] are included in these Articles of Agreement and Peace;

In confirmacôn whereof the partyes above mencôned have hereunto sett their hands the day and yeare above written.

GEORGE CARTWRIGHT

THESE ARTICLES following were likewise proposed by the same Indian Princes & consented to by Colonell Cartwright in behalfe of Colonell Nicolls the 25th day of September 1664.

1 That the English do not assist the three Nations of the Ondiakes Pinnekooks and Pacamtekookes, who murdered one of the Princes of the Maques, when he brought ransomes & presents to them upon a treaty of peace.

2. That the English do make peace for the Indian Princes, with the Nations down the River.

3. That they may have free trade, as formerly.

4. That they may be lodged in houses, as formerly.

5. That if they be beaten by the three Nations above mencôned, they may receive accommodacôn from y[e] English.

The alliance between the nations was preserved on a wampum belt made from beads fashioned out of shells, which were pierced and sewn into patterns on animal hides.[93] The Iroquois gave a

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[93]Chief J.M. Matchewan of the Barriere Lake Indian Government, explained the significance of wampum in the following manner:

> Wampum belts were used by Indian nations in eastern North America to record agreements and laws, long before the coming of the white man. Wampum is a cylindrical bead, purple or white in colour, made from the hard shell of the clam. Woven together, the wampum form designs that symbolize actual events. It takes years to make a wampum belt and, once made, it is handed down from generation to generation, along with the memory of what it records.

See "Mitchikanibikonginik Algonquins of Barriere Lake: Our Long Battle to Create a Sustainable Future," in B. Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country*, (Toronto: Summerhill Press, 1993) at 141.

In "The Quest of the Six Nations Confederacy for Self-Determination," (1986), 44 *U.T. Fac. L. Rev.* 1 at 9, D. Johnston gave the following explanation of the symbolism of wampum: "Each design carried with it a universe of meaning. Wampum belts were integral both to spiritual ceremonies and council meetings. Moreover, they were the medium of international communication." The use of wampum belts to commemorate the treaties entered into between the Iroquois and European nations was a common practice in the seventeenth century. See R.A. Williams, Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonization and Americanizing the White Man's Indian Jurisprudence," (1986), *Wisc. L. Rev.* 219 at 291 [hereinafter "Algebra"]; Jacobs, *supra* note 65 at 41-9.

wampum belt to the British at the signing of the *Treaty of Albany*.[94] The signing of the written treaty and the presentation of the wampum belt marked the commencement of formal alliances between them.[95]

As a result of the pattern of the wampum belt presented by the Iroquois, the *Treaty of Albany* became known as the Two-Row Wampum treaty. The belt showed two parallel rows of purple wampum on a background of white wampum. The white wampum symbolised the purity of the agreement. The two purple rows denoted the spirit of the nations' ancestors and the separate, but parallel paths that they would take in their respective vessels. One vessel, a birch bark canoe, was for the Iroquois people, their laws, customs, and way of life. The other, a ship, was for the British and their laws, customs, and way of life. Three beads of wampum -- symbolising peace, friendship, and respect -- separated the two rows. The three beads linked the nations together, but just as their paths never cross on the wampum belt, neither was to attempt to interfere with the other's affairs.[96] The independence of the nations established in the *Treaty of Albany* is still cited today as an example of British recognition and affirmation of aboriginal autonomy.[97]

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[94]See Williams, *supra* note 88 explains, at 277. The significance of the Two-Row Wampum is outlined below.

[95]The dealings between the British and the Iroquois as autonomous nations was noted by Sir William Johnson in a speech at the Onondaga Conference attended by the Five Nations in April, 1748, as reproduced in *R. v. Sioui* (1990), 70 D.L.R. (4th) 427 at 449 (S.C.C.):

> Brethren of the five Nations I will begin upon a thing of a long standing, our first Brothership. My Reason for it is, I think there are several among you who seem to forget it; It may seem strange to you how I a Foreigner should know this, But I tell you I found out some of the old Writings of our Forefathers which was thought to have been lost and in this old valuable Record I find, that our first Friendship Commenced at the Arrival of the first great Canoe or Vessel at Albany ...

[96]The Two-Row Wampum is described in a number of sources: see, for example, Williams, *supra* note 88 at 96:

> The Iroquois tradition is that the Two Row Wampum Belt was made at the same time as this written document [Treaty of Albany]: it provides that the English and the Iroquois will be as two boats on the same river, travelling in the same direction, but parallel, so that neither interferes with the course of the other; it provides that no person from one nation shall cross into the boat of the other.

See also Williams, Jr., "Algebra," *supra* note 93 at 291; Johnston, *supra* note 93 at 11.

[97]Grand Chief M. Mitchell, Mohawk Council of Akwesasne, "An Unbroken Assertion of Sovereignty," in Richardson, *supra* note 93 at 109-10.

> Our belief and faith that we are still an independent nation go back to the first treaty signed in North America, in 1664, when the original European settlers came to confer with our

As the first formal alliance between Britain and the aboriginal peoples, the *Treaty of Albany* made use of forms existing within each culture that were duly representative of the solemnity with which the parties pledged their peace, friendship, and respect. The use of formally written treaties on parchment was a practice that Britain had previously reserved for its relations with independent, sovereign powers. Meanwhile, the Iroquois' representation of the agreement on a belt of wampum, which was highly valuable and required great skill to make, demonstrated the sanctity with which they viewed their alliance with Britain.[98] The use of formal agreements by aboriginal peoples was also a practice that had been used by many of them prior to contact with

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people in Albany, New York. What came out of that was the Two Row Wampum Treaty, in which conditions for our collaboration were agreed to by the two sides. ...

The Europeans at the 1664 conference said that their King would be a father to us, but the Haudenosaunee replied that there is only one father for us, and we call him Sonkwaiatisen, the Creator. The Iroquois said, this is how it will be: You and I are brothers. We will not make laws for you, but we will look after you, help you settle in this land, give you the medicines you will need to survive, and show you what you can plant, what animals you can hunt, and how to use this land. ...

The original Two Row Wampum agreement stipulated that each side would refrain from interference in the other's government. Because we feel that this agreement is still binding, Akwesasne has steadfastly refused to vote in Canada's elections.

See also G. Erasmus, National Chief, Assembly of First Nations, "Twenty Years of Disappointed Hopes," *ibid.* at 1-2:

All across North America today First Nations share a common perception of what was then agreed [in the *Treaty of Albany*]: we would allow Europeans to stay among us and use a certain amount of our land, while in our own lands we would continue to exercise our own laws and maintain our own institutions and systems of government.

[98]As Jacobs, *supra* note 65 explains, at 42:

Grains from Delaware Indian "Penn Wampum Belts," obtained from the Indians by the Penn family, were approximately one-fourth of an inch wide and three-eighths to one-half inch in depth. According to X-ray reproductions, the perforations were between one-eighth and one-sixteenth of an inch in diameter. The grains were laced together with native fiber and deerskin, cut into narrow strips, and made into necklaces, bracelets, strings, belts, girdles, and collars. Each grain had its known value, the black or purple being worth twice as much as the white.

Making of wampum beads was difficult. For one thing, before the natives obtained awls from Europe, they had to bore out the shell currency with sharp stones. The English, observing the value placed on wampum beads, made imitation porcelain beads, which were sold to the Indians at what was probably a handsome profit.

Since wampum was made near the seashore, inland tribes traveled as many as six hundred miles to trade skins and pelts for this precious commodity.

the Europeans.[99] The combination of these practices strongly suggests the existence of a nation-to-nation relationship between the parties.

The alliance between the groups that was solemnised at Albany was greater than the representations made either in the written treaty or the Two-Row Wampum. Those indicators portrayed particular aspects of the alliance entered into, but did not constitute the nature of the alliance itself. The treaty and the Two-Row Wampum were merely mnemonic devices designed to assist the parties in recalling the nature of the agreement between the groups.[100] What the treaty truly represented, and what was more accurately depicted in the Two-Row Wampum than in the parchment version, was an alliance between independent nations. The basis for this suggestion will become clearer in the discussion of the Covenant Chain alliance below.

The alliance between Britain and the Five Nations respected the strength and independence of the parties; it was not intended to diminish the autonomy of either of them.[101] This fact was clearly indicated in both the written treaty -- each party maintaining its own jurisdiction over its own citizens -- and the Two-Row Wampum -- each party keeping to its own path. In addition to maintaining the status quo in this regard, the alliance between the groups was intended to provide them with increased strength for their mutual benefit, whether that be related to trade, relations with other autonomous nations (whether European or aboriginal), or military assistance and cooperation. The *Treaty of Albany* was the precedent upon which future agreements between Britain and aboriginal nations, such as the Covenant Chain alliance, were based.

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[99]Note, for example, pre-contact Mi'kmaq practices, as related by the Union of Nova Scotia Indians, *The Mi'kmaq Treaty Handbook*, (Sydney & Truro, N.S.: Native Communications Society of Nova Scotia, 1987) Preface at i:

> Well before the arrival of Europeans, formal agreements equivalent to treaties were negotiated between sovereign nations of North America. The meaning and effect of these arrangements were not limited by a few words on paper as are present-day business contracts. Rather, these treaties were living and evolving relationships among various indigenous nations. Like the members of a family, representatives of the nations that had entered into a treaty met from time to time to exchange gifts, forgive one another and renew their friendship. We, the Mi'kmaq, related to Europeans the same way.

[100]Williams, *supra* note 88 at 158, 165.

[101]That the Iroquois were said to have placed themselves under the protection of Britain according to the written version of the treaty does not equate to a relinquishing of their independent status, for there was a real *quid pro quo* for Britain's promise to protect them from their enemies.

(d) The Covenant Chain Alliance

On the heels of the *Treaty of Albany* came the Covenant Chain, a military, political, social, and economic alliance initially between the Dutch and River Indians of the Hudson River region, but later forged between the British and the Iroquois Confederacy.[102] The Covenant Chain was ultimately expanded to link Britain with a host of other aboriginal nations.[103] Although the exact date of the commencement of the British-Iroquois Covenant Chain is uncertain, it appears that the *Treaty of Albany* was at least a precursor to it. This notion is supported by a statement made by the sachems of the Iroquois Confederacy in 1737:

> In Antient times when our forefathers first met at this place [Albany] we will tell you what then happened; before there was a house in this place, when we lodged under the Leaves of the Trees the Christians and We Entered into a Covenant of friendship, and the Indians loved the Christians on Account they sold them the goods Cheap. This Government was likened unto a Great Ship which was moared behind a great Yper Tree [a species of elm] but because the Tree was perishable the Anchor was lifted up and laid behind the Great hill at Onondage and the Six Nations are to take Care of that Anchor: that it be not Removed by any Enemy.[104]

The Covenant Chain provided the foundation for the proliferation of solemn relations between Britain and the aboriginal peoples of North America.[105] It was represented by Britain as a mutual and lasting alliance between autonomous nations.[106] This representation of mutuality may be seen through the following exchange of promises between Sir William Johnson and the Six Nations on 20 February 1756:

> Brethren
>
> This animates me with fresh pleasure and affection, and at this important conjuncture of affairs to brighten and strengthen the Covenant Chain, that has so long linked us together in mutual friendship and brother[ly] affection which I hope will continue inviolable and sacred, as long as the Sun shines or the Rivers continue to water the earth, notwithstanding all the intrigues

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[102]The origins of the Covenant Chain between the Dutch and the aboriginals is discussed in Jennings, *Ambiguous Iroquois Empire*, *supra* note 1 at 47-57.

[103]As Williams, *supra* note 88 explains at 59, the Covenant Chain alliance stretched from the east coast of North America to the west of Lake Superior, and from the coasts of James Bay to the Florida borders.

[104]As reproduced in *NYCD*, *supra* note 1 VI at 106. See also Williams, *supra* note 88 at 109: "The date of the making of the original Chain, according to Cadwallader Colden, was 1664 -- the date when the British took over New York from the Dutch. The evidence points to the Treaty of Fort Albany as a part of that first forging of the Covenant Chain."

[105]See R.A. Williams, Jr., "Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace," (1994), 82 *Calif. L. Rev.* 981 at 991 [hereinafter "Linking Arms Together"], "The Chain's imagery and metaphors -- of two once-alien groups connected in an interdependent relationship of peace, solidarity, and trust -- became the governing legal and political language of English-Iroquois diplomacy for most of the Encounter era, and even into the Revolutionary era."

[106]See Jennings, *Ambiguous Iroquois Empire*, *supra* note 1 at 38: "... [T]he kings of England who claimed sovereignty over the Iroquois League also recognized the League as an independent entity."

> of our old and perfidious enemys, who have left no means unessayed, and especially at this time to weaken and divide us that so they may in the event root out the remembrance of your name, and Nations from the face of the earth.
>
> A large Covenant Belt.
>
> ...
>
> Brother Warraghiyagey
>
> We have now opened our minds with Freedom & sincerity and we understand each other clearly let us mutually remember our engagements which we have again so solemnly renewed and if at any time our enemy should attack us, prove by your readiness to support & assist us, that you really love us, and we assure you we shall not be wanting on our parts to give proofs of the like fidelity, & friendship.
>
> A Belt.[107]

The existence of the Covenant Chain as a nation-to-nation compact marked a continuation of British-Iroquois relations that had been established in the *Treaty of Albany*. As an alliance between independent nations, the Covenant Chain was not a means by which one nation was subordinated to the authority of another. The participants in the alliance maintained their independence while enjoying the protection of their allies.[108] The Covenant Chain was thus both a mutual protectorate and an alliance.[109] It did not terminate the independence of the aboriginal peoples nor place them under the authority of Britain.[110] The symbolism of the Covenant Chain, in which each nation places its arms in the chain's links, is demonstrative of this premise.[111]

The Covenant Chain was a concrete manifestation of the alliance between Britain and the aboriginal peoples. It was described symbolically as a ship, representing Britain, tied to an immovable object such as a great tree (the Tree of Peace) or mountain (usually at Onondaga, the council fire of the Iroquois Confederacy). At the alliance's origins, the ship was moored with rope. When the alliance was strengthened, the rope, which was susceptible to rotting, was replaced by an iron chain, which was stronger and more permanent. Later, when the alliance

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[107]As reproduced in *NYCD*, *supra* note 1 VII at 59, 62.

[108]See Williams, Jr., "Linking Arms Together," *supra* note 105 at 990:

> From both the English and Iroquois perspective, the Covenant Chain was a relationship of trade and collective security, designed to counter the French-based commercial and military empire centered in Canada. But it was also much more than that. Grounded in Iroquois legal and political traditions prescribing the constitutional organization of multicultural alliances, the Covenant Chain enabled the Iroquois to demand, and for a not inconsiderable time during the Encounter era to receive, reciprocal treatment and respect as mutual partners in their alliance with the English colonies.

[109]This is illustrated by Jennings, *Ambiguous Iroquois Empire*, *supra* note 1 at 38-9.

[110]Williams, *supra* note 88 at 293.

[111]See the discussion of this point, below.

became even more firmly entrenched, the iron chain was replaced with a silver chain that was impervious to rust. At a General Congress at Fort Stanwix in November, 1768, the process of replacing the ship's tether was described to Sir William Johnson in the following manner:

> We remember that on our first Meeting with you, when you came with your ship we kindly received you, entertained you, entered into an alliance with you, though we were then great & numerous and your people inconsiderable and week and we know that we entered into a Covenant Chain with you and fastened your ship therewith, but being apprehensive the Bark would break and your ship be lost we made one of iron, and held it fast that it should not slip from us, but perceiving the former chain was liable to rust ; We made a silver chain to guard against it Then, Brother, you arose, renewed that chain which began to look dull, and have for many years taken care of our affairs by the command of the Great King, & you by your labors have polished that chain so that it has looked bright and is become known to all Nations, for which we shall ever regard you and we are thankfull to you in that you have taken such care of these great affairs of which we are allways mindfull, and we do now on our parts renew and strengthen the Covenant Chain by which we will abide so long as you shall preserve it strong & bright on your part.[112]

The Covenant Chain symbol was used equally by British and aboriginal groups to describe the alliance between them. For example, the Covenant Chain metaphor was used by the Onondaga Chief Canasatego in 1744:

> About two Years after the Arrival of the English, an English Governor came to Albany, and finding what great Friendship subsisted between us and the Dutch, he approved it mightily, and desired to make as strong a League, and to be upon as good Terms with us as the Dutch were, with whom he was united, and to become one People with us: and by his further Care in looking into what had passed between us, he found that the Rope which tied the Ship to the great Mountain was only fastened with Wampum, which was liable to break and rot, and to perish in a Course of Years; he therefore told us, he would give us a Silver Chain which would be much stronger, and would last for ever. This we accepted, and fastened the Ship with it, and it has lasted ever since.[113]

Later, Sir William Johnson described British-Native alliances in graphic terms, with the image of the Covenant Chain thrust out prominently:

> Bretheren: As you have now in behalf of yourselves and all your people laid hold of the Covenant Chain of peace and friendship with the Great King of England my master, and called the Great God above to witness that you do sincerely intend and firmly resolve that you will hereafter behave to all his subjects as fast friends and loving bretheren, into which Covenant Chain I have taken you all, your wives and children : -- Therefore lest you may forget what was meant by the Covenant Chain in old times, I will briefly remind you of it's obligations. --

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[112]"At a General Congress with the several Nations at Fort Stanwix Tuesday Nov 1st 1768," as reproduced in *NYCD*, *supra* note 1 VIII at 126 [in "Proceedings at a treaty held by Sir W. Johnson with the Six Nations, and other Indian tribes at Fort Stanwix, in the months of October and November, to settle a boundary line," *ibid.* at 111-135]. Note also the description given by Jacobs, *supra* note 65 at 44.

[113]As quoted in F. Jennings *The Founders of America: How Indians Discovered the Land, Pioneered in it, and Created Great Classical Civilizations: How They Were Plunged into a Dark Age by Invasion and Conquest; and How They Are Now Reviving*, (New York: Norton, 1993) at 216. See also N.J. Frederickson and S. Gibb, *The Covenant Chain: Indian Ceremonial and Trade Silver*, (Ottawa: National Museum of Man, National Museums of Canada, 1990) at 11; Jennings, *Ambiguous Iroquois Empire*, *supra* note 1.

> When the Indians your forefathers first made this Covenant Chain with the English, both parties engaged to keep the ends of it fast in their hands; that they would take great care to keep it from breaking or from getting any rust or filth upon it; that they would be as one flesh and blood, so that if any enemy should intend to hurt or strike one party, the other should immediately give him notice, rise up & help him; and that a good road should allways be kept open between their habitations, that when they might call for each others assistance, they could easily and speedily come.[114]

The Covenant Chain was representative of the strong and lasting alliance in which the groups treated each other as equals. The chain represented many things -- alliance, friendship, respect, trust, protection, mutuality -- but its primary effect was to reinforce the relationship between the nations. The chain and what it represented was far greater than the sum of its constituent parts.[115] When linked together, the participants in the Covenant Chain were a formidable economic, military, and political force. When various parties joined the Covenant Chain, their entrance was described metaphorically as the placing of their arms through one of the chain's links:

> We have not much to give or say but return our hearty thanks for the good you do us, as we have always been in the Covenant chaine, but of late New England, Virginia, Maryland and adjacent Collonys did not put in their armes into the chain ; pray animate them to make us strong, and assist us according to Covenant made between us and altho' an angry Dog should come and endeavour to bitt the chaine in peices with his teeth, yet we will keep it firme both in peace and warr and do renue the Old Covenant, that so that tree of wellfare, may flourish and that his Roots may spread thro' all the Country.[116]

The symbolic effect of Britain and the aboriginal nations placing their arms in the Covenant Chain and grasping it tightly demonstrates that the Covenant Chain was regarded by the parties as an alliance that existed only through the cooperation of independent nations.[117]

Although the Covenant Chain was designed as a permanent alliance, it was expected that the nations would regularly renew their respective undertakings.[118] This process of renewal was

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[114]"Sir William Johnson's Second Speech to the aforesaid Indians," 22 April, 1757, as reproduced in *NYCD*, *supra* note 1 VII at 251.

[115]Williams, *supra* note 88 at 324; See also Williams, Jr., "Linking Arms Together," *supra* at note 108.

[116]"The Maquasse *propose* for themselves." New York Colonial Manuscripts, XXXVII, as reproduced in *NYCD*, *supra* note 1 III at 779 [in response to "His Excell[cy] the Governor's answer to the Maquasse, Oneydes, Onnondages, Cayouges and Sinnekes and Skachkook Indians, at Albany the 4th day of June 1691," *ibid.* at 778.

[117]Williams, *supra* note 88 at 61: "The chain acts as a symbol which binds the nations together without causing them to lose their individual characters. ... It is consistent with the unity language of all the other symbols of the Iroquois: the bundles of arrows bound together for strength; the rope which is more powerful than its single strands, and the longhouse itself, many families under one roof." See also *ibid.* at 64: "The Covenant Chain is also characteristic of Iroquois symbols in that it is designed so that no one nation has preeminence: each nation with its arms in the chain is equal to each other. ... Though some nation might have specific functions in maintaining or renewing the chain, the equality of the nations within it is an important part of its power and strength."

designed to remind the parties of the solemn compact that they had entered into. While the Chain was strong when firmly grasped by the parties, it required continuous cultivation, lest it be taken for granted, neglected, and left to weaken:

> The periodic renewal and reminder of past agreements of unity serves to "strengthen the union", establishing an atmosphere in which further and continued agreement can take place. It is also a practice that teaches that the peace and alliance must be worked at, actively maintained, that its continued existence cannot be taken for granted, or neglected, or it might weaken.[119]

The process of renewing the Covenant Chain alliance was often described as the polishing of the silver chain that affixed the British ship to North America. When the chain was neglected through a lack of renewed commitment, it was described as "tarnished" or "rusted."[120] An example of the renewing of the Covenant Chain may be seen in the speech of Sir William Johnson at Onondaga Lake, 26 June 1756:

> In the name of the Great King of England your Father, and my Master I do by this Belt renew & brighten the ancient Covenant Chain, of mutual Peace, Friendship and firm alliance between you and your allies, and all His Majestys subjects your Bretheren upon this continent, exhorting you by the memory of your faithful wise and brave forefathers, and by the sacred engagements you yourselves have entered into that you do preserve your fidelity to the Great King of England your father, and your union with and attachment to all his subjects and your Bretheren, inviolable & lasting as the great lights of Heaven and the immoveable Mountains ... and I do at the same time assure you that all his great men and subjects your Bretheren will keep this Covenant Chain bright & unbroken.
>
> Gave the Covenant Chain Belt.[121]

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[118] *Ibid.* at 65.

[119] *Ibid.*, at 50.

[120] An example of this symbolism may be seen in the "Report of Proceedings with the Confederate Nations of Indians, at a Conference held at Canajohary," 4 April 1759, reproduced in *NYCD*, *supra* note 1 VII at 388:

> I do now therefore, in the name of the great King of England, my master & in behalf of all his Subjects Your Bretheren by this Belt renew, strengthen and brighten that Antient Cov^{t} Chain, and in his Name & on their parts, I do assure you it shall be held so fast & the terms of it so punctually observed that you shall have no just cause to reproach us; The Sun now shines clear upon us & while we hold this Cov^{t} Chain firmly in our hands & are carefull to keep it from contracting any Rust we shall be able to drive away all Clouds which may attempt to come between us, & continue to see & smile upon each other as Bretheren ought to do.

[121] As reproduced in *NYCD*, *supra* note 1 VII at 139. It should be noted that the use of the term "father" in referring to the King of England in this quotation denotes the aboriginals' use of familial terms to describe their relations, not their submission to the higher authority of the Crown. See Williams, *supra* note 88 at 11: 'In receiving a European sovereign as their "father", the Indian nations would believe they had someone who would care for them and protect them from their enemies. The British, on the other hand, thought they had arranged for the acquisition by the King of new subjects with a duty of absolute obedience."

As Williams notes, the British made use of Iroquois diplomatic practices in their relations with the Confederacy. Therefore, the use of the term "father" or "brother" -- which existed in the various relations between members of the Iroquois Confederacy -- would likely have been used by the British in the manner that the term was understood in Iroquois diplomacy. See also Jennings, *Ambiguous Iroquois Empire*, *supra* note 1. The use of terms such as these provides a good demonstration of the need to foster contextual appraisals of aboriginal rights issues

Renewing the Covenant Chain came in different forms. At various times, it took the form of the exchange of presents or belts of wampum, the restating of the nations' solidarity, by agreement of further undertakings of union, or the extension of the alliance to include other aboriginal groups. In a speech shortly after his appointment as Superintendent-General of Indian Affairs in 1755, Sir William Johnson discussed the renewal of the Covenant Chain more than 100 years after its creation:

> ... You well know and these Books testifie that it is now almost 100 years since your Forefathers and ours became known to each other. -- That upon our first acquaintance we shook hands & finding we should be useful to one another, entered into a covenant of Brotherly love and mutual friendship. -- And tho' we were at first only tied together by a Rope, yet lest this Rope should grow Rotten and break, we tied ourselves together by an iron Chain -- lest time and accidents might rust and destroy this Chain of iron, we afterwards made one of Silver; the strength and brightness of which would but eject to no decay -- The ends of this Silver chain we fixt to the immoveable mountains, and this in so firm a manner, that the hands of no mortal Enemy might be able to remove it. All this my Brethren you know to be Truth; you know also that this Covenant Chain of love and friendship, was the dread and envy of all your Enemies and ours, that by keeping it bright and unbroken, we have never split in anger one drop of each other's blood to this day. -- You well know also that from the beginning to this time we have almost every year strengthened and brightened this Covenant Chain in the most publick & solemn manner. You know that we became as one body, one blood & one people, the same King our common Father, that your Enemies were ours, that whom you took into your Alliance and allowed to put their hands into this Covenant Chain as Brethren, we have always considered and treated as such.[122]

Johnson's speech reinforces the notion that the Covenant Chain was initiated by the signing of the *Treaty of Albany* and continued the nation-to-nation relations established by that initial treaty.

The Covenant Chain alliance existed at the very foundation of British-aboriginal relations in North America. The notions of peace, friendship, and respect that characterised the Covenant Chain spread across North America in all directions. One of the notable links in the Covenant Chain alliance is that between Britain and the aboriginal peoples living in the Maritimes, as represented more formally in a number of treaties signed between 1693 and 1752. These treaties, like others in the Covenant Chain, share the same basic tenets.

(e) The Maritime Indian Treaties

Treaties between Britain and the aboriginal peoples residing in the Maritimes were, as a

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so that more accurate and culturally-appropriate understandings may be obtained. On the topic of the renewal of the Covenant Chain alliance, see also Frederickson and Gibb, *supra* note 113 at 11.

part of the Covenant Chain, designed to create and maintain strong and lasting alliances.[123] These treaties attempted to provide for peace and friendship between the nations in a period marred by constant raids across what is now the eastern Canada-U.S. border. The Mi'kmaq saw the series of treaties and alliances they entered into with Britain as renewing the original bond made between the groups. In this way, the Maritime treaties renewed earlier agreements in the same manner as the Covenant Chain had renewed the initial agreement made in the *Treaty of Albany*.[124] Contemporary descriptions of the Maritime treaties by the Mi'kmaq share much in common with the language used by aboriginal nations to describe the Covenant Chain alliance in the seventeenth and eighteenth centuries:

> The eighteenth century agreements between the Mi'kmaq nation and Britain were, and still are, regarded by us as a form of brotherhood. When there was some injury or threat of conflict we met to exchange reassurances and renew our engagements. That is why, over several decades, one finds half a dozen or more seemingly separate treaties between the Mi'kmaq and the British Crown. The surviving documents are often incomplete summaries of meetings that typically required many days and were repeated every few years as necessary. By themselves, the documents are fragments; considered together, they constitute a great chain of agreement. In other words, the treaty documents ... should be seen not as distinct treaties but as stages and renewals of a larger agreement or pact that developed during the 1700s between the Mi'kmaq and the British.[125]

Research by historian William Wicken demonstrates that the contemporary understanding of treaties held by the Mi'kmaq corresponds to historical accounts of those treaties.[126] His examination of Mi'kmaq understandings of a 1752 treaty that was the subject of the 1928 case of *R.* v. *Syliboy*[127]demonstrates that the Mi'kmaq community's understanding of the treaty was premised upon information passed down from their parents, grandfathers, and community elders.[128] Oral cultures, such as the Mi'kmaq, depend on the constant repetition of important

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[122]Extracted from "The "The Honble William Johnson's second speech to the Sachems and Warriors of the Confederate Nations, Mount Johnson, 24 June 1755, as reproduced in *NYCD*, *supra* note 1 VI at 970.

[123]See, generally, J.Y. Henderson, "Mi'kmaq Tenure in Atlantic Canada," (1995), 18 *Dalhousie L.J.* 196.

[124]See W.C. Wicken, '"Heard It From Our Grandfathers": Mi'kmaq Treaty Tradition and the *Syliboy* Case of 1928,' (1995), 44 *U.N.B.L.J.* 145 [hereinafter "Mi'kmaq Treaty Tradition"]; Grand Chief D. Marshall Sr., Grand Captain A. Denny, Putus S. Marshall, of the Executive of the Grand Council of the Mi'kmaw Nation, "The Covenant Chain," in B. Richardson, ed., *supra* note 93 at 82: "In the Mi'kmaq view, the Mi'kmaq Compact, 1752, affirmed Mikmakik and Britain as two states sharing one Crown -- the Crown pledging to preserve and defend Mi'kmaq rights against settlers as much as against foreign nations." These contemporary accounts of Mi'kmaq understandings of the nature of their relations with Britain are based on the oral history and storytelling of the Mi'kmaq people; they may, therefore, be understood to be equally relevant to determining how the Mi'kmaq viewed their relations with Britain at the time these treaties were signed.

[125]*The Mi'kmaq Treaty Handbook*, *supra* note 99 Preface at i.

[126]Wicken, "Mi'kmaq Treaty Tradition," *supra* note 124.

[127][1929] 1 D.L.R. 307 (N.S. Co. Ct.).

[128]Wicken, "Mi'kmaq Treaty Tradition," *supra* note 124 at 150.

events so that they are not lost over time. Since the treaties with Britain established the nature of Mi'kmaq-British relations, the Mi'kmaq understanding of those treaties would have become an integral element of Mi'kmaq oral history soon after they were signed. To assist in entrenching this understanding, treaty negotiations and signings were attended by Mi'kmaq elders, sakamows, and younger men who would assume leadership positions.[129] Moreover, evidence presented by Wicken demonstrates that, at least until the 1930s, the Mi'kmaq possessed original parchment copies of the eighteenth century treaties they had signed with Britain.[130]

Britain's need to enter into treaties with the aboriginal peoples of the Maritimes was predicated upon the same basis as other alliances it entered into with aboriginal peoples around what are now Quebec, Ontario, Michigan, New York State, and Pennsylvania. However, the strategic position of Acadia rendered alliances with the aboriginal peoples of paramount importance in the early history of European battles in North America:

> The headwaters of the Kennebec River, which flow south through Maine to the Atlantic, were near the headwaters of the Chaudière River, which flows north into the St. Lawrence. This river system provided a direct overland invasion route between New France and New England. Whoever controlled Nova Scotia and Cape Breton would be able to interfere with the maritime lifelines of New France or New England. Acadia acted not only as a buffer zone and guardian of the Gulf of St. Lawrence for New France, but also as a sanctuary from which military and naval expeditions could be launched against New England in the event of war. Thus Acadia and its peoples were to become paramount in the struggle between France and England for supremacy in North America.[131]

Being tremendously outnumbered by the aboriginal peoples in the Maritimes and with the serious threat to its North American presence posed by the French, Britain quickly realised the necessity of alliance with the aboriginal peoples in the region.[132] The treaties that emerged during the period from the late seventeenth century until the middle of the eighteenth century are generally described as "peace and friendship" treaties, reflecting the parties' primary intentions in entering into them.

These peace and friendship treaties provide fodder for confusion, in that they often included references to the submission of the aboriginal peoples to the British Crown. For instance, the treaty of 11 August 1693 held that the aboriginal signatories acknowledge "our

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[129]*Ibid.* at 150-1.

[130]*Ibid.* at 152-4.

[131]W.E. Daugherty, *Maritime Indian Treaties in Historical Perspective*, (Ottawa: Treaties and Historical Research Centre, Research Branch, Corporate Policy, Department of Indian and Northern Affairs Canada, 1983) at 1.

hearty subjection and obedience unto the crown of England."[133] In the treaty of 13 July 1713, the aboriginals were held to be "lawfull subjects of our Sovereign Lady, Queen Anne" and to have promised their "hearty Subjection & Obediance unto the Crown of Great Britain."[134] The agreement of 15 December 1725 was described as the Submission and Agreement of the Delegates of the Eastern Indians, and contained language to that effect.[135] Meanwhile, Treaty No. 239, dated 13 May 1728, held that the signatories:

> ... [I]n the name and behalf of the said tribes we represent, acknowledge His said Majesty King George's jurisdiction and dominion over the territories of the said Province of Nova Scotia or Acadia, and make our submission to His said Majesty in as ample a manner as we have formerly done to the Most Christian King.[136]

Attempting to reconcile the seemingly-disparate views of these treaties as peace and friendship treaties or articles of submission necessitates an analysis of the relative positions of the parties at the time the treaties were signed. It also requires that the various impediments to arriving at a common understanding of the treaties be revealed.

Ascertaining accurate understandings of these treaties is a complex process. It requires a modicum of extrapolation from the information that was available at the time. The complex task of interpreting the Maritime treaties is compounded by the significant barriers in language and culture between the groups in question. These linguistic and cultural differences require that the words used in treaties be interpreted not according to literal translations, but on the basis of the reasonable understanding of the parties at the time in light of the historical circumstances that existed, such as the relative strength of those involved. In some situations, this method of interpretation reinforces the literal wording of a treaty. For instance, the language of the *Treaty of Albany* is corroborated by the translation of the Two-Row Wampum that accompanied it. In other situations, such as with the peace and friendship treaties, it points out the discrepancy between the words of the treaty and the understanding possessed by the aboriginal parties to it (which were provided by the Crown's own representations). As will be discussed in greater detail

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[132]*Ibid.* at 20. See also L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867*, (Vancouver: University of British Columbia Press, 1979) at 171.

[133]As reproduced in P.A. Cumming and N.H. Mickenberg, *Native Rights in Canada*, Second Edition, (Toronto: Indian-Eskimo Association of Canada, 1972) at 295-6.

[134]*Ibid.* at 296-8.

[135]*Ibid.* at 300-2.

[136]Subsequent treaties in 1749, 1752, and 1760-61 use similar language of submission to the British Crown and of the Crown's dominion over the Maritimes.

in Chapter VII, this method of treaty interpretation is instituted because of the cultural barriers to understanding the true meaning of bargains between nations with different world views.

Historical research has rendered questionable whether aboriginal "submissions" to the sovereignty of the British Crown under these treaties were understood as such by the aboriginal peoples.[137] Analysis of the historical and political contexts in which the treaties were signed provides reasons for doubting the aboriginals' informed consent to these terms. For instance, British military presence in the Maritimes at this time was insufficient to have commanded the manner of submission that the wording of the treaties appear to have contemplated. That is not to suggest that Britain did not make claims to sovereignty in its dealings with the aboriginal peoples in the Maritimes. The existence of statements made by aboriginal leaders after the English conquest of Port-Royal (renamed Annapolis Royal) through to the mid-1750s -- in which the aboriginals maintained that they remained independent nations -- clearly suggests that the British did make claims to sovereignty over the aboriginals and their lands.[138] Had Britain not made overtures of sovereignty, whether by words or actions, there would have been no need for the aboriginals to vociferously maintain their independence.

The historical evidence surrounding the peace and friendship treaties indicates that the "terms of submission" that did exist were incorrectly communicated to the aboriginal signatories.[139] For example, articles read to the Indians of Panaouamské at a ratification of the 1725 agreement at Casco Bay in 1726 -- by which they were to agree to submit themselves to the British Crown and live according to English law -- were translated orally to mean that the Panaouamské had "come to salute the English Governor to make peace with him and to renew the ancient friendship which had been between them before."[140] Regarding the 1725 agreement, Upton concluded:

> This confirmed to the Indians the ownership of what they already possessed. To the Indians the treaty was no threat. Three years later this agreement made in Boston was confirmed in Annapolis Royal and became a peace treaty applicable to the "Indians inhabiting within His Majestie's Province of Nova Scotia or Acadia. ..." The Indians agreed to submit to His Majesty

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[137]See, for example, Upton, *supra* note 132; W.C. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties," (1994), 43 *U.N.B.L.J.* 241 [hereinafter "Mi'kmaq and Wuastukwiuk Treaties"]; Wicken, "Mi'kmaq Treaty Tradition," *supra* note 124.

[138]Wicken, "Mi'kmaq and Wuastukwiuk Treaties," *supra* note 137 at 250.

[139]*Ibid.* at 250-1.

[140]"Traité de paix entre les anglois et les abenakis", 1727, dans H.R. Casgrain, éd., *Collection de manuscrits contenants Lettres, Mémoires et autres documents historiques relatifs à la Nouvelle-France, recueillis aux Archives de la Province de Québec ou copiés à l'étranger*, vol. III, Québec, 1884, aux 134-5 as cited, *ibid.* at 251.

> King George II, "in as ample a manner as we have formerly done to the Most Christian King." To the Indians this change of allegiance meant little; they retained their land and were allowed to live as independently as they had under the French king.[141]

This evidence suggests that the references to aboriginal subjection to the Crown included in the peace and friendship treaties is far less clear than a literal translation of the written versions of the treaties suggests. As illustrated above, there are significant reasons not to regard literal translations of the treaties' terms as factual representations of the agreements between the parties. From a legal standpoint, Britain's representations to the aboriginal peoples in the treaties are what ought to be focused on. These representations ought to be used to indicate the true nature of the agreement between the parties. If the British misinformed the aboriginals as to the meaning of the treaties, then the misrepresentation that induced the aboriginals to sign ought to be binding at law. If the written terms of a treaty contemplated the submission of the Indians to the British Crown, but the Indians were induced to sign on the basis of a misrepresentation, the written terms of the treaty are of questionable legal effect because of their fraudulent nature.

For the written terms of the treaties to be binding at law, there must be an indication that the aboriginal peoples understood and agreed to them. This would be difficult to demonstrate, given that the aboriginals did not speak English and could not read. British concepts of sovereignty would also have been foreign to the aboriginals, just as the latter's notions of land use would have been to the British. Consequently, it is logical to conclude that the language and concepts implemented in treaties were not always understood by the aboriginal peoples in the same manner as they may have been by the Crown's representatives.[142] Attempts at translation by the Crown's representatives or persons appointed by the aboriginal peoples for that task were also affected by these problems. Not only were the language and concepts implemented in the treaties not always understood by the aboriginals, but the Algonquian-based languages of the Mi'kmaq and the Wuastukwiuk (Maliseet) contained many words and ideas that were not readily translatable into English and vice versa.[143] Meanwhile, the British were not always careful to ensure that the terms of treaties were actually understood by the aboriginal signatories.[144]

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[141]Upton, *supra* note 132 at 10.

[142]See D.N. Paul, *We Were Not the Savages: A Micmac Perspective on the Collision of European and Aboriginal Civilizations*, (Halifax: Nimbus, 1993) at 70.

[143]Wicken, "Mi'kmaq and Wuastukwiuk Treaties," *supra* note 137 at 251. See also Paul, *supra* note 142 at 69:

For these reasons, the fact that the aboriginal peoples ostensibly agreed to the terms of the treaties by affixing their marks or totems to the documents is not to be automatically taken as an indication of their understanding and acceptance of the treaties' terms.[145] Rather, the aboriginals' signing of treaties is to be viewed in light of the cultural and linguistic factors by which observers may legitimately question whether the treaties were truly understood and therefore agreed to. From what can be discerned from the aboriginals' understanding of the treaties, it would appear that they believed, or were induced to believe, that the treaties they signed continued to be based on the principles of peace, friendship, and respect that had always governed their treaty relations with Britain. As the following chapter will attempt to demonstrate, British representations to the aboriginal peoples after the conquest of New France continued the practices that had been entrenched in the *Treaty of Albany*, Two-Row Wampum, and Covenant Chain alliance. This is indicated in representations made by British officials as well as in the *Royal Proclamation of 1763* and the *Treaty of Niagara, 1764*.

Another major problem for the Micmac in the treaty process was the language barrier. The Micmac were forced to deal with two White tribes that spoke strange languages. The treaties they entered into with the British had to be first translated into French and then interpreted into Micmac. To make matters worse, many French and English words have no comparable meaning in Micmac, and the language used in the treaties can, even today, only be fully understood by those well acquainted with English legal terminology. Practically speaking, statements such as "enter into Articles of Pacification with his Majesty's Governments," contained in the Treaty of 1725 would have been incomprehensible to the Tribe.

[144]Dickason, "Amerindians," *supra* note 70 at 53.

[145]This proposition will be examined further in Chs. VI and VII.

III. The Formative Years of Crown-Aboriginal Relations: From Covenant Chain to Niagara

> From the time of the earliest European explorations of the North American continent, relations between Indians and non-Indians were shaped by mutual needs of self-preservation and survival; military alliance, commercial enterprise and the disposition of land and its resources were preoccupations of all participants. The relative success of the countries which emerged in the eighteenth century as the most persistent and prosperous New World colonizers depended upon how well these nations were prepared to recognized the importance of this basic principle and to adapt their policies and actions accordingly.[1]

The principles of peace, friendship, and respect that connected the parallel paths of Britain and the Iroquois in the Two-Row Wampum in the seventeenth century continued to provide the basis for the parties' interaction throughout the Covenant Chain alliance that remained vibrant into the second half of the eighteenth century. During this period, Britain's practice of entering into alliances with the aboriginal peoples on a nation-to-nation basis had become a firmly-entrenched aspect of Britain's New World policy.[2] Not coincidentally, Britain's dependence on its aboriginal alliances reached its zenith in this era, which was marked by continual battles between Britain and France for North American supremacy until the conquest of New France in 1760-1.

This chapter is concerned largely with the second half of the formative years of Crown-Native relations, dating from the early stages of the eighteenth century through to the *Treaty of Niagara* in 1764. The primary focus of this chapter will be the latter part of this time period, from the 1750s until the early 1760s. This was a key interval for both Britain and the aboriginal peoples. The battle between Britain and France for control over North American territory and trade reached its apex in these years. Not coincidentally, the strategic importance of the aboriginal peoples to both of the European powers reached its height at this same time.

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[1] J. Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763*, (Ottawa: Research Branch, Indian and Northern Affairs Canada, 1981) at 1.

[2] See Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment*, (Ottawa: Minister of Supply and Services, 1995) at 23 [hereinafter "*Treaty Making*"]; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, 5 Vols., (Ottawa: Minister of Supply and Services, 1996) [hereinafter "*RCAP Final Report*"] Vol. II, *Restructuring the Relationship*.

The discussion in this chapter will focus on the nature of Britain's relations with the aboriginal peoples both prior to and after the conquest of New France. It will be argued that Britain continued to represent its interaction with the aboriginal peoples as nation-to-nation relations throughout this time. These representations will be shown to have taken a variety of forms. They may be found in speeches made by British officials to the aboriginal peoples as well as in the correspondence of those same officials. Colonial instruments and instructions also provide evidence of the nature of Britain's representations to the aboriginal peoples. Most importantly, Britain's major North American policy document of the eighteenth century -- the *Royal Proclamation of 1763* -- and its largest-ever treaty with the aboriginal peoples -- the *Treaty of Niagara* -- support this characterisation of the nature of British-Native relations during this period.

Britain's representations to the aboriginal peoples that the latter would be treated as autonomous nations will be argued to have been more than an exercise of political expediency. Had Britain made these representations to the aboriginal peoples only to prevent the aboriginals from becoming allies of France, there would have been no need for Britain to continue making these same representations after France ceased to be a major military power in North America. The representations made by Britain to the aboriginals after the conquest of New France will be argued to constitute a continuation of the groups' early alliances. After the initial dependency of British colonists upon the aboriginals for their survival in the New World, military and political necessity provided the impetus for nation-to-nation alliances between European nations and the aboriginal peoples. This necessity came about as a direct result of the power and position held by the aboriginal peoples in the early history of British-French competition for North American supremacy.

(a) The Position of Aboriginal Peoples in the European Struggle for North America

Well before the European would-be colonisers had established their respective toeholds in North America in the sixteenth and early seventeenth centuries, they had been confronted with each other's competing claims to territory. These claims, which the Europeans initially attempted to justify through the doctrines of discovery, conquest, and occupation, were not appropriate to

the situation existing in sixteenth and seventeenth century North America.[3] Practical realities soon indicated to the Europeans that their desire to engage in trade with the aboriginal peoples and to establish settlements would not be solved by abstract doctrines of international law spun in the parlours of European statesmen. Rather, their competition for trade and empire would be resolved on the battlefields. Meanwhile, the early trade alliances that the aboriginal peoples had entered into with Britain and France eventually thrust them into their European allies' wars.[4]

The aboriginal peoples had been integrally involved in the battles between Britain and France during the eighteenth century that led up to the latter's surrender of New France in 1760-1. Indeed, aboriginal groups had been important participants on both sides of British-French battles from the initial stages of European-aboriginal relations in North America. As a result of their superior military strength, the aboriginal peoples were potentially dangerous enemies to the Europeans as well as much sought-after allies.[5] The threat of exclusive aboriginal alliances with either Britain or France enabled the aboriginals to command superior terms in their dealings with both European powers. Britain and France were well aware of the strategic importance of the aboriginal peoples.[6] They knew that their ambitions of empire in North America could not be realised without the aboriginals' cooperation. As had been the situation during the preliminary stages of European-aboriginal interaction, the Europeans were once again heavily dependent on aboriginal assistance.[7]

With Britain and France competing to achieve predominance in North America in the eighteenth century, the aboriginals were able to play the two European powers off against each other for their own benefit.[8] To use the terminology adopted by White, the British-French rivalry

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[3]See the discussion of discovery, conquest, and occupation in Ch. II; see also J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples," (1995), 33 *Osgoode Hall L.J.* 623 at 633.

[4]J.R. Miller, "Introduction," in Miller, ed. *Sweet Promises: A Reader in Indian-White Relations in Canada*, (Toronto: University of Toronto Press, 1991) at x [hereinafter "*Sweet Promises*"]. See also Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations n Canada*, Revised Edition, (Toronto: University of Toronto Press, 1991) at 79 [hereinafter "*Skyscrapers*"].

[5]According to O.P. Dickason, "Amerindians between French and English in Nova Scotia, 1713-1763," in Miller, *Sweet Promises*, *supra* note 4 at 49 [hereinafter "Amerindians"], the importance of keeping the aboriginal peoples out of alliances with the enemy was more important to both Britain and France than in securing them as allies.

[6]*R.* v. *Sioui* (1990), 70 D.L.R. (4th) 427 at 448-9 (S.C.C.).

[7]Miller, *Skyscrapers*, *supra* note 4 at 79; see also Dickason, "Amerindians," *supra* note 5 at 62; *Sioui*, *supra* note 6 at 449.

[8]See, for example, Dickason, "Amerindians," *supra* note 5 at 45, 50; L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867*, (Vancouver: University of British Columbia

in North America created a "middle ground" on which the aboriginal peoples enhanced their own positions vis-à-vis the Europeans.[9] The aboriginal peoples played a vital role in maintaining the delicate military balance between Britain and France. The aboriginals were shrewd negotiators who were well aware of the strategic value of their positions in the European struggle in North America.[10] They also realised that their own interests were best served by maintaining the balance of power between the two European nations. Maintaining this balance ensured the aboriginals' autonomy. It also enhanced their bargaining position and necessitated that they be treated with respect by the Europeans. This situation changed drastically, however, in the second half of the eighteenth century.

Once France ceased to be a major power in North America the pre-existing relationship between Britain and the Native peoples was placed in jeopardy. France's defeat entailed the end of the middle ground that had served aboriginal interests from the second half of the seventeenth century.[11] The conquest of New France had other equally significant effects upon the aboriginals. While Britain had strengthened its position in North America by virtue of its wars with France, those same wars had drastically reduced the strength of the aboriginal peoples. The combined effects of disease, lengthy wars, colonial expansion, and aboriginal dependence on European goods rendered the aboriginal peoples more heavily dependent upon Britain than they had ever been. The result was that British-aboriginal relations that had long been dominated by the aboriginals were now tilted in favour of Britain. This view was expressed by General Thomas Gage, who stated that "All North America in the hands of a single power robs [the aboriginals] of their Consequence, presents, & pay."[12]

Press, 1979) at xiii; R.S. Grumet, *Historic Contact: Indian People and Colonists in Today's Northeastern United States in the Sixteenth Through Eighteenth Centuries*, (Norman, Okla.: University of Oklahoma Press, 1995) at 12.

[9]R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*, (Cambridge: Cambridge University Press, 1991).

[10]For an illustration of Iroquois' perspectives on negotiating with the British and French, see F. Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its Beginnings to the Lancaster Treaty of 1744*, (New York: Norton, 1984); Jennings, *Empire of Fortune: Crowns, Colonies, and Tribes in the Seven Years' War in America*, (New York: Norton, 1988); J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia*, Ph.D. dissertation, Cambridge University, 1985, reprinted, (Saskatoon: University of Saskatchewan Native Law Centre, 1985).

[11]It should be noted, however, that the middle ground did continue, albeit in a modified fashion. See the further discussion of this point, *infra*.

[12]As quoted in White, *supra* note 9 at 256.

After the conquest of New France, there was a rift in British attitudes towards the aboriginal peoples. On the one hand, military leaders such as Gage and General Jeffrey Amherst thought that Britain could now dictate the future course of British-aboriginal relations. As White explains, "General Amherst's new vision of the *pays d'en haut* was a simple one: the British were conquerors; the Indians were subjects."[13] However, Sir William Johnson and his right-hand man, George Croghan, believed that British relations with the aboriginal peoples should continue as they had prior to the conquest. They contended that any change in the status quo would lead to aboriginal revolt that would be costly to Britain's colonial desires.[14] This split between Britain's diplomatic and military representatives in North America was responsible for an inconsistency in British attitudes towards the aboriginal peoples. This inconsistency was most apparent in the years between the conquest of New France and the release of the *Royal Proclamation of 1763*;[15] it did continue, however, until the outbreak of war between Britain and her American colonies.[16]

Despite the split in British diplomatic and military attitudes towards the aboriginal peoples from the conquest of New France until the American Revolution, Britain's representations to the aboriginal peoples during this period were consistent. Britain continued to indicate to the aboriginal peoples that its relations with them were nation-to-nation relations. The new "middle ground"[17] that emerged in the aftermath of the conquest may be seen in a variety of sources. These include the representations of British officials, colonial instruments -- such as the Royal Proclamations of 1761[18] and 1763[19] and the "Plan for the Future Management of Indian Affairs"

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[13]*Ibid.* See also *ibid.* at 257-9.

[14]See O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, (Toronto: McClelland & Stewart, 1992) at 182 [hereinafter "*Canada's First Nations*"]; see also Johnson's letter to the Lords of Trade, as reproduced, *infra* note 82.

[15]R.S.C. 1985, App. II, No. 1.

[16]During British-American hostilities in North America, which lasted beyond the revolutionary war until the signing of the *Treaty of Ghent, 1814* and the Rush-Bagot Convention of 1817, British diplomatic and military attitudes towards the aboriginal peoples converged. Britain's need for aboriginal alliances during this time led it to consistently regard the aboriginals as independent actors. See Miller, *Skyscrapers*, *supra* note 4 at 87; B. Graymont, *The Iroquois in the American Revolution*, (Syracuse: Syracuse University Press, 1972); G.F.G. Stanley, "The Indians in the War of 1812," in Miller, *Sweet Promises*, *supra* note 4 at 105..

[17]Which was not truly a "middle ground," but a continuation of the nature of British-aboriginal relations that had been created during the middle ground era that had existed during British-French conflict in North America until the conquest of New France. Note the discussion in White, *supra* note 9, Ch. VII.

[18]*Draft of an Instruction for the Governors of Nova Scotia, New Hampshire, New York, Virginia, North Carolina, South Carolina, and Georgia forbidding them to Grant Lands or make Settlements which may interfere with the Indians bordering on those Colonies*, issued pursuant to the *Order of the King in Council on a Report of the Lords of Trade*, 2 December 1761, as reproduced in E.B O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, 11 vols., (Albany: Weed, Parsons, 1853-61) VII at 478-9 [hereinafter "*NYCD*"].

[19]*Supra* note 15.

of 10 July 1764[20] -- and in instructions given to General Murray of 7 December 1763[21] and to Governor Carleton in 1768.[22]

This new middle ground marked the triumph of Sir William Johnson's diplomatic relations with the aboriginal peoples over the military policy of forcible subjugation favoured by Amherst. After the conquest, Amherst had ended the regular giving of presents that had been a fundamental element of British-Indian diplomacy. He believed that this practice promoted aboriginal laziness and increased their dependence on the Crown.[23] Amherst's cession of presents was also driven by a desire to reduce the financial cost of relations with the Native peoples. Rather than giving presents to maintain the peace and friendship of the aboriginals, Amherst sought to coerce their good behaviour with the threat of military force. This change in policy was unsuccessful. Friendly relations between Britain and the aboriginals disintegrated.[24] The most dramatic result of this disintegration was the launch of Pontiac's Rebellion in 1763.

Although Pontiac's Rebellion was ultimately unsuccessful in its attempt to drive out the British, it had a dramatic effect on the actions that had been taken by both Britain and the aboriginals following the conquest of New France. The fact that the rebellion occurred indicated to Britain that it was not in a position to unilaterally alter the nature of its relations with the aboriginals from their pre-conquest form. The rebellion forced Britain to realise that the aboriginal peoples were still a formidable force that had to be reckoned with. Meanwhile, the failure of the rebellion indicated to the aboriginals that they were no longer strong enough to defeat the British. Once it became apparent to the aboriginals that they could not overthrow the British, the aboriginals sued for peace.

After Pontiac's Rebellion had ended, Britain quickly abandoned Amherst's policy of military coercion. Amherst himself returned to Britain in November, 1763, his policies having been condemned by the Lords of Trade.[25] The aboriginals had initiated their revolt as a direct result of Amherst's policy. Furthermore, the cost of warfare with the aboriginals ended up far

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[20]As reproduced in *NYCD*, *supra* note 18 VII at 637.

[21]As reproduced in A. Shortt and A.G. Doughty, eds., *Documents Relating to the Constitutional History of Canada, 1759-1791*, Part I, (Ottawa: King's Printer, 1918) at 199-200 (articles 60-62).

[22]*Ibid.* at 319-20 (articles 59-61).

[23]See White, *supra* note 9 at 257-8.

[24]See *ibid.* Chs. 6-7.

[25]*Ibid.* at 289.

greater than the costs of continuing to provide presents would have been.[26] With Amherst's departure, Britain returned to its traditional diplomatic practices under the authority of Sir William Johnson and General Thomas Gage.[27] Thus, in spite of the change in power relations between Britain and the aboriginal peoples and the brief change in Britain's approach towards its relations with the aboriginal peoples, the foundational principles of peace, friendship, and respect once again proved to be the basis upon which Britain represented its dealings to the aboriginal peoples. In summary, Britain continued to represent to the aboriginal peoples that it regarded those peoples as independent nations even after the conquest of New France. While Britain offered its protection to the aboriginal peoples and their lands in the *Royal Proclamation of 1763*, the terms of the document indicate that it continued to respect the aboriginals' autonomy.

(b) The *Royal Proclamation of 1763*

The *Royal Proclamation of 1763* was the most prominent document pertaining to British Indian policy in North America in the eighteenth century.[28] While the *Treaty of Paris, 1763* marked the formal end of substantial French influence in North American affairs, the Proclamation established British policy for its North American colonies.[29] The Proclamation announced Britain's consolidation of its previous North American holdings with those that it had obtained from France under the *Treaty of Paris*. The Proclamation was also a declaration of British suzerainty over North America to other European nations. Equally important, however, the Proclamation was a statement of British policy vis-à-vis its North American possessions. It also

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[26]*Ibid.* at 290.

[27]Though Gage had earlier been an ally of Amherst's, he compromised his previous position in order to obtain peace. See *ibid.* at 289-90.

[28]The importance of the Proclamation continues to the present day in Canadian aboriginal rights jurisprudence. However, while the Proclamation has been cited in a wealth of cases since the origins of Canadian aboriginal rights jurisprudence and continues to be the source of contention to the present day, it has rarely been cited by American courts in the context of aboriginal rights issues. See R.N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs," (1989), 69 *Boston U. L. Rev.* 329 at 367: "In almost two hundred years of American legal history, the Proclamation has been cited by the United States Supreme Court only eleven times, and usually only as a passing historical reference." As a document of British policy, it is not surprising that the Proclamation has been cited so rarely in the United States in comparison to its use in Canada.

The discussion of the Proclamation herein is based on viewing the document as one that respects aboriginal rights and protects those rights through its provisions relating to the creation of an exclusive Indian "Hunting Ground," the prohibition of sales of Indian lands directly from the aboriginals to colonists, and the regulation of trade with the Indians.

[29]Miller, *Skyscrapers*, *supra* note 4 at 71.

addressed lands belonging to the aboriginal peoples and established guidelines for the future course of Crown-aboriginal relations.

The Proclamation was Britain's response to potential threats to its newly-acquired North American empire emanating from the American colonies' expansionist desires, the defeated French in Quebec, and deteriorating British-Indian relations. Indeed, in the aftermath of the British triumph over France, relations with the Indians had become strained, to the point that wars with them loomed as distinct possibilities. The Proclamation was designed to curb American territorial expansion, establish control over the newly acquired colony of Quebec, and prevent the outbreak of politically and economically costly Indian wars.[30] This was to be accomplished through the creation of an immense Indian hunting ground. This hunting ground was bordered at the north by Rupert's Land and rested between the thirteen American colonies to the east and the Mississippi River to the west. Excepted from this land mass were the existing colonies of Florida, Newfoundland, and the newly-expanded colony of Quebec.[31]

Under the pretense of protecting Indian interests, the Proclamation prevented the Indian hunting grounds from being trespassed upon or purchased from the Indians without the express permission of the Crown. The relevant portion of the Proclamation establishing this policy reads as follows:

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[30]This is also discussed in L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, (Toronto: University of Toronto Press, 1996) Ch. II.

[31]There have been many debates over the precise extent of the geographical boundaries of the Proclamation: see B. Slattery, *The Land Rights of Indigenous Canadian Peoples As Affected by the Crown's Acquisition of Their Territories*, D.Phil. dissertation, Oxford University, 1979, reprinted, (Saskatoon: University of Saskatchewan Native Law Centre, 1979), at 277-81 [hereinafter "*Land Rights*"]; G.S. Lester, *The Territorial Rights of the Inuit of the Northwest Territories: A Legal Argument*, unpublished D.Jur. dissertation, Osgoode Hall Law School, 1981 at 1182-6. In any event, the boundaries marked out by the Proclamation were later altered in the *Treaty of Stanwix, 1768*, and eventually wiped out altogether by the creation of the United States of America. The *Treaty of Stanwix* is reproduced in *NYCD*, *supra* note 18 VIII at 135-7 (with map attached). See also "Proceedings of Sir William Johnson with the Indians at Fort Stanwix to settle a Boundary Line," *ibid.* at 111-34.

The terms of the Proclamation itself, *supra* note 15 at 6, prohibit governing officials in British North America from granting warrants of survey or patents for any lands:

> ... beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians.

Meanwhile, the boundaries of the Indian hunting grounds are described as:

> ... all the Lands and Territories not included within the Limits of Our Said New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians.

Britain did not necessarily want settlement of the Indian hunting grounds permanently closed. However, by temporarily halting settlement in the Indian hunting grounds, the Proclamation established a buffer zone between the Americans and Quebec, thereby quelling any possibility of an alliance between them.[32] The ban on settlement was consistent with Britain's pretext of restoring order to the area in the aftermath of seven years of British-French war. The temporary nature of the ban was intended to appease the expansionist American colonies that had set their territorial sights west of the Appalachians. Meanwhile, the Proclamation's protection of the Indians and their lands enabled the aboriginals to continue to serve the needs of the fur trade rather than fighting to protect their land from usurping American colonists.[33]

While the Proclamation ultimately failed in most of its intentions, it had a lasting effect upon Crown-Native relations in Canada which remains to this day.[34] It recognised and affirmed the existence of the special relationship between the Crown and Native peoples. Moreover, its protection of aboriginal peoples and their lands was the basic principle underlying Crown-Native relations in Canada and the harbinger of subsequent Indian legislation in Canada.[35] As Clinton notes:

> The Proclamation ... established the British model for the management of Indian affairs in the American colonies, emphasizing three key elements: (1) centralization of the management of trade, diplomatic, land-cession, and other relations with the Indian tribes in agents and officials responsible to a central government in combination with the diminution or elimination of all local authority over such matters; (2) long-term, effective guarantees of Indian tribal land

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[32]For another view that the Proclamation's reserved lands served as a buffer zone between the Thirteen Colonies and Canada, see C.W. Alvord, *The Illinois Country, 1673-1818: The Centennial History of Illinois*, (Springfield: Illinois Centennial Commission, 1920).

[33]This sentiment is echoed by Stagg, *supra* note 1 at 356.

[34]Curiously, the printed copy of the Royal Proclamation that has survived in the Public Archives of Canada is a copy that was given to the Algonquins and Nipissings and turned over by them to Sir John Johnson, the son of Sir William Johnson, and his successor as Superintendent-General of Indian Affairs in Canada, in 1847 in support of a petition in which they outlined their claims to lands in the Ottawa River valley: see P.C. Williams, *The Chain*, unpublished LL.M. thesis, Osgoode Hall Law School, 1982 at 76.

[35]Indeed, the aboriginal rights elements of the Proclamation were never altered.

> and resources, including hunting and fishing rights; and (3) protection of Indian autonomy and sovereignty separated from local colonial authority.[36]

The lasting effect of the aboriginal rights provisions of the *Royal Proclamation of 1763* is indicated by the reference made to them in section 25 of the *Constitution Act, 1982*.[37] Section 25 states that:

> 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 or freedoms 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 ...

The contemplation of rights or freedoms recognised by the Proclamation in section 25 demonstrates that the Proclamation did recognise aboriginal and treaty rights. The continuing effect of the Proclamation more than 200 years after its creation demonstrates that it is now clearly the most important eighteenth century document on British aboriginal policy in North America. The Proclamation served a number of important functions in the creation and implementation of British Indian policy in Canada. Not the least of these functions was the reiteration of the special relationship between the parties that had been created by way of numerous military, political, social, economic alliances from the time of contact.

(c) The Effects of the *Royal Proclamation of 1763*

The *Royal Proclamation of 1763* was much more than a document setting out British intentions to solidify its North American possessions. It demonstrated that Britain intended to continue its nation-to-nation relations with the aboriginal peoples despite the removal of the French threat to British North America.[38] The document did not create any rights that were not

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[36]Clinton, *supra* note 28 at 381.

[37]Enacted as Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11.

[38]As the Royal Commission on Aboriginal Peoples has noted in *Treaty Making*, *supra* note 2 at 11:

> ... [W]hile the Royal Proclamation asserted suzerainty over Aboriginal peoples living "under Our Protection", it also recognized that these people were "Nations" connected with the Crown by way of treaty and alliance. ... [T]he Proclamation acknowledged the retained sovereignty of Aboriginal peoples under the Crown's protection, and adopted measures to secure and protect their Territorial rights. This arrangement is the historical basis of the enduring constitutional relationship between Aboriginal nations and the Crown and provides the source of the Crown's fiduciary duties to those nations.

already in existence;[39] rather, it recognised the existing rights of the aboriginal peoples and sought to protect those rights, particularly land rights, by forbidding British colonists from directly purchasing aboriginal lands or squatting upon them.[40] The statements made by Secretary of State Lord Egremont in a letter to the Lords of Trade of 5 May 1763, shortly before the Proclamation was issued, supports this interpretation:

> The second question which relates to the security of North America, seems to include two objects to be provided for; The first is the security of the whole against any European Power; The next is the preservation of the internal peace & tranquility of the Country against any Indian disturbances. Of these two objects the latter appears to call more immediately for such Regulations and Precautions as your Lordships shall think proper to suggest &ca
>
> Thô in order to succeed effectually in this point it may become necessary to erect some Forts in the Indian Country with their consent, yet his Majesty's Justice and Moderation inclines him to adopt the more eligible Method of conciliating the minds of the Indians by the mildness of His Government, *by protecting their persons & property, & securing to them all the possessions rights and Privileges they have hitherto enjoyed & are entitled to most cautiously guarded against any Invasion or Occupation of their hunting Lands, the possession of which is to be acquired by fair purchase only*, and it has been thought so highly expedient to give the earliest and most convincing proofs of his Majesty's gracious and friendly Intentions on this head, that I have already received and transmitted the King's commands to this purpose to the Governors of Virginia, the two Carolinas & Georgia, & to the Agent for Indian Affairs in the Southern

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See also the discussion of the *Royal Proclamation of 1763* in *Treaty Making*, *supra* note 2 at 24-5; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*, (Ottawa: Minister of Supply and Services, 1993) at 19:

> The vision embodied in the *Royal Proclamation of 1763* was coloured by the imperial ambitions of Great Britain, which was seeking to extend its influence and control in North America. Nevertheless, when seen in another light, it has certain points of correspondence with the traditional Iroquois image of the Tree of Peace, as expressed for example by the Onondaga sachem, Sadeganaktie, during negotiations with the English at the city of Albany in 1698:
>
> > ... all of us sit under the shadow of that great Tree, which is full of Leaves, and whose roots and branches extend not only to the Places and Houses where we reside, but also to the utmost limits of our great King's dominion of this Continent of America, which Tree is now become a Tree of Welfare and Peace, and our living under it for the time to come will make us enjoy more ease, and live with greater advantage than we have done for several years past.

[39]While the landmark 1888 Privy Council judgment in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 (P.C.) held that aboriginal rights were derived from the *Royal Proclamation of 1763*, modern Canadian courts have held that the Proclamation did not create any rights which were not already in existence: see, for example, *R.* v. *Koonungnak*, [1963-64] 45 W.W.R. 282 at 302 (N.W.T. Terr. Ct.): 'This proclamation has been spoken of as the "Charter of Indian Rights." Like so many great charters in English history, it does not create rights but rather affirms old rights. The Indians and the Eskimos had their aboriginal rights and English law has always recognized these rights.'; *Calder* v. *Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145 at 200 (S.C.C.) per Hall J.; *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development* (1979), 107 D.L.R. (3d) 513 at 541 (F.C.T.D.); *Guerin* v. *R.* (1984), 13 D.L.R. (4th) 321 at 335 (S.C.C.) per Dickson J.

[40]The arguments in favour of construing the Proclamation in this manner are not unique. Similar arguments have been advanced by Slattery in *Land Rights*, *supra* note 31 and the Royal Commission on Aboriginal Peoples in *RCAP Final Report*, *supra* note 2.

> Department, as your Lordships will see fully in the inclosed copy of my circular letter to them on this subject.[41]

The prohibitions in the Proclamation regarding land were directed at the British colonists, not the aboriginal peoples. The Proclamation's restrictions were intended to protect Britain's aboriginal allies from having their rights ignored by colonists in search of land. This protection would help Britain maintain friendly relations with the aboriginal peoples and preserve the delicate balance of power it held in North America. Lord Egremont's letter supports this construction. The terms of an earlier Royal Proclamation also indicate Britain's desire to protect aboriginal peoples and their rights from British settlers for these purposes.

The *Royal Proclamation of 1763* followed on the heels of an earlier proclamation issued by King George III in 1761.[42] This first proclamation was made in response to a report of the Lords of Trade dated 23 November 1761.[43] This report advised George III to issue a statement regarding the treatment of aboriginal peoples in British North America. The preamble to the Royal Proclamation of 2 December 1761 recognised that maintaining order amidst the chaos created by the Seven Years' War required the cultivation of peaceful relations with the aboriginal peoples:

> WHEREAS the peace and security of Our Colonies and Plantations upon the Continent of North America does greatly depend upon the Amity and Alliance of the several Nations or Tribes of Indians bordering upon the said Colonies and upon a just and faithfull Observance of those Treaties and Compacts which have been heretofore solemnly entered into with the said Indians by Our Royall Predecessors Kings & Queens of this Realm ...

In addition to cultivating friendly relations with the aboriginals and requiring the faithful observance of treaties already concluded with them, the Proclamation of 1761 denoted Britain's intention to "support and protect the said Indians in their just Rights and Possessions." George III instructed his colonial governors to issue proclamations that would give effect to this intention. He further ordered his governors to ensure that such proclamations were made known to the settlers and to the aboriginal peoples, so that "Our Royal Will and Pleasure in the Premises may be known and that the Indians may be apprized of Our determin'd Resolution to support them in

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[41]"Lord Egremont to the Lords of Trade," 5 May 1763, as reproduced in *NYCD*, *supra* note 18 VII at 520-1 [Emphasis added]. See also A.C. Hamilton, *A New Partnership*, (Ottawa: Minister of Public Works and Government Services Canada, 1995) at 7: "The Royal Proclamation of October 7, 1763 recited the legal principles of that day. It did not make new law."

[42]*Supra* note 18.

[43]*Order of the King in Council on a Report of the Lords of Trade*, 23 November 1761, as reproduced, *ibid.* at 472-6.

their just Rights, and inviolably to observe Our Engagements with them." These statements appear to conform with earlier treaty patterns, such as the *Treaty of Albany* and the Covenant Chain, in which Britain recognised aboriginal autonomy. Because of its temporal proximity to the *Royal Proclamation of 1763* and the lack of indication of any change in British policy regarding the aboriginal peoples at this time, the *Royal Proclamation of 1761* is a useful aid in interpreting the principles articulated in the *Royal Proclamation of 1763*.

The *Royal Proclamation of 1761* was not the only document emanating from the Crown that sheds light on the meaning of the *Royal Proclamation of 1763*. The royal instructions to the various Governors of Nova Scotia from 1756-1773 are consistent with the notion that Britain represented its dealings with the aboriginal peoples as those between autonomous nations:

> And whereas we have judged it highly necessary for our service that you should cultivate and maintain a strict friendship and good correspondence with the Indians inhabiting within our said province of Nova Scotia, *that they may be induced by degrees not only to be good neighbors to our subjects but likewise themselves to become good subjects to us*; you are therefore to use all proper means to attain those ends, to have interviews from time to time with the several heads of the said Indian nations or clans, to endeavour to enter into a treaty with them, promising them friendship and protection on our part ...[44]

In addition to the terms of royal proclamations and instructions, other events in this period reinforce the notion that the aboriginal peoples were treated as autonomous by Britain in her relations with them.

Sir William Johnson's response to a treaty negotiated by Colonel John Bradstreet with a small delegation of Shawnees, Mingos, Delawares, and Wyandots east of Presque Isle in 1764 buttresses the conclusion that the aboriginal peoples were treated as autonomous by Britain. In the treaty, Bradstreet had asserted British sovereignty over the Indians. Johnson assumed that there must have been some mistake. As Johnson explained in a letter to the Lords of Trade, the aboriginals were autonomous peoples who would not relinquish their independence by submitting to British sovereignty:

> I have just received from Genl Gage a copy of a Treaty lately made at Detroit by Coll. Bradstreet with the Hurons and some Ottawaes & Missisagaes; these people had subscribed to a Treaty with me at Niagara in August last, but by the present Treaty I find, they make expressions of subjection, which must either have arisen from the ignorance of the Interpreter, or from some other mistake; for I am well convinced, they never mean or intend, any thing like it, and that they can not be brought under our Laws, for some Centuries, neither have they any word which can

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[44]L.W. Labaree, ed., *Royal Instructions to British Colonial Governors 1670-1776*, (New York and London, 1935) at 469, 806, as reproduced in K.M. Narvey, "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company," (1974), 38 *Sask. L. Rev.* 123 at 177. [Emphasis added]

> convey the most distant idea of subjection, and should it be fully explained to them, and the nature of subordination punishment ettc, defined, it might produce infinite harm, but could answer no purpose whatever ... I am impatient to hear the exact particulars of the whole transaction, and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principal causes of all our troubles, and as I can see no motive for proposing to them terms, which if they attended to them, they most assuredly never meant to observe, and 'tis out of our power to enforce, I am apt to think it may occasion a necessity for being sufficiently watchful over their motives ...[45]

Shortly after these events, Johnson abandoned Bradstreet's claims of absolute British sovereignty over the aboriginal peoples.[46] When Johnson negotiated the *Treaty of Niagara*, he returned to the principles that characterised the Covenant Chain alliance: British recognition of aboriginal autonomy and the desire to maintain peaceful, mutually enriching relations.[47]

The *Royal Proclamation of 1763* recognised that the exploitation of Indian land interests by European settlers posed a threat to the continued good relations between the Indians and the Crown. The Crown desperately needed to maintain these relations with the aboriginals.[48] The Proclamation characterised the relationship between the Crown and aboriginal peoples as one between autonomous entities coexisting in a peaceful and mutually beneficial manner. Its description of "the several Nations or Tribes with whom We are connected, and who live under our Protection" indicates that the aboriginal peoples were not subjects of the Crown, but allied nations.

This assertion that the Proclamation recognised the aboriginal peoples as allies rather than subjects is also supported by British correspondence contemporaneous with the issuing of the Proclamation. A letter from the Lords of Trade to Sir William Johnson on 5 August 1763 suggests that the Proclamation's description of "the several Nations or Tribes with whom We are connected, and who live under our Protection" ought to be interpreted as meaning that those aboriginal nations were simply living on soil claimed by Britain, not that they were no longer independent:

> His Majesty having been pleased upon our report to him of the arrangements necessary to be taken in consequence of the Cessions made to His Majesty in America by the late Definitive

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[45]"Sir William Johnson to the Lords of Trade," 30 October 1764, as reproduced in *NYCD*, *supra* note 18 VII at 674.

[46]See White, *supra* note 9 at 306.

[47]See *ibid.* at 307. Refer also to the discussion of the *Treaty of Niagara*, *infra*. For further discussion of Johnson's diplomatic relations with the aboriginal peoples on the "middle ground," see White, *supra* note 9 at 307-22, 339-56.

[48]B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada," (1984), 32 *Am. J. Comp. L.* 361 at 369; Dickason, *Canada's First Nations*, *supra* note 14 at 181. Refer back to the earlier discussion of the Crown's rationale for issuing the Proclamation.

> Treaty of Peace, to direct that the Agents for Indian Affairs should correspond with Us in all matters regarding their departments, and should transmit all such informations as we should require from them, we take this opportunity of acquainting you with His Majesty's commands ...
>
> A regular and constant correspondence upon these points, at all times usefull and important, is now become essentially necessary from the great number of hitherto unknown tribes and nations, which are now under His Majesty's immediate protection, and the necessity there is of speedily falling upon some method of regulating the Indian commerce & policy, upon some more general and better established system than has hitherto taken place.
>
> It is with a view to this object that we have proposed to His Majesty that a proclamation should be issued declaratory of His Majesty's final determination to permit no grants of lands nor any settlement to be made within certain fixed bounds under pretence of purchase or any pretext whatever, leaving all the territory within these bounds free for the hunting grounds of the Indian Nations ...[49]

This letter reveals that the Crown's protection of the aboriginal peoples did not entail their subjection to the Crown's authority in North America. The notion of "the several Nations or Tribes with whom We are connected, and who live under our Protection" contained in the *Royal Proclamation of 1763*, for example, does not require the automatic assumption of aboriginal subjection to British authority. Instead, it suggests the existence of an alliance, or "connection" between the groups under which Britain has agreed to protect the aboriginals.[50] The Proclamation's description of the aboriginals living under the protection of the Crown denotes the Crown's recognition of its historical commitments to protect the aboriginal peoples. In this sense, the Proclamation is consistent with the promises of British protection of the aboriginal peoples encompassed in the *Treaty of Albany* and the Covenant Chain. By simultaneously asserting British suzerainty while affirming the independence of the aboriginal peoples, the Proclamation was consistent with the symbiotic nature of Crown-Native relations. The Proclamation sought to maintain the integrity of this relationship by prohibiting the exploitation of aboriginal peoples and their lands. The document recognised the importance of the Indian interest in land and sought to protect the aboriginals from being taken advantage of by the Crown's subjects as a result of the different understandings each had with relation to the use of land.[51]

In addition to protecting aboriginal land interests by setting aside the Indian hunting grounds as exclusive aboriginal territory, the Proclamation also provided other protections for the aboriginal peoples and their rights. It forbade colonists from purchasing lands directly from the

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[49]"Lords of Trade to Sir William Johnson," 5 August 1763, as reproduced in *NYCD*, *supra* note 18 VII at 535.

[50]See the discussion of this point in Narvey, *supra* note 44 at 223-5.

[51]The distinction between aboriginal and non-aboriginal conceptions of land and land use is discussed in Rotman, *Parallel Paths*, *supra* note 30 at Ch. II and in the Royal Commission on Aboriginal Peoples' report, *Treaty Making*, *supra* note 2 at 2, 9-14.

aboriginals. It made the Crown a requisite intermediary in all land transactions with aboriginal peoples. The Proclamation also regulated trade between British subjects and the aboriginal peoples. The protection of aboriginal rights in the Proclamation led it to become known as the Indian "Bill of Rights."[52]

The protection provided by the *Royal Proclamation of 1763* should be viewed as serving two primary purposes. It demonstrated to other European nations that Britain intended to respect the rights of the aboriginal peoples. The Proclamation was a declaration of the Crown's exclusive rights vis-à-vis other European nations in North America;[53] this included the exclusive right to obtain land from the aboriginal peoples at such time as they desired to dispose of it. The Proclamation was also a demonstration to the aboriginal peoples that the principles established in the *Treaty of Albany, 1664* would continue to be respected in spite of the British conquest of New France. This latter effect becomes clear when the Proclamation is viewed in conjunction with the *Treaty of Niagara*, as discussed below.

Britain's ability to impose restrictions on its own subjects through the *Royal Proclamation of 1763* is not in question. Indeed, Lord Egremont's letter to the Lords of Trade reveals his belief that Britain had the authority to regulate the territory covered by the Proclamation. Whether Britain had the ability to make binding pronouncements on the aboriginal peoples at this time is a separate issue that will not be examined here. By protecting pre-existing aboriginal rights, though, the 1763 Proclamation continued a trend that had existed in a formal way since the *Treaty of Albany*.

The *Royal Proclamation of 1763* ought to be regarded as a protection of aboriginal land interests and the aboriginal peoples' autonomy from Britain. It, along with its predecessor, the *Royal Proclamation of 1761*, demonstrates the same desire to protect the status quo that had existed under the Covenant Chain alliance between the groups. Throughout the Covenant Chain alliance, Britain undertook to protect aboriginal land interests as a part of the reciprocal obligations and benefits that arose from the nature of their relations with the aboriginal peoples.

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[52]See, for example, *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1885), 10 O.R. 197 at 226 (Ch.), (1887), 13 S.C.R. 577 at 674; *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613 at 636 (B.C.C.A.); *R.* v. *Koonungnak*, *supra* note 40 at 302; *Calder*, *supra* note 40 at 203; *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and Others* (the "Alberta Indian Association Case"), [1982] 2 All E.R. 118 at 124-5 (C.A.).

[53]With the notable exception of Alaska, the French islands of St. Pierre and Miquelon, and those territories west of the Mississippi which had been ceded to Spain by France prior to 1763.

These reciprocal obligations and benefits included the maintenance of long-established trade networks. They also included the parties' mutual obligations to provide military assistance to the other against their respective enemies. Thus, when the 1763 Proclamation contemplated a continuation of the status quo, that ought to be understood to include the continuation of existing practices of Crown-aboriginal alliances.

In many respects, the *Royal Proclamation of 1763* may be viewed as similar in intention and effect to the modified version of the doctrine of discovery formulated by Marshall C.J. in *Johnson* v. *M'Intosh*[54] and *Worcester* v. *Georgia*.[55] The Proclamation provided Britain with the exclusive right to treat with the aboriginal peoples in those new territories claimed by it, not a right of sovereignty over them and their lands. If the Crown was to obtain ownership and control over aboriginal lands, it would have to do so through the treaty-making process. The protection of aboriginal rights in the Proclamation therefore denotes the qualifications imposed by the Crown upon its own rights. These qualifications stem from the Crown's recognition and affirmation of the autonomy of the aboriginal peoples and the latter's pre-existing rights, including rights to land.

The Proclamation was not premised entirely upon the Crown's recognition and affirmation of its historical relationship with the aboriginal peoples. As discussed earlier, the protection of aboriginal lands through the creation of the Indian hunting grounds served the Crown's own interests as well. This is reflected in the Proclamation, which states that not only is the protection of the aboriginal peoples and their interests "just and reasonable," but that its provisions are "essential to Our Interest and the Security of Our Colonies":

> 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 ...[56]

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[54]8 Wheat. 543 (U.S. 1823). See the discussion of *Johnson* v. *M'Intosh* in Ch. II.

[55]6 Pet. 515 (U.S. 1832). See the discussion of *Worcester* in Ch. II.

[56]Compare the Proclamation's statement 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," with the declaration by Ojibway Chief Minavavana in 1761 that the British "have ventured your life among us, in the expectation that we should not molest you": see the footnote references on this point in Ch. II.

Therefore, while recognising and affirming aboriginal interests, the Proclamation also sowed the seeds for the onslaught of colonialism that was soon to become the dominant characteristic of Crown-Native relations.[57] As Borrows argues:

> In placing these divergent notions within the Proclamation the British were trying to convince Native people that there was nothing to fear from the colonists, while at the same time trying to increase political and economic power relative to First Nations and other European powers. The British perceptively realized that alleviating First Nations' "Discontent" required that Native people believe that their jurisdiction and territory were protected; however, the British also realized that the colonial enterprise required an expansion of the Crown's sovereignty and dominion over the "Indian" lands. Thus, while the Proclamation seemingly reinforced First Nation preferences that First Nation territories remain free from European settlement or imposition, it also opened to door for the erosion of these same preferences.[58]

Viewing the Proclamation as an affirmation of aboriginal independence, protection of pre-existing aboriginal rights, and a declaration of the Crown's sovereignty over its North American possessions becomes evident when the Proclamation is understood in context. The Proclamation is only one source of information shedding light on the Crown's intentions for its post-conquest dealings with the aboriginal peoples.[59] To achieve a contextual and culturally-appropriate method of understanding the Proclamation, aboriginal understandings of the document are equally relevant to those of Britain.[60]

The need to consider aboriginal perspectives on the meaning of the Proclamation arises from the fact that the Proclamation was used to entice the aboriginals to attend the conference that led to the conclusion of the *Treaty of Niagara, 1764*.[61] Indeed, the Proclamation was

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[57]The effects of the Proclamation in providing the foundation for the onset of British colonialism and the effects of colonialism on the aboriginal peoples is discussed in greater detail in Rotman, *supra* note 30 Ch. II and III; see also Dickason, "*Canada's First Nations*," *supra* note 14 at 188-9.

[58]J. Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation," (1994), 28 *U.B.C. L. Rev.* 1 at 17.

[59]See *ibid.* at 10, n. 31: '... [T]he words of the Royal Proclamation contain only a thin edge of information for understanding the constitutional relationship with First Nations and settlers established upon contact. Therefore, in order to understand constitutionally the Royal Proclamation, one must look beyond the "terms of the instrument."'

[60]See *ibid.* at 10-11:

> Contextualization of the Proclamation reveals that one cannot interpret its meaning using the written words of the document alone. To interpret the principles of the Proclamation using this procedure would conceal First Nations perspectives and inappropriately privilege one culture's practice over another. First Nations chose to chronicle their perception of the Proclamation through other methods such as contemporaneous speeches, physical symbols, and subsequent conduct.

[61]*Ibid.* at 21:

presented to the aboriginal peoples for their consideration at Niagara.[62] If the Proclamation had remained a unilateral declaration of Crown policy towards aboriginal peoples, aboriginal understandings of the document would be much less important. Indeed, the aboriginal peoples were not consulted about the terms of the Proclamation prior to its release. As a unilateral document of British policy, the aboriginals would not have been consulted about the Proclamation regardless of their status vis-à-vis Britain. However, the subsequent use of the Proclamation at Niagara as both the means for enticing the aboriginals to attend and the basis for the treaties signed at that conference render aboriginal understandings of the document relevant in assessing its meaning.

The aboriginal peoples based their understandings of the Proclamation on means other than the written instrument. They understood it as it was represented to them by the Crown -- as a continuation of the principles of peace, friendship, and respect that had characterised their formal relations from 1664. It is unlikely that many aboriginals would have been able to read the Proclamation or comprehend its obtuse wording. Furthermore, it would likely have been difficult, if not impossible, to translate the document into aboriginal languages and concepts. Aboriginal understandings of the Proclamation would, therefore, have been no different than their understandings of the treaties they entered into with the Crown. Aboriginal understandings of the Proclamation or of treaties would not have been based solely on the Crown's translations of the written documents, though. Rather, they would have encompassed the entirety of the negotiations leading up to the finalisation of those documents.[63] Insofar as the Proclamation was a unilateral declaration, the aboriginals would have understood it by coupling the Crown's translation of the document with the circumstances in which the document was presented to them.

As discussed above, the Crown's declaration of sovereignty in the Proclamation was not an absolute declaration, but was made subject to the pre-existing rights belonging to the aboriginal peoples. The explicit recognition and protection of aboriginal autonomy and rights in the Proclamation demonstrates this point:

> The people of the Algonquins and Nippising Nations met with the British Superintendent of Indian Affairs at Oswegatchie and were persuaded to be messengers in inviting other Nations to attend a peace council at Niagara in the summer of 1764. Representatives of these two Nations travelled throughout the winter of 1763-64 with a printed copy of the Royal Proclamation, and with various strings of wampum, in order to summons the various First Nations to a council with the British.

[62]Refer to the discussion of the *Treaty of Niagara*, *infra*.

[63]This idea is expanded upon in the discussion of treaties in Chs. VI and VII.

> ... 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 ...

The reservation to the aboriginal peoples of the Indian hunting grounds was not, as the wording might indicate, an illustration of aboriginal subjugation to Britain. When placed within the context of events occurring in 1763, it should be viewed as a British attempt to ensure the protection of aboriginal land rights by preventing British subjects from residing upon or purchasing non-surrendered Indian lands. Prior to 1763, British subjects had squatted upon aboriginal lands and otherwise attempted to dispossess the aboriginals. British settlers also erected housing and cleared forests for farming, which had the further effect of scaring away wildlife that the aboriginals depended on for their survival. These actions caused great resentment on the part of the aboriginals. Pre-Proclamation treaties attempted to appease the aboriginals by regulating settler incursions into aboriginal territories. The Proclamation's creation of the hunting grounds similarly sought to prohibit settler intrusions onto aboriginal lands.

Had the Crown's declaration of suzerainty in the Proclamation been intended to deprive the aboriginal peoples of their autonomy and pre-existing rights, the Proclamation would not have explicitly protected the aboriginals' rights against those of the Crown. The Crown protected aboriginal rights from its own interests by declaring certain lands to be aboriginal lands rather than proclaiming those lands to be Crown lands held for the aboriginals' use. That is not to suggest that the Proclamation did not attempt to limit pre-existing aboriginal land rights. The Proclamation did seek to confine the aboriginals' pre-existing rights by preventing them from alienating their lands to whomever they might please.[64] Therefore, while the Crown's declaration

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[64]Borrows suggests that this was a purposeful inclusion, so that the contradictory desires of the Crown and the aboriginals might be recognised for the time being, but which also provided the Crown with the means with which to extinguish the aboriginals' rights at a later date. See Borrows, *supra* note 58 at 17-18:

> The Proclamation uncomfortably straddled the contradictory aspirations of the Crown and First Nations when recognizing Aboriginal rights to land by outlining a policy that was designed to extinguish these rights. ... In implementing these principles an area of land was designated as First Nation territory. The boundaries were determined by past cessions and existing First Nation possessions. These principles codified pre-existing First Nation/colonial practice and reflected some First Nation preferences in maintaining territorial integrity and decision making power over their lands. These principles simultaneously worked against First Nation preferences by enabling the Crown to enlarge its objectives by creating a process to take land away from First Nations.

of suzerainty over North America in the Proclamation directly affected the aboriginal peoples, that assertion ought to be understood as being directed primarily at other European nations.

The notion that the primary audience for the Proclamation was other European nations and not the aboriginal peoples is buttressed by the Crown's subsequent actions in presenting the Proclamation to the aboriginal peoples at the Niagara conference.[65] The Niagara conference had been organised for the purpose of solidifying historical alliances and creating new ones. Its purpose was to renew and expand the existing Covenant Chain alliance. The Niagara gathering was also intended to assure the aboriginal peoples that the defeat of France would have no effect on long-standing Crown-Native alliances. Correspondence between British officials suggests that Britain felt it was necessary to conclude treaties with the aboriginals and to assure them of Britain's intention to respect their rights. The correspondence between General Thomas Gage and the Earl of Halifax illustrates this point:

> After concerting with Sir W^m^ Johnson the proper measures to be taken in order to conclude a peace with the Indians ... I have wrote to Major Gladwin, that if he finds them sincerely disposed to peace, in the spring, he would give notice to the Chiefs of the several Nations to repair to Niagara by the end of June, where Sir W^m^ Johnson would meet them in order to complete the work of peace, agreeable to their own forms and ceremonies.[66]

Britain's desire to convince the aboriginal peoples of its intentions to respect their rights may be one reason why the *Royal Proclamation of 1763* was presented to the aboriginal peoples at Niagara -- insofar as those intentions were explicitly included in the document. The Proclamation's protection of the aboriginal peoples should, therefore, be viewed as a continuation of the principles of peace, friendship, and respect and the recognition of aboriginal autonomy first embodied in the *Treaty of Albany* and Two-Row Wampum and continued through the Covenant Chain. While the Proclamation may have provided a framework for the realisation of Britain's colonialist desires, it did not ignore Britain's historical undertakings and responsibilities towards the aboriginal peoples. Indeed, the *Treaty of Niagara* demonstrates this very point.

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[65]See Borrows, *supra* note 58.

[66]"General Gage to the Earl of Halifax," 13 April 1774, as reproduced in *NYCD*, *supra* note 18 VII at 617. See also "Sir William Johnson to the Lords of Trade," 11 May 1774, as reproduced, *ibid.* at 625: "... I am by the appointment of the General to go in June to make peace with them, and the western Nations, at which time I shall not omit using all my endeavours for obtaining such concessions and tying them down in such a manner, as will be most conducive to the public security hereafter ..."; "Sir William Johnson to the Earl of Halifax," 22 May 1764, as reproduced, *ibid.* at 632: "... I am the next month to meet the Senecas and Western Nations at Niagara, when the Terms entered into by the former, shall be solemnly ratifyed, and such others offered to the rest, as are best calculated for His Maj^ty's^ interest, and the future welfare of the Colonies ...".

(d) The *Treaty of Niagara, 1764*

The meeting of aboriginal nations with Sir William Johnson in 1764 that resulted in the *Treaty of Niagara* was the largest ever gathering of aboriginal nations for the purposes of treating with the Crown. Some 2,000 aboriginal people from various nations and tribes came to Niagara to treat with Johnson.[67] The purpose of the treaty, according to Johnson, was to create a "Treaty of Offensive and Defensive Alliance." This treaty would assure the aboriginal peoples that they would receive:

> ... [A] Free Fair & open trade, at the principal Posts, & a free intercourse, & passage into our Country, That we will make no Settlements or Encroachments contrary to Treaty, or without their permission. That we will bring to justice any persons who commit Robberys or Murders on them & that we will protect & aid them against their & our Enemys, & duly observe our Engagements with them.[68]

The *Treaty of Niagara* sheds significant light on the Crown's intentions for its future relations with the aboriginal peoples that had been set out in the *Royal Proclamation of 1763*. Sir William Johnson read aloud the terms of the Proclamation to the assembled aboriginal representatives at the Niagara conference. The aboriginals gave a promise of peace and set out principles of mutual non-interference.[69] Presents were exchanged, including Johnson's presentation of Covenant Chain belts to the aboriginal representatives. Johnson then made the following statement, indicating that by the presentation of the belts, Britain and the aboriginals were bound in peace and friendship:

> Brothers of the Western Nations, Sachems, Chiefs and Warriors; You have now been here for several days, during which time we have frequently met to renew and Strengthen our Engagements and you have made so many Promises of your Friendship and Attachment to the English that there now remains for us only to exchange the great Belt of the Covenant Chain that we may not forget our mutual Engagements.
>
> I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire that you will take fast hold of the same, and never let it slip, to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipeweighs at St. Marys [Michilimackinac] whilst the other end remains at my house, and moreover I desire that you will never listen to any news which comes to any other Quarter. If you do it, it may shake the Belt.[70]

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[67]"Sir William Johnson to the Lords of Trade," 30 August 1764, as reproduced *ibid.* VII at 648. See also "General Gage to the Earl of Halifax," 21 September 1764, as reproduced, *ibid.* at 655.

[68]*The Papers of Sir William Johnson*, 14 Vols., (Albany: University of the State of New York, 1921-65) IV at 328 [hereinafter "Johnson Papers"].

[69]See D. Braider, *The Niagara*, (New York: Holt, Rinehart, 1972) at 137.

[70]Johnson Papers, *supra* note 68 at 309-10.

The aboriginal peoples used a two-row wampum belt, like that given to the Crown at the *Treaty of Albany, 1664*, to reflect their understanding of the agreement made at Niagara and the words of the Proclamation.[71]

Borrows has suggested that the *Royal Proclamation of 1763* became a treaty at Niagara "because it was presented by the colonialists for affirmation, and was accepted by the First Nations."[72] Whether the *Royal Proclamation of 1763* was a treaty that culminated with the agreements reached at Niagara or a unilateral declaration of Crown intentions, the Proclamation and the *Treaty of Niagara* ought to be viewed as two interrelated parts of Britain's post-conquest policy for North America. The Proclamation was an official declaration of Britain's pre-emptive right to jurisdiction over its North American holdings vis-à-vis other European nations. The *Treaty of Niagara*, meanwhile, was the means by which the Crown communicated its intentions to the aboriginal peoples, in accordance with treaty protocol that had been developed over the history of Crown-Native relations.

The oral representations made to the aboriginal peoples at Niagara and the wampum belts that were presented elaborated upon the principles that had been referred to, either explicitly or implicitly, in the Proclamation. For example, the Crown's protection of the aboriginal peoples and their lands in the Proclamation was affirmed in the treaties signed at Niagara. The treaty concluded with the Seneca Indians is a case in point. The ninth article of that treaty states that the Seneca "shall be left in the quiet and peaceable possession of all their Rights not comprised in the foregoing articles" and that they "shall be once more admitted into the Covenant chain of friendship with the English."[73] The fact that the aboriginal peoples understood the terms of the Proclamation by reference to the Two-Row Wampum indicates a different understanding of the Proclamation than that historically established in the jurisprudence. The aboriginals understood the Proclamation in conjunction with the *Treaty of Niagara* and the representations made during the treaty negotiations by Sir William Johnson, the Crown's duly-authorised emissary.[74] As Borrows suggests:

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[71]Borrows, *supra* note 58 at 23-4.

[72]*Ibid.* at 20.

[73]"Articles of Peace concluded with the Seneca Indians," 3 April 1764, as reproduced in *NYCD*, *supra* note 18 VII at 623.

[74]See the references in note 67; Borrows, *supra* note 58 at 21: "It is significant to note that Sir William Johnson, Superintendent of Indian Affairs, had earlier agreed to meet with the First Nations and reassert their mutual relationship through requirements prescribed by the Aboriginal peoples, which criteria involved the giving and receiving of wampum belts."

> The evidence surrounding the Treaty of Niagara demonstrates that the written text of the Proclamation, while it contains a partial understanding of the agreement at Niagara, does not fully reflect the consensus of the parties. The concepts found in the Proclamation have different meanings when interpreted in accord with the wampum belt. For example, the belt's denotation of each Nation pursuing its own path while living beside one another in peace and friendship casts a new light on the Proclamation's wording "the several Nations ... with whom we are connected ... should not be molested or disturbed. ..." These words, read in conjunction with the two row wampum, demonstrate that the connection between the Nations spoken of in the Proclamation is one that mandates colonial non-interference in the land use and governments of First Nations. Therefore, First Nations regarded the agreement, represented by the Proclamation and the two row wampum, as one that affirmed their powers of self-determination in, among other things, allocating land.[75]

Johnson's presentation of the *Royal Proclamation of 1763* for the aboriginals' consideration at Niagara reinforces the notion that the Proclamation ought to be viewed in conjunction with the *Treaty of Niagara*. The text of the negotiations at Niagara indicates that the Crown's representations to the aboriginal peoples reaffirm the Crown's historical undertakings towards the aboriginal peoples.[76] The Proclamation had effectuated the same result via its protection of aboriginal peoples and their rights. This effect is indicated by the following passage:

> ... 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 ...

In summary, the *Treaty of Niagara*, in conjunction with the actions and representations of the Crown and the aboriginal peoples during its negotiation, provides a contextual framework for understanding Crown-Native relations at the time. The Niagara agreements properly allow appraisals of the Proclamation to account for aboriginal understandings of the document.[77]

(e) Contextualising the Formative Years of Crown-Aboriginal Relations

The arguments made in this dissertation for a unified, contextual appraisal of aboriginal rights issues require the consideration of both aboriginal and British understandings of historical events and instruments. This applies equally to the *Treaty of Albany* and the Covenant Chain alliance discussed in Chapter II as to the *Royal Proclamation of 1763* and the *Treaty of Niagara*.

As the Crown's Indian Affairs agent, Johnson's representations to the aboriginals are legally binding on the Crown.

[75]Borrows, *supra* note 58 at 25.

[76]See, for example, *NYCD*, *supra* note 18 VII at 621-756.

Incorporating aboriginal understandings provides the context for culturally-appropriate appraisals that have been absent from much of Canadian aboriginal rights jurisprudence. Canadian courts must recognise the importance of using aboriginal understandings of documents or historical situations if they are to obtain a well-rounded understanding of Crown-Native relations and their effects on aboriginal peoples and their rights.

The creation of special canons of aboriginal treaty interpretation that pay heed to aboriginal understandings expressly acknowledges that the written versions of treaties do not encapsulate the entirety of agreements arrived at between the Crown and the aboriginal peoples.[78] As the Supreme Court of Canada explained in the *Sioui* decision, understanding the true nature of an agreement between the Crown and aboriginal peoples requires ascertaining the common intention of the parties. A complete understanding of a treaty cannot be obtained simply by relying upon the conceptions held by one of the parties.[79] In the context of the Crown's post-conquest policy for North America, this necessitates that the *Royal Proclamation of 1763* be understood in conjunction with the *Treaty of Niagara*:

> The declaration of the Proclamation was accompanied by promises made at Niagara which both parties agreed to adhere to. These covenants form a part of the Proclamation's meaning to First Nations. Therefore, a "natural understanding" of the Proclamation by First Nations includes an interpretation that includes the promises made at Niagara. ... This method of interpretation does not make the technical words of the document unimportant, it merely means that First Nation perspectives must form a part of the common law's understanding of the Proclamation.[80]

Although it has been argued that the *Royal Proclamation of 1763* and the subsequent *Treaty of Niagara* did not end the pattern of mutuality and respect that had characterised Crown-aboriginal relations since the *Treaty of Albany*, they did signify a turning point in North American history. The Proclamation marked a shift in British attitudes towards its North American interests. The Crown's actions after the Proclamation was issued demonstrate a consistent emphasis on colonisation. Shortly after the signing of the *Treaty of Niagara*, the boundary of the aboriginal hunting territory established in the *Royal Proclamation of 1763* became the subject of

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[77]Borrows, *supra* note 58 at 40: "The Treaty of Niagara reveals what has been hidden in the Proclamation's words because it reasserts the state of mutual non-interference that was intended when principles to guide relationships were formalized between Native and non-Native people."

[78]See the discussion of treaties in Chs. VI and VII.

[79]See *Sioui*, *supra* note 6 at 463. In striving towards these common intentions, it is not sufficient to look only for any overlap between Crown and aboriginal perspectives. If, for example, one party adopts a broad understanding of a treaty and the other adopts a narrow understanding, the only common elements that may exist would be tantamount to adopting the narrow understanding.

negotiation between the Crown and the aboriginal peoples occupying those lands. The geographic extent of the Indian hunting ground had been the subject of much contention since the release of the Proclamation. These negotiations led to the conclusion of the *Treaty of Stanwix, 1768* and the aboriginals' cession of considerable acreage to the Crown.[81] What is important to note from this transaction is that while the Crown desired to obtain more land for the purposes of colonisation, it did so through the treaty-making process rather than by expropriation. This fact suggests that the aboriginals continued to be regarded as autonomous nations.

The Crown's actions in negotiating the *Treaty of Niagara* and the *Treaty of Stanwix* provide further proof that the Proclamation did not mark the end of the historical Crown-Native relationships based upon the autonomy of the parties. In fact, the opposite appears to be true. The representations made by Sir William Johnson and the understandings possessed by the aboriginal peoples indicate that the *Treaty of Niagara* was intended to serve two purposes. Firstly, it was made to consolidate existing links in the Covenant Chain alliance. Equally important, however, was Britain's intention to increase the chain's strength through the addition of new links -- those aboriginal nations that had either been attached to France or that had been neutral prior to the conquest. Despite the removal of France as a serious threat to British North America, Britain remained dependent upon the friendship and alliance of the aboriginal peoples. This fact may be discerned from the earlier discussion of Britain's return to pre-conquest treaty protocol in 1763. It is also evident in a letter from Johnson to the Lords of Trade shortly after the *Treaty of Niagara*:

> The Indians all know, we cannot be a match for them in the midst of an extensive, woody Country, where, tho' we may at a large expence convey an army, we can [n]ot continue it there, but must leave our small Posts at the end of the Campaign, liable either to be blockaded, surprised, or taken by Treachery. View all our attempts made to posess the interior Country, and your Lordps will find, we have met with the same spirit of opposition from the Indians, from whence I infer, that if we are determined to possess our Out Posts, Trade ettc. securely, it can not be done for a Century by any other means, than that of purchasing the favour of the numerous Indian Inhabitants.[82]

The continuation of the historical Crown-Native relationship through the *Treaty of Stanwix, 1768* demonstrates that, even after Britain had conquered New France and desired to establish a stronger colonial presence in North America, it still required, and actively sought, the

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[80]Borrows, *supra* note 58 at 42-3.

[81]See *supra* note 31; see also "Proceedings of Sir William Johnson with the Indians at Fort Stanwix to settle a Boundary Line," as reproduced, *ibid.* at 111-34.

[82]"Sir William Johnson to the Lords of Trade," 30 August 1764, *supra* note 67 at 649-50.

cooperation of the aboriginal peoples.[83] The following exchange between the aboriginal nations assembled at Fort Stanwix and Sir William Johnson demonstrates the continuation of the principles of peace, friendship, and respect that had long characterised Crown-Native relations. The aboriginal peoples initiated the discussion:

> Brother
>
> We are glad that you have opened the River and cleared the Roads as it is so necessary to us both. We were promis[d] that when the war was over, we should have Trade in plenty, Goods cheap and honest men to deal with us and that we should have proper persons to manage all this. We hope that these promises will never be forgot but that they will be fully performed that we shall feel the benefits of an intercourse between us -- that the Roads and waters may be free and open to us all to go to the Southward, or for our friends from thence with whom we are now at peace to visit us, that we may have proper persons in our Countrys to manage affairs and smiths to mend our arms and implements -- and in the expectation of this, we do, now on our parts open the Roads and waters, and promise to assist in keeping them so.
>
> A Belt.
>
> ...
>
> Brother
>
> By this Belt we address ourselves to the Great King of England through You our superintendant in the Name and in behalf of all the Six Nations Shawanese, Delawares and all other our Friends, Allies, & Dependants, We now tell the King that we have given to him a great and valuable Country, and we know that what we shall now get for it must be far short of its value -- We make it a condition of this our Agreem[t] concerning the Line that His Majesty will not forget or neglect to shew us His favor or suffer the Chain to contract Rust, but that he will direct those who have the management of our affairs to be punctual in renewing our antient agreements.[84]

Johnson responded thusly:

> Brothers
>
> The speech which you addressed particularly to His Mâty shall be faithfully transmitted to him with the rest of your proceedings. I have attended to the whole of it & I persuade myself that every reasonable article will be taken proper notice of & that he will take such measures as to him shall seem best for your benefit and for the rendering you justice -- I likewise consider your good intentions towards the Traders who sustained the losses & your desire to fulfill all your other engagements as instances of your integrity. I wish that you may on your parts carefully remember & faithfully observe the Engagements you have now as well as formerly entered into with the English, and that you may every day grow more sensible how much it is your Interest to do so And I once more exhort you all to be strong and stedfast to keep firm hold of the Covenant Chain & never to give attention or credit to People who under the Masque of friendship shoud come amongst you with stories which may tend to weaken your attachment to us, but to keep your

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[83]At least their cooperation in agreeing to treat with the Crown. The accuracy of the treaty itself -- specifically whether the aboriginal peoples agreed to surrender entirely the lands referred to or whether the boundaries described in the treaty are accurate representations of what was agreed to during the negotiations -- is another question. The issue of whether the written versions of treaties are accurate depictions of the nature of the agreements reached between the Crown and aboriginal peoples will be discussed further in Chs. VI and VII.

[84]"Proceedings of Sir William Johnson with the Indians at Fort Stanwix to settle a Boundary Line," as reproduced in *NYCD*, *supra* note 18 VIII at 126-7.

eye stedfastly on those whose business & inclination it is to tell you truth & make your minds easy

A Belt.

Brothers the Shawanese & Delawares

... I likewise desire you to remember all your engagements with the English to observe the treaty of Peace with the Cherokees, to avoid any irregularities on the Frontiers & pay due regard to the Boundary Line now made, & to make all your People acquainted with it, & to keep the Roads & Waters open and free whereby you will enjoy the benefits of Peace & Commerce, the esteem of the King of Great Britain & the friendship of all his subjects & I desire you will remember & often repeat my words

A Belt.

Brothers the Indians of Canada

With this Belt I recommend it to you to remember what has been done at this & all former Treaties and to make the same public among all your people on your return to Canada recommending it to them to continue to promote peace and to discountenance all evil reports & idle Stories which may be propagated by ignorant or bad men & to communicate all usefull intelligence to me from time to time as a proof of your regard for your engagements & a means of recommending yourselves to the esteem of the King and people of England.

A Belt.[85]

The *Treaty of Stanwix* was not the only document at this time that suggested the continuation of Crown-Native relations based on the principles of peace, friendship, and respect. Various instructions given by the Crown to its representatives in Canada after the *Royal Proclamation of 1763* was released, including virtually-identical instructions given to General Murray of 7 December 1763,[86] and to Governor Carleton in 1768,[87] also indicate that the

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[85]*Ibid.* at 131.

[86]As reproduced in Shortt and Doughty, *supra* note 21 at 199-200 (articles 60-62):

60. And whereas Our Province of Quebec is in part inhabited and possessed by several Nations and Tribes of Indians, with whom it is both necessary and expedient to cultivate and maintain a strict Friendship and good Correspondence, so that they may be induced by Degrees, not only to be good Neighbours to Our Subjects, but likewise themselves to become good Subjects to Us; You are therefore, as soon as you conveniently can, to appoint a proper Person or Persons to assemble, and treat with the said Indians, promising and assuring them of Protection and Friendship on Our part, and delivering them such Presents, as shall be sent to you for that purpose.

61. And you are to inform yourself with the greatest Exactness of the Number, Nature and Disposition of the several Bodies or Tribes of Indians, of the manner of their Lives, and the Rules and Constitutions, by which they are governed or regulated. And You are upon no Account to molest or disturb them in the Possession of such Parts of the said Province, as they at present occupy or possess; but to use the best means You can for conciliating their Affections, and uniting them to Our Government, reporting to Us, by Our Commissioners for Trade and Plantations, whatever Information you can collect with respect to these People, and the whole of your Proceedings with them.

62. Whereas We have, by Our Proclamation dated the seventh day of October in the Third year of Our Reign, strictly forbid, on pain of Our Displeasure, all Our Subjects from

foundation of pre-colonial relations between the Crown and aboriginal peoples continued to be the basis for post-1763 Crown-Native relations. Section 62 of Murray's instructions, reproduced below, and section 61 of Carleton's instructions each provided that the governors were to give effect to the terms of the Proclamation:

> Whereas We have, by Our Proclamation dated the seventh day of October in the Third year of Our Reign, strictly forbid, on pain of Our Displeasure, all Our Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands reserved to the several Nations of Indians, with whom We are connected, and who live under Our Protection, without Our especial Leave for that Purpose first obtained; It is Our express Will and Pleasure, that you take the most effectual Care that Our Royal Directions herein be punctually complied with, and that the Trade with such of the said Indians as depend upon your Government be carried on in the Manner, and under the Regulations prescribed in Our said Proclamation.[88]

> making any Purchases or Settlements whatever, or taking Possession of any of the Lands reserved to the several Nations of Indians, with whom We are connected, and who live under Our Protection, without Our especial Leave for that Purpose first obtained; It is Our express Will and Pleasure, that you take the most effectual Care that Our Royal Directions herein be punctually complied with, and that the Trade with such of the said Indians as depend upon your Government be carried on in the Manner, and under the Regulations prescribed in Our said Proclamation.

[87]*Ibid.* at 319-20 (articles 59-61):

> 59. And Whereas Our Province of Quebec is in part Inhabited and Possessed by several Nations and Tribes of Indians, with whom it is both necessary and Expedient to cultivate and maintain a Strict Friendship and good Correspondence, so that they may be Induced by Degrees not only to be good Neighbours to Our Subjects, but likewise to be good Subjects to Us, You are therefore, as soon as You conveniently can, to appoint a proper person or persons to Assemble and treat with the said Indians, promising and Assuring them of Protection and Friendship on our part, and delivering them such presents as shall be sent to You for that purpose –
>
> 60. And You are to Inform yourself with the greatest Exactness of the Number, Nature and Disposition of the several Bodies or Tribes of Indians, of the manner of their Lives, and the Rules and Constitutions by which they are governed or regulated, and You are upon no Account to molest or disturb them in the possession of the said province as they at present Occupy or Possess, but to Use the best means You can for Conciliating their Affections, and Uniting them to Our Government, reporting to Us, by One of Our principal Secretaries of State, and to Our Commissioners for Trade and Plantations whatever Information You can collect with respect to these People, and the whole of Your Proceedings with them –
>
> 61. Whereas We have, by Our proclamation dated the 7th day of October in the 3rd Year of Our Reign, strictly forbid, on pain of Displeasure, all our Subjects from making any purchases or Settlements whatever, or taking possession of any of the Lands reserved to the several Nations of Indians, with whom we are connected, and who live under our protection without our especial leave for that purpose first obtained It is Our Express Will and Pleasure, that you take the most Effectual Care, that Our Royal Directions herein be punctually complied with, and that the Trade with such of the said Indians as depend upon Your Government be carried on in the Manner, and under the Regulations prescribed in Our said proclamation –

[88]Compare the texts of Murray's and Carleton's instructions in notes 86 and 87.

These same pre-colonial principles may also be seen to have been incorporated into the "Plan for the Future Management of Indian Affairs" of 10 July 1764.[89] Clauses 41-3 of this document clearly reveal the sentiment that had been established by the *Royal Proclamation of 1763* and continued in the *Treaty of Niagara*:

> 41st That no private persons, Society Corporation or Colony be capable of acquiring any property in lands belonging to the Indians either by purchase of or grant or conveyance from the said Indians excepting only where the lands lye within the limits of any Colony the soil of which has been vested in proprietors or corporations by grants from the Crown in which cases such proprietaries or corporations only shall be capable of acquiring such property by purchase or grant from the Indians.
>
> 42d That proper measures be taken with the consent and concurrence of the Indians to ascertain and define the precise and exact boundary and limits of the lands which it may be proper to reserve to them and where no settlement whatever shall be allowed.
>
> 43rd That no purchases of land belonging to the Indians whether in the name and for the use of the Crown or in the name and for the use of proprietaries of Colonies be made but at some general meeting at which the principal Chiefs of each Tribe claiming a property in such lands are present and all Tracts so purchased shall be regularly surveyed by a sworn surveyor in the presence and with the assistance of a person deputed by the Indians to attend such survey and the said surveyor shall make an accurate map of such Tract which map shall be entered upon record with the Deed of conveyance from the Indians.

A letter from the Lords of Trade to Lieutenant-Governor Cadwallader Colden of 10 July 1764 explained that the purpose behind this plan was to unify Indian Affairs in British North America, as well as to relieve the aboriginals' discontent regarding the many frauds and abuses in relation to their lands:

> Sir.
>
> Having under our consideration a plan for the future management & direction of Indian Affairs throughout all North America, under one uniform and general system of administration, we herewith transmit to you the heads of this plan, desiring you will report to us, as speedily as possible, your opinion thereupon. ...
>
> Besides the general abuses and enormities complained of by the Indians concerning irregular purchases and grants of land, as stated in this plan, we find by our letters from Sir William Johnson that the Mohocks continue still to express the greatest uneasiness and dissatisfaction on account of the Kancaderosseras or Queenborough Patent, as also that to the Corporations of Albany at Fort Hunter. It is our duty therefore to desire you will take the earliest favourable opportunity of recommending to the Assembly to pass a Bill for vacating these Patents, in like manner as was done in 1705 in the case of the extravagant patents granted by Governor Fletcher.[90]

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[89] *Supra* note 20.

[90] As reproduced, *ibid.* at 633.

(f) Conclusion

On the strength of the arguments made above, the second half of the formative years of Crown-Native relations may be seen to be a continuation of the Crown-aboriginal relations discussed in Chapter II. Britain's representations to the aboriginal peoples up to and after the conquest of New France -- save for the brief change in attitude during Amherst's tenure -- should be understood to continue the status quo in its relations with the aboriginals. This characterisation of the status of Crown-Native relations during this period is reinforced by the *Royal Proclamation of 1763* and the declarations made by Sir William Johnson in subsequent negotiations with the aboriginals, including the *Treaty of Niagara* and the *Treaty of Stanwix*. It is further buttressed by the Crown's instructions to its colonial representatives, as indicated in the instructions to General Murray and Governor Carleton and the "Plan for the Future Management of Indian Affairs" of 10 July 1764.

Insofar as the aboriginal rights provisions of the Proclamation were never repealed and have been expressly incorporated in section 25 of the *Constitution Act, 1982*, they continue to serve as the basis for modern Crown-Native relations. The principles of peace, friendship, and respect on which pre-colonial Crown-Native relations were built -- as reflected primarily in the *Treaty of Albany*, the Covenant Chain alliance, the Royal Proclamations of 1761 and 1763, and the *Treaty of Niagara* -- should continue to be the basis for the contemporary understanding of Crown-Native relations. The creation of fiduciary obligations owed by the Crown to the aboriginal peoples as a result of the nature of their historical relationships provide the aboriginals with another sound legal basis which entitles them to rely on the representations made by the Crown in its treaty negotiations. The Crown's fiduciary obligation to the aboriginal peoples is the subject of Chapters IV and V. The Crown's continued practice of entering into treaties with the aboriginal peoples in the nineteenth and early twentieth centuries also draws upon the nature of historical Crown-Native relations. Crown-Native treaty relations will be discussed in Chapters VI and VII.

The formative years of Crown-Native relations provide the appropriate background for ascertaining the meaning and effects of Crown-aboriginal fiduciary and treaty relationships. In the absence of such context, it is impossible to discern the substantive basis of those relations or the nature of the obligations existing thereunder. Thus, when seeking to understand the implications

of Crown-Native fiduciary and treaty relations -- and to avoid the pitfalls of treating those issues in a jurisprudential vacuum, as evidenced by the Supreme Court of Canada's decisions in *Sioui* and *Sparrow* -- it is necessary to examine them within this larger aboriginal rights superstructure. This method of analysis will begin with the fiduciary nature of Crown-aboriginal relations.

IV. Understanding Crown-Native Fiduciary Relations

> At this critical and interesting conjuncture I am sensible the utmost attention be paid to our Indian Alliance and no measures left untried that may have the least tendancy to strengthen and increase it. Wherefore I would humbly propose a steady and uniform method of conduct, a religious regard to our engagements with them a more unanimous and vigorous exertion of our strength than hitherto, and a tender care to protect them and all their Lands against the insults and encroachments of the Common enemy as the most and only effectual method to attach them firmly to the British Interest, and engage them to act heartily in our favor at this or any other time.[1]

Through two of the most significant decisions in modern Canadian aboriginal rights jurisprudence, *Guerin* v. *R.*[2] and *R.* v. *Sparrow*,[3] the Supreme Court of Canada declared that the Crown owes fiduciary obligations to the aboriginal peoples of Canada and entrenched those obligations in section 35(1) of the *Constitution Act, 1982*.[4] Those cases gave judicial sanction to the description of Crown-Native relations as fiduciary and rendered fiduciary law applicable to Crown-Native relationships generally. In so doing, the Supreme Court blazed a new path in Canadian aboriginal rights jurisprudence. Yet, in describing Crown-Native relations as fiduciary, it should be noted that the Supreme Court did not create a relationship that did not exist previously.

The fiduciary nature of Crown-Native relations is the result of the historical relationship between the Crown and aboriginal peoples. The parties' reliance upon each other as a result of their trade, military, and political partnerships created a fiduciary relationship between them that still exists. Thus, when the Supreme Court of Canada held that the Crown had fiduciary obligations to the Musqueam band in *Guerin*, the court merely assigned a title and method of analysis for subsequent treatment of the historical rights, duties, and responsibilities that already existed between the groups. These rights, duties, and responsibilities are rooted in the early treaties between the parties, such as the *Treaty of Albany* and the Covenant Chain alliance, as well as in later documents, such as the *Royal Proclamation of 1763* and the *Treaty of Niagara*. The description of Crown-Native relations as fiduciary provided a legally-enforceable basis for the

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[1]"Sir William Johnson to the Lords of Trade, Fort Johnson, 8 Mar. 1756," as reproduced in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, 11 vols., (Albany: Weed, Parsons, 1853-1861) VII at 43 [hereinafter "*NYCD*"].

[2](1984), 13 D.L.R. (4th) 321 (S.C.C.).

[3](1990), 70 D.L.R. (4th) 385 (S.C.C.).

[4]Enacted as Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11.

aboriginal peoples of Canada to ensure that the Crown lived up to its historical obligations to them.

The early interactions between Britain and the aboriginal peoples gave rise to an inchoate fiduciary relationship between the groups. The parties' ensuing reliance upon each other for military and political assistance, as documented in Chapters II and III, created a corresponding vulnerability of each party at the hands of the other. The parties' power to affect each other's interests and their respective vulnerability to that power are what created this fiduciary duty. The fact that Britain and the aboriginal peoples initially engaged in these relations as relative equals does not prevent the creation of a fiduciary relationship between them.

As will be demonstrated below, fiduciary relations may exist as easily between parties on a more or less equal footing as between stronger and weaker groups. Each party's vulnerability at the hands of the other within the scope of a particular relationship creates a power imbalance that gives rise to fiduciary obligations. That power imbalance does not need to be present between the groups generally -- that is, outside of the scope of their fiduciary relationship -- for a fiduciary relationship to exist between them (although it may exist nonetheless). As illustrated in Chapters II and III, the Crown-Native fiduciary relationship developed from the tying together of the groups' interests over many years through formal and informal means.

(a) Debunking the Assumption of Inherent Inequality

The idea that there must be an inherent imbalance of power between the parties to a fiduciary relationship is based upon the widely-held, but incorrect assumption that fiduciary relationships exist only between dominant and subordinate parties. This understanding is sometimes referred to as "inequality theory."[5] A common illustration of inequality theory's characterisation of fiduciary relations is the relationship between guardian and ward. In this genre of fiduciary relations, the guardian is legally responsible for the ward's interests. The ward is incapable of assuming control over these matters as a result of a legal disability that arises either from age or physical or mental incapacity. In this fiduciary relationship, power is vested entirely

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[5]See the discussion in L.I. Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada," (1996), 24 *Man. L.J.* 60 at 63-5 [hereinafter "Vulnerable Position"]; see also the discussion of the inequality theory of fiduciary doctrine in Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, (Toronto: University of Toronto Press, 1996) at 167-9 [hereinafter "*Parallel Paths*"]; Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding," (1996), 34 *Alta. L. Rev.* 821.

in the guardian. Thus, within the fiduciary relationship, the balance of power heavily favours the guardian. This power imbalance mirrors that existing between the two individuals generally, or outside of their fiduciary relationship, because of the ward's legal incapacity.

Inequality theory highlights an important characteristic of fiduciary relations – beneficiaries' vulnerability at the hands of their fiduciaries. The beneficiaries' vulnerability stems from the positions occupied by the parties relative to each other and the balance of power distributed between them within the relationship. Yet, while vulnerability is a notable characteristic of fiduciary relations, it is only one component of such relationships. When vulnerability is overemphasised, it becomes a hindrance to understanding the nature of fiduciary relations.

Vulnerability is overemphasised when it ceases to be a characteristic endemic to fiduciary relationships and instead becomes a determining factor for their existence. When vulnerability is overemphasised, fiduciary relations are deemed to exist only where the parties occupy distinctively dominant and subordinate roles. Although fiduciary relations may exist between such parties, the fact that one person is inferior in power to another is not a sufficient basis upon which to ground a fiduciary relationship.[6] Fiduciary relations are as prevalent among parties on an equal footing -- such as equal partners in a business venture or partners in a professional services firm (*i.e.* law, accounting, architecture, etc.) -- as among parties who are inherently unequal, such as guardian and ward. As Weinrib notes:

> It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. ... The fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement.[7]

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[6]See the comments of Gibbs C.J. in *Hospital Products Ltd.* v. *United States Surgical Corp.* (1984), 55 A.L.R. 417 at 433 (H.C. Aust): "Another circumstances which it is sometimes suggested indicates the existence of a fiduciary relationship is inequality of bargaining power, but it is clear that such inequality alone is not enough to create a fiduciary relationship in every case and for all purposes." See also P.D. Finn, "The Fiduciary Principle," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts*, (Toronto: Carswell, 1989) at 46 [hereinafter "Fiduciary Principle"].

[7]E. Weinrib, "The Fiduciary Obligation," (1975), 25 *U.T.L.J.* 1 at 6. See also T. Frankel, "Fiduciary Law," (1983), 71 *Cal. L. Rev.* 795 at 810:

> It is important to emphasize that the entrustor's vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and the fiduciary. In no sense are fiduciary relations and the risks they create for the entrustor similar to adhesion contracts or unfair bargains. The relation may expose the entrustor to risk even if he is sophisticated, informed, and able to bargain effectively. Rather, the entrustor's vulnerability stems from the *structure* and *nature* of the fiduciary relation.

That there is no need for the relative positions of two or more persons involved in a fiduciary relationship to be dominant and subordinate may be demonstrated by examining the relationship of partners in a professional services firm. Suppose that two people, *A* and *B*, possess equal qualifications and work together as partners. They share equally in the profits and losses of the firm and neither is otherwise superior or inferior to the other. However, because of the nature of their relationship, the actions of one partner bind the other even where the other is unaware of the former's actions. For example, if *A* signs an agreement on behalf of the partnership, *B* incurs responsibility and/or liability under the agreement. Consequently, *B*, while in all other respects equal, is nevertheless vulnerable to *A*'s actions and vice versa. Because of *A* or *B*'s power to affect the other's interests and the other's resultant vulnerability to that power, the relationship between *A* and *B* is described as fiduciary in nature.

From this illustration, it may be observed that while the nature of any given fiduciary relationship may result in an inequality in power between the fiduciary and beneficiary *within that relationship*, there is no need or requirement for any inequality to exist *outside* of that relationship or prior to its formation.[8] Thus, where a stockbroker experienced in tax planning hired a chartered accountant to advise him in tax planning and sheltering, it was possible for the Supreme Court of Canada to find that the accountant owed fiduciary obligations to the stockbroker when the investments the accountant prescribed went bad.[9] As La Forest J. explained:

> ... [W]hile the doctrine of unconscionability is triggered by abuse of a pre-existing inequality in bargaining power between the parties, such an inequality is no more a necessary element in a fiduciary relationship than factors such as trust and loyalty are necessary conditions for a claim of unconscionability ...[10]

Excessive judicial categorisation of inherently unequal forms of fiduciary relationships -- such as parent and child or guardian and ward -- and an overemphasis upon beneficiaries' vulnerability have combined to create the mistaken impression that all fiduciary relationships exist between unequal parties. One such example may be seen in *Follis* v. *Albemarle TP.*, where McTague J.A. stated that:

> It seems to me ... that there must be established some inequality of footing between the parties, either arising out of a particular relationship, as parent and child, guardian and ward, solicitor and client, trustee and *cestui que trust*, principal [*sic*] and agent, etc., or on the other

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[8]Where, for example, partners in a professional services firm jointly own a cottage that does not belong to their firm, their relationship vis-à-vis that cottage has nothing to do with the fiduciary nature of their business relationship. The former relationship is, therefore, not bound by the same requirements as the latter.

[9]See *Hodgkinson* v. *Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.).

[10]*Ibid.* at 174.

> hand, that it can be established that dominion was exercised by one person over another, no matter how the particular relationship may be categorized.[11]

As the discussion above demonstrates, this assertion is simply untrue.

The best way to understand the relative positions of the parties in fiduciary relationships is to think of the fiduciary relationship as a transfer of powers from the beneficiary, *B*, to the fiduciary, *F*.[12] The powers transferred by *B* to *F* originally belonged to the former and, in fact, still do. *B* has merely *loaned* the powers to *F* within the ambit of their fiduciary relationship; they do not become *F*'s own possession. *F* is duty-bound to use these powers in the same manner as *B* would, subject to any constraints *B* imposes on their use. *F* may not exceed these imposed limits or else be liable for breach of duty. The purpose of *F*'s duty is to act within the parameters established by *B* through the latter's transfer of powers, not to exceed them.[13] When the fiduciary relationship is terminated, the powers return to *B*. A similar method of understanding the relative positions of fiduciaries and beneficiaries in fiduciary relationships was espoused by Justice McLachlin in the Supreme Court of Canada's decision in *Norberg* v. *Wynrib*.[14] She explained that: "It is as though the fiduciary has taken power which rightfully belongs to the beneficiary on the condition that the fiduciary exercise the power entrusted exclusively for the good of the beneficiary."[15]

The inequality in the relationship between fiduciary and beneficiary results from the transfer of powers from *B* to *F*. The inequality of this position is illustrated by the change in power relations between *B* and *F* within the boundaries of their fiduciary relationship. Originally both had complete and equal powers -- *Q*. Upon the transfer of prescribed powers, *P*, from *B* to *F*, the fiduciary relationship came into being. However, within that fiduciary relationship, *F*'s powers now amount to *Q*+*P*, whereas *B* only possesses *Q*-*P*. The result is a power inequality that did not exist prior to the creation of the fiduciary relation. Although the beneficiary's interests are protected by the law of fiduciaries, this protection serves only as a check on the fiduciary's ability to abuse the power transferred from the beneficiary.

This discussion of the relative power of beneficiaries vis-à-vis their fiduciaries illustrates that parties do not have to be inherently unequal to be involved in fiduciary relations. Instead, it

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[11][1941] 1 D.L.R. 178 at 181 (Ont. C.A.).

[12]See the discussion in Rotman, "Vulnerable Position," *supra* note 5 at 67-9.

[13]Hence, for example, the federal Crown's breach of fiduciary duty in *Guerin*, *supra* note 2.

[14](1992), 92 D.L.R. (4th) 449 (S.C.C.).

may be seen that the fiduciary relationship itself creates an inequality in the parties vis-à-vis each *other within the confines of that relationship*. This inequality of the parties creates vulnerability. Thus, the fiduciary relationship creates vulnerability, vulnerability does not create the fiduciary relationship. Vulnerability is, therefore, a *consequence*, rather than a *catalyst*, of fiduciary relations.[16]

To summarise, both the inequality of the parties in fiduciary relationships and vulnerability are by-products of fiduciary relations rather than primary ingredients in their creation. While fiduciary relationships may exist between unequal parties, the parties need not be unequal for a fiduciary relation to arise. What should be emphasised in any examination of the fiduciary nature of a relationship, then, is whether the nature of the parties' interaction is such that it ought to be presumed that one or more of the parties owes obligations of a fiduciary nature to one or more others. Pre-existing power relations are irrelevant. Once these fundamental premises are established and accepted, it is possible for a more complete and accurate juridical picture of fiduciary doctrine to come into being.

(b) The Origins of the Crown-Native Fiduciary Relationship

The crystallisation of British-aboriginal relations during the formative period discussed in Chapters II and III solidified the inchoate fiduciary relationship that had been forged between the groups through their seventeenth century alliances. This solidification of Crown-Native relations formed the basis of their modern fiduciary relationship. By examining how Britain and the aboriginal peoples respectively represented the nature of their interaction during the formative years of their relationship, modern Crown-Native fiduciary and treaty relationships may be understood in a manner consistent with the unified, contextual, and culturally-appropriate approach to aboriginal and treaty rights issues argued for in this work.

The fact that Crown-Native relations may not have been described as fiduciary prior to *Guerin* does not mean that fiduciary or fiduciary-like obligations did not exist before that decision was rendered. Describing a relationship as fiduciary does not change or alter its dynamics. Those

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[15]*Ibid.* at 501.

[16]See Hon J.R.M. Gautreau, "Demystifying the Fiduciary Mystique," (1989), 68 *Can. Bar Rev.* 1 at 5, where he states that vulnerability "... is nothing more than a description of the victim's situation when the fiduciary can affect his lawful interests by exercising his position of power."

dynamics are what cause the relationship to be described as fiduciary. Thus, a court's description of a relationship as fiduciary does not transform it into something other than what it has always been. Rather, its effect is to furnish beneficiaries to such relationships with legal protection of their interests. In the aftermath of the *Guerin* decision, in which the Supreme Court rooted the Crown's fiduciary obligations, in part, in the *Royal Proclamation of 1763*, the nature of Crown-aboriginal relations from 1763 onward is legitimately described as fiduciary.[17] However, on the basis of the assertion made in Chapter III that the Proclamation merely affirmed pre-existing Crown-Native relations, the fiduciary nature of the parties' interaction may be traced back to the origins of those relations.

The fiduciary nature of Crown-Native relations has continued from the origins of those relations to the present day in spite of the various changes in the history of Crown-Native interaction. Initially, the aboriginal peoples were the dominant party in their interaction with Britain. They were the primary carriers of fiduciary responsibility during the early years of Crown-aboriginal intercourse because of their ability to affect Britain's interests. Britain's ability to affect the Native peoples' interests at that time was minimal. The power relations between the groups gradually evened out, placing the parties on a relatively equal footing. At this point, both parties owed similar fiduciary obligations and were owed like fiduciary benefits. With the conquest of New France in 1760-1 and the ascendancy of Britain as the most powerful European nation in North America, Britain took on increased fiduciary responsibility towards the aboriginal peoples. Meanwhile, the aboriginals' fiduciary obligations to Britain decreased proportionately with their ability to influence British interests.[18] In the present day, the aboriginal peoples' inability to significantly affect the Crown's interests renders their continuing fiduciary obligations to the Crown of minimal significance. This situation may change, of course, as the relationship between the parties continues to evolve.

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[17]While *Guerin* did not discuss the existence of the Crown's general fiduciary obligations to the aboriginal peoples, it will be argued, *infra*, that that is precisely the implication of the *Guerin* decision. As will be illustrated further, this interpretation of *Guerin* is supported by the decisions of the Federal Court of Appeal in *Kruger* v. *R.* (1985), 17 D.L.R. (4th) 591 (F.C.A.) and the Supreme Court of Canada in *Sparrow*, *supra* note 3 and *Mitchell* v. *Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 (S.C.C.). See also the discussion at the beginning of Ch. V.

[18]That is not to say that the aboriginal peoples did not continue to owe fiduciary obligations to the Crown at this time. Indeed, the aboriginals continued to have fiduciary obligations to respect the peace and friendship between the groups.

The Crown's fiduciary obligations to the aboriginal peoples necessitate that the Crown act selflessly, with honesty, integrity, and the utmost good faith, in the best interests of the aboriginal peoples. The Crown's duty also entails that it must avoid placing itself or being placed in situations that would compromise the aboriginal peoples' interests. That is not to suggest that the Crown does not have other responsibilities that compete with its duties to the aboriginal peoples. This issue will be considered in the section entitled "The Crown's Duty and Conflict of Interest" in Chapter V. While the extent of the Crown's fiduciary duty has not yet been judicially considered, it arguably permeates most aspects of Crown-Native relations.[19]

When considering the fiduciary element of Crown-Native relations, it is vital to recognise that it remains linked to historical events and practices. The change of circumstances which enabled the Crown to impose its ambitions of empire upon the aboriginal peoples in the nineteenth century cannot ignore the more than two hundred years of relations between the groups that enabled the Crown to implement its colonialist policies. As will be discussed later, fiduciary law prohibits fiduciaries from repudiating their duties to their beneficiaries at any time during their fiduciary relationship. More importantly, without the assistance of the aboriginal peoples described in previous chapters, Britain would not have achieved the power that eventually enabled it to subjugate them. Retracing the process by which Britain obtained its position of power in North America demonstrates the extent to which Britain owes that position to its historical relationships with the aboriginal peoples.

Britain's victory in the European competition for empire in North America necessitated the stringing together of a number of events that could not possibly have been envisaged when Henry VII granted his charter to John Cabot in 1496. Initially, Britain had to establish a colonial presence in North America. This meant that she had to attain some degree of self-sufficiency. As discussed in Chapter II, the first British settlers relied wholeheartedly on the aboriginal peoples to teach them how to cope in surroundings that they were completely unfamiliar with. They relied upon the benevolence of the aboriginal peoples for their very survival. Had the aboriginals not provided the British with food and other assistance, early British attempts at colonisation would have quickly resulted in disaster.

Once Britain had established a toehold in North America, it had to vie with other European nations for the Native peoples' favour. Without securing alliances with powerful

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[19]For greater discussion of this point, see Rotman, *Parallel Paths*, *supra* note 5.

aboriginal nations, Britain would have been unable to maintain its presence in North America, either militarily or economically. The aboriginal peoples were the most powerful military force on the continent for some two hundred years after contact. Their military might made them essential for trade. The aboriginal peoples were successful trappers who knew the topography of the land far better than the European arrivals. Moreover, the most powerful aboriginal nations controlled trade routes, thereby necessitating the creation of European-aboriginal alliances. Britain therefore had to secure alliances with enough powerful aboriginal nations to resist the military and economic might of rival European nations and their aboriginal allies, or that of politically-neutral nations such as the Iroquois Confederacy.

In addition, Britain had to anticipate the devastating effects that disease would have upon the aboriginal peoples.[20] Disease drastically reduced aboriginal populations, thereby rendering them far less of an opposition to Britain's ambitions of empire. Britain would also have had to foresee the aboriginal reliance on European manufactured goods that increased aboriginal dependence on Britain. While disease and war had irrevocably devastated the aboriginal population, the aboriginals' reliance on manufactured goods rendered them ultimately dependent upon the British. Over the course of many years, aboriginal reliance on European manufactured goods led them to lose the skills necessary to produce their own implements. This, in turn, manifested their need to acquire European tools, which meant focusing their attention on European trade relations:

> Even those who did not participate directly in the fur trade obtained European goods from Indian middlemen, while those Indians who did participate, blending a subsistence living with the pursuit of furs for trade, became particularly dependent upon European goods: guns, ammunition, traps, hardware of all sorts, and manufactured cloth. One Indian, while expressing antipathy towards the Hudson's Bay Company, said that the Indians would die if the Company went away.[21]

Finally, Britain had to expect that none of its European competitors would have been equally able to rely upon these same events for their own benefit or to end up in a better position than Britain. Had this chain of events not occurred, each building upon the other in Britain's favour, Britain may not have achieved its ultimate place in North American affairs in the second half of the eighteenth century. As this fantastic chain of events indicates, Britain could not

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[20]See, generally, G.E. Sioui, *For an Amerindian Autohistory: An Essay on the Foundations of a Social Ethic*, S. Fischman, tr., (Montreal: McGill-Queen's University Press, 1992).

[21]J.L. Taylor, "Two Views on the Meaning of Treaties Six and Seven," in R. Price, ed. *The Spirit of the Alberta Indian Treaties*, (Edmonton: Pica Pica Press, 1987) at 11.

possibly have predicted the outcome of its North American endeavours, nor could it have planned each event in the chain to have occurred in precisely the fashion that they did.

While Britain may not have been able to predict this sequence of events, it should have anticipated that its relations with the aboriginal peoples carried with them obligations of a binding nature. As with the specific alliances it had entered into with the aboriginal peoples, these relations were designed to be perpetual. Indeed, both Britain and the aboriginal peoples represented their alliances as perpetual -- as seen, for example, in the Covenant Chain and in more modern treaties between the groups that will be discussed in Chapters VI and VII. Thus, the fiduciary obligations that Britain had undertaken throughout the many years of its interaction with the aboriginal peoples could not be repudiated once Britain no longer required the aboriginal peoples in the same fashion that it had previously. As discussed below, fiduciary doctrine prohibits the Crown from abandoning its fiduciary obligations to the aboriginal peoples that were created and solidified over the course of this foundational period. It prescribes onerous obligations on the Crown while providing the aboriginal peoples with legally enforceable means to ensure that the Crown lives up to its duties.

(c) Judicial Recognition of Crown-Native Fiduciary Relations

In spite of the entrenchment of fiduciary doctrine as an essential element of Crown-Native relations, Canadian courts have been reluctant to consider the implications of the Crown-Native fiduciary relationship for the parties involved. Nevertheless, the use of fiduciary rhetoric in Canadian aboriginal rights jurisprudence has become axiomatic. In fact, the application of fiduciary doctrine to Crown-Native relations is now presumed to exist as a self-evident truth without ever having been subjected to a thorough analysis of its applicability or appropriateness to those relations.[22] This has occurred despite the fact that the judiciary has not addressed such fundamental questions as which emanations of "the Crown" owe fiduciary obligations to the

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[22]See, for example, *Paul* v. *Canadian Pacific Ltd.* (1989), 53 D.L.R. (4th) 487 at 504 (S.C.C.); *Roberts* v. *Canada* (1989), 57 D.L.R. (4th) 197 at 208 (S.C.C.); *Sparrow, supra* note 3 at 408; *Bruno* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1991] 2 C.N.L.R. 22 at 27 (F.C.T.D.); *Cree Regional Authority* v. *Robinson*, [1991] 4 C.N.L.R. 84 at 99 (F.C.T.D.); *Ontario (Attorney-General)* v. *Bear Island Foundation* (1991), 83 D.L.R. (4th) 381 at 384 (S.C.C.); *Quebec (Attorney-General)* v. *Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 182-5.

aboriginal peoples of Canada.[23] While contemporary Canadian courts may feel obliged to make use of fiduciary rhetoric in their aboriginal rights decisions, their sense of obligation appears to begin and end at recognising the Crown's duty and its incorporation in section 35(1) of the *Constitution Act, 1982*.[24] The recent Supreme Court of Canada decisions in *R.* v. *Badger*[25] and *R.* v. *Van der Peet*[26] are clear examples of this phenomenon.[27]

If fiduciary principles are to be used to characterise the interaction between the Crown and aboriginal peoples, the courts must provide guidance for their application. To truly understand fiduciary doctrine's application to Crown-Native relations, it is necessary to possess adequate understandings of fiduciary doctrine and the nature of Crown-Native relations individually before considering the effects of the former on the latter. The fact that fiduciary law has enjoyed its position as one of the most significant facets of Canadian aboriginal rights law for more than a decade without any detailed analysis or elaboration is indicative of the segmented and disjointed aboriginal rights jurisprudence illustrated by the *Sioui/Sparrow* dichotomy highlighted in Chapter I.

Stating that a fiduciary relationship exists or that it has been breached without illustrating what the relationship encompasses or the ramifications of such a breach is of limited utility.[28] Indeed, the portrayal of a relationship as fiduciary is only an initial step; the explanation of the resultant obligations arising by virtue of the relationship's existence requires more work.[29] As Mr. Justice Felix Frankfurter explained in *Securities & Exchange Commission* v. *Chenery Corp.*:

> ... [T]o say that a man is a fiduciary only begins analysis; it gives direction to a further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?[30]

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[23]The question of which emanations of the Crown -- British, and/or Canadian (federal and/or provincial) Crowns, or some combination thereof -- hold fiduciary obligations to the aboriginal peoples of Canada is canvassed in greater detail in Rotman, *Parallel Paths*, *supra* note 5. See also Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility," (1994), 32 *Osgoode Hall L.J.* 735.

[24]The judiciary's obligation in this limited regard is mandated by the *Sparrow* decision, *supra* note 3 at 406-8.

[25](1996), 133 D.L.R. (4th) 324 (S.C.C.).

[26][1996] 4 C.N.L.R. 177 (S.C.C.).

[27]See the discussion of this point in L.I. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism, and Fiduciary Rhetoric in *Badger* and *Van der Peet*," (1997), 8(2) *Constitutional Forum* 40.

[28]See P.D. Finn, *Fiduciary Obligations*, (Sydney: The Law Book Company, 1977) at 1 [hereinafter "*Fiduciary Obligations*"].

[29]See R. Flannigan, "The Fiduciary Obligation," (1989), 9 *Ox. J. Leg. Stud.* 285 at 310.

[30]318 U.S. 80 at 85-6 (1943).

Fiduciary law has its origins in public policy, specifically the desire to protect certain types of relationships that are deemed to be socially valuable or necessary.[31] The common elements to those relationships which come under the auspices of fiduciary doctrine are the trust and confidence reposed by one party in another within a given context. This reposing of trust and confidence by one party in the honesty, integrity, and fidelity of another, as well as the former's reliance upon the latter's care of that trust, is the basis for the creation of fiduciary doctrine.[32] Yet, whereas the policy underlying fiduciary doctrine is rooted in a desire to preserve and protect the integrity of socially valuable or necessary relationships which arise due to human interdependency, the basis of fiduciary law's application centres on the characteristics of actual relationships between parties.

The specific nature of a relationship and the circumstances under which it germinated render the interaction between parties fiduciary, not the people involved or whether their interaction fits into an established category of fiduciary relations.[33] No type of relationship may be precluded from being classified as fiduciary simply because it has not previously been recognised as fiduciary or because the parties to the relationship are not traditionally associated with fiduciary relations.[34] As Sir Eric Sachs J. explained in *Lloyd's Bank* v. *Bundy*, "the relationships which result in such a duty must not be circumscribed by reference to defined limits."[35] For this reason, fiduciary doctrine is best described as *situation-specific*. Fiduciary doctrine's emphasis on context insists that fiduciary principles be applied only where the nature of a particular relationship warrants their application.[36] Yet, even in situations where fiduciary doctrine ought to be applied to a relationship, only those principles of fiduciary doctrine that are relevant to the relationship in question are to be applied.

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[31]See P. Finn, "The Fiduciary Principle," supra note 6 at 26; Weinrib, *supra* note 7 at 11.

[32]See *Nocton* v. *Ashburton*, [1914] A.C. 932 at 963 (H.L.); *Canson Enterprises* v. *Boughton & Co.* (1991), 85 D.L.R. (4th) 129 at 154 (S.C.C.).

[33]Dickson J. explicitly acknowledged this point in *Guerin*, *supra* note 2 at 341.

[34]See *Tate* v. *Williamson* (1866), 2 L.R. Ch. App. 55 at 60-1 (Ch.). The open-endedness of fiduciary categorisation is also well-recognised in Canadian jurisprudence. See, for example, *Laskin* v. *Bache & Co.* (1971), 23 D.L.R. (3d) 385 at 392 (Ont. C.A.); *Canadian Aero Service Ltd.* v. *O'Malley* (1973), 40 D.L.R. (3rd) 371 at 383 (S.C.C.); *Guerin*, *supra* note 2 at 341; *International Corona Ltd.* v. *Lac Minerals Ltd.* (1988), 62 O.R. (2d) 1 at 44, 46 (Ont. C.A.); *M.(K.)* v. *M.(H.)* (1992), 96 D.L.R. (4th) 289 at 326 (S.C.C.).

[35][1975] 1 Q.B. 326 at 341 (C.A.). See also M.V. Ellis, *Fiduciary Duties in Canada*, (Toronto: De Boo, 1988) at 1-7; L.S. Sealy, "Some Principles of Fiduciary Obligation," [1963] *Camb. L.J.* 119 at 135; Weinrib, *supra* note 7 at 7; J.R.F. Lehane, "Fiduciaries in a Commercial Context," in P.D. Finn, ed., *Essays in Equity*, (Sydney: The Law Book Company, 1985) at 96; Sir A. Mason, "Themes and Prospects," in Finn, *ibid.* at 246; Gautreau, *supra* note 16 at 8.

[36]See, for example, *Hayward* v. *Bank of Nova Scotia* (1984), 7 D.L.R. (4th) 135 at 142 (Ont. H.C.).

The fact that the Canadian judiciary has not engaged in contextual analysis of fiduciary doctrine and its application to Crown-Native relations is rooted in the judiciary's general unwillingness to engage in contextual analysis of aboriginal rights issues, not because fiduciary doctrine ought not be applied to Crown-Native relations in Canada. Indeed, fiduciary doctrine is an appropriate vehicle to govern Crown-Native relations because of its significant emphasis on context. That aspect of fiduciary doctrine alone renders it a more valuable and suitable approach to Canadian aboriginal rights jurisprudence than the judiciary's present method. However, there are additional reasons why fiduciary law is an appropriate means by which to understand Crown-Native relations.

Although early cases dealing with the issue of Crown obligations to the aboriginal peoples focused on the existence of a trust relationship between the parties,[37] fiduciary doctrine is a much more appropriate vehicle to describe Crown-Native relations. This is because it transcends situations involving property. For example, the Crown's obligations to aboriginal peoples may be seen to encompass not only aboriginal lands, as in *Guerin*,[38] but also the protection of aboriginal practices, such as the right to hunt, trap, and fish. Whereas fiduciary law is not dependent on the existence of a legally recognisable property interest to take effect,[39] trust law requires that there be a sufficient property interest to constitute the *corpus*, or *res*, of a trust.[40] This prerequisite creates particular problems in applying trust law to aboriginal and treaty rights. For example, in

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[37]Note, for example, *Henry* v. *The King* (1905), 9 Ex. C.R. 417; *Dreaver* v. *The King* (1935), 3 C.N.L.C. 92 (Exch.); *Chisholm* v. *The King*, [1948] 3 D.L.R. 797 (Exch.); *Miller* v. *The King*, [1948] Ex. C.R. 372, rev'd [1950] 1 D.L.R. 513 (S.C.C.); *St. Ann's Island Shooting and Fishing Club* v. *The King*, [1949] 2 D.L.R. 17 (Exch.), aff'd [1950] 2 D.L.R. 225 (S.C.C.) [hereinafter "*St. Ann's Island*"]. The cases are discussed in greater detail in Rotman, *Parallel Paths*, *supra* note 5 Ch. IV.

[38]See the further discussion of the Crown's fiduciary obligation in *Guerin*, *infra*.

[39]See, for example, Rotman, *Parallel Paths*, *supra* note 5 at 165-6; *Moore* v. *Royal Trust Co.*, [1956] S.C.R. 880; *Standard Investments Ltd.* v. *C.I.B.C.* (1985), 22 D.L.R. (4th) 410 (Ont. C.A.); *Canson Enterprises*, *supra* note 19 at 146; P.D. Maddaugh, "Definition of Fiduciary Duty," in *Fiduciary Duties*, Law Society of Upper Canada Special Lectures, 1990, (Toronto: De Boo, 1991) at 17; L.S. Sealy, "Fiduciary Relationships," [1962] *Camb. L.J.* 69 at 76; Finn, "Fiduciary Principle," *supra* note 6 at 37.

[40]To create a legally-valid trust, three essential characteristics, known as the three certainties, must exist. The subject matter of the trust, also known as the *corpus* or *res*, must be clearly and readily identifiable and legally-recognisable as property. Additionally, the shares in the trust property which the beneficiaries of the trust are to be entitled to must be unequivocal (*i.e.* the benefit to be obtained from the property by each beneficiary must be ascertained). This is known as the *certainty of subject*. The person who seeks to establish the trust -- the *settlor* -- must use explicit language in creating the trust so that there is no doubt as to the purpose or function of the trust. This is known as the *certainty of object*. Finally, the intention of the settlor to establish the trust must itself be beyond question. This is known as the *certainty of intent*. For a more detailed discussion of the basic legal requirements for the establishment of a trust, see D.W.M. Waters, *Law of Trusts in Canada*, Second Edition, (Toronto: Carswell, 1984) Chapter 5 [hereinafter "*Law of Trusts*"]; G. Williams, "The Three Certainties," (1940), 4 *Mod. L. Rev.* 20.

Pawis v. *R.*, the Federal Court, Trial Division held that aboriginal hunting and fishing rights could not be the subject of a trust because they did not constitute a trust *res*.[41] Since fiduciary law does not require the existence of a legally recogniseable property interest there is no inherent difficulty in having aboriginal hunting, trapping, or fishing rights be the subject of a Crown fiduciary obligation to an aboriginal group.

Fiduciary law also avoids the difficulties of engaging judicial debate as to whether aboriginal rights in land are beneficial or non-beneficial in nature and therefore capable or incapable of constituting the *res* of a trust. The discussion of whether the relationship between the Crown and the Musqueam band existed within the realm of trust or fiduciary law was a significant aspect of the *Guerin* decision. While Justice Dickson, as he then was, found the requirement that aboriginal peoples surrender their land interests to the Crown before alienating it was the key ingredient for the existence of the Crown's fiduciary obligation, Justice Wilson found that that same element created a trust relationship in *Guerin*.[42] The reason for the differences in their conclusions is directly traceable to their different methods of examining the nature of aboriginal title.

Dickson J. suggested that the nature of Indian title is not accurately described by common law conceptions of property, but is a *sui generis* interest. He explained that aboriginal title does not, strictly speaking, amount to beneficial ownership, but that it is not entirely caught by the concept of a personal right either.[43] Its vital characteristics are: its existence independent of any treaty, executive order, or legislative enactment;[44] its general inalienability;[45] and that, upon its

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[41]*Pawis* v. *R.* (1979), 102 D.L.R. (3d) 602 at 613-14 (F.C.T.D.).

[42]Wilson J. did find, however, that a fiduciary relationship existed generally between the Crown and aboriginal peoples. See the discussion of this point, *infra*.

[43]*Guerin*, *supra* note 2 at 339. While Dickson J. explained that the nature of aboriginal title does not "strictly speaking, amount to a beneficial interest, neither is its nature completely exhausted by the concept of a personal right" his statement does not, *ipso facto*, render the Indian interest in land non-beneficial. The point that Dickson J. attempts to emphasise in his judgment is that the exact nature of aboriginal title cannot be conclusively determined by analogy with common law concepts of property, but is *sui generis*. As he stated, *ibid.* at 339, "... in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law."

This same view was expressed over sixty years earlier by Viscount Haldane in *Amodu Tijani* v. *The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 403 (P.C.), where, in discussing the nature of aboriginal title, he stated that:

> There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.

[44]*Guerin*, *supra* note 2 at 336.

surrender, the Crown is under an obligation to deal with the land on the Indians' behalf.[46] He deemed anything beyond these three[47] features to be unnecessary and potentially misleading. Justice Dickson's determination that the Indian interest in land was not beneficial in nature meant that it was insufficient to constitute the *res* of a trust.[48] He found that the basis of the fiduciary relationship in *Guerin* was the Crown's duty to act in the best interests of the Musqueam band in the leasing of the surrendered reserve lands. The legally enforceable nature of the duty regulated the manner in which the Crown exercised its discretion over the surrendered Musqueam land pursuant to the surrender requirements contained in the *Indian Act*.

Justice Dickson based his conclusion largely upon the Supreme Court of Canada's decision in *Smith* v. *R.*, in which the Indian interest in land was characterised as a right which disappeared upon surrender and could not be transferred to a grantee, whether the Crown or a private individual.[49] As he explained in *Guerin*:

> As the *Smith* decision, *supra*, makes clear, upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust

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[45]Indian lands are inalienable except to the Crown or through the Crown as an intermediary in dealings with third parties, as indicated in the *Royal Proclamation of 1763*. The custom of allowing surrenders of Indian reserve lands only through the Crown is a long-standing practice of the Crown which dates back to the early colonisation of North America. This practice also existed in other parts of the British Empire: see, for example, *R.* v. *Symonds*, [1847] N.Z.P.C.C. 387 at 391 (N.Z.S.C.). Currently, the relevant provisions concerning the surrender of reserve lands are contained within sections 18(1) and 37-41 of the *Indian Act*, R.S.C. 1985, c. I-5, s. 37. For further discussion and analysis of the surrender requirements contained within the *Indian Act*, see J.P. Salembier, "How Many Sheep Make A Flock? An Analysis of the Surrender Provisions of the *Indian Act*," [1992] 1 C.N.L.R. 14.

[46]*Guerin*, *supra* note 2 at 339.

[47]Although Dickson J. expressly stated, *ibid.* at 339, that there are only two essential features of aboriginal title – its general inalienability and the Crown's obligation to deal with land on the Indians' behalf upon its surrender – implicit in this statement is the fact that aboriginal title is a pre-existing, legal right to property which is not dependent upon any action of the Crown but is "derived from the Indians' historic occupation and possession of their tribal lands": *ibid.* at 335. Refer to his commentary on this latter issue, *ibid.* at 335-9.

[48]*Ibid.* at 342. However, Dickson J.'s characterisation of the nature of the Indian title was ultimately irrelevant to his decision because of his reliance on the precedent established in *Smith* v. *R.* (1983), 147 D.L.R. (3d) 237 (S.C.C.), the implications of which are discussed below. Note that Dickson J.'s conclusion that the non-beneficial nature of aboriginal title renders it incapable of constituting the *res* of a trust is disputed by D. Waters in "New Directions in the Employment of Equitable Doctrines: The Canadian Experience," in Youdan, *supra* note 18 at 423, where he suggested that:

> ... [A] personal interest, less than an equitable estate, is an acceptable beneficial interest for the purposes of a trust. In *Moore* v. *Royal Trust Co.*, a mere personal license to live in a particular house was accepted by the Supreme Court of Canada as a valid beneficial interest.

See *Moore* v. *Royal Trust Co.*, *supra* note 39.

[49]*Smith*, *supra* note 48 at 250. See also the commentary on this point in J.D. Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen*," (1985), 30 *McGill L.J.* 559 at 572-6; R.H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians," (1989), 53 *Sask. L. Rev.* 301 at 318-19.

> *res*, so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender.[50]

It should be noted, however, that the characterisation of aboriginal title in *Smith* is both inconsistent with Dickson J.'s own definition in *Guerin* and contrary to precedent. If, as in *Guerin*, a band surrenders its interest in land for leasing purposes with the intention to have the land revert back it at the conclusion of the lease, how is it possible for the band to regain the land if its interest vanished upon surrender? Surely, the band must retain a reversionary interest in land that it surrenders for lease.

In *Corporation of Surrey* v. *Peace Arch Enterprises Ltd.*, the British Columbia Court of Appeal found that a surrender of Indian lands to the Crown for leasing purposes was not final and complete, but conditional.[51] The court held that lands surrendered under such circumstances did not cease to be lands held by the Crown for the benefit of the band. Moreover, in *St. Ann's Island Shooting and Fishing Club* v. *The King*, Rand J. held that the surrender of lands by the Chippewa and Pottawatomie Indians of Walpole Island to the Crown for leasing purposes was not an absolute and final surrender by the band of its interests in the land:

> I find myself unable to agree that there was a total and definite surrender. What was intended was a surrender sufficient to enable a valid letting to be made to the trustees "for such term and on such conditions" as the Superintendent General might approve. It was at most a surrender to permit such leasing to them as might be made and continued, even though subject to the approval of the Superintendent General, by those having authority to do so. It was not a final and irrevocable commitment of the land to leasing for the benefit of the Indians, and much less to a leasing in perpetuity or in the judgment of the Superintendent General to the Club. To the Council, the Superintendent General stood for the Government of which he was the representative. *Upon the expiration of the holding by the Club, the reversion of the original privileges of the Indians fell in to possession.*[52] [Emphasis added]

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[50]*Guerin*, *supra* note 2 at 342.

[51](1970), 74 W.W.R. 380 at 385-6 (B.C.C.A.). This fact was explicitly recognised by the Supreme Court in *Smith*, *supra* note 48 at 247-8.

[52]*St. Ann's Island*, *supra* note 37 at 231. See also, *ibid.*: 'That there can be a partial surrender of "personal and usufructuary rights" which the Indians enjoy is confirmed by *St. Catherine's Milling & Lbr. Co.* v. *The Queen* (1888), 14 App. Cas. 46, in which there was retained the privilege of hunting and fishing ...' Compare this last statement with that made by Estey J. in *Smith*, *supra* note 48 at 250: '... it should be noted that the release in the *St. Catherine's* case was conditional but in a more direct sense. The releasors ... retained the right to "hunt and fish throughout the surrendered territory". Nevertheless, it was determined that the release was absolute and relieved the provincial title of the burden of the Indian rights under s. 91(24).'

There is a considerable difference between *St. Catherine's Milling* and *Smith*, on the one hand, and *Surrey* v. *Peace Arch*, *St. Ann's Island*, and *Guerin* on the other. The former involve the surrender of aboriginal lands for sale, whereas the latter are concerned with surrenders for lease purposes only. This fact was recognised by Estey J. in *Smith*, *supra* note 48 at 249:

Although Estey J. did distinguish between surrenders for the purpose of sale and those for lease purposes in *Smith*, he failed to deal with the implications of his characterisation of the nature of aboriginal title. Not only does the *Smith* precedent create a problem upon the termination of a lease of aboriginal lands, but it makes redundant the treaty-making process between the Crown and aboriginal peoples. If the Indian interest in land vanishes upon surrender and is not capable of being transferred, then how may the Crown acquire that interest by way of treaty? If the Crown's title to Canadian soil could not have been obtained from the aboriginal peoples -- since their interest is incapable of being transferred -- then that title must have been original. English land law insists that title to land, unless it is an original title, must necessarily be derivative.[53] Logically, the Crown's title to Canada could not be original, since the aboriginal peoples were in occupancy and possession of the land prior to the Crown's arrival. The question of how the Crown obtained its title when that title cannot be justified under the only two methods of acquisition contemplated by English land law thus remains as long as the precedent in *Smith* is authoritative.

Justice Wilson held that finding that aboriginal bands have a beneficial interest in their reserve lands was merely an acknowledgment of an historical reality.[54] She determined, however, that the aboriginals did not hold the fee to reserve lands, but a more limited interest.[55] Wilson J. found that the Crown does not generally hold reserve lands in trust for bands under section 18 of

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> In these proceedings, however, the court is not called upon to decide if such a leasing arrangement or leasing mechanics amount to another form of "use" or "benefit" to the Indians. Here the release of the right of occupancy is unfettered and absolute. The provisions of s. 53(1) [of the *Indian Act*, R.S.C. 1970, c. I-6] are not here applicable. The consequence in law of the surrender of 1895 is that described in the *St. Catherine's* case. The rights of the surrendering party were thereby terminated.

It would appear, therefore, that Dickson J. was at fault in *Guerin* for overextending the precedent created in *Smith* by not recognising that Estey J.'s judgment in *Smith* was not intended to apply to situations involving lands surrendered for leasing purposes. In fairness to Dickson J., however, the wording of the *Smith* decision regarding the effect of a surrender does not suggest that the judgment ought to be limited to surrenders for the purposes of sale only. Further, where aboriginal peoples do retain hunting and fishing rights when surrendering land, there ought to be a continuing obligation on the part of the Crown to protect those interests which survive the surrender process. However, according to the *Smith* decision, -- and as discussed in the first paragraph of this note -- there would be no continuing aboriginal interest in the land, and therefore no Crown obligation.

[53]For a more detailed discussion on this latter point and how it relates to the title of aboriginal peoples, see K. McNeil, *Common Law Aboriginal Title*, (Oxford: Clarendon Press, 1989).

[54]*Guerin*, *supra* note 2 at 356-7.

[55]*Ibid.*

the *Indian Act* as a result of the band's limited interests in that land.[56] Nevertheless, she held that a band's interest in its reserve lands was sufficient to constitute the *res* of a trust in a situation where a band surrenders land to the Crown on specified terms for the purpose of alienation to a third party:

> It seems to me that s. 18 presents no barrier to a finding that the Crown became a full-blown trustee by virtue of the surrender. The surrender prevails over the s. 18 duty but in this case there is no incompatibility between them. Rather the fiduciary duty which existed at large under the section to hold the land in reserve for the use and benefit of the band crystallized upon the surrender into an express trust of specific land for a specific purpose.[57]

In the absence of such a surrender, Wilson J. declared that the nature of the Indian interest in reserve lands combines with the Crown's duty to protect that interest to create a fiduciary relationship.[58]

The judgments of Dickson and Wilson JJ. in *Guerin* support the general notion that the Crown possesses fiduciary obligations to aboriginal peoples with respect to aboriginal lands held by the Crown on the aboriginals' behalf. The primary significance of *Guerin* lies in its recognition of the legal nature of the Crown's duty and the obligations which emanate from it. Upon a judicial determination that the Crown owes an aboriginal group an obligation to act in the latter's best interests, it is immaterial from a remedial perspective whether those obligations are derived from fiduciary or trust law.[59] From an evidentiary point of view, however, the distinction between classifying the Crown as a fiduciary, as opposed to a trustee, is quite significant.

The evidentiary requirements for demonstrating a fiduciary relationship are substantially less than those necessary to prove a trust. There are no "certainties" in fiduciary law as there are in trust law.[60] Moreover, as explained earlier, the existence of a fiduciary relationship is not dependent upon the existence of a property interest, or *res*, as is a trust relationship.[61] The nature

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[56]*Ibid.*

[57]*Ibid.* at 360-1.

[58]*Ibid.* at 357.

[59]See the comments by Dickson J. in *Guerin*, *supra* note 2 at 334:

> 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.

[60]Fiduciary law is thus more flexible in its application than Trust law.

[61]That is not to suggest, however, that a property interest cannot be the subject of a fiduciary relationship.

and scope of a relationship is what renders it fiduciary, not the actors involved or the subscription to particular rules or regulations.[62] In spite of these procedural advantages over trust law, it often remains difficult for beneficiaries to demonstrate the existence of a breach of duty by their fiduciaries. These difficulties arise by virtue of the power imbalance between beneficiaries and their fiduciaries within the confines of their fiduciary relationships[63] and the latter's control over the former's affairs. These factors often enable unscrupulous fiduciaries to conceal the existence of a breach of duty or evidence relating to a breach. To alleviate this situation, fiduciary doctrine presumes the existence of the fiduciary's breach of duty upon its allegation by a *cestui que trust*, thereby requiring the fiduciary to demonstrate that there was, in fact, no breach of duty. This reverse onus was described by Lord Penzance in *Erlanger* v. *New Sombrero Phosphates Ltd*:

> The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relationship and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that [fiduciary] position, the burden of shewing that he has not used it to his own benefit.[64]

Because of this reverse onus provision, beneficiaries need only demonstrate, *prima facie*, the existence of a fiduciary relationship between the parties and that it has been breached. Once a court accepts that a relationship is fiduciary and that a breach may have occurred, the burden of proof shifts to the fiduciary to disprove the existence of a breach.[65] Fiduciaries may only rebuff allegations of breach by demonstrating that they did not act contrary to the best interests of their beneficiaries. Fiduciaries may not satisfy the reverse onus by illustrating that their actions also benefited their beneficiaries.[66]

The notion that fiduciaries may only disprove an allegation of breach by demonstrating their fidelity to their beneficiaries' interests holds true regardless of whether the actions were

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[62]*Guerin*, *supra* note 2 at 341, per Dickson J.

[63]This notion will be discussed in greater detail, *infra*.

[64][1877-78] 3 A.C. 1218 at 1230 (H.L.). See also *Allcard* v. *Skinner* (1887), [1886-90] All E.R. Rep. 90 at 93 (C.A.); *Zamet* v. *Hyman*, [1961] 3 All E.R. 933 at 938 (C.A.); Ellis, *supra* note 35 at 1-3 to 1-4; J.C. Shepherd, *The Law of Fiduciaries*, (Toronto: Carswell, 1981) at 126-7; Gautreau, *supra* note 16 at 26-7; R.G. Slaght, "Proving a Breach of Fiduciary Duty," in *Fiduciary Duties*, *supra* note 39 at 42-3.

[65]See R. Cooter and B.J. Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences," (1991), 66 *N.Y.U. L. Rev.* 1045, at 1048; see also Slaght, *supra* note 64 at 42-3.

[66]Ellis, *supra* note 35 at 1-3.

entered into in good or bad faith.[67] As long as fiduciaries place their interests before or on par with those of their beneficiaries, they may be found liable for breaching their fiduciary duties.[68] Fiduciaries may also not be relieved of liability for breaching their duties by demonstrating that any loss suffered by their beneficiaries would have occurred notwithstanding the former's wrongful actions.[69] The Supreme Court's characterisation of the Crown's duty as fiduciary rather than trust-like in *Guerin* therefore imposes the strict demands of a trustee's duties upon the Crown without exacting the onerous task of establishing the existence or maintenance of a trust upon the aboriginal peoples. Although none of the three judgments rendered in *Guerin* garnered the support of a majority of the eight participating judges,[70] the judgments of Dickson and Wilson JJ. both support the principle of a general Crown fiduciary obligation towards aboriginal peoples.[71]

The *Guerin* decision dealt only with the fiduciary obligation of the federal Crown in the context of land surrenders because of the facts in the case, not as a result of the limited scope of the Crown's duty to aboriginal peoples. Justice Dickson expressly contextualised the limited scope of his examination of the Crown's duty in *Guerin* by stating that the relevance of the Crown's fiduciary duty 'in the present appeal ... is based on the requirement of a "surrender" before Indian land can be alienated.'[72] Had he wanted to indicate that the Crown only possessed

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[67]This position is expressed in the legal maxim *quod ab initio non valet in tractu temporis non convalescet*, "That which is bad in its commencement improves not by the lapse of time." See *Black's Law Dictionary*, Fifth Edition, (St. Paul, Minn.: West, 1979) at 1126. See also *Parfitt* v. *Lawless* (1872), 2 L.R. P. & D. 462 at 468; E. Vinter, *A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts*, Third Edition, (Cambridge: W. Heffer, 1955) at 11; Ellis, *supra* note 35 at 1-3.

[68]This notion was approved by the House of Lords in *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378 at 381, 386 (H.L.).

[69]See Ellis, *supra* note 35 at 2-20.3, 2-21; *Island Realty Investments Ltd.* v. *Douglas* (1985), 19 E.T.R. 56 (B.C.S.C.).

[70]The *Guerin* case was actually heard by the full panel of the Supreme Court, however Chief Justice Bora Laskin died prior to the rendering of judgment. The *Guerin* judgment was rendered by the remaining eight justices. Upon Laskin C.J.C.'s death, his position as Chief Justice was filled by Dickson J. and, ironically, the vacancy on the Supreme Court was filled by Le Dain J., the judge who, in the Federal Court of Appeal's disposition of *Guerin*, found that the Crown's obligation to the Musqueam band was only a political trust that was unenforceable in the courts: see [1983] 143 D.L.R. (3d) 416 at 469, 470-1 (F.C.A.).

[71]See the discussion on this point below and at the beginning of Ch. V. Justice Wilson's finding that a trust relationship existed in *Guerin* was the result of the unique fact situation in *Guerin*. See *Guerin*, *supra* note 2 at 360-1. The generally-applicable portion of her judgment holds that the Crown has a fiduciary obligation towards Indian bands which arose pursuant to the restrictions imposed on its alienation by the aboriginals and the Crown's discretion under section 18 of the *Indian Act*. See *ibid.* at 356-9.

[72]*Guerin*, *supra* note 2 at 339. Note also *ibid.* at 341-2, where Justice Dickson stated "When, as here, an Indian band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf."

fiduciary obligations to Native peoples within the confines of land surrenders, he would have specifically limited the application of the Crown's obligations to that context. The Federal Court of Appeal's decision in *Kruger* v. *R.*,[73] which was released shortly after *Guerin*, affirmed this interpretation of the *Guerin* decision. As Heald J.A. explained:

> I do not think, however, that what was said by Mr Justice Dickson relative to the fiduciary relationship existing between the Crown and the Indians [in *Guerin*] can be construed in such a way as to be authority for the proposition generally that the fiduciary relationship arises only where there is a surrender of Indians [*sic*] land to the Crown. It is correct to note, as did Mr. Justice Urie, that those comments were made by the learned justice in the context of the facts of that case ...[74]

The *Sparrow* decision ended debate over the extent of the Crown's fiduciary duties by determining that the Supreme Court's findings in *Guerin* encompassed Crown-Native relations generally.[75] Later, in *Mitchell* v. *Peguis Indian Band*, Chief Justice Dickson echoed the point made by Justice Heald in *Kruger*, when he explained that: "On its facts, *Guerin* only dealt with the obligations of the federal Crown arising upon surrender of land by Indians ..."[76]

The use of fiduciary doctrine in the context of Crown-Native relations is a valuable tool to ensure that the Crown lives up to the historical obligations it owes to the aboriginal peoples. Fiduciary law monitors the intercourse between those who give their trust and those who care for that trust.[77] It ensures that fiduciaries live up to the lofty expectations demanded of them by requiring them to carry out their duties of utmost good faith, or *uberrima fides*,[78] to a high,

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[73]*Supra* note 17.

[74]*Ibid.* at 597. See also *ibid.* at 646 (per Urie J.A.).

[75]*Sparrow*, *supra* note 3 at 408.

[76]*Supra* note 17 at 209.

[77]See Finn, "Fiduciary Principle," *supra* note 6 at 2.

[78]The necessity of *uberrima fides*, or utmost good faith, is the foundation of fiduciary doctrine. It is not only the fundamental premise around which fiduciary law is built; it is the hallmark of the fiduciary relation. In order to allow the proper functioning of the fiduciary relation, the utmost good faith of the parties, in particular that of the fiduciary, must be strictly observed.

The legal concept of *uberrima fides* possesses an entirely separate existence from the concept of good faith in law in that it is an equitable rather than common law duty. That is not to say that *uberrima fides* is not a legally-enforceable duty, since the once-separate jurisdictions belonging to law and equity were merged over 100 years ago by way of the British *Judicature Acts* of 1873 and 1875: *Judicature Act, 1873* (U.K.), 36 & 37 Vict. c. 66; *Judicature Act, 1875* (U.K.), 38 & 39 Vict., c. 77. The distinction between *uberrima fides* and good faith is made herein because the former is much more onerous than the common law's duty of good faith and requires greater fidelity of a fiduciary to a beneficiary than if ordinary good faith at common law was applicable. Good faith is defined in *Black's Law Dictionary*, *supra* note 67 at 623 as:

> An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction [*sic*] unconscientious.

objective standard.[79] Fiduciary law provides beneficiaries with the means to enforce their fiduciaries' duties. It also imposes remedies where fiduciaries fail to discharge their obligations. In all, fiduciary law seeks to ensure the equitableness of dealings between parties to relationships which, by their nature, are particularly susceptible to fraud, undue influence, and other activities which run afoul of public policy.[80] In the context of Crown-Native relations, fiduciary law is rigorous in its demands of the Crown and protecting of the interests of the aboriginal peoples. Finally, as part of the common law, fiduciary doctrine is binding upon the Crown and enforceable in Canadian courts.

The inherent flexibility of fiduciary doctrine renders it appropriate to monitor the *sui generis* nature of Crown-Native relations. The situation-specific nature of fiduciary doctrine stresses that fiduciary law is not capable of being boiled down into a simplified theory which is capable of precise and identical application to all relationships.[81] To do so would eliminate the flexibility that is one of fiduciary theory's most valuable attributes.[82] The situation-specific nature of fiduciary doctrine therefore allows it to be tailored to the specific requirements of various incarnations of Crown-Native fiduciary relations while maintaining the ability of the aboriginal peoples to enforce the obligations owed to them by the Crown.

Uberrima fides, on the other hand, is not merely good faith, but good faith magnified to its highest extreme -- *i.e.* the utmost good faith. It is characterised, *ibid.* at 1363, as:

> The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight.

Since fiduciary law is equitable in its origins, the more onerous duty of *uberrima fides* is applicable rather than good faith at common law. In short, *uberrima fides* is an legally-enforceable duty whose origins stem from the jurisdiction originally belonging to Equity and is both binding upon fiduciaries and enforceable in a court of law. An example of *uberrima fides* may be seen in insurance contracts, where a continuing duty of the utmost good faith exists between the insurer and insured because of the nature of insurance contracts and the possibilities which exist therein for *mala fide* activity. See, for example, *Carter* v. *Boehm* (1766), [1558-1774] All E.R. Rep. 183 (K.B.). The seminal case on insurance contracts in Canada is *Fine's Flowers Ltd.* v. *General Accident Assurance Co.* (1974), 5 O.R. (2d) 137 (H.C.), aff'd (1977), 81 D.L.R. (3d) 139 (Ont. C.A.), where the Ontario High Court of Justice, at 139, described the relationship between insurer and insured as "a close and continuing relationship."

[79]This standard is objective in that it is determined by the judiciary and is not tailored to the requirements of particular relationships as are many other facets of fiduciary doctrine. See Frankel, *supra* note 7 at 821-4, 830-1; Finn, *Fiduciary Obligations*, *supra* note 28 at 16.

[80]See the similar sentiments in Flannigan, *supra* note 29 at 321-2; Vinter, *supra* note 67 at 2.

[81]See *Lloyd's Bank v. Bundy*, *supra* note 35 at 341; *Re Craig*, [1971] Ch. 95 at 104. The situation-specificity of fiduciary doctrine was described by Maddaugh, *supra* note 39 at 30, in relation to ascertaining the scope and intensity of particular fiduciary duties owed in specific situations, in the following manner: "No single test or set of tests will suffice. As in the case of identifying a fiduciary in the first place we must look to the particular relationship that exists between the parties."

The Crown-Native fiduciary relationship discussed herein is actually comprised of two distinct types, or genres, of fiduciary relationships. One is a *general* duty, while the other is a *specific* duty. The Crown owes a general, overarching fiduciary duty to the aboriginal peoples as a result of the parties' historical relationship from the time of contact. The key characteristics of this relationship are bilateral needs, respect, trust, and the mutually recognised and respected independence of both European and aboriginal nations during the formative years of the relationship. In addition to the Crown's general duty, the Crown also owes specific fiduciary duties or obligations to particular Native groups stemming from its relationships with those groups. These specific duties arise from individual treaties, agreements, or alliances, as well as from government initiatives such as the federal *Indian Act*. It is possible for the Crown to owe both a general and one or more specific fiduciary duties to an aboriginal nation a result of its intercourse with those people. Since the Crown's fiduciary obligation may be recognised either in the totality of its relationships with aboriginal peoples or in specific events or circumstances, an aboriginal nation's claim against the Crown for a breach of fiduciary obligation may be based either on the totality of the events giving rise to the Crown's general fiduciary duty or on specific Crown obligations arising out of a particular event or occurrence.

(d) The Two Planes of Fiduciary Relations

In addition to generating general and specific duties, fiduciary relationships may be seen to exist on two independent, but interconnected planes -- the legal and the extra-legal. These two planes respectively include what will be described as "applied" and "pure" fiduciary relationships. The legal plane of fiduciary relationships includes all relationships which are recognised by law as fiduciary, or have had fiduciary law "applied" to them. This plane includes relations that are declared to be fiduciary in accordance with fiduciary doctrine as well as those judicially deemed to be fiduciary without any demonstration of their fiduciary nature or adherence to the dictates of fiduciary law. The extra-legal plane, in contrast, is comprised only of relationships that may be designated as "pure" fiduciary relationships. A pure fiduciary relationship is one that adheres to the essential characteristics of fiduciary theory. These pure fiduciary relationships include relationships which have properly been recognised at law as fiduciary, as well as other

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[82]D.A. DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation," (1988), 5 *Duke L.J.* 879 at 910.

relationships which ought to be legally recognised as fiduciary because of their facts and circumstances, but have not been. The distinction between "pure" and "applied" fiduciary relationships is not always detected. Only the former are appropriately classified as fiduciary. The latter, meanwhile, are largely responsible for much of the confusion which presently surrounds fiduciary doctrine.

One of the most notorious examples of applied fiduciary relationships causing confusion in fiduciary jurisprudence occurred in *Chase Manhattan Bank* v. *Israel British Bank*.[83] In that case, the plaintiff had transferred two million dollars to the defendant's account. Because of a clerical error, a second payment in the same amount was made by the plaintiff to the defendant that same day. Upon discovering its error, the plaintiff gave instructions to stop the second payment, but the instructions were not received in sufficient time to prevent the defendant from receiving the funds. The defendant bank was put into receivership shortly thereafter.

In finding for the plaintiff, Justice Goulding held that a fiduciary relationship existed between the parties as a result of the second transfer. Before the mistaken payment, there had been no existing fiduciary relationship between the parties. However, since the plaintiff's money was indistinguishable from the other moneys belonging to the defendant, the only way to recover it was via equitable tracing. Unlike tracing at common law, under which title to the property being followed must be readily identifiable,[84] tracing in Equity places a charge upon the asset, thereby allowing a claimant to follow it into a mixed fund.[85] This enabled the court to segregate the money attributed to the second transfer from the remainder of the defendant's funds. Thus, the fiduciary relationship found to exist in *Chase Manhattan* was imposed not because of the nature of the relationship between the parties, but to deny the defendant the benefit of the plaintiff's error.

The danger of a *Chase Manhattan*-type result has been lessened in Canada since the Supreme Court of Canada's recognition of unjust enrichment as an independent head of equitable action in *Pettkus* v. *Becker*.[86] At the time of the *Chase Manhattan* decision, unjust enrichment was not recognised as a cause of action in English law. Had it been recognised, there would have

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[83][1981] Ch. 105.

[84]See Waters, *Law of Trusts*, *supra* note 40 at 1036.

[85]*Ibid.* at 1037.

[86](1980), 117 D.L.R. (3d) 257 (S.C.C.). On unjust enrichment generally, see M.M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust," (1988), 26 *Alta. L. Rev.* 407.

been no need to demonstrate the existence of a fiduciary relationship between the parties. While the *Chase Manhattan* decision may have provided a just and equitable result, the method it used to facilitate that result was an inappropriate application of fiduciary law. However noble the intentions of the court may have been to rectify an obvious wrong, such misapplication of fiduciary law clouds the understanding of what ought and what ought not be characterized as fiduciary relationships.

The independence of the two planes of fiduciary relationships is reflected in the fact that some relationships which are fiduciary on one plane may not be fiduciary on the other. A relationship which is wrongfully characterised by law as fiduciary -- for example, merely to facilitate equitable tracing, but with no fiduciary qualities or characteristics[87] -- exists only on the legal plane as an applied fiduciary relation. A relationship which, by its nature and circumstances, is fiduciary, but has yet to be recognised as such by law -- such as the Crown-Native relationship prior to the *Guerin* decision -- exists only on the extra-legal plane. It is entirely possible, however, for a relationship to exist simultaneously on both planes. That is what happened to the Crown-Native relationship in the aftermath of *Guerin*. After the *Guerin* decision, the Crown-Native relationship, which previously ought to have been recognised by law as fiduciary on the basis of historical Crown-Native interaction, was given legal recognition and became also an applied fiduciary relation. In accordance with this understanding, it may be seen that the fiduciary relationship between the Crown and aboriginal peoples was not "created" by the Supreme Court of Canada in *Guerin*. *Guerin* only marked the first judicial recognition and protection of this historical relationship. It is the contention here that the common law ought to have recognised the Crown's fiduciary obligations to the aboriginal peoples long before *Guerin*, since those duties were created by the history of Crown-Native relations.

While Canadian jurisprudence ought to have recognised the Crown's fiduciary obligations long before the *Guerin* decision, having Crown-Native interaction be governed by fiduciary law should not be viewed as accepting the legitimacy of colonialism in Canada and its creation of hierarchical Crown-Native relations. Such an assertion would appear to be based on the incorrect assumption that fiduciary relationships exist only between dominant and subordinate parties. As

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[87]Such as in the cases of *Reading* v. *Attorney-General*, [1949] 2 K.B. 232 (C.A.), aff'd [1951] A.C. 507 (H.L.), *Chase Manhattan Bank* v. *Israel British Bank*, *supra* note 83, and *Goodbody* v. *Bank of Montreal* (1974), 47 D.L.R. (3d) 335 (Ont. H.C.).

demonstrated earlier in this chapter, fiduciary relations are just as prevalent among parties on an equal footing as among parties who are inherently unequal.

Fiduciary law therefore does not govern Crown-Native relations because the aboriginal peoples are inherently unequal vis-à-vis the Crown. Rather, fiduciary law governs those relations because the rigorous, yet malleable principles of fiduciary doctrine are contextually appropriate to monitor the special needs of the *sui generis* situation created by the interaction of the Crown and aboriginal peoples over the course of more than three hundred years. The relationship between the Crown and aboriginal peoples in Canada is fiduciary as a result of the historical interaction and alliances between the parties dating back to the time of contact. By recognising that the relationships from which the Crown's fiduciary obligations originate pre-date judicial recognition of the fiduciary nature of Crown-Native relations, the Supreme Court in *Guerin* implicitly acknowledged that *Guerin* did not create a form of Crown-Native relationship that did not exist previously.[88]

(e) Summary

The fiduciary character of the Crown-Native relationship has its origins in the formative years of Crown-Native interaction. Elements of the general fiduciary nature of the relationship may be seen in documents ranging from the *Treaty of Albany, 1664* through to the Covenant Chain alliance, the *Royal Proclamation of 1763*, the *Treaty of Niagara, 1764*, and beyond. Owing to its basis in the formative years of their relationship, the existence of the Crown-Native fiduciary relation ought not be dependent upon the continued recognition of aboriginal sovereignty by Britain or any change in the structure or intent of Indian treaties. Fiduciary law's concern with these events lies solely in determining whether these changes are consistent with the fulfillment of fiduciary obligations by the Crown, specifically whether they constitute a breach of the Crown's duties to Native peoples.

If the Crown entered into these solemn alliances with the Native peoples, but did not, in fact, recognise the aboriginal peoples' independent status, it would still be bound by these same fiduciary obligations. The content and context of Crown-Native relations from the time of contact demonstrate that, even if the Crown did not accept the notion of aboriginal autonomy, its

representations of acknowledging that status are sufficient to render it a fiduciary of the Native peoples. The intention, or lack thereof, of a fiduciary (or beneficiary, for that matter) to enter into a fiduciary relationship is irrelevant to the ultimate determination of whether or not a fiduciary relationship exists.[89] Fiduciaries need not voluntarily assume these obligations to their beneficiaries in order for them to arise.[90] In fact, a fiduciary relationship may arise by the unilateral actions of a would-be fiduciary;[91] by voluntary and mutual arrangements;[92] as a result of the nature of the intercourse between parties;[93] or by its imposition by the courts. In addition, a

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[88]See, for example, *Guerin*, *supra* note 2 at 334, 340 (per Dickson J.), and at 356 (per Wilson J.); *Roberts*, *supra* note 22 at 210.

[89]Regarding this important point, the existence of a background document on the history of Canadian Indian policy taken from the office of the Assistant Deputy Minister of Indian Affairs during an aboriginal occupation of the Indian Affairs building in Ottawa in 1974, discussed in P.C. Williams, *The Chain*, unpublished LL.M. thesis, Osgoode Hall Law School, 1982 at 308, is particularly intriguing. Under the heading entitled "Responsibility for a People," the document reads as follows:

> As long as the white population remained small and hence dependent on the natives, relations between Indian and white seemed to be between sovereign powers although all colonial and European governments held to the principle that natives were, in fact, subject peoples, a principle that governed their colonial policies in many other parts of the world.
>
> As the number of colonists increased, this assertion of European sovereignty over the Indians became overt, and gradually the technological superiority of the Europeans, both as a coercive force and as the source of increasing Indian material dependency, enabled them to make good this claim.

If the intent of the parties is irrelevant to the determination of whether a relationship is fiduciary, then the fact that the Crown never intended their relations with the aboriginal peoples to be fiduciary in nature or that "all colonial and European governments held to the principle that natives were, in fact, subject peoples" is completely irrelevant to the issue of whether the Crown is bound by fiduciary duties to Native peoples. Curiously, if all colonial and European governments held that Natives were subject peoples, why would the relationships between Europeans and Natives appear as sovereign in their makeup, as the background paper suggests, if they were not so?

[90]See *Huff* v. *Price* (1990), 76 D.L.R. (4th) 138 at 171 (B.C.C.A.), where it was held that in a situation where no previous fiduciary relationship had existed, a fiduciary relationship "grew out of particular elements of the way the structure was managed and manipulated."

[91]Finn, *Fiduciary Obligations*, *supra* note 28 at 201; A.W. Scott, "The Fiduciary Principle," (1949), 37 *Calif. L. Rev.* 539 at 540. It should be noted, however, that fiduciary relationships also arise in the absence of any unilateral undertaking by a would-be fiduciary: see *M.(K.)* v. *M.(H.)*, *supra* note 34 at 324.

In this situation, the method of understanding the relative positions of the parties in fiduciary relationships described earlier would have to be altered by substituting the *transfer* of a beneficiary's powers to a fiduciary with the *assumption* of the beneficiary's powers by the fiduciary. Therefore, instead of the beneficiary *loaning* powers, the fiduciary has taken them subject to the qualification that the fiduciary use them only in the beneficiary's best interests, as required by the courts. The remaining implications discussed in that example apply equally to this context.

[92]Such as entering into a contract or other arrangement or, in the Native law context, the signing of a treaty between the Crown and Native peoples.

[93]See note 90.

gratuitous undertaking is enforceable under fiduciary law,[94] while a fiduciary relationship may be found to exist where neither party intended to create such a relationship.[95] The important consideration to be weighed is whether the nature of the parties interaction is sufficient to render their relationship a fiduciary one.

The Crown's general fiduciary duty is derived from a number of historical, political, social, and legal events dating from the time of contact. This duty is rooted primarily in the formative years of Crown-Native relations, but hovers over the totality of Crown-aboriginal relations. The Crown's general duty may also be accounted for in a number of documentable events. These events include: the reciprocally-enriching, interdependent relationship between the Crown and aboriginal peoples characterised by the recognised independence of its actors, mutual respect, need, and political expediency;[96] the military and political alliances forged between the Crown and aboriginal peoples; the ongoing process of treaty negotiations and ratifications; the *Royal Proclamation of 1761*[97] and the *Royal Proclamation of 1763*, which reflect the Crown's recognition and affirmation of its fiduciary responsibility towards the Native peoples; the further assertion of this fiduciary responsibility in section 91(24) of the *Constitution Act, 1867*; the promulgation of specific legislation to govern aboriginal peoples, which eventually became consolidated as the *Indian Act* in 1876;[98] and section 35(1) of the *Constitution Act, 1982*.

The Crown's fiduciary obligations to the aboriginal peoples have continued to exist throughout the changes in the nature of their relationship. It is the product of historical

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[94]See Scott, *supra* note 91 at 540; Sealy, "Fiduciary Relationships," *supra* note 39 at 76; Frankel, *supra* note 7 at 820-1; *Lyell* v. *Kennedy* (1889), 14 A.C. 437 at 463 (H.L.).

[95]Frankel, *supra* note 7 at 821.

[96]There are a wealth of sources which document in detail the interdependency of the British-Native relationship in North America. One fine, legally-based account which focuses upon the relationship of the Iroquois with the British and French from contact to the mid-eighteenth century is J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia*, Ph.D. dissertation, Cambridge University, 1985, reprinted, Saskatoon: University of Saskatchewan Native Law Centre, 1985. A useful historical accompaniment to Hurley's thesis is F. Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its Beginnings to the Lancaster Treaty of 1744*, (New York: Norton, 1984). See also D.M. Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples," (1986), 30 *Ottawa L. Rev.* 307 at 308.

Reproductions of some accounts of particular historical events may be seen in V.J. Voger, ed, *This Country Was Ours: A Documentary History of the American Indian*, (New York: Harper & Row, 1972). See also B. Slattery, "Understanding Aboriginal Rights," (1987), 66 *Can. Bar Rev.* 727 at 753-5; Slattery, "First Nations and the Constitution: A Question of Trust," (1992), 71 *Can. Bar Rev.* 261 at 271-2 [hereinafter "First Nations and the Constitution"].

[97]*Draft of an Instruction for the Governors of Nova Scotia, New Hampshire, New York, Virginia, North Carolina, South Carolina, and Georgia forbidding them to Grant Lands or make Settlements which may interfere with the Indians bordering on those Colonies*, issued pursuant to the *Order of the King in Council on a Report of the Lords of Trade*, 2 December 1761, as reproduced in *NYCD*, *supra* note 1 VII at 478-9.

relationships, the actions of the Crown and its representatives, British and Canadian governmental practice, treaties, and legislative recognition.[99] Since the early stages of the twentieth century, the aboriginal peoples have become more dependent upon the Crown's fulfillment of its duty than at any stage of their relationship. It is arguable that the Crown's obligations have become even more stringent because of the ascent of the Crown in the political and economic structure of Canada at the expense of the aboriginal peoples and in direct contravention of its fiduciary duty to them.[100] On this basis, it is critical to inquire further into the legal ramifications of the Crown-Native fiduciary relationship for the parties involved.

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[98]S.C., 1876, c. 18.

[99]See Slattery, "First Nations and the Constitution," *supra* note 96 at 271-2.

[100]For instance, the Crown's subjugation of the aboriginal peoples would not appear to be consistent with its undertaking to protect the rights and interests of the aboriginal peoples, as outlined in the *Royal Proclamation of 1763*.

V. The Legal Implications of Crown-Native Fiduciary Relations

> ... [I]n all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must not only be justice, but generosity.[1]

The characterisation of Crown-Native relations as fiduciary in the *Guerin* case had a tremendous impact on Canadian aboriginal rights jurisprudence.[2] It required a major shift in judicial thinking about the nature of the Crown's obligations to the aboriginal peoples. Whereas the judiciary had previously viewed Crown-Native relations as giving rise only to moral obligations,[3] those same obligations were, after *Guerin*, legally binding and exacted a high standard of care from the Crown.

The previous chapter examined the basis of Crown-Native fiduciary relations and the application of fiduciary law to them. This chapter will focus on the legal implications of characterising those relations as fiduciary. A number of issues will be addressed, such as whether the Crown-Native fiduciary relationship may be terminated and if the Crown's fiduciary duty may be reduced in scope. Other points to be covered are the Crown's exercise of its fiduciary obligations to the aboriginal peoples -- namely, is it a pro-active or passive duty -- and the potential for conflict of interest between those obligations and the Crown's often-competing duties to the public at large. The chapter will conclude with an examination of the contemporary implications of Crown-Native fiduciary relations.

It should be asked why many of these fundamental questions remain unanswered by the judiciary more than a decade after the *Guerin* decision was released. The general nature of the

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[1] *Province of Canada* v. *Dominion of Canada and Province of Quebec: In re Indian Claims* (the "Robinson Treaties Annuities Case"), [1896] 25 S.C.R. 434 at 535 per Sedgewick J.

[2] *Guerin* v. *R.* (1984), 13 D.L.R. (4th) 321 (S.C.C.).

[3] The following comment by Justice Taschereau in the Supreme Court of Canada's decision in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1887), 13 S.C.R. 577 at 649, while made during the nineteenth century, remained indicative of judicial attitudes towards the Crown's obligations to aboriginal peoples up to the *Guerin* decision:

> The Indians must in the future ... be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.

Crown's duty was emphasised shortly after the *Guerin* decision in *Kruger* v. *R.*[4] and became an undisputed fact following the *Sparrow* decision.[5] Meanwhile, the number of post-*Guerin* cases released by the Supreme Court of Canada which accept the general fiduciary nature of Crown-Native relations has increased substantially since *Guerin*.[6] The answer is traceable to the judiciary's treatment of *Guerin* in the years following its release.

Although a strict interpretation of *Guerin* entails that the Crown owes fiduciary obligations to aboriginal peoples only with regard to the latter's surrender of land,[7] as the previous chapter has argued, the *Guerin* decision should be read to stand for much more. *Guerin* provided the initial judicial authority for the proposition that the Crown plays the role of fiduciary to Native peoples in a wide variety of situations. The finding of a fiduciary obligation in *Guerin* arose out of the history of Crown-Native relations.[8] The surrender requirement in issue in the case stemmed from those historical relations. Thus, the surrender requirement did not create the fiduciary relationship, but was a creation of that relationship.

Because of the limited scope of the facts in issue in *Guerin*, the Court did not establish guidelines for the application of a general Crown fiduciary duty to the aboriginal peoples. Subsequent courts have cited the *Guerin* decision for the proposition that the Crown owes fiduciary obligations to aboriginal peoples without expanding upon its limited discussion. Those courts have relied upon the *Guerin* precedent as if it provided the necessary guidance for a proper examination of the application of fiduciary principles to Crown-Native relations generally when the Court in *Guerin* did not address that larger question. This latter judicial practice bears primary responsibility for the confused status of Crown-Native fiduciary relations that currently

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[4](1985), 17 D.L.R. (4th) 591 (F.C.A.).

[5]*R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.).

[6]See *Paul* v. *Canadian Pacific Limited* (1989), 53 D.L.R. (4th) 487 (S.C.C.); *Roberts* v. *Canada* (1989), 57 D.L.R. (4th) 197 (S.C.C.); *Sparrow*, *supra* note 5; *Mitchell* v. *Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 (S.C.C.); *Ontario (Attorney-General)* v. *Bear Island Foundation* (1991), 83 D.L.R. (4th) 381 (S.C.C.); *Quebec (Attorney-General)* v. *Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)* (1995), 130 D.L.R. (4th) 193 (S.C.C.); *R.* v. *Badger* (1996), 133 D.L.R. (4th) 324 (S.C.C.); *R.* v. *Lewis* (1996), 133 D.L.R. (4th) 700 (S.C.C.); *R.* v. *Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.); *R.* v. *Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C.); *R.* v. *N.T.C. Smokehouse*, [1996] 4 C.N.L.R. 130 (S.C.C.); *R.* v. *Pamajewon*, [1996] 4 C.N.L.R. 164 (S.C.C.); *R.* v. *Adams*, [1996] 4 C.N.L.R. 1 (S.C.C.); *R.* v. *Coté*, [1996] 4 C.N.L.R. 26 (S.C.C.).

[7]For greater discussion of the implications of a strict interpretation of the *Guerin* decision, see L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, (Toronto: University of Toronto Press, 1996) [hereinafter "*Parallel Paths*"] Ch.V.

[8]*Ibid.*

exists. To eliminate some of this confusion, this chapter seeks to illustrate some implications of characterising those relations as fiduciary.

(a) Terminating the Crown-Native Fiduciary Relationship

The ability of the Crown or the aboriginal peoples to terminate their fiduciary relationship has become an important topic in light of self-government agreements, the federal government's proposal to recognise the aboriginal right to self-government in the failed Charlottetown Accord,[9] and the initial and final reports of the Royal Commission on Aboriginal Peoples.[10] A number of issues surround any discussion of whether the Crown's fiduciary duty to Native peoples may be terminated. It must initially be asked if the Crown's general fiduciary duty to aboriginal peoples is a permanent one. If that duty is deemed to be permanent, the question then becomes whether it may be contracted out of by either the Crown or the aboriginal peoples.

The *Sparrow* case provides some insight into this question. In *Sparrow*, the Supreme Court of Canada found that the Crown's fiduciary obligations to Native peoples were constitutionally entrenched in section 35(1) of the *Constitution Act, 1982*.[11] While the *Sparrow* case indicates that the Crown's duty is constitutional in status, that does not answer whether that duty is permanent. Constitutions can be amended. An amendment to section 35(1) would be quite difficult. It would be subject to the onerous amending procedure outlined in section 38 that requires resolutions of the Senate, House of Commons, and of the legislative assemblies of at least two-thirds of the provinces that aggregately have at least fifty per cent of the population of all the provinces for a constitutional amendment. The less stringent amending procedure in section 43 -- which requires resolutions of the Senate, House of Commons, and the legislative assembly of each province to which the amendment applies -- cannot be used since aboriginal and treaty rights pertain to all provinces and territories, albeit to varying degrees. The section 43 procedure

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[9]The accord was defeated by referendum on October 26, 1992. The federal government's self-government proposals may be seen in *Shaping Canada's Future Together*, (Ottawa: Minister of Supply and Services Canada, September, 1991).

[10]*The Right of Aboriginal Self-Government and the Constitution: A Commentary by the Royal Commission on Aboriginal Peoples*, (Ottawa: February, 1992); *Report of the Royal Commission on Aboriginal Peoples*, 5 Vols., (Ottawa: Minister of Supply and Services Canada, 1996).

[11]*Supra* note 5 at 408-9. The *Sparrow* decision also indicates, at 417, that the Crown has an obligation to consult with the aboriginal peoples about their rights.

applies only to amending constitutional provisions which apply to one or more, *but not all*, of the provinces.[12]

Even if it was possible to obtain a constitutional amendment removing the Crown's fiduciary duties to Native peoples from section 35(1), that would not automatically terminate the Crown's duty. As discussed in Chapter IV, the Crown's duty predates the enactment of the *Constitution Act, 1982* and is entrenched in a number of other sources. For instance, *Guerin* judicially sanctioned the existence of the Crown-Native fiduciary relationship in the absence of any consideration of the effects of section 35(1) -- since the *Constitution Act, 1982* did not exist at the time the action was commenced. If the *Guerin* precedent was overturned, thereby removing the Crown's fiduciary duty from the common law, that occurrence would still not end the Crown's duty. Even in the absence of any positive legal bases upon which to ground the Crown's fiduciary obligation, the Crown's duty nonetheless exists on the extra-legal plane, just as it existed prior to its judicial recognition in *Guerin*.[13] Since the Native peoples are the sole beneficiaries of the Crown-Native fiduciary relationship, they alone possess the ability to terminate it. Their ability to end their fiduciary relationship with the Crown exists independently of their ability to contract out of their rights contained within section 35(1).[14] By combining the sole ability of Native peoples to terminate the Crown-Native fiduciary relationship at will with the Crown's concomitant inability to escape its fiducial obligations, the Crown-Native relationship may be seen to exist at the pleasure of the aboriginal peoples.

(b) Reducing the Scope of the Crown's Fiduciary Obligations

Although only the aboriginal peoples may terminate the Crown-Native fiduciary relationship, any continuation of the Crown's fiduciary responsibilities in the presence of the push towards aboriginal self-government raises a second set of issues. Does the transfer of Crown powers or their voluntary relinquishment to the aboriginal peoples reduce the scope of the

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[12]In the absence of constitutional amendment, the only other way to terminate the Crown's duty is by obtaining aboriginal consent. Because of the nature and history of the Crown-Native fiduciary relationship, it would be unseemly to allow the Crown to unilaterally extricate itself from its obligations to the aboriginal peoples without finding itself in breach of its duty.

[13]See discussion of the two planes of fiduciary doctrine in Ch. IV.

[14]Section 35(1) merely recognises and protects rights, it does not force their acceptance by the aboriginal peoples. Accordingly, aboriginal peoples possess the ability to contract out of section 35(1) rights if they choose to do so.

Crown's fiduciary obligations? If the Crown may, in fact, transfer or relinquish powers over Indian affairs directly to Native peoples, does the Crown retain fiduciary obligations to ensure the smooth transition of those powers? Moreover, would the transfer of powers from the Crown to the aboriginal peoples amount to a breach of those obligations or would it absolve the Crown of a part of its fiduciary obligations?

Self-government may exist in a variety of forms. Aboriginal self-government may be conceived of as being as limited as the ability of aboriginal peoples to determine the composition of their own band lists or as expansive as complete governmental powers over aboriginal peoples, reserves, money, or other matters. Because of this wide range of possibilities, it would appear likely that different effects would result from a limited transfer of governmental powers -- such as those seen in sections 10(1), 60(1), and 69(1) of the *Indian Act*[15] -- versus a wholesale transfer of powers from the Crown to the aboriginal peoples.

The questions which arise from this issue are vital to the determination of the Crown's role and responsibilities in the face of aboriginal self-government. If the Crown's transfer of powers over aboriginal peoples, as under a self-government agreement, terminates the Crown's fiduciary obligations, when is the Crown's duty terminated? Does the duty end when self-government is first implemented or only after it has been solidly entrenched? Is the answer to this question different if the Crown is relinquishing or vacating its jurisdiction over a previously-controlled area to allow for the exercise of inherent aboriginal powers, such as the federal Crown's phasing out of the Department of Indian Affairs in Manitoba? Finally, if the Crown transfers powers, whether on a limited or absolute basis, does it retain a duty to ensure that those powers are adequately exercised?

The Crown's fiduciary obligation mandates that it act in the best interests of the Native peoples. However, for fiduciaries to act in their beneficiaries' best interests, the fiduciaries must first determine what those interests are. This entails that the fiduciaries must take all necessary steps to inform themselves as to their beneficiaries' best interests, including direct consultation with their beneficiaries. The Crown must then act to further those interests. The return of legislative or governing powers to aboriginal peoples or the vacating of a jurisdictional area to allow for the aboriginal exercise of inherent powers would, *prima facie*, appear to be in the

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[15]R.S.C. 1985, c. I-5. These will be discussed below.

aboriginals' best interests. Consequently, such an action would satisfy the Crown's fiduciary duty.

The current *Indian Act* provides for the limited transfer of previously Crown-controlled activities to Indian bands. Section 10(1) allows a band to assume control over its own membership list as long as it adheres to certain criteria.[16] Under section 60(1), the Governor in Council, upon request by a band, may grant the band the ability to control and manage its own reserve lands.[17] Similarly, section 69(1) provides for the ability of a band to control, manage, and expend its own revenue moneys.[18] The transfer of these powers by the Crown to the bands to exercise on their own behalf may not completely relieve the Crown of its fiduciary obligations. Similarly, the return of powers by the Crown to the aboriginals or the vacating of a jurisdictional area to allow for the aboriginal exercise of inherent powers, though fulfilling the Crown's fiduciary obligations, may not end those obligations. By virtue of the length of time that the Crown has assumed jurisdiction and responsibility for Indian affairs while simultaneously preventing the Native peoples from exercising self-determination, it would be unconscionable to allow the Crown to be instantaneously free of its fiducial responsibilities without providing for a period of adjustment.

The history of Crown-Native relation saw the Crown render the aboriginal peoples dependent through colonialist legislation such as the *Indian Act*.[19] Because of its historical actions, the Crown ought to be seen to possess continuing fiduciary obligations to facilitate the transfer of control over certain powers to the aboriginal peoples and to provide aid to them where required. This aid may take a variety of forms. It may be advisory or supportive in nature, financial, or a combination of these. This period of transition is not required because of a need for continued Crown paternalism. Rather, it is necessary because it would be inequitable to leave the aboriginal peoples on their own after years of forced dependence and the Crown's elimination of their ability to be self-sufficient. The Crown has a responsibility to ensure that the aboriginal peoples overcome the dependence that was created by the Crown and which occurred in breach of the Crown's fiduciary obligations to the aboriginals.

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[16]The band must establish rules for the regulation of the list in accordance with the Act and, once it has indicated its intent to assume control over its membership list, receive the consent of a majority of its electors.

[17]Although rights granted under section 60(1) are subject to revocation at any time by the Governor in Council via section 60(2).

[18]Either in whole, or in part, subject to the Governor in Council's approval.

[19]See the discussion in Rotman, *Parallel Paths*, *supra* note 7 Ch. III.

Since no two aboriginal nations are alike, the duration of this transitional period, and the amount of Crown aid required, may only be determined on a case-by-case basis. Moreover, since the Crown-Native fiduciary relationship exists at the pleasure of the aboriginal peoples, the Crown's transitional duties may only be terminated by an explicit and informed release by the aboriginal beneficiaries or by decree of a court.[20] This unilateral ability of an aboriginal nation to terminate the Crown's transitional duties ought to apply regardless of the scope of the transferred powers. Should the Crown fail to perform this supervisory role, it ought to be held liable for a breach of its fiduciary duty to the same extent and in the same fashion as if it had failed to positively exercise the transferred powers prior to their transfer. In properly discharging this supervisory role and removing the possibility of a finding of breach of duty against it, though, the Crown must know whether its fiduciary duty to the aboriginal peoples is purposive or passive.

(c) The Purposive Nature of the Crown's Fiduciary Duty

The Supreme Court of Canada indicated in the *Sparrow* decision that the Crown's fiduciary obligation to Native peoples should be purposively applied.[21] The Federal Court of Appeal adopted this same attitude in *Eastmain Band* v. *Canada (Federal Administrator)*.[22] More recently, the Supreme Court of Canada affirmed its earlier findings in *Sparrow* in its decisions in *R.* v. *Van der Peet*[23] and *R.* v. *Coté*.[24] In none of these cases did the courts explain what this finding of a purposive fiduciary obligation entails. They did not suggest whether the purposive nature of the Crown's duty requires it to act positively to further the aboriginal peoples' best interests or act only when it is expressly required to, such as where a band wishes to surrender land. Without knowing how it must act in order to fulfill its fiduciary obligations, the Crown may unknowingly be found in breach of its duty by failing to live up to the purposive standard mandated by the courts.

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[20]In either of these situations, the Crown's transitional duties are deemed to have ended, either by way of aboriginal consent or a court declaration. The Crown cannot unilaterally deem its duties to be at an end without risking being found in breach of duty if a court determines that those duties still exist. If the Crown believes that its duties ought to be deemed completed, the Crown may make an application to the courts to be relieved of any continuing transitional duties. Such an action is quite consistent with a fiduciary's ability to bring a reference as to the fulfillment of its duties before the courts.

[21]*Supra* note 5.

[22][1993] 3 C.N.L.R. 55 (F.C.A.) [hereinafter "*Eastmain, CA*"].

[23]*Supra* note 6 at 407.

If the purposive nature of the Crown's duty requires positive activity to promote the Native peoples' best interests, this renders the Crown's duty *prescriptive*. A prescriptive duty places an onus upon the Crown, under the watchful eye of fiduciary law, to positively determine what is in the aboriginals' best interests and to act accordingly. If, on the other hand, the Crown is not required to actively promote aboriginal interests, the Crown's duty may be described as *proscriptive*. This would entail having the courts determine, after the fact, whether particular Crown actions or inactions demonstrated fidelity to the aboriginals' best interests. The *prescriptive* vision may, therefore, be seen as being pro-active, whereas the *proscriptive* view is passive.

Fiduciary doctrine is premised upon the notion that fiduciaries must act selflessly and in the best interests of their beneficiaries. These fiduciary requirements apply in situations where fiduciaries are expressly required to act and where fiduciaries have the discretion to act. Because fiduciary doctrine looks at fiduciaries' action and inaction to determine whether they are consistent with their beneficiaries' interests, a fiduciary's duty ought to be regarded as prescriptive. If fiduciaries were bound only to *consider* whether to exercise their fiduciary powers, they could breach their duties by choosing not to act where they have a discretion and still escape liability for such a breach. Where, for example, a fiduciary does not purchase certain property for a beneficiary when it would be in the latter's interests for the fiduciary to make the purchase, the fiduciary ought to be found in breach of duty for failing to act.

A fiduciary's consideration of whether or not to exercise certain powers must be subordinated to the general premise that fiduciaries must act in their beneficiaries' best interests. Not only must fiduciaries positively exercise a power where its exercise is in their beneficiaries' best interests, fiduciaries are equally bound not to exercise certain powers where their exercise would contravene their beneficiaries' interests. This understanding of fiduciary doctrine shares much in common with the rule against conflict of interest. Fiduciaries are in conflict of interest where they take positive action that contravenes their beneficiaries' best interests, such as where fiduciaries accept bribes in exchange for selling their beneficiaries' property at prices lower than market value. Fiduciaries are also in conflict of interest where they possess the ability to facilitate their beneficiaries' best interests but fail to act. An example of such failure to act would be a

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[24]*Supra* note 6. Note also *New Zealand Maori Council* v. *Attorney-General*, [1987] 1 N.Z.L.R 641 at 664 (C.A.).

situation where fiduciaries are paid by third parties to not exercise options to purchase valuable property on behalf of their beneficiaries in order to allow third parties to exercise those options for their own benefit.

The purposive method of interpreting section 35(1) of the *Constitution Act, 1982* mandated by *Sparrow* does not apply only to the Crown's fiduciary duty. It pertains equally to the other aboriginal and treaty rights contained within that section.[25] The purposive nature of the Crown's fiduciary duty in *Sparrow* therefore should be seen to require the active promotion and furtherance of those rights through direct consultation with the aboriginal peoples. The potential breadth of this prescriptive duty presents the possibility of numerous conflicts of interest arising between the Crown's duty to the aboriginal peoples and its other responsibilities. This possibility is discussed below.

(d) The Crown's Duty and Conflict of Interest

The potential for the Crown to find itself in conflict of interest vis-à-vis its obligations to the aboriginal peoples is a significant factor to account for in any discussion of the Crown's fiduciary duty to Native peoples. Fiduciary doctrine's rule against conflict of interest holds that fiduciaries must not let their personal interests, or those of other parties, affect the fulfillment of their fiduciary obligations. Fiduciaries must not benefit from their positions as fiduciaries.[26] They may also not benefit a third party at the direct expense or in lieu of their beneficiaries' interests.[27]

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[25]This is, of course, subject to the justificatory test for legislative initiatives formulated by the Supreme Court in *Sparrow*, *supra* note 5. Note also the commentary by W.I.C. Binnie in "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" (1990), 15 *Queen's L.J.* 217 at 220:

> Equally serious for government is at least the possibility that the fiduciary duty places on Parliament a *positive* duty to act under section 91(24) of the Constitution Act, 1867 in relation to Indians and lands reserved for the Indians. It will be argued on behalf of Aboriginal organizations that Parliament no longer has a mere legislative power. It may now have a power coupled with a duty.

As to whether the *Sparrow* justificatory test ought to apply equally to aboriginal and treaty rights, see the discussion in L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test," (1997), 36 *Alta. L. Rev.* 149.

[26]See the discussion on this point in Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment*, (Ottawa: Minister of Supply and Services, 1995) [hereinafter "*Treaty Making*"]. See, more generally, *Aberdeen Railway Co.* v. *Blaikie Brothers* (1854), [1843-1860] All E.R. Rep. 249 at 252 (H.L.); *Davis* v. *Kerr* (1890), 17 S.C.R. 235 at 246.

[27]Such as in *Reading* v. *Attorney-General*, [1949] 2 K.B. 232 (C.A.), aff'd [1951] A.C. 507 (H.L.), where Reading, a British Army sergeant in Egypt during World War II, assisted smugglers in transporting illicit alcohol

The prohibition against personal gain also applies to situations where there is an *opportunity* for personal gain or third party gain.[28] Fiduciaries must also provide full disclosure of their actions while in their fiduciary capacities.[29] Fiduciaries may be found in conflict of interest even in the absence of malevolent actions merely by deviating from the fiduciary standard of conduct prescribed by law.[30]

In light of these onerous duties imposed upon fiduciaries by the rule against conflict of interest, it must be asked how the Crown may maintain fidelity to its fiduciary obligations to Native people while many of its other interests may be served by not acting in the latter's best interests. While the reconciling of fiduciary duties is not unique to the Crown,[31] the activities and considerations that the Crown is confronted with are unique. Although there are other circumstances where fiduciaries may find it difficult to adhere to their duties to their beneficiaries,

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by riding in their civilian vehicle in military uniform to avoid inspection by the police. In this situation, not only did Reading benefit from his breach of duty, but so did the smugglers that he was assisting. Although the courts held that Reading was a fiduciary of the British Crown under these circumstances, this case is one example of "applied" fiduciary relationships discussed in Ch. IV.

[28]See *Keech* v. *Sandford* (1726), 25 E.R. 223 (Ch.); *Canadian Aero Services Ltd.* v. *O'Malley* (1973), 40 D.L.R. (3rd) 371 (S.C.C.); *LAC Minerals* v. *International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.); *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378 (H.L.).

[29]Note *Harrison* v. *Harrison* (1868), 14 Gr. 586 (P.C.).

[30]See M.V. Ellis, *Fiduciary Duties in Canada*, (Toronto: De Boo, 1988) at 1-2 to 1-3:

> It is the fact of a departure from adherence to the beneficiary's best interests, rather than an evaluation of the fiduciary's motive in the departure, that constitutes a breach of fiduciary duty. It is in this sense that the absence of malice will not validate a repugnant act. ...
>
> Even where the fiduciary acts in good faith and in fact reaps a profit for the beneficiary, then, his actions will constitute a breach of fiduciary duty where he places his own interests ahead of, or equal to, the party to whom he owes the duty. The single-mindedness of his intentions must be directed toward the beneficiary to the detriment of his own self-interest.

See also *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378 at 381, 386 (H.L.).

[31]Indeed, a corporate director possesses various fiduciary duties to the corporation, its employees, and to its various classes of shareholders which must be reconciled with daily operational decisions. The latter assertion, while more controversial than the former two, is nevertheless a fundamental aspect of a corporate director's fiduciary obligations: see P.L. Davies, "Directors' Fiduciary Duties and Individual Shareholders," in E. McKendrick, ed., *Commercial Aspects of Trusts and Fiduciary Obligations*, (Oxford: Clarendon Press, 1992), at 84; Ellis, *supra* note 30 at 15-24; *Coleman* v. *Myers*, [1977] 2 N.Z.L.R. 255 (C.A.); *Goldex Mines Ltd.* v. *Revill* (1975), 7 O.R. (2d) 216 (C.A.); *Greenhalgh* v. *Arderne Cinemas Ltd.*, [1950] 2 All E.R. 1120 (C.A.); J.C. Shepherd, *The Law of Fiduciaries*, (Toronto: Carswell, 1981) at 351-6; J.G. McIntosh, "Corporations," in *Fiduciary Duties*, Law Society of Upper Canada Special Lectures, 1990, (Toronto: De Boo, 1991) at 207.

or where they may be tempted to act in conflict of interest, the Crown's fiduciary responsibilities to the aboriginal peoples are *sui generis*.[32]

The constitutional negotiations surrounding the failed Charlottetown Accord illustrate the unique position of the Crown as fiduciary. During the negotiation process, a number of issues that touched on various Crown responsibilities were discussed. In addition to the recognition of aboriginal self-government, the issues of Senate reform and Quebec sovereignty, among others, were raised. Indeed, the respective concerns of the aboriginal peoples and province of Quebec carried a fair measure of conflict between them. Another unique characteristic of the Crown as fiduciary is the various personifications and understandings of the Crown and their ability to change over time because of historical and political events. Because of the number of unique situations which arise as a result of the Crown's role as fiduciary to aboriginal peoples, the potential for conflict of interest is high.

The potential for conflict of interest on the part of the Crown is replicated in a number of areas. One of the most conspicuous of these is the Indian land claims process. In both the Specific and Comprehensive Claims processes,[33] the federal Crown, through its Department of Justice and Department of Indian Affairs, is the appraiser of a claim's merit as well as its arbiter of fact. The Department of Indian Affairs and the Department of Justice are appendages of the federal Crown responsible for discharging the latter's duties and obligations. The Department of Indian Affairs is responsible for administering the *Indian Act*, the federal Crown's own legislation which has historically destroyed aboriginal governments and infrastructures while forcing them to become increasingly dependent upon the Crown.[34] Meanwhile, the Department of Justice, as the legal representative of the federal Crown, is bound, first and foremost, to represent and protect

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[32]The following discussion of the unique nature of the Crown's role as fiduciary to aboriginal peoples is not intended to contradict the situation-specificity of fiduciary doctrine, which emphasises that all fiduciary relationships are *sui generis* and must be treated accordingly. Rather, it is intended for illustrative purposes only.

[33]The Crown's definition of Specific and Comprehensive Claims, as outlined in the Department of Indian Affairs and Northern Development's booklet entitled *Outstanding Business – A Native Claims Policy*, (Ottawa: Queen's Printer, 1982), is as follows:

> The term "comprehensive claims" is used to designate claims which are based on traditional Native use and occupancy of land. Such claims normally involve a group of bands or Native communities within a geographic area and are comprehensive in their scope including, for example, land, hunting, fishing and trapping rights and other economic and social benefits.
>
> ... The term "specific claims" ... refers to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties.

[34]See the discussion of the effects of the *Indian Act* on aboriginal peoples in Rotman, *Parallel Paths*, *supra* note 7 Ch. III.

the federal Crown's interests. Consequently, it is not possible for these departments to impartially decide upon the merits of Indian claims that seek to reclaim revenue-generating lands from the federal Crown. Additionally, the position of the Crown during treaty negotiations with aboriginal peoples also places it in a potential conflict of interest.[35]

Another potential conflict of interest exists with regard to Indian moneys held in trust by the Crown and the Crown's obligations to Native peoples under treaties or other agreements. Under section 61(1) of the *Indian Act*,[36] the Governor in Council has complete discretion to determine how to use Indian moneys.[37] The Crown's fiduciary obligation requires that where the Crown is obliged to provide enumerated services to a band by virtue of a treaty or agreement, the Crown must use its own funds, not those of the Indians, or those paid to the Indians under the treaty or agreement. Perhaps the ultimate conflict of interest on the part of the Crown arose from the inclusion of section 149A to the *Indian Act* in 1927,[38] which made the raising of funds for the purposes of commencing legal action against the Crown an offence. This section effectively prevented legal action from being taken against the Crown by Indian bands without any determination of whether they possessed just claims.

The spectre of conflict of interest is also raised by the Crown's duty to promote and protect the Native peoples' interests while simultaneously seeking to obtain surrenders of their lands at the lowest possible cost -- whether for its own purposes or on behalf of private parties. This scenario is also a part of the larger rule which forbids fiduciaries from purchasing property under their control from their beneficiaries.[39] Over time, the rigidity with which this rule has been enforced by the judiciary has weakened. It has been made subject to certain exceptions, such as where a trustee purchases trust property under the terms of a will, all of which seek to ensure the

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[35]See Hon. A.C. Hamilton, *A New Partnership*, (Ottawa: Minister of Public Works and Government Services Canada, 1995) at 96-7:

> The problem facing the Government in the treaty-making process is how to give effect to the fiduciary relationship with the Aboriginal party. A complicating factor is that government negotiators, during treaty negotiations, are also expected to protect the interests of the general public and third parties who may have received title, leases, permits or other benefits in the territory and may want access to the land and resources in the treaty area in the future.

[36]*Supra* note 15.

[37]Unless, of course, the authority over Indian moneys is managed by a band for itself under section 69(1).

[38]R.S.C. 1906, c. 81, as amended by section 6 of *An Act to Amend the Indian Act*, S.C. 1926-27, c. 32.

[39]See, for example, *Ex parte Lacey* (1802), 31 E.R. 1228 (Ch.); *Ex parte James* (1803), 32 E.R. 385 (Ch.). Note also Ellis, *supra* note 30 at 2-9: "... [T]he Court enforces such a prohibition on the express premise that public policy seeks to enjoin a person in a position of utmost trust and confidence from following his naturally occurring self-interest, a temptation that must be overcome by operation of a rule of law."

fair treatment of the beneficiary by the purchasing fiduciary. However, the conflict stemming from the Crown's purchase of Indian lands is arguably more deeply rooted in the heart of the Crown-Native relationship than other fiduciaries' purchases of beneficiaries' property interests.

The general principle that fiduciaries must not purchase property from their beneficiaries appears to place the Crown in breach of its fiduciary responsibilities to the aboriginal peoples where it obtains Indian lands for its own use.[40] A similar situation is created under section 37 of the *Indian Act*, which prevents Indian reserve lands from being alienated without first being surrendered to the Crown. The act of surrender, under current jurisprudence, removes the Indian interest in land, leaving the land subject only to the Crown's complete, perfected title.[41] Therefore, even if only temporarily, the Crown acquires the full interest in Indian lands as soon as it accepts a surrender. To determine whether the Crown is in breach of its fiduciary duty by requiring the surrender of aboriginal title before Indian lands may be sold or leased, one must consider the reason for this surrender requirement. Does it exist because of a desire to protect the aboriginals from exploitation of their land interests or is it simply a mechanism to ensure that the Crown retains control over aboriginal lands?

If the Crown cannot obtain such a surrender without breaching its fiduciary duties, does that entail that aboriginal peoples may not alienate their lands at all or does it merely render the operation of section 37 void? And what of the requirement that aboriginal peoples surrender their rights to the federal Crown under existing federal Comprehensive Claims policy?[42] It has been suggested that as a result of these problems, this principle of fiduciary doctrine cannot apply to reserve lands.[43] Another suggestion has been to exclude the rule against conflict of interest from Crown-Native fiduciary relations altogether.[44] Neither of these suggestions are valid solutions to the problem arising as a result of the *sui generis* nature of Crown-Native relations.

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[40]Which is different than the Crown's position as a requisite intermediary in the alienation of Indian lands to a third party, as required by the *Indian Act*.

[41]See *Smith* v. *R.* (1983), 147 D.L.R. (3d) 237 (S.C.C.). See also the discussion of *Smith* in Ch. IV.

[42]See the discussion of this in Hamilton, *supra* note 35.

[43]D.R. Lowry, *Native Trusts: The Position of the Government of Canada as Trustee for Indians, A Preliminary Analysis*, Unpublished report prepared for the Indian Claims Commission and the Union of Nova Scotia Indians, 1973 at 38.

[44]M.J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law," (1993), 27 *U.B.C. L. Rev.* 19 at 43-4, although Bryant concludes, at 44, that: "the conflicts rule in the Crown-aboriginal context should be modified so as to serve the purpose of the imposition of the duty: the safeguarding of aboriginal title and accompanying rights."

The rule against conflict of interest is a fundamental principle of fiduciary doctrine. It maintains the integrity of fiducial relations by deterring fiduciaries who may be tempted to act indecorously. However, it, like all other fiduciary principles, is susceptible to adaptation to the requirements of specific situations. One such instance may occur where the Crown has a valid and demonstrated need to obtain Indian lands. Another possible example is where the Crown seeks to regulate aboriginal and treaty rights.

The permissible range of exceptions under any justificatory test must be consistent with the theoretical basis of the conflict of interest rule. The *Sparrow* justificatory test, for example, insists that valid limitations to section 35(1) rights[45] may arise only in circumstances in which they are *absolutely* necessary. The complex regulatory scheme fashioned by the Supreme Court in *Sparrow* was designed to allow only vitally important limitations to section 35(1) rights to successfully navigate through the *Sparrow* test's requirements.[46] Moreover, as the *Sparrow* test recognises, any limitation on aboriginal rights must remain faithful to the nature of the Crown's fiduciary obligations to the aboriginal peoples.[47] While the *Sparrow* test is a valid exception to the conflict of interest rule, the courts ought not expand that exception beyond reasonable limits. The Supreme Court of Canada's recent decision in *R.* v. *Gladstone* may have stretched the *Sparrow* test too far to allow it to continue as an exception to the conflict rule.[48]

In *Gladstone*, the regulatory scheme under consideration went beyond the conservation objective established in *Sparrow*. It included not only the quantity of fish to be harvested, but how that stock would be allocated -- in particular, to which groups it would be allocated. Furthermore, rather than having the Crown's legislative objectives be "necessary" in order to infringe upon aboriginal rights, as in *Sparrow*, in Chief Justice Lamer's majority decision in *Gladstone*, the Crown's objectives only had to be "compelling and substantial."[49] The Court's majority decision held that the maintenance of social harmony -- by restricting the aboriginal commercial fishing right and extending the rights of non-aboriginal fishermen -- was a "compelling

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[45]The *Sparrow* test is discussed in relation to section 35(1) rights because the test has been held to apply to both aboriginal and treaty rights, most recently and conclusively in the Supreme Court of Canada's decision in *R.* v. *Coté*, *supra* note 6. See the discussion in Rotman, "Defining Parameters," *supra* note 25.

[46]Whether the *Sparrow* test is able to accomplish its stated intention is an entirely different matter which remains to be seen through its future application.

[47]*Sparrow*, *supra* note 5 at 413: "The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."

[48]*Supra* note 6.

and substantial" objective that warranted the infringement of the aboriginal right in question. As the Chief Justice explained:

> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.[50]

The conclusion to be garnered from the majority's decision in *Gladstone* is that vague and undefined interests of Canadian society as a whole are sufficient to trump section 35(1) rights. This finding stands in marked contrast to the *Sparrow* decision. In *Sparrow*, the court stated that justifying infringements of aboriginal rights on the basis of "public interest" was so vague as to provide no meaningful guidance and so broad that it was untenable as a test for justifying limitations on aboriginal rights.[51] As McNeil has commented, the majority judgment in *Gladstone* allows aboriginal rights to be overridden "on broad policy grounds relating to economic and regional fairness, and even to support the economic interests of particular groups such as commercial fishers whose historic use of the fishery may well have been a violation of Aboriginal rights all along."[52]

The *Gladstone* ruling essentially justifies the Crown's breach of its fiduciary duty to the aboriginal peoples via its extension of the *Sparrow* test. The justificatory test articulated in *Sparrow* qualified as an exception to the general rule against conflict of interest because it allowed only necessary limitations on aboriginal rights in situations where no acceptable alternatives existed. The test was consistent with the notion that rights in a democratic society are not absolute and must be balanced with competing interests. However, the majority decision in *Gladstone* stretches the *Sparrow* test beyond acceptable limits. Applying the *Sparrow* test in this manner is inconsistent with the Crown's fiduciary obligations to the aboriginal peoples and should not insulate the Crown from liability based on conflict of interest.

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[49]*Ibid.* at 96.

[50]*Ibid.* at 98.

[51]*Sparrow*, *supra* note 5 at 412.

[52]K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified," (1997), 8(2) *Constitutional Forum* 33 at 39.

Although there are tremendous difficulties in reconciling the Crown's fiduciary duty to the aboriginal peoples with its other responsibilities, the rule against conflict of interest should not be rendered inapplicable to specific facets of Crown-Native fiduciary relationships or removed from that relationship altogether. In appropriate situations, such as with the *Sparrow* justificatory test prior to its modification in *Gladstone*, the conflict rule may be modified to allow for legitimate exceptions. The malleability of fiduciary doctrine allows its general precepts to be modified to the needs of individual fiduciary relationships. While fiduciary rules may be modified in appropriate circumstances, the integrity of fiduciary relationships must be maintained. Consequently, the test for allowing a modification or exception to the general rule against conflict of interest must be whether allowing such a change would destroy the integrity of those relationships.

(e) Reconciling the Crown's Competing Obligations

The Crown, as a fiduciary, must make all attempts to avoid placing itself in conflict of interest situations and reduce existing conflicts as much as possible. As the United States Court of Claims explained in *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States* -- a case where Congress sought to act as a fiduciary for aboriginal peoples and exercise its power of eminent domain to enable it to take aboriginal property -- "Congress can own two hats, but it cannot wear them both at the same time."[53] To deal with this situation, the Court of Claims developed the "good faith effort" test, which holds that there is no breach of governmental duty where Congress exercises good faith in its dealings with the aboriginal peoples in question and provides adequate compensation for the taking of aboriginal lands. This test was later endorsed by the United States Supreme Court in *United States* v. *Sioux Nation of Indians*.[54]

The "good faith effort" test appears to be a reasonable method of reconciling the Crown's fiduciary obligations to aboriginal peoples with its other responsibilities where one must be compromised to another. If Canadian law adopted the "good faith effort" test, that would not eliminate Crown conflicts of interest. It would simply mandate a remedy to a wronged beneficiary for the Crown's conflict. In this way, it could be seen to be similar to the effects of the *Sparrow* justificatory test, at least prior to its modification in *Gladstone*.

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[53]390 F.2d 686 at 691 (U.S. Ct. Cl. 1968).

[54]448 U.S. 371 (1980). For further discussion of the *Fort Berthold* test, see J.D. Hurley, "Aboriginal Rights in Modern American Case Law," [1983] 2 C.N.L.R. 9 at 37.

How is the Crown to act where its fiduciary duty to the aboriginal peoples conflicts with its other responsibilities? If, for example, the Crown wants to expropriate aboriginal land for use as an airport during wartime, is it subordinating its fiduciary duty to the aboriginal peoples in favour of its obligations to protect the country or to fulfill its international obligations? The simple answer is yes. However, that does not necessarily entail that the Crown has acted in breach of its duty to the aboriginals. The Crown's fiduciary duty to the aboriginal peoples does not mean that the Crown must place aboriginal peoples' concerns above all others. Rather, it requires that the Crown act with the utmost good faith towards its aboriginal beneficiaries' best interests.

In the hypothetical situation presented, the Crown would be required to act with honesty and integrity towards the aboriginal peoples in question. The Crown would be obliged to weigh its need to expropriate the land against the anticipated effects that taking the land would have on the aboriginals. A careful consideration of the competing costs and interests involved -- in a manner similar to the requirements outlined in the *Sparrow* justificatory test -- would determine whether the land was absolutely needed. This would involve considering the need to build the airport, to build it in that vicinity, and whether it had to be built on the aboriginal land in question. The Crown would be bound to consider the availability and suitability of alternative sites before it could take the aboriginals' land. The greater the potential detriment to the aboriginal peoples from the taking of their land, the greater the onus that would be placed on the Crown to demonstrate its need to take the land.

If it was ultimately deemed necessary to use the aboriginals' land, the Crown's fiduciary obligations would require that it avoid or minimise the detrimental effects that taking away the land would have on its beneficiaries. The Crown would have to consult with the aboriginal peoples in question to determine what these detrimental effects, if any, would be. Finally, the Crown would be bound to adequately and expeditiously compensate the people. The cost of compensation ought to reflect fair value or otherwise be proportionate to the importance of the project.

As a result of its fiduciary obligations to the aboriginal peoples, the Crown must avoid conflict of interest situations or else risk being found in breach of its duty. Where past conflicts of

interest have occurred that cannot be made subject to exception,[55] the Crown may be found liable for a breach of duty. Where conflict of interest situations continue to exist and there is no legitimate basis for claiming an exception from the conflict rule, the Crown must act to eliminate such conflicts by changing the dynamics giving rise to the conflict. The Crown would thus be required to amend its Specific and Comprehensive Claims processes or substitute new procedures.

Another way for the Crown to remove a conflict situation is to eliminate the requirement that a band must make a surrender to the Crown in order to sell or lease its interest in land. By requiring aboriginal peoples to surrender lands to the Crown before they may sell or lease them to third parties, the Crown is, *prima facie*, in conflict of interest. The restriction on the aboriginal peoples' free alienation of their lands may have been a valid attempt to protect aboriginal peoples from being exploited by land speculators around the time of the *Royal Proclamation of 1763*. If, however, such a restriction on alienation is no longer necessary, then it no longer qualifies as an exception to the conflict rule. The Crown may still make itself a requisite intermediary in the alienation of Indian land interests without the necessity of surrender. For example, it could require that a band wishing to enter into a sale or lease agreement with a private party submit any such agreement to the Minister for approval. More fundamentally, the need for the Crown to continue as a go-between in land transactions between aboriginal peoples and private parties might be reconsidered altogether, insofar as it provides no tangible benefits to the aboriginal peoples and is inconsistent with the current status of Crown-Native relations.

(f) The Contemporary Implications of Crown-Native Fiduciary Relations

With the promulgation of the *Constitution Act, 1982*, the Canadian federal and provincial governments now have a constitutional responsibility to act in a manner consistent with the recognition and protection of aboriginal and treaty rights in section 35(1).[56] As described earlier, this responsibility is purposive. The purposive nature of the Crown's duty does not require the

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[55]Such as the Crown's traditional practice of using moneys derived from the sale or lease of surrendered lands to pay its own expenses relating to Indian affairs, including paying the salaries of Indian agents: see D.C. Nahwegahbow, M.W. Posluns, D. Allen, and D. Sanders, *The First Nations and the Crown: A Study of Trust Relationships*, unpublished research report prepared for The Special Committee of the House of Commons on Indian Self-Government, 1983 at 290-1.

[56]See, for example, Rotman, *Parallel Paths*, *supra* note 7; Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility," (1994), 32 *Osgoode Hall L.J.* 735; Royal Commission on Aboriginal Peoples, *Treaty Making*, *supra* note 26 at 7.

Crown to seek prior court approval of legislative or policy initiatives that affect Indians *qua* Indians. Rather, it requires that the Canadian federal and provincial Crowns must act, without the need for further judicial direction, where their action is necessary or appropriate to the fulfillment of their fiduciary obligations. Situations where Crown action is necessary or appropriate to the fulfillment of their fiduciary obligations includes the need to enhance or further section 35(1) rights:

> ... [I]nitiatives by provincial governments to fulfil their fiduciary obligations need not await the elaboration of section 35 of the *Constitution Act, 1982* into a kind of master treaty framework that will structure First Nations' space in the Constitution. To the extent that provincial governments are in a position to respect and secure existing aboriginal rights, the law declared in *Sparrow* requires them to do so.[57]

If provinces are unsure whether they must act in a specific instance, the purposive nature of their fiduciary duties requires them to make appropriate inquiries.[58] This same premise holds true of the federal Crown. Above all, the purposive nature of the federal and provincial Crowns' fiduciary duties to Native peoples insists that, in light of the historical relationship between the Crown and aboriginal peoples, the Crown must maintain its honour, integrity, and avoid sharp practice in all of its dealings with them.[59]

Because of the existence of both general and specific Crown-Native fiduciary relations, it is impossible to precisely delineate the totality of obligations which may arise under the rubric of the Crown's fiduciary obligations to the aboriginal peoples. What may be safely asserted, though, is that the Crown's fiduciary obligations to Native peoples encompass the range of areas in which the Crown has had and continues to have contact with Native peoples. Although the special relationship between the Crown and aboriginal peoples in Canada has been recognised for quite some time, its precise nature and legal ramifications are only beginning to be understood. The Crown's fiduciary duty to the aboriginal peoples is a long-standing duty as well as a continuing one.[60] That duty applies to Crown-Native relations generally and is not restricted to situations involving the surrender of aboriginal lands.

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[57]N. Lyon, *Aboriginal Peoples and Constitutional Reform in the 90's*, (Background Study No. 7, Constitutional Reform Project, Centre for Public Law and Public Policy, York University, 1991) at 9.

[58]*Ibid.*: "If there is genuine doubt as to whether aboriginal rights do exist, each provincial government has direct access to its court of appeal, on a reference, for a judicial determination of the matter." In addition, fiduciaries' responsibilities to act in their beneficiaries' best interests requires them to inform themselves as to what those best interests are, which includes a requirement to consult with their beneficiaries.

[59]This is emphasised through the *Sparrow* court's reliance upon the precedent established in *R.* v. *Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.).

[60]Refer back to the discussion in Chs. II and III.

While the Crown's fiduciary duty to the aboriginal peoples is not restricted to aboriginal lands, it does apply to them. This includes traditional lands, reserve lands (even in situations where a band manages its reserve lands in accordance with section 60(1) of the *Indian Act*), treaty land entitlements, and lands surrendered for leasing purposes. The Crown's duty applies also to aboriginal moneys. The Crown's duty in this regard extends to the management of Indian band funds and may also apply to situations where a band manages its own funds in accordance with section 69(1) of the *Indian Act*. In addition, the Crown's duty applies to the realisation of aboriginal self-government. This may include the Crown's obligation to provide funding, administrative services, and supervise the transition to self-government.

The preservation of aboriginal customs, languages, and cultures may be grouped together with the issue of self-government and may include the requirement that the Crown provide funding in conjunction with the protection of these rights under various treaties and agreements. Other matters associated with aboriginal rights of self-government include Native health, welfare, and education. The Crown's obligations in this regard incorporate promises made under treaties and may include: the building of schoolhouses and/or provision of teachers; the provision of hospitals, medical services or medicines in accordance with treaty medicine chest clauses or other provisions; and the provision of adequate housing, sewage, and other waste disposal systems. Aboriginal economic self-sufficiency and development is also pertinent to this discussion of the extent of the Crown's fiduciary duty. This aspect of the Crown's duty may include obligations arising from its acquisition of lands, resources, and minerals at the direct expense of its aboriginal beneficiaries, under the terms of treaties whereby the Crown agreed to provide money, tools, livestock, farm implements, etc. to the aboriginal signatories, or from the requirements necessary for the transition to Native self-government.

The Crown's fiduciary duty also extends to the protection of aboriginal hunting, fishing, trapping, and agricultural rights. This includes wild rice harvesting and may also include the commercial right to hunt and fish. Although aboriginal commercial rights of trapping and agriculture are not a disputed matter, commercial hunting and fishing are more controversial.[61] Because of the nature of historical Crown-Native relations, the Crown holds fiduciary duties

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[61]There have been fewer cases on Indian commercial hunting rights than on commercial fishing rights. One of the most important recent cases addressing Indian commercial hunting is *R.* v. *Horseman*, [1990] 1 S.C.R. 901. On the question of Indian commercial fishing rights, see *R.* v. *Agawa* (1988), 65 O.R. (2nd) 505 (C.A.); *R.* v.

relating to the resolution of outstanding Native rights claims. This includes the Crown's negotiation of such issues (pertaining to both aboriginal and treaty rights) in good faith, avoiding existing and future conflict of interest situations, providing funding for aboriginal rights litigation, and creating and/or funding impartial dispute resolution mechanisms.

The imposition of the federal *Indian Act* also results in Crown fiduciary responsibilities. The *Indian Act* is an extension of the Crown's legislative responsibility for "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. The *Indian Act* was held to codify some of the Crown's fiduciary obligations to aboriginal peoples in cases such as *Guerin*,[62] *Roberts* v. *Canada*,[63] and *Mitchell* v. *Peguis Indian Band*.[64] Thus the range of issues covered by the *Indian Act* -- including Indian band lists, reserves, surrenders, wills and estates, mental incompetents, minors, and the management of Indian lands and moneys -- may give rise to Crown fiduciary obligations.

Finally, the Crown may hold fiduciary obligations to the aboriginal peoples stemming from any other rights which may exist by way of treaty, agreement, statute, constitutional enactment or amendment, Crown practice, or that may be found to exist by the courts. For instance, in *Eastmain Band* v. *Robinson*,[65] the Crown's fiduciary duty was found to include a duty to follow the *Environmental Assessment and Review Process Guidelines Order* ("EARP Guidelines").[66] Upon appeal, however, the trial decision, including the duty to follow the EARP Guidelines, was reversed.[67]

While these suggestions as to the extent of the Crown's fiduciary obligations are only speculative, they are premised upon the history of Crown-Native relations. What is needed is a clear judicial pronouncement on the extent of the Crown's fiduciary obligations. However, the Supreme Court of Canada's post-*Guerin* considerations of the Crown's fiduciary duty provide little guidance for ascertaining the extent of that duty. The judiciary's handling of the fiduciary question within the field of Native law and the impact of its judgments have been twofold. The

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Bombay, [1993] 1 C.N.L.R., 92 (Ont. C.A.); *R.* v. *Jones* (1993), 14 O.R. (3d) 421 (Ont. Prov. Div.); *Gladstone*, *supra* note 6; *N.T.C. Smokehouse Ltd.*, *supra* note 6; *Van der Peet*, *supra* note 6.

[62]*Supra* note 2 at 340, 356-7.

[63]*Supra* note 6 at 208.

[64]*Supra* note 6 at 209.

[65][1992] 1 C.N.L.R. 90 (F.C.T.D.).

[66]S.O.R. 84-467.

most obvious effect has been to entrench fiduciary law as a vital element of Canadian aboriginal rights jurisprudence. Second, in securing a place for fiduciary law in the law of aboriginal rights, the judiciary has managed to add an additional, unexplained piece to the puzzle. The judiciary's unwillingness to elaborate upon the implications of the *Guerin* decision has created a significant problem which it has thus far been reluctant to address. The judiciary's insular treatment of the Crown's fiduciary duty to the aboriginal peoples has not been singled out for special treatment in this regard, though. A similar situation has also arisen within the context of judicial analyses of Crown-aboriginal treaties and treaty relationships. The next two chapters will focus their attention on Crown-Native treaties and the negotiations giving rise to them.

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[67]*Eastmain, CA*, *supra* note 22. For further discussion, see N. Kleer and L. Rotman, "Environmental Protection and First Nations: Changing the Status Quo," unpublished paper, *Canadian Institute* Conference "Doing Business with First Nations," 1 and 2 March 1993.

VI. Conceptualising Crown-Native Treaty Relations

> In the name of the Great King of England your Father, and my Master I do by this Belt renew & brighten the ancient Covenant Chain, of mutual Peace, Friendship and firm alliance between you and your allies, and all His Majestys subjects your Bretheren upon this continent, exhorting you by the memory of your faithful wise and brave forefathers, and by the sacred engagements you yourselves have entered into that you do preserve your fidelity to the Great King of England your father, and your union with and attachment to all his subjects and your Bretheren, inviolable & lasting as the great lights of Heaven and the immoveable Mountains ... and I do at the same time assure you that all his great mean and subjects your Bretheren will keep this Covenant Chain bright & unbroken.[1]

> The commissioners bring a paper containing what they wish already written out. It is not what the Indians want, but what the commissioners want. All they have to do is to get the signatures of the Indians. Sometimes the commissioners *say* they compromise, but they never change the document.[2]

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[1]"Sir William Johnson, Speech, camp at Onondaga Lake, 26 June 1756," as reproduced in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, 11 vols., (Albany: Weed, Parsons, 1853-1861) VII at 139 [hereinafter "*NYCD*"].

[2]Sitting Bull, Dakota Chief, 1888, as quoted in V.J. Voger, ed., *This Country Was Ours*, (New York: Harper & Row, 1972) at 181. Note also the following speech by Chief Sitting Bull at the council of the Silent Eaters (described by Voger as "a sort of dinner club of Hunkpapa Sioux warriors, of which Sitting Bull was a leading member"), in 1889, *ibid.* at 181-2:

> Friends and Relatives: Our minds are again disturbed by the Great Father's representatives, the Indian Agent, the squaw-men, the mixed-bloods, the interpreters and the favorite ration-chiefs. What is it they want of us at this time? They want us to give up another chunk of our tribal land. This is not the first time or the last time. They will try to gain possession of the last piece of ground we possess. They are again telling us what they intend to do if we agree to their wishes. Have we ever set a price on our land and received such value? No, we never did. What we got under the former treaties were promises of all sorts. They promised how we are going to live peaceably on the land we still own and how they are going to show us the new ways of living -- even told us how we can go to heaven when we die, but all that we realized out of the agreements with the Great Father was, we are dying off in expectation of getting things promised us.
>
> One thing I wish to state at this time is, something tells me that the Great Father's representatives have again brought with them a well-worded paper, containing just what they want but ignoring our wishes in the matter. It is this that they are attempting to drive us to. Our people are blindly deceived. Some are in favor of the proposition, but we who realize that our children and grandchildren may live a little longer, must necessarily look ahead and flatly reject the proposition. I, for one, am bitterly opposed to it. The Great Father has proven himself an *unktomi* [trickster] in our past dealings.
>
> When the White People invaded our Black Hills country our treaty agreements were still in force but the Great Father has ignored it -- pretending to keep out the intruders through military force, and at last failing to keep them out they had to let them come in and take possession of our best part of our tribal possession. Yet the Great Father maintains a very large standing army that can stop anything.
>
> Therefore I do not wish to consider any proposition to cede any portion of our tribal holdings to the Great Father. If I agree to dispose of any part of our land to the white people I

Treaty relations between the Crown and aboriginal peoples in North America have been a fundamental aspect of the interaction between the groups from earliest times. Treaties are foundational documents in the history of Crown-Native relations. Initially, they established parameters for peaceful intercourse. Later, they served as the basis for the parties' renewal of their historical commitments to each other. As negotiated documents between separate entities, the treaties provide valuable insight into the nature of historical Crown-Native relations. They were the primary means by which diplomatic relations were conducted between the groups. However, the often-divergent manner in which the treaties have been regarded by the Crown and the aboriginal peoples also demonstrates the significant differences between the parties' conceptualisations of the treaties. Thus, when examining Crown-Native treaties, it is necessary to account for the parties' respective understandings of their purpose and intent.

The following two chapters examine separate aspects of Crown-Native treaties and their interpretation. This chapter focuses on the understanding of treaties held by the Crown and the aboriginal peoples. It aims to enhance existing understandings of treaties by placing them in historical context. This will be accomplished, in part, through an examination of treaty protocol that developed between the groups. This chapter looks to the historical basis for the signing of the treaties and the different functions that treaties have served. Crown and aboriginal understandings of the nature and purpose of treaties will also be examined to facilitate a more culturally-sensitive method of analysis. In arguing in favour of a more well-rounded understanding of treaties, this chapter builds on the historical background discussed in Chapters II and III. Meanwhile, Chapter VII concentrates on the canons of treaty interpretation that govern the contemporary judicial interpretation of treaties and the different functions those canons perform.

Treaties signed between the Crown and aboriginal peoples took a variety of forms.[3] For example, not all treaties involved the cession of land. Some involved the perpetual payment of

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would feel guilty of taking food away from our children's mouths, and I do not wish to be that mean. There are things they tell us sound good to hear, but when they have accomplished their purpose they will go home and will not try to fulfill our agreements with them.

My friends and relatives, let us stand as one family, as we did before the white people led us astray.

[3]See D. Opekokew and A. Pratt, "The Treaty Right to Education in Saskatchewan," (1992), 12 *Windsor Y.B. Access Just.* 3 at 8: "As a class, Indian treaties are recognized by the courts as a unique or *sui generis* type of document, but it is still true that within that class there are enormous variations."

annuities while others provided for one-time payments. What the treaties did share in common, though, was their creation or maintenance of mutually-beneficial relationships between the Crown and aboriginal peoples. They emerged as the result of negotiations between the parties, not out of unilateral action:

> ... [T]he aboriginal parties to treaties were considered to be distinct, self-governing nations, capable of making collective decisions, of establishing co-equal relationships ("alliances") and of controlling their own affairs. They had the capacity to negotiate with the Crown, and to voluntarily agree or withhold consent. The Crown approached the aboriginal societies on the basis that problems were to be solved through co-operation, negotiation and *quid pro quo* bargaining, rather than unilateral imposition.[4]

In the process of establishing the respective rights of the parties, the treaties would recognise the independence of the European and aboriginal nations that signed them.[5]

The treaties solidified the relationship between the Crown and aboriginal peoples at strategic points in North American history.[6] In addition to the mutual benefits received from trade, political, and military alliances, each side obtained valuable consideration from the other. This consideration came at a price, however. It was obtained only after giving up something equally desired by the other side.[7] The forms of consideration exchanged included tangibles --

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[4]B.H. Wildsmith, "Treaty Responsibilities: A Co-Relational Model," (1992), *U.B.C. L.* Rev. Special Edition on Aboriginal Justice 324 at 331. See also *ibid.*, at 330; M. Jackson, "The Articulation of Native Rights in Canadian Law," (1984), 18 *U.B.C. L. Rev.* 255 at 257; *R.* v. *Sioui* (1990), 70 D.L.R. (4th) 427 at 437 (S.C.C.): "... [R]elations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens"; *ibid.* at 448: "... [B]oth Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations,"; and *ibid.* "... Indian nations were regarded in their relations with the European nations which occupied North America as independent nations."

[5]See P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government," (1995), 21 *Queen's L.J.* 173 at 197:

> ... [T]he process of negotiating treaties serves as evidence that the Crown historically treated Aboriginal nations as sufficiently autonomous to warrant treaties. Moreover, the process suggests that the Crown viewed treaties as necessary or desirable agreements to obtain prior to subjecting Aboriginal peoples to foreign law. In other words, the treaty-making process is evidentiary support of the fact that Aboriginal nations were (and were regarded by the Crown as) self-governing communities, and entitled to govern themselves until they suggest an intent to the contrary.

[6]See B. Slattery, "Aboriginal Sovereignty and Imperial Claims," (1991), 29 *Osgoode Hall L.J.* 681 at 684:

> ... [T]he numerous treaties concluded between First Nations and colonial governments played an essential role in determining the various parties' expectations and actions, and moulding their understanding (and misunderstanding) of the other parties. These treaties necessarily figure prominently in any historical account of Aboriginal-European relations.

[7]See C. Wilkinson and J.M. Volkman, "Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" -- How Long a Time Is That?,' (1975), 63 *Calif. L. Rev.* 601 at 603: 'It is

such as lands, goods, and moneys -- and intangibles -- guarantees of rights, or promises of peace, protection, or non-interference with another's affairs. Therefore, the treaties should be viewed as negotiated documents in which each side was guaranteed certain benefits by the other. The Crown obtained the right to use certain lands and to have aboriginal guarantees of non-interference with British settlement. The aboriginal peoples received assurances that they would not be disturbed in the possession of their lands or have their traditional ways of life disrupted by the British presence.

In contemporary considerations of treaties, the benefits received by the Crown are generally not brought into issue. The modern focus when examining treaty rights is the promises made to the aboriginal peoples. This understanding of the treaties is skewed, insofar as the treaty rights guaranteed to aboriginal peoples are the result of consensual negotiations and an agreed-upon exchange of benefits. This corrupted understanding of treaties also affects the respect given to the treaty promises made to the aboriginal peoples. Aboriginal treaty rights have not been given the respect that their incorporation in treaties should dictate. This becomes apparent when the enforcement of the aboriginal peoples' treaty rights is contrasted with the enforcement of those belonging to the Crown. The Crown's rights under the treaties are glossed over in treaty analysis, being regarded as self-evident truths. Meanwhile, aboriginal treaty rights have often been viewed as existing at the pleasure of the Crown, or emanating from the Crown's benevolence. Such understandings will be demonstrated to be entirely false.

It will be argued that treaties between the Crown and aboriginal peoples in Canada ought to be viewed as relations between nations as opposed to individual or isolated agreements between parties. Regarding treaties as individual agreements provides a static representation of what were, and still are, essential ingredients of evolving political and legal relationships. For this reason, such a vision of treaties ought to be rejected. The process of renewal and affirmation of treaties, as illustrated by the Covenant Chain alliance, ought to be seen to indicate the larger importance of Crown-Native treaties as continuing and evolving relations between nations. This larger aspect of treaties is one element of what is generally referred to as the "spirit and intent" of treaties. The notion of treaties as more than simple agreements is also consistent with the earlier

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important to recognize that the American Indian's treaty rights are not "gifts" or "grants." Indians fought hard, bargained extensively, and made major concessions in return for such rights.'

assertion that the agreements, compacts, and alliances entered into between the Crown and aboriginal peoples were greater than their representations on parchment or wampum belts.[8]

Since the treaties were negotiated and ratified in a consensual process, neither party ought to be able to alter the promises made therein without the free and informed consent of the other. Insofar as the Crown pledged its honour to the aboriginal peoples in the treaties and made solemn promises to them therein, it would be unseemly to allow the Crown to unilaterally alter its historical treaty commitments. In fact, it could be maintained that by signing the treaties, the Crown bound itself as to the manner and form of any future laws that had the potential to infringe upon treaty rights. This "manner and form" would apply equally to legislation or constitutional enactments, but would not be unlimited. Its effect would be restricted to procedure and could not affect content, substance, or policy.[9] Requiring aboriginal consent prior to enacting laws that would infringe upon treaty promises is arguably a procedural, as opposed to substantive, requirement.

It may legitimately be argued that a legislative body may bind itself procedurally to a particular manner and form notwithstanding the doctrine of parliamentary supremacy.[10] While this notion is not universally held, there would appear to be a sound basis for it. As Hogg suggests:

> There is still a school of thought that holds that even a manner and form restriction cannot bind a "sovereign" legislature. The effect of this school of thought is to deny to a legislative body the power to change its traditional forms and structures: this would invalidate such things as special-majority rules, the abolition or creation of upper houses, and the addition of referenda to the legislative process. It seems implausible that a legislative body should be disabled from making changes to its present structure and procedures. Moreover, the case-law, while not conclusive, tends to support the validity of self-imposed manner and form requirements.[11]

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[8]Refer back to Ch. II, n. 100 and its accompanying text, where it is suggested that the parchment or wampum versions of treaties are not the treaties themselves, but mnemonic devices intended to assist in recalling what was agreed to between the parties.

[9]See P. Hogg, *Constitutional Law of Canada*, 1997 Student Edition, (Toronto: Carswell, 1997) at 276; R. Elliot, "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values," (1991), 29 *Osgoode Hall L.J.* 215, esp. at 218; W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change," (1950-51), 24 *Aust. L.J.* 103.

[10]See Hogg, *ibid.* at 276-81; *R.* v. *Mercure*, [1988] 1 S.C.R. 234. The classic formulations of parliamentary supremacy, such as that by A.V. Dicey, focus primarily on *substance* rather than *procedure*, thereby entailing that limiting the manner and form restriction to procedural matters would still be consistent with such formulations of parliamentary supremacy.

[11]Hogg, *ibid.* at 278.

One example of the use of such manner and form restrictions is the *Canadian Bill of Rights*.[12] Section 2 of the *Bill of Rights* provides that it is supreme over other federal statutes unless the other statutes in question expressly declare that they operate notwithstanding the *Bill*. The Supreme Court of Canada has held that this primacy clause effectively binds subsequent statutes, notwithstanding the doctrine of implied repeal.[13] Consequently, the *Bill of Rights* may be seen to bind subsequent legislation in manner and form unless the latter expressly exercise the notwithstanding clause in section 2.

The notion that a legislative body may bind itself procedurally to a particular manner and form of lawmaking does not mean that it may never pass legislation that infringes upon, as opposed to extinguishes, treaty rights. Following the constitutional entrenchment of treaty rights in section 35(1) of the *Constitution Act, 1982*,[14] Parliament may not extinguish "existing" treaty rights absent constitutional amendment. The provincial legislatures were never competent to extinguish treaty rights.[15] However, either of these bodies may *infringe* upon treaty rights, subject to the justificatory requirements established in the *Sparrow* test,[16] if they enact legislation that is either consistent with the imposed manner and form requirements or if those requirements are first repealed.[17] Therefore, manner and form restrictions do not entail that a legislative body may *never* infringe upon treaty rights, only that it is restricted in its ability to do so.

In the situation of treaty rights, however, it could be argued that if the Crown has bound itself to ensuring that the manner and form of subsequent laws is consistent with promises made in the treaties, the only way that the Crown may repeal these restrictions is to obtain the consent of

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[12]S.C. 1960, c. 44.

[13]See, for example, *R.* v. *Drybones*, [1970] S.C.R. 282. The doctrine of implied repeal, which is based upon the notion of parliamentary supremacy, holds that a sovereign parliament may be seen to have repealed an earlier, inconsistent statute through a subsequent, contrary statutory enactment.

[14]Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11.

[15]Since the only valid provincial legislation that could affect "Indians, and Lands reserved for the Indians" are laws of general application -- whether they are laws that do not affect "Indianness" and therefore apply *ex proprio vigore* (of their own effect), or laws that affect, but do not go to the core of, Indianness, which are referentially incorporated into federal law via section 88 of the *Indian Act*, R.S.C. 1985, c. I-5 -- they are incapable of satisfying the "clear and plain" intent test for extinguishing aboriginal or treaty rights expressed by the Supreme Court of Canada in cases such as *Calder* v. *Attorney-General of British Columbia* (1973) 34 D.L.R. (3d) 145 (S.C.C).

[16]*R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C). Note that this test has since been modified by *R.* v. *Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C.).

[17]See Elliot, *supra* note 9 at 245. As Hogg, *supra* note 9 explains, at 278, n. 37, "The manner and form law could itself be directly repealed in the ordinary way, but it could not be disregarded. Direct repeal can be guarded against by entrenching the entrenching provision, i.e., by stipulating that the new manner and form procedure is also applicable to the repeal or amendment of the entrenching provision itself."

the aboriginal peoples concerned. As discussed earlier, because of the consensual nature of the treaties, which are what bind the Crown to this manner and form requirement, treaty rights ought to be capable of being infringed upon by legislation or constitutional enactment only with the consent of the aboriginal signatories. This requirement of consent is consistent with a procedural restriction such as that suggested above. This argument may be circumvented, of course, through a constitutional amendment to section 35(1), although the same principles discussed above would render such an action repugnant to the solemn nature of treaties.

The Crown's binding of its future lawmaking ability through the treaties may be seen as part of the treaty "exchange" between the Crown and the aboriginal peoples described earlier. Following the signing of treaties, the Crown could no longer enact laws that were inconsistent with the principles of peace, friendship, and respect established therein. Promulgating laws that would unilaterally infringe upon treaty rights would be incompatible with these foundational principles. This argument is consistent with the understanding of treaties put forward herein -- as forging relationships between nations and establishing parameters for the parties' future interaction. If the Crown could unilaterally override its treaty promises through legislation or constitutional enactment, these parameters would be rendered meaningless as the Crown could alter them at will.

In spite of the importance of Crown-aboriginal treaties and the relationships that were spawned from the treaty-making process, Canadian courts have generally ignored the history of Crown-Native relations when engaging in treaty interpretation and analysis. While Canadian aboriginal rights jurisprudence has formulated some guidelines for what constitutes a treaty, as well as principles of treaty interpretation, the courts have not placed sufficient emphasis on the need for contextual appraisals of treaties. Such appraisals are fundamental to determining these issues within the larger Crown-Native superstructure. By not placing their analyses of treaties into their larger historical context, the courts have arrived at inappropriate results that ignore the sanctity and solemnity with which the treaties were negotiated and signed.

Until rather recently, the courts interpreted treaties according to their written versions or by use of records penned by the Crown's representatives. To rectify the imbalance in perspective created by these practices, treaties must be examined in a manner that accounts for both Crown and aboriginal perspectives and understandings, as well as the historical contexts within which they originated. Treaties entered into between aboriginal nations and the Crown are not identical

to other forms of agreement, such as domestic contracts or international treaties. Rather, they are *sui generis*.[18] Therefore, the interpretation of Crown-Native treaties is not bound by the domestic law of contracts nor the tenets associated with international treaties. As the Supreme Court explained in the *Simon* case, principles applicable to domestic contracts or international agreements are applicable only by analogy to Crown-Native treaties.[19]

The unique nature of Crown-Native treaties is reflected in the combination of factors giving rise to their existence. These factors are the documents themselves, as contained in written versions, on wampum belts, and the records of the negotiations surrounding them. Records of treaty negotiations may be discovered in a variety of places. They may be found in the oral histories of the aboriginal peoples. They are also contained in the written records of treaty negotiators. In addition, accounts of treaty negotiations exist in correspondence between the Crown's representatives in Canada and those in Britain. Finally, information about treaty negotiations is revealed through oral exchanges between the aboriginal peoples and the Crown's representatives that have been documented in aboriginal oral histories and in written forms.[20]

Although Crown-Native treaties are unique agreements, their uniqueness should not be understood to detract from the solemnity with which they are to observed. As the Supreme Court of Canada held in *R.* v. *Sioui*, "It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred."[21] While the nature and history of Crown-Native relations, including treaty relations, in Canada has been the topic of earlier chapters, Crown-Native treaties and treaty relations will be examined from both Crown and aboriginal perspectives to provide insight into the way that those agreements should be considered in a modern setting.

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[18]See *Simon* v. *R.* (1984), 24 D.L.R. (4th) 390 at 404 (S.C.C.). The unique nature of aboriginal treaties may also be seen, for example, in *Francis* v. *The Queen* (1956), 3 D.L.R. (2d) 641 at 652 (S.C.C.); *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613 at 617-18 (B.C.C.A.); *Pawis* v. *The Queen*, (1979), 102 D.L.R. (3d) 602 at 607 (F.C.T.D.); *Sioui*, *supra* note 4 at 437.

[19]See *Simon*, *supra* note 18 at 404. See the further discussion of the canons of aboriginal treaty construction in Ch. VII.

[20]Some of these materials have been compiled and published, while others are found in archival storage. Two useful accounts of treaty negotiations are *NYCD*, note 1, *supra*, and A. Morris, *The Treaties of Canada with The Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto*, (Toronto: Belfords, Clarke, 1880).

[21]*Sioui*, *supra* note 4 at 456, citing *Simon*, *supra* note 18 and *White and Bob*, *supra* note 18.

(a) British and Aboriginal Understandings of Treaties and Treaty Relations

When the Crown initially entered into treaties with aboriginal nations, it did so on a nation-to-nation basis.[22] The Crown represented those treaties as being solemn agreements that respected the autonomy of the aboriginal peoples while keeping them secure in their lands and rights.[23] The "separate house" image conveyed in the following statement made by Sir William Johnson at Niagara in 1764 is a clear example of such representations:

> Brothers of the Western Nations, Sachems, Chiefs and Warriors; You have now been here for several days, during which time we have frequently met to renew and Strengthen our Engagements and you have made so many Promises of your Friendship and Attachment to the English that there now remains for us only to exchange the great Belt of the Covenant Chain that we may not forget our mutual Engagements.
>
> I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire that you will take fast hold of the same, and never let it slip, to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipeweighs at St. Marys [Michilimackinac] whilst the other end remains at my house, and moreover I desire that you will never listen to any news which comes to any other Quarter. If you do it, it may shake the Belt.[24]

Similar representations will be shown to have continued into the twentieth century. In spite of continuing to make these representations, the Crown did not always live up to them.[25] In a variety of situations, the Crown regarded treaties only as means to acquire land for settlement, maintain administrative control over the aboriginal peoples, and promote aboriginal assimilation.[26]

The aboriginal peoples, on the other hand, viewed treaties with the Crown as opportunities to solidify their relationships with the Europeans. The treaties were also used, from their standpoint, to entrench their rights vis-à-vis the Europeans.[27] The aboriginals saw the treaties as having three primary functions. Initially, the treaties established a nation-to-nation

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[22]See the discussion in Chs. II and III.

[23]See J.Y. Henderson, "Empowering Treaty Federalism," (1994), 58 *Sask. L. Rev.* 241 at 296.

[24]As reproduced in *The Papers of Sir William Johnson*, 14 Vols., (Albany: University of the State of New York, 1921-65) IV at 309-10.

[25]See the discussion of judicial understandings of treaties in Ch. VII.

[26]See L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, (Toronto: University of Toronto Press, 1996) at 52; Letter from Sir J. Kempt to Lt.-Gov. J. Colborne, 16 May 1829, as quoted in J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, Revised Edition (Toronto: University of Toronto Press, 1991) at 99; Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment*, (Ottawa: Minister of Supply and Services, 1995) at 28-9 [hereinafter "*Treaty Making*"].

[27]See also D. Opekokew, *The Political and Legal Inequities Among Aboriginal Peoples in Canada*, (Kingston: Institute of Intergovernmental Relations, Background Paper No. 14, 1987) at 24.

relationship between the groups.[28] Secondly, the treaties established a framework for the parties' continued interaction and the sharing of resources. Finally, the terms of the treaties indicated the Crown's intention to respect aboriginal rights.

The conquest of New France and the release of the *Royal Proclamation of 1763* were turning points in the nature of Crown-aboriginal relations.[29] However, it was not until after the American Revolution that any tangible effects of that change became evident in Crown-Native treaty relations.[30] The American Revolution caused an tremendous influx of new settlers into Canada.[31] These settlers came north because they were either forced out of the United States or had remained loyal to the Crown. This new wave of immigration greatly increased the population of Quebec and Nova Scotia. Eventually the population surge created by this immigration resulted in the formation of New Brunswick and the division of Quebec into Upper and Lower Canada. The migration from the United States created settler demands for land. In response to these demands, Britain initiated negotiations with aboriginal nations for the surrender of their lands through treaty.[32]

The Crown was able to obtain surrenders of aboriginal lands under treaties, at least from its perspective, in exchange for promises of reserves, money, annuities, and other goods. As will be illustrated, the aboriginals did not always share this understanding of the so-called "land surrender" treaties. Generally, the money required to pay for the treaty promises came from the sale of much of the surrendered lands to private interests.[33] Once the Crown realised that it could obtain great tracts of land without having to spend much, if any, money, it fostered the use of

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[28]Opekokew and Pratt, *supra* note 3 at 8: "Generally, when the First Nations refer to treaty rights, they do not distinguish between the political and legal content of those rights. They have historically considered the treaties to be ... political and legal agreements between sovereign government orders."

[29]This is discussed in greater detail in Ch. III. See also *infra* note 40.

[30]This is discussed briefly in Ch. III.

[31]See O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, (Toronto: McClelland & Stewart, 1992) at 224: "Settler expansion was dramatic -- the population rose threefold from approximately 750,000 in 1821 to 2.3 million by 1851; in Upper Canada alone it rose by a factor of ten, to reach 952,000."

[32]That is not to suggest that there were no previous treaties in Canada which sought the surrender of aboriginal lands. While such treaties did exist prior to the nineteenth century, they were less prevalent than peace and friendship treaties or other treaties of alliance. See the commentary in *Treaty Making*, *supra* note 26 at 17: "... [T]reaty objectives on the part of Crown representatives alone varied significantly ... and were influenced by a broad range of factors, including the immediate agenda of the government of the day and the particular mandate of the negotiators." The situation in the American colonies was different: refer back to the discussion of the geographical limitations of this work in Chapter I.

[33]See Dickason, *supra* note 31 at 225; Miller, *supra* note 26 at 93: "... [T]he Indians indirectly funded most of the purchase price of their land through instalment payments made from revenues derived from that land."

treaties to open up land for new settlement. The use of coercion by the Crown to obtain these surrenders was not unusual. In 1836, the Chippewas of Saugeen and Nawash surrendered 1.5 million acres of land to the Crown in exchange for a reserve of 450,000 acres under Treaty 45 1/2. The treaty stipulated that the reserve was to be protected from non-aboriginal encroachment. Shortly after signing the treaty, the Chippewas began complaining to the Crown that their reserve was being occupied by squatters and that timber was being cut down and removed. No action was taken by the Crown regarding the complaints. However, in 1854, the Crown sought a further surrender of land from the Chippewas. They were informed by Superintendent of Indian Affairs T.G. Anderson that unless they surrendered some of the lands that had been reserved for them under the 1836 treaty, the Crown would not protect those lands from non-aboriginal encroachment as the treaty had promised:[34]

> You complain that the whites not only cut and take timber from your lands but that they are commencing to settle upon it and you can't prevent them, and I certainly do not think the Government will take the trouble to help you while you remain thus opposed to your own interest -- the Government as your guardian have the power to act as it pleases with your reserve ... if it is not sold the trees and the land will be taken from you by your white neighbours and your children will then be left without resource.[35]

Some two weeks after sending the above letter, Anderson forwarded another letter to the Chippewas that expressed a similar sentiment. It stated that "emigrants are coming so thick that I do not believe that the Government will be able to retain for you all your reserves."[36] As a result of these letters, the Chippewas agreed to surrender much of their remaining reserve land to the Crown under Treaty No. 72 in 1854. It would appear, however, that the Crown's failure to protect the Chippewas' lands was based more on its unwillingness rather than any inability to do so. Immediately after the conclusion of Treaty No. 72, Anderson issued a notice warning squatters not to trespass on the newly-surrendered lands. He also enlisted the assistance of the local sheriff to police the area and enforce the Crown's exclusive right to the lands. No such actions had been taken prior to the signing of the second treaty.[37] The use of coercion by the

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[34]See J.J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government," (1992), 30 *Osgoode Hall L.J.* 291 at 323 [hereinafter "Genealogy of Law"].

[35]Letter from T.G. Anderson, Superintendent of Indian Affairs, 2 August 1854 to the Owen Sound and Saugeen Indians: see PAC RG 10, Vol. 213 at 126356; Borrows, "Genealogy of Law," *supra* note 34 at 322.

[36]As quoted in Borrows, "Genealogy of Law," *supra* note 34 at 323.

[37]The discussion in this section has been summarised from information contained in the Public Archives of Canada regarding Treaty No. 72. See, for example, the *Report on Negotiation Proceedings Regarding Surrender of the Saugeen Tract* from Superintendent General of Indian Affairs L. Oliphant to Lord Elgin, Governor-General of Canada, PAC RG 10, Vol. 117.

Crown to entice the signing of treaties may also be seen in the negotiation of Treaties 1 and 2, as recounted in a letter written by Lieutenant-Gov. Adams G. Archibald:

> We told them that whether they wished it or not, immigrants would come in and fill up the country; that every year from this one twice as many in number as their whole people there assembled would pour into the Province, and in a little while would spread all over it, and that now was the time for them to come to an arrangement that would secure homes and annuities for themselves and their children.[38]

Over time, the Crown began to view treaties with the aboriginal peoples exclusively as agreements concluded to obtain surrenders of aboriginal lands.[39] Yet, while the Crown's regard for treaties began to change after 1763,[40] the Crown's representations to the aboriginal peoples in treaty negotiations did not. In its post-1763 treaties, the Crown failed to distinguish between treaties which preceded this change and those which arose subsequent to it. Consequently, the aboriginal signatories to these later treaties viewed them in the same manner as treaties signed prior to 1763. Political changes after 1763 had, however, altered power relations between the Crown and the aboriginal peoples so that the latter were not in a position to enforce their understandings of the treaties.

The 1836 Manitoulin Island treaty provides a good illustration of how the Crown continued to represent nineteenth century treaties as following the pattern of pre-1763 treaties. The treaty was negotiated by the Lieutenant-Governor of Upper Canada, Sir Francis Bond Head. Bond Head believed that the Indians were destined for extinction.[41] Furthermore, he viewed them

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[38]Letter from Lieutenant-Gov. Adams G. Archibald to the Secretary of State for the Provinces, dated July 29, 1871, as detailed in Morris, *supra* note 20 at 34. See also the discussion of the Crown's treaty negotiations with the Chippewas of Saugeen and Nawash in Borrows, "Genealogy of Law," *supra* note 34; Rotman, *supra* note 26 Ch. XVI.

[39]As Dickason explains, *supra* note 31 at 273, by Confederation 123 treaties and land surrenders had been negotiated. Of the 483 treaties listed in Canada, *Indian Treaties and Surrenders from 1680 to 1902*, 3 Vols., (Ottawa: Brown Chamberlin, 1891-1912), the majority involve land surrenders.

The idea that treaties with aboriginal peoples were designed for the sole purpose of obtaining surrenders of land may be seen, for example, in Justice Hall's judgment in *Calder*, *supra* note 12 at 202: "Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed." While Hall J.'s comments were made for the purpose of demonstrating that the Indian title to lands in British Columbia had not been extinguished prior to the province entering Confederation in 1871, his generalisation about the purpose of treaties is illustrative of a generally-held vision of Crown-Native treaties.

[40]Dickason, *supra* note 31 at 188-9: "After the 1763 Proclamation, treaties and administration took on a different character, a development that would find its continuity in Upper Canada. Priorities changed -- instead of being primarily concerned with peace and secondarily (if at all) with land issues, treaties now focused primarily on land, secondarily on peace and friendship."

[41]J. Borrows, "Negotiating Treaties and Land Claims: The Impact of Diversity Within First Nations Property Interests," (1992), 12 *Windsor Y.B. Access Just.* 179 at 189 [hereinafter "Negotiating Treaties"].

as an impediment to increased settlement in Upper Canada. He regarded the 1836 treaty as a means to remove all Indians in Canada to Manitoulin Island, where they could live out their existence without hindering non-aboriginal settlement.[42] However, Bond Head's representations to the aboriginal peoples did not mesh with the manner in which he regarded the treaty. Bond Head was unequivocal in his representations to the aboriginal peoples that the 1836 treaty was an affirmation of the *Treaty of Niagara, 1764*. As he explained: "Several snow seasons have now passed since we met council at the crooked place (Niagara) at which time and place your Great Father the King and the Indians of North America tied their hands together by the Wampum of friendship."[43] Bond Head also attached wampum to the 1836 treaty. By linking the Manitoulin Island treaty with the *Treaty of Niagara* and attaching wampum to it, the aboriginal peoples would have been led to believe that the 1836 treaty was a nation-to-nation agreement just as the *Treaty of Niagara* had been.[44] This understanding of the 1836 treaty continued well after the Manitoulin Island treaty had been signed.[45]

Relatively few large land cession treaties were signed in the eighteenth century after the *Treaty of Stanwix* in 1768. Things began to change in the early stages of the nineteenth century, which saw the beginnings of the Crown's new policy of aboriginal assimilation.[46] Treaties played a major role in the implementation of this policy. They were the vehicles whereby aboriginal land interests were, from the Crown's perspective, extinguished and the aboriginal peoples placed on reserves. Placing Native peoples on reserves was intended to curtail their traditional activities and allow them to be more closely monitored by the Crown.[47] If the Crown had not already abandoned the principles of reciprocity that characterised the *Treaty of Albany*, the Covenant Chain, and the Maritime treaties in its nineteenth century treaties after the *Treaty of Stanwix*,[48] it certainly would appear to have done so once it adopted this assimilationist policy.

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[42]*Ibid.*

[43]*Ibid.* at 193.

[44]*Ibid.* at 193-4. As the discussion of the *Treaty of Niagara* in Ch. III illustrates, that treaty was represented by Sir William Johnson as a continuation of the Covenant Chain alliance that dated back to the *Treaty of Albany* in 1664.

[45]*Ibid.* at 194: "Future generations of First Nations people would take Bond Head's agreement at face value and claim their ownership of land on Manitoulin Island to the exclusion of non-Native people."

[46]The effects of colonialism on the aboriginal peoples is discussed in Rotman, *supra* note 26 Ch. III.

[47]See note 26 and its accompanying text.

[48]This is disputed by the Six Nations Iroquois, as explained in Opekokew, *supra* note 27 at 24, who maintain that the 1784 Haldimand Proclamation and the 1793 Simcoe Patent, two of the more prominent treaties at the end of the eighteenth century, confirm their independence or sovereignty as allies. As noted, *ibid.* at 51, the

Although the Crown apparently had, by the early nineteenth century, no longer regarded the aboriginal peoples as autonomous but as subjects who needed to be civilised and assimilated, it continued to treat with the Native peoples as it always had. As Henderson notes, "Crown negotiators often emphasized that the treaties were foundational agreements, establishing or confirming the basic and enduring terms of the relationship between Aboriginal peoples and the Crown."[49] This sentiment is echoed by the authors of *The True Spirit and Original Intent of Treaty 7*, who explain that:

> The Aboriginal leaders were allowed to feel that they were negotiating as equals, but the Euro-Canadians did not respect their culture and they saw their nations as inferior. The Aboriginal leaders could hardly be expected to know that these men they were bargaining with in good faith had little resolution to take seriously the discussions that the Aboriginal leadership solemnized by smoking the pipe.[50]

Hamilton has explained the Crown's actions in the following manner: "The basis upon which the Government acted, which was to run the lives of these people until they could be assimilated into Canadian society, is not reflected in the treaties. It hardly accords with the promises that were made by the Queen's representatives ..."[51] Thus, while the Crown continued to represent to the aboriginals that their independence would be respected and their rights protected from unwanted incursions, these representations were inconsistent with the Crown's regard for the aboriginal peoples.[52]

Haldimand Proclamation states "I have, at the earnest Desire of many of, these His Majesty's faithful Allies, purchased a Tract of Land ..." while the Simcoe Patent reads:

> ... [W]hereas the attachment and fidelity of the Chiefs, Warriors and people of the Six Nations to Us and our Government has been made manifest ... by the bravery of their conduct. ... We being desirous of showing our approbation of the same and in recompense of the losses they may have sustained ... confirming ... the full and entire possession ... of the said District or Territory to be held and enjoyed by them in the most free and ample manner and *according to the several customs and usages of them* ..." [Emphasis added]

[49]Henderson, *supra* note 23 at 296.

[50]Treaty 7 Elders and Tribal Council, with W. Hildebrandt, S. Carter, and D. First Rider, *The True Spirit and Original Intent of Treaty 7*, (Montreal & Kingston: McGill-Queen's University Press, 1996) at 198 [hereinafter "*The True Spirit and Original Intent of Treaty 7*"]. See also J.M Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History*, (New York: Guildford Press, 1993).

[51]Hon. A.C. Hamilton, *A New Partnership*, (Ottawa: Minister of Public Works and Government Services Canada, 1995) at 9; see also *Treaty Making*, *supra* note 26 at 29.

[52]See Opekokew and Pratt, *supra* note 3 at 9:

> In the Commissioners' reports of the treaty assemblies prior to the Indian people signing the Treaties, we repeatedly hear that the Indians were desirous of maintaining their way of life, and such assurances were given to the Indian signatories that the treaties were given in addition to or in furtherance of their right to maintain their way of life.

As treaties between the Crown and Native peoples became more frequent during the nineteenth and early twentieth centuries, the Crown continued to assure the aboriginals that they would be able to continue their traditional ways of life. In this respect, the Crown's representations to the aboriginal peoples had remained relatively unchanged from the time of the *Treaty of Albany* in 1664. The representations made by Alexander Morris, the Crown's chief negotiator for many of the early post-Confederation numbered treaties and Lieutenant-Governor of Manitoba and the North-West Territories, are indicative of this continuity.[53] During negotiations for Treaty No. 3 in 1873, Morris stated that the aboriginal peoples would have the exclusive use of certain lands for farms and reserves. As for the lands that were to be surrendered, Morris explained that "It may be a long time before the other lands are wanted, and in the meantime you will be permitted to fish and hunt over them."[54] When this statement is read in conjunction with the declarations made by the gathered chiefs the following day in which they clearly and repeatedly expressed that the land in question belonged to them,[55] it would appear that the aboriginals' believed that they were only sharing their lands with the Crown and would continue their traditional ways of life. Moreover, they were not discouraged from maintaining such beliefs by the Crown's representatives.

During negotiations for Treaty No. 6 in 1876, Morris was more explicit about not having the treaty interfere with the aboriginals' traditional lifestyles. Initially, he explained that "What I have offered does not take away your living, you will have it then as you have now, and what I offer now is put on top of it."[56] Later in the negotiations, he reiterated the same point, stating that "I want the Indians to understand that all that has been offered is a gift, and they still have the same mode of living as before."[57] Morris then explained that "we do not want to take away the means of living that you have now, we do not want to tie you down."[58] Once the treaty had been agreed to, Morris recounted the effects that the treaty would have on the aboriginals: "The

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[53]See Hamilton, *supra* note 51 at 7-8:

> Their belief is that earlier treaties were intended to guarantee the right of Aboriginal peoples to live as they did prior to treaties being signed. This belief finds support in such works as The Honourable Alexander Morris' *The Treaties of Canada with Indians of Manitoba and Northwest Territories Including the Negotiations on Which They Were Based* and in letters and other documents showing comments and promises made by the federal negotiators of the day.

[54]Morris, *supra* note 20 at 58.

[55]*Ibid.* at 59, 60, 61, 62, 63.

[56]*Ibid.* at 211.

[57]*Ibid.* at 221.

Government will not interfere with the Indians' daily life, they will not bind him. They will only help him to make a living on the reserves ..."[59]

The same sentiments that had been expressed by Morris in Treaties 3 and 6 may be seen again in Treaty No. 7 in 1877. Once the Blackfeet had agreed to conclude the treaty, the assembled chiefs gave an address to the two Treaty Commissioners -- Lieutenant-Colonel James F. McLeod and David Laird, the successor to Morris as Lieutenant-Governor of the North-West Territories -- in which they expressed their understanding of the treaty's terms. In response, McLeod said "The Chiefs all here know what I said to them three years ago, when the Police first came to the country -- that nothing would be taken away from them without their own consent."[60] The oral history of the Treaty No. 7 bands[61] indicates that the leaders who agreed to the treaty believed that it was a peace treaty in which they agreed to end hostilities among themselves and not interfere with the peaceful settlement of farmers in the region.[62] According to the elders' account of the treaty, nothing was said about having the peace of the treaty being linked to a surrender of land.[63]

By the time Treaty No. 7 was negotiated, the Blackfoot chiefs were already familiar with the Crown's treaty process. A number of the Blackfoot chiefs had signed the Lame Bull Treaty of 1855 that had allowed development in the American West in exchange for peace and the promise of payments to the signatory tribes. This treaty had also been understood by the Blackfoot to be a peace treaty rather than a land surrender treaty.[64] Therefore, the chiefs' understanding of the purpose of Treaty No. 7 would have been the same as the 1855 treaty in the absence of an indication to the contrary by the treaty commissioners. According to evidence provided by Peter Wesley, a Stoney Indian whose Cree-speaking mother was present at Blackfoot Crossing where Treaty No. 7 was negotiated, no such contrary intention was ever indicated:

> On the morrow the Chief asked him [Lieutenant-Governor Laird] what was the real meaning of this proposal? The answer was, "To make peace between us. We will have friendship when and where we ever meet. I am asking you to put your rifle down in exchange for a peace treaty. The money I am just about to give you is for this purpose. Not to kill each other. And furthermore, I am not going to take over your land, but I am willing to pay you money if you put down your rifle and make peace with me, this is what I mean." This was the answer given by

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[58] *Ibid.* at 233.
[59] *Ibid.* at 241.
[60] *Ibid.* at 274-5.
[61] See *The True Spirit and Original Intent of Treaty 7*, *supra* note 50.
[62] *Ibid.* at 111-12.
[63] *Ibid.* at 112.
[64] *Ibid.*

> the Lieutenant Governor. So that was how peace was made and that is the way it was. Nothing besides peace-making was talked about. The Chief had been told that he could still use his land in the same manner as before and there would be no interruption either, these were the final words put forth by the Governor through the interpreter. My mother talked and understood Cree very well. That was why my mother understood all the conversations held between the Governor and the Chiefs.[65]

The transmission of Crown treaty protocol and representations from aboriginal groups that had signed treaties to others that would sign treaties some years later had a significant effect on the latter's understanding of the treaty-making process. The dissemination of such information was not uncommon, insofar as treaty interpreters were often Métis traders and trappers who migrated from place to place in British North America. Communication between aboriginal groups also took place during east-west and north-south trade between aboriginal nations that was a fundamental element of the British fur trade. By the middle of the eighteenth century, the fur trade had traveled as far as the Athabasca River and Peace River country because of Cree migration from Ontario and the western journeys of the French explorer Pierre Gaultier de Varennes, Sieur de La Vérendrye.[66]

It was also not uncommon for European explorers to hear the aboriginal peoples talk about other white men and their practices even in situations where no other white men had previously infiltrated those territories. One such example occurred in the late 1720s when La Vérendrye met two Cree near the Lake of the Woods. They told him of white men to the southwest who sawed wood into boards and used boats. Those white men lived in a land full of strange trees and animals. La Vérendrye concluded that the Cree were referring to the Spanish colonies rather than the English at Hudson Bay and James Bay, since the Spanish were located in the southwest and the Cree would have been familiar with the trees and animals in the Hudson Bay/James Bay area.[67] If the Cree had visited the Spanish, they would have encountered many other aboriginal groups along the way. Alternatively, they could have heard stories about the Spanish if they belonged to a geographically spread out information network. As Ray explains, "the Native people in the heart of the continent were receiving news and circulating stories about events that were occurring thousands of miles away on unknown shores."[68]

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[65] *Ibid.* at 317.

[66] A.J. Ray, *I Have Lived Here Since the World Began*, (Toronto: Lester, 1996) at 78-9.

[67] *Ibid.* at 43.

[68] *Ibid.*

The presence of such forms of communication provides a basis for understanding the existence of relatively uniform concerns among the aboriginal peoples in the later post-Confederation treaties, such as Treaty No. 8 and onwards. In these treaties, the treaty commissioners were uniformly bombarded with aboriginal concerns that the treaties were the method by which the Crown would remove their lands and rights and confine them to reserves.[69] These same concerns were voiced whether the treaties were signed in the West or in the East. The negotiations surrounding Treaty No. 9 -- signed with the aboriginal peoples living in the James Bay area -- demonstrate the uniformity of these concerns. Some of this communication may be found in a variety of sources, including treaty commissioners' reports and provincial archives.

In the report of the commissioners for Treaty No. 9, signed in 1905 and 1906, there was discussion of an aboriginal named "Yesno" -- so-called because his knowledge of the English language consisted only of the words "yes" and "no" -- encountered during treaty negotiations at Fort Hope.[70] Yesno informed the gathered Indians that they should receive cattle, implements, seed-grain, and tools for signing a treaty with the Crown. As the commissioners' report indicates:

> Yesno had evidently travelled, and had gathered an erroneous and exaggerated idea of what the government was doing for Indians in other parts of the country, but, as the undersigned wished to guard carefully against any misconception or against making any promises which were not written in the treaty itself, it was explained that none of these issues were to be made, as the band could not hope to depend upon agriculture as a means of subsistence; that hunting and fishing, in which occupations they were not to be interfered with, should for very many years prove lucrative sources of revenue.[71]

An examination of the promises made to the aboriginal peoples in other post-Confederation numbered treaties indicates that Yesno's information was correct. While the Treaty No. 9 area was generally unfit for agriculture, it appears that rather than informing the assembled Indians of this fact as a reason for not including such promises, the commissioners avoided the issue by maintaining the Yesno was wrong. Meanwhile, the commissioners' statement that they wanted to "guard carefully against ... making any promises which were not written in the treaty itself"

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[69]This is discussed in the illustrations of treaty negotiations below.

[70]See *The James Bay Treaty, Treaty No. 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930* at 6.

[71]*Ibid.*

suggests that the treaty had already been drafted prior to these negotiations taking place.[72] Treaty No. 9 is discussed in greater detail below.

The wide-scale dissemination of information about treaties to aboriginal groups is also indicated by Hamar Foster's relation of a story that occurred in 1887, when a delegation of aboriginals from the Naas and Skeena Rivers went to Victoria to demand an agreement like those that had been made with tribes east of the Rocky Mountains. When the delegation made its demands to the Premier of British Columbia, William Smithe, Nisga'a member John Wesley was asked to explain precisely what was being requested. Wesley replied that the delegation wanted a law "such as the law of England and the Dominion Government which made a treaty with the Indians." When Smithe inquired where Wesley had obtained his information, the following exchange occurred:

> WESLEY: It is in the law books.
>
> SMITHE: Who told you so?
>
> WESLEY: There are a good many Indians who can read and write, and they are the ones who say this ...
>
> SMITHE: And they told you this, did they?
>
> WESLEY: Yes.
>
> SMITHE: Well, I should like them to produce the book that they read this in. I have never seen that book.
>
> WESLEY: We could not tell you the book just now but we can probably find it for you if you really want to see it.
>
> SMITHE: There is no such law either English or Dominion that I know of, and the Indians or their friend have been misled.[73]

As Foster has surmised, the book referred to by Wesley was most likely Alexander Morris' *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*,[74] which had been published in 1880.[75] As Foster explains, Indian Superintendent Powell, who was present at

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[72]The notion that treaties were sometimes drafted before treaty negotiations had commenced, thereby rendering those negotiations merely symbolic, is discussed in Ch. VII.

[73]*BC Sessional Papers* 1887 at 255-7 (*Report of Conferences between the provincial Government and Indian Delegates from Fort Simpson and Naas River*), as reproduced in H. Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927," in H. Foster and J. McLaren, eds., *Essays in the History of Canadian Law, Vol. VI, British Columbia and the Yukon*, (Toronto: The Osgoode Society for Canadian Legal History and University of Toronto Press, 1995) at 47.

[74]*Supra* note 20.

[75]*Supra* note 73 at 47-8.

the meeting of the delegates with the Premier, knew that missionary William Duncan had been reading to the Tsimshian from a "law book."[76]

The Crown's representations to the aboriginal peoples that their traditional ways of life would not be affected by the signing of treaties continued in Treaty No. 8, which was concluded in 1899. Such assurances are rife in the treaty commissioners' report of 22 September 1899.[77] Initially, the report states that the commissioners pointed out to the aboriginal signatories "that the same means of earning a livelihood would continue after the treaty as existed before it."[78] The report also details the course of action taken when the aboriginals expressed concern that their hunting and fishing privileges would be curtailed:

> The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.[79]

The commissioners' report illustrates that the aboriginals were assured one further time that "the treaty would not lead to any forced interference with their mode of life."[80] The repeated assurances made by the treaty commissioners came in response to the fact that there was significant aboriginal apprehension in signing the treaty.[81]

In addition to demonstrating that the commissioners assured the aboriginal signatories that their traditional lifestyles would remain unaffected by their signing of the treaty, the commissioners' report clearly illustrates the distinction between the Crown's intentions and the representations made to the aboriginal peoples. Indeed, the commissioners note that their duplicity was necessary to entice the aboriginals to sign the treaty. As they stated with regard to the question of Indian reserves:

> It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that

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[76]*Ibid.* at 48. Foster also notes that when reserve commissioner Peter O'Reilly visited the Tsimshian and the Nisga'a at Port Simpson the following year, they had obtained a copy of a book which contained the texts of the Douglas treaties signed with aboriginal groups on Vancouver Island in the 1850s.

[77]*Treaty No. 8 Made June 21, 1899 and Adhesions, Reports, Etc.*, (Ottawa: Queen's Printer, 1966).

[78]*Ibid.* at 5.

[79]*Ibid.* at 6.

[80]*Ibid.*

[81]See *ibid.* at 5.

> the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.[82]

Meanwhile, the Order in Council that set up the commission for Treaty No. 8 demonstrated that the Crown's intent was to eventually confine the aboriginals to the reserves set aside for them.[83] Any other effect would have been inconsistent with the Order in Council's stated goal that "the country to be treated for should be thrown open to development."[84]

Treaty No. 9, concluded with various aboriginal groups in Northern Ontario, followed a similar pattern to Treaty No. 8. The report of the Treaty No. 9 commissioners indicates that the aboriginal peoples in the treaty area were also concerned that if they signed the treaty, they would be forced to live on reserves and be deprived of their traditional practices of hunting and fishing. The commissioners informed the aboriginals that "their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with."[85] Another interesting aspect of the commissioners' report is its indication that the commissioners "carefully guarded against making any promises over and above those written in the treaty which might afterwards cause embarrassement [*sic*] to the governments concerned."[86] This inclusion would seem to indicate the commissioners' knowledge that previous treaty commissioners had made promises over and above those contained in the written agreements.

Treaty No. 10, signed in 1906 with Chipewyan, Cree, and other Indians situated in parts of Saskatchewan and Alberta not already covered by other treaties, continued the trend initiated by other post-Confederation treaties. Commissioner J.A. McKenna's report indicated that there had been an influence among the treaty Indians "which tended to make them regard the treaty as a means of enslaving them."[87] They were concerned that signing the treaty would result in the curtailment of their hunting and fishing privileges. Consequently, they requested that the lakes and rivers not be monopolised or depleted by non-aboriginal commercial fishing.[88] McKenna told them that "the same means of earning a livelihood would continue after the treaty was made as existed before it" and that "the treaty would not lead to any forced interference with their mode of

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[82]*Ibid.* at 7.
[83]P.C. No. 2749, as reproduced, *ibid.* at 3-4.
[84]*Ibid.* at 4.
[85]*Supra* note 70 at 5.
[86]*Ibid.* at 10-11. Refer back to the quoted material in note 71.
[87]*Treaty No. 10 and Reports of Commissioners*, (Ottawa: Queen's Printer, 1966) at 5.
[88]*Ibid.* at 6.

life."[89] Commissioner McKenna also indicated that to the aboriginals that they would not be confined to their reserves.[90]

The last of the post-Confederation numbered treaties, Treaty No. 11, was signed in 1921.[91] Again, the aboriginals voiced concerns about infringements on their liberty to hunt, fish, and trap to the treaty commissioner. Commissioner H.A. Conroy assured the aboriginals that their rights would not be so limited. In doing this, he stressed that greater quantities of twine for nets and more ammunition were provided for in Treaty No. 11 than under any preceding treaty. This fact, he explained, "went a long way to calm their fears."[92] When the aboriginals expressed concerns that signing the treaty would confine them to reserves and make then liable for military service, they were told that they were exempt from the latter and that they would be able to choose their own reserves, which would be "for their own use, and not for the white people, and that they would be free to come and go as they pleased."[93] Commissioner Conroy explained that the aboriginals were satisfied with these answers and agreed to sign the treaty.

What may be gathered from the foregoing illustrations of post-Confederation treaty representations is that the Crown's commissioners uniformly represented that these treaties would not interfere with the aboriginals' previous ways of life. The aboriginals were told that they would be able to hunt and fish as usual. They were also told that they would have reserves for their exclusive use set aside for them, but that they would not be confined to those reserves. Other benefits promised in the treaties were represented as being given in exchange for their peace and friendship.[94] From the aboriginals' perspective, it would have been logical for them to have presumed that if the treaties would not interfere with their previous lifestyles, the Crown's treaties respected their autonomy. This inference would have been reinforced by the promises of an exclusion from taxation in Treaty No. 8 and of military service exemptions in Treaties 8 and 11,

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[89]*Ibid.* at 7.

[90]*Ibid.* at 8.

[91]*Treaty No. 11 (June 27, 1921) and Adhesion (July 17, 1922) with Reports, Etc.* (Ottawa: Queen's Printer, 1957).

[92]*Ibid.* at 3.

[93]*Ibid.*

[94]An exception to this did exist in Treaty No. 9 negotiations, where Moonias, one of the most influential chiefs, said that from the time he was very young, he had never been given something for nothing and that the treaty commissioners "come to us from the King offering to give us benefits for which we can make no return. How is this?" Moonias was answered by Father F.X. Fafard of the Roman Catholic mission at Albany, who explained that under the treaty, "the Indians were giving their faith and allegiance to the King, and for giving up their title to a large area of land of which they could make no use, they received benefits that served to balance anything that they were giving." See *supra* note 70 at 6.

insofar as compulsory military service and the payment of taxes would have been viewed by the aboriginals as demonstrative of their lack of autonomy, and hence subservience, to the Crown's authority.

From these illustrations, it may be concluded that the aboriginal peoples' understanding of treaties, which was based on the Crown's representations therein, was that they continued to be compacts made on a nation-to-nation basis.[95] The treaties were viewed as agreements that arose out of negotiations between the Crown and the aboriginal peoples, not as a result of the former's munificence. As Squamish Chief Dan George explained:

> Lest no one forget it ... we are a people with special rights guaranteed to us by promises and treaties. We do not beg for these rights, nor do we thank you ... because we paid for them ... and God help us the price we paid was exorbitant. We paid for them with our culture, our dignity and self-respect. We paid and paid and paid until we became a beaten race, poverty stricken and conquered.[96]

The aboriginal peoples continued to regard the treaties as creating or solidifying alliances that would be continuous and everlasting. The obligations arising by way of these agreements were to be of a similar duration.[97]

Descriptions of treaties lasting "as long as the sun rises over our head and as long as the water runs,"[98] or being "inviolable & lasting as the great lights of Heaven and the immoveable Mountains"[99] by both the Crown's representatives[100] and the aboriginal peoples[101] support the

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[95]See Wildsmith, *supra* note 4 at 330-1, 335; Henderson, *supra* note 23 at 246:

> From the beginning of treaties with the First Nations, the European Crowns recognized the First Nations' autonomy. From the Eurocentric viewpoint, the European Crowns recognized the sovereignty of the First Nations; however, from a First Nations' perspective, the European Crowns recognized the inherent self-determination of Aboriginal peoples.

See also Henderson, *ibid.*, at 248-9, 250.

[96]From Waubageshig, ed., *The Only Good Indian: Essays by Canadian Indians*, (Toronto: New Press, 1970), as quoted in A.D. McMillan, *Native Peoples and Cultures of Canada: An Anthropological Overview*, (Vancouver: Douglas & McIntyre, 1988) at 293-5.

[97]The Covenant Chain alliance and the written texts of the treaties corroborates this understanding. See the discussion of the Covenant Chain in Ch. II; Dickason, *infra* note 102.

[98]Ojibway Chief Mawedopenais to Lieutenant-Governor Morris at the negotiations surrounding Treaty No. 3 in Morris, *supra* note 20 at 73. See also the promise made by Lieutenant-Governor Morris to Chief Mawedopenais at the signing of Treaty No. 3, *ibid.* at 75: "I accept your hand and with it the lands, and will keep all my promises, in the firm belief that the treaty now to be signed will bind the red man and the white together as friends for ever."

[99]From William Johnson's speech at Onondaga Lake, 26 June 1756, in *NYCD*, *supra* note 1 VII, at 139.

[100]Lieutenant-Governor Morris at Treaty No. 4, in Morris, *supra* note 20 at 96:

> I told my friends yesterday that things changed here, that we are here to-day and that in a few years it may be we will not be here, but after us will come our children. The Queen thinks

aboriginals' understanding of the documents as solemn and continuous agreements. Furthermore, as Dickason has stated, 'The phrase "as long as the sun shines and the water flows" was introduced by the whites; once it became part of the treaty language, however, Natives expected whites to live up to their word.'[102] Because of these representations, the aboriginal peoples believe that the obligations undertaken by the Crown in the context of treaties must still be fulfilled.[103] Hamilton's consultations with the aboriginal peoples led him to conclude that "For Aboriginal people, the historical significance and their understanding of treaties and of treaty making is that they represent an on-going relationship between two or more peoples bound by honour and trust."[104]

One of the primary purposes of the treaties, from the aboriginal peoples' point of view, was to protect their survival as distinct peoples. This included the protection of their traditional practices of hunting, fishing, and trapping.[105] Treaties were viewed by the aboriginal peoples as concrete guarantees of their rights through the preservation of their cultures and traditional

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> of the children yet unborn. I know that there are some red men as well as white men who think only of to-day and never think of to-morrow. The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.

[101]Chief Mis-tah-wah-sis to Lieutenant-Governor Morris at Treaty No. 6, *ibid.*, at 213: "What we speak of and do now will last as long as the sun shines and the river runs, we are looking forward to our children's children, for we are old and have but few days to live."

[102]Dickason, *supra* note 31 at 275.

[103]See Indian Chiefs of Alberta, *Citizens Plus*, (Edmonton: Indian Association of Alberta, 1970), at 7-8 [hereinafter "*Citizens Plus*"]:

> The Government must admit its mistakes and recognize that the treaties are historic, moral and legal obligations. The redmen signed them in good faith, and lived up to the treaties. The treaties were solemn agreements. Indian lands were exchanged for the promises of the Indian Commissioners who represented the Queen. Many missionaries of many faiths brought the authority and prestige of whiteman's religion in encouraging Indians to sign.

[104]Hamilton, *supra* note 51 at 6.

[105]See, for example, Morris, *supra* note 20, at 236, 240, 272; J.E. Foster, "The Saulteaux and the Numbered Treaties: An Aboriginal Rights Position?" in R. Price, ed., *The Spirit of the Albert Indian Treaties*, (Edmonton: Pica Pica Press, 1987) at 163-4; *Re Paulette and Registrar of Titles (No. 2)*, (1973), 42 D.L.R. (3d) 8 at 33 (N.W.T.S.C.):

> Throughout the hearings before me there was a common thread in the testimony -- that the Indians were repeatedly assured they were not to be deprived of their hunting, fishing and trapping rights. To me, hearing the witnesses at first hand ... many of whom were there at the signing, some of them having been directly involved in the treaty making, it is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in the territories that their traditional use of the lands was not affected.

ways.[106] The treaties continued to be viewed this way well into the second half of the twentieth century. As the Indian Chiefs of Alberta explained in *Citizens Plus*, "The only way to maintain our culture is for us to remain as Indians. To preserve our culture it is necessary to preserve our status, rights, lands and traditions. Our treaties are the bases of our rights."[107]

Aside from the terms of the treaties relating to the surrender of aboriginal lands to the Crown, treaties in the second half of the nineteenth century and into the early twentieth century almost inevitably addressed aboriginal rights to use the lands that were the subject of the treaties for traditional practices, such as hunting, fishing, and trapping. Most of these treaties expressly included these rights in the written version of the documents.[108] However, even where aboriginal rights such as these were contained in the treaties, they were generally not respected by the Crown.[109] Meanwhile, other treaty promises, such as the provision of farm implements and grain, and sometimes even the setting aside of reserves and the payment of annuities, remained unfulfilled.[110]

The distinction between the Crown's vision of the purpose of treaties and that held by the aboriginal peoples may be illustrated by looking at treaty negotiations between the groups. For instance, the background to the signing of Treaty No. 3, also known as the North-West Angle Treaty, indicates the cross-purposes that the Crown and the aboriginal peoples operated under

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[106]See Dickason, *supra* note 31 at 275: "In [the aboriginal peoples'] view, treaties were a means by which they would be able to adapt to the demands of the contemporary world within the framework of their own traditions."

[107]*Citizens Plus*, *supra* note 103 at 5.

[108]Whereas the Crown recorded its understanding of treaties on parchment, the aboriginal peoples made use of the spoken word, wampum belts, and the exchange of presents: see Borrows, "Negotiating Treaties," *supra* note 41 at 191-2.

[109]The actions of the Crown in failing to live up to its treaty obligations include its failure to set aside reserves or provide annuities promised under the treaties or its enactment of legislation that expressly repudiated treaty guarantees. As Dickason explains, *supra* note 31 at 253, during Sir Francis Bond Head's brief tenure as Lieutenant-Governor of Upper Canada from 1836-8, he did not always honour the land provisions for the Indians included in the treaties he negotiated with them. Refer back to the discussion of Bond Head's representations in the 1836 Manitoulin Island treaty, *supra*; see also Borrows, "Negotiating Treaties," *supra* note 41 at 188-94. More generally, see D.N. Sprague, "Canada's Treaties with Aboriginal Peoples," (1996), 23 *Man. L.J.* 341 at 346, who notes that many Indian bands did not receive treaty land entitlements commensurate with what had been promised to them in the treaties.

The Crown's failure to respect treaty promises is also profoundly illustrated in the Crown's promulgation of the *Natural Resource Transfer Agreements, 1930*, S.C. 1930, c. 3, 29, and 41, which were incorporated into the *British North America Act, 1930* (U.K.), 20-21 Geo. V., c. 26. These agreements directly affected treaty rights contained in Treaty Nos. 1 and 2 and 4 through 8 without any prior consultation with the aboriginal peoples affected. See the discussion of these agreements in Ch. VIII.

[110]Many of these unfulfilled promises, as with those discussed in note 109, are the subject of aboriginal claims under the federal Specific Claims Process. See also Sprague, *supra* note 109 at 348-9.

during their negotiations. Treaty No. 3 was signed on 3 October 1873 between the Crown and the Saulteaux band of Ojibway Indians at the North-West Angle of the Lake of the Woods. This treaty is significant in a number of respects. Most importantly, it created the need for future treaties by opening a passage to the West through Saulteaux territory. The gateway created by Treaty No. 3 allowed for the continuation of the transnational railroad and the spread of white settlers. The terms and conditions of Treaty No. 3 also shaped the content of future treaties.[111]

By 1869, the Dominion government had commenced building a transnational railroad to facilitate settlement in the Canadian West. The admission of Manitoba and British Columbia into Confederation in 1870 and 1871 respectively provided an even greater impetus for the Crown to facilitate the completion of a fixed link between those provinces and the rest of Canada. However, the route chosen for the transcontinental railroad proceeded through Saulteaux territory. The Saulteaux had previously sought compensation from the Crown for the latter's taking of trees and its use, without permission, of Saulteaux territory for construction of the railway. The Saulteaux were willing to negotiate terms under which the Crown would receive a right-of-way through their territory. They did not, however, want to surrender their land. These intentions were indicated by their chief speaker, Mawedopenais:

> ... [W]e are willing to allow the Queen's subjects the right to pass through our lands, to build and run steamers, build canals and railroads and to take up sufficient land for buildings for Government use - but we will not allow farmers to settle on our lands.[112]

In spite of the Saulteaux's intentions, the Crown nevertheless proceeded to negotiate with the Saulteaux with the intention of obtaining a full and complete surrender of their lands.[113]

During the treaty negotiations, the Saulteaux maintained that the territory belonged to them:

> We think it a great thing to meet you here. ... All this is our property where you have come. ... the Great Spirit has planted us on this ground where we are, as you were where you

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[111]See Dickason, *supra* note 31 at 280.

[112]W.E. Daugherty, *Treaty Research Report, Treaty #3*, (Ottawa: Treaties and Historical Research Centre, Department of Indian Affairs and Northern Development, 1987) at 7. See also *ibid.*, at 8-9:

> The Saulteaux were quite prepared to sign an agreement which would allow for a right-of-way through their territory and permit the government to undertake certain activities, for which the Indians were to be compensated. Thus, in their view, a treaty was defined as those specific items they were willing to grant. The fact that they flatly stated they would not "allow farmers to settle on their land" indicates clearly that they were not prepared to cede title to their land.

[113]As evidenced by the correspondence of Indian Commissioners Wemyss M. Simpson, Simon J. Dawson, and Lieutenant-Governor Adams G. Archibald, as reproduced, *ibid.* at 7-20 and in Morris, *supra* note 20 at 44.

> came from. We think where we are is our property. I will tell you what he said to us when he he [*sic*] planted us here; the rules we should follow -- us Indians -- He has given us rules that we should follow to govern us rightly.[114]

In response, Lieutenant-Governor Morris attempted to shame the Saulteaux into surrendering their lands:

> If we do not shake hands and make our Treaty to-day, I do not know when it will be done, as the Queen's Government will think you do not wish to treat with her. ... I am sorry to see that your hands were very wide open when you gave me this paper. I thought what I promised you was just, kind and fair between the Qeeen [*sic*] and you. It is now three years we have been trying to settle this matter. If we do not succeed to-day I shall go away feeling sorry for you and for your children that you could not see what was good for you and for them.[115]

When this tactic failed, he tried to intimidate the Saulteaux into accepting a surrender of their lands: "I am very sorry; you know it takes two to make a bargain ... I have to go away and report that I have to go without making terms with you. I doubt if the Commissioners will be sent again to assemble this nation."[116]

The Saulteaux eventually signed Treaty No. 3. Under the written terms of the treaty, they agreed to, "cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her Successors forever, all ... rights, titles and privileges whatsoever, to the lands included within the following limits ..."[117] However, the statement made by Chief Sakatcheway (also known as Kakatcheway) -- representing the Lac Seul band as well as his own Mattawan and English River band -- strongly suggests that his acceptance of the treaty did not contemplate the absolute *surrender* of land, but a *sharing* of the parties' resources, including cattle, water, fish, knowledge, *or* land:

> I understand the matter that he asks; if he puts a question to me as well as to others, I say so as well as the rest. We are the first that were planted here; we would ask you to assist us with every kind of implement to use for our benefit, to enable us to perform our work; a little of everything and money. We would *borrow* your cattle; we ask you this for our support; I will find whereon to feed them. The waters out of which you sometimes take food for yourselves, we will *lend* you in return. ... If you give what I ask, the time may come when I will ask you to *lend* me one of your daughters and one of your sons to live with us; and in return I will *lend* you one of my daughters and one of my sons for you to teach what is good, and after they have learned, to teach us. If you grant us what I ask, although I do not know you, I will shake hands with you. This is all I have to say.[118]

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[114]Morris, *supra* note 20 at 59.

[115]*Ibid.* at 60-1.

[116]*Ibid.* at 61.

[117]*Ibid.* at 322.

[118]*Ibid.* at 63 [Emphasis added].

Treaty No. 3 was not the only treaty in which the written terms did not accord with aboriginal understandings. The written version of Treaty No. 6, negotiated three years later, contained identical terms regarding the absolute nature of the aboriginals' surrender of their territory.[119] However, a statement made by Chief Crowfoot during the treaty negotiations reveals that he, like Sakatcheway, had a far different understanding of the treaty:

> Our land is more valuable than your money. It will last forever. It will not perish as long as the sun shines and the waters flow, and through all the years it will give life to men and beasts.
>
> We cannot sell the lives of men and animals and therefore, we cannot sell the land. It was put here by the Great Spirit and we cannot sell it, because it does not really belong to us. You can count your money and burn it with the nod of a buffalo's head, but only the Great Spirit can count the grains of sand and the blades of grass on these plains. As a present to you, we will give you anything we have that you can take with you, but the land we cannot give.[120]

The use of all-inclusive language regarding the aboriginal surrender of their land interests in Treaties 3 and 6, which was also used in many other treaties, likely did not mean the same thing to the Crown's representatives as it did to the aboriginal peoples. To the Crown, the language used indicated the completeness of the surrender, leaving no residual interest to the aboriginal peoples.[121] It is uncertain exactly what effect the use of such language had upon the aboriginal signatories. Given the tremendous differences in aboriginal and non-aboriginal conceptions of land and its use, it is unlikely that the aboriginal peoples would have shared the Crown's understanding. In contrast with common law conceptions of land ownership, the aboriginals viewed land as something that could be used and cared for, but not sold.[122] As anthropologist Dr. June Helm explained in her testimony in the *Re Paulette* case:

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[119]*Ibid.* at 352.

[120]As reproduced in D. Opekokew, *The First Nations: Indian Government and the Canadian Confederation*, (Saskatoon: Federation of Saskatchewan Indians, 1980) at 12.

[121]In "The Spirit and Terms of Treaty Eight," in Price, *supra* note 105 at 95, Daniel offers the following explanation of why treaty commissioners did not explain the use of such all-inclusive language in treaties:

> It is likely that the commissioners felt that it was a mere formality from the governmental point of view. The government had already made some laws applicable in the area and fully intended to establish further control. From their point of view, they already owned the land; so the treaty was merely a means of extinguishing the vague aboriginal rights and placating the native people by offering the advantages of a treaty.

[122]See the discussion in Rotman, *supra* note 26, Chapter II; *Treaty Making*, note 26, *supra*, at 9-14; Daniel, *supra* note 121 at 95-6.

It should be noted, as well, that there is no reason to suggest that a surrender of land under the terms of a treaty need necessarily be viewed only as an absolute transfer of all rights from the aboriginal peoples to the Crown, in accordance with common law understandings and conceptualisations of what constitutes a surrender of land. As Macklem suggests in "First Nations Self-Government and the Borders of the Canadian Legal Imagination," (1991), 36 *McGill L.J.* 382 at 427 [hereinafter "First Nations Self-Government"]:

> How could anybody put in the Athapaskan language through a Métis interpreter to monolingual Athapaskan hearers the concept of relinquishing ownership of land. I don't know, of people who have never conceived of a bounded property which can be transferred from one group to another. I don't know how they would be able to comprehend the import translated from English into a language which does not have those concepts, and certainly in any sense that Anglo-Saxon jurisprudence would understand. So this is an anthropological opinion and it has continued to puzzle me how any of them could possibly have understood this. I don't think they could have.[123]

Insofar as the Crown and the aboriginal peoples may have had completely different understandings of what was contained in their treaties, there is reason to suggest that the treaties were not true compacts.[124] Instead, what happened in practice is that the Crown's superior power enabled it to implement its understanding of the treaties while simultaneously insulating it from liability for failing to discharge its treaty obligations.[125]

> The act of surrender ... need not be interpreted by reference to traditional Anglo-Canadian understandings of title transfers. A surrender need not be read as conveying an absolute right of exclusion and as automatically stripping native people of continued use and enjoyment of the land in question. Instead, a surrender could be viewed as the granting of consent to a system of priority of use, whereby native people, in return for benefits provided by the Crown, agree either that nonnative use or native use will have priority in the event of conflict between uses. When there is no conflict in use, namely, where one party can engage in activity that does not threaten the use put to the land by the other party enjoying priority, the act of surrender need not foreclose native use and enjoyment.

[123]Testimony of Dr. J. Helm, at 33-4, as reproduced in Daniel, *supra* note 121 at 95. Note also the report of the Nelson Committee in 1959 -- *Report of the Commission Appointed to Investigate the Unfulfilled Provisions of Treaties 8 and 11 as They Apply to the Indians of the Mackenzie District 1959*, reprinted (Toronto: Indian-Eskimo Association of Canada, 1970) -- as reproduced, *ibid.* at 95-6:

> Very few of the adults had received an elementary education and consequently were not able to appreciate the legal implications of the Treaties. Indeed some bands expressed the view that since they had the right to hunt, fish and trap over all of the land in the Northwest Territories, the land belonged to the Indians. The Commission found it impossible to make the Indians understand that it is possible to separate mineral rights or hunting rights from actual ownership of land.

[124]See *The True Spirit and Original Intent of Treaty 7*, *supra* note 50 at 195:

> While there can be unanimity on the meaning of certain clauses, in general the texts of treaties can be interpreted in a variety of ways. It is questionable whether a "mutually understood agreement" was ever arrived at between a people representing a written culture on the one hand and a people representing an essentially oral culture on the other.

[125]See also *ibid.*:

> The expansion of these nation-states saw the subordination of classes, ethnic groups, and races to a dominant class or racial group. The interests of one particular class or group were privileged at the expense of the interests of the others. What emerged in each instance was a so-called national culture that in fact was little more than the culture favoured by those who made up the dominant group or class.

Aside from this fundamental problem of a lack of "meeting of the minds" in treaty negotiations, there is another major distinction between the British and aboriginal understandings of treaties. The Crown tended to view its compacts with the aboriginal peoples exclusively in light of the written documents that were signed by the parties. However, the aboriginal peoples viewed their agreements with the Crown as being comprised of the entire treaty-making process.[126] This included oral promises made during treaty negotiations or contained within the agreements themselves.[127] Therefore, while to the Crown the parchment handed over to the aboriginal peoples constituted the entirety of the treaty, to the aboriginal peoples, the parchment copy of the treaty was simply one aspect of the larger treaty-making process.[128] This larger treaty-making process is what is commonly referred to as the "spirit and intent" of the agreement. This spirit and intent encompassed the relationship between the Crown and the aboriginal peoples[129] and the relationship of individual treaties to existing and future agreements.[130]

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[126]See Hamilton, *supra* note 51 at 7: "During my meetings with them, many Aboriginal people ... persistently asserted that the written versions of the treaties do not contain the whole of the agreements that were discussed and do not reflect the spirit and intent of the parties."

[127]See *Citizens Plus*, *supra* note 103 at 8

[128]*Ibid.* at 26; see also Jackson, *supra* note 4 at 262.

[129]See Opekokew and Pratt, *supra* note 3 at 34-5:

> It has often been said that to the Indian peoples, the treaties are sacred and have a quasi-constitutional character, in that the treaties are meant to define the relationship of the Crown with the First Peoples. To the Indian people, the terms of the treaties include much more than the literal words indicate. It was the Crown's negotiators who drafted the document which was to become the formal "treaty", but it took both parties to create the "relationship" which the Indians came to rely on and which the formal document embodied.

See also Grand Chief D. Marshall Sr., Grand Captain A. Denny, Putus S. Marshall, of the Executive of the Grand Council of the Mi'kmaw Nation, "The Covenant Chain," in B. Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country*, (Toronto: Summerhill Press, 1993) at 75:

> Treaties are spiritual as well as political compacts that confer solemn and binding obligations on the signatories. The spiritual basis of the treaties is crucial to an understanding of their meaning, since it represents an effort to elevate the treaties, and relations among peoples, beyond the vagaries of political opportunism and expediency. They are intended to develop through time to keep pace with events, while still preserving the original intentions and rights of the parties.

[130]See Wildsmith, *supra* note 4 at 332; Borrows, "Negotiating Treaties," *supra* note 41 at 191-2:

> Renewal and re-interpretation were practised to bring past agreements into harmony with changing circumstances. First Nations preferred this articulation of treaty-making to exercise their powers of self-government because it was consistent with their oral tradition. The idea of the principles of a treaty being "frozen" through terms written on paper was an alien concept to the Odawa.

Because the Crown and the aboriginal peoples held different understandings of what constituted a treaty, they also had different understandings of their agreements.[131] For instance, when the written terms of a treaty failed to include a substantive guarantee that had been promised in the scope of negotiations -- such as the recognition and protection of aboriginal hunting and fishing rights "as carried on formerly" -- the Crown did not consider it to exist as a part of the treaty. The aboriginal signatories, meanwhile, viewed those promises as being as integral to the nature of the agreement between the groups as the parchment version of the treaty. Not surprisingly, when disputes of this nature occurred, the Crown would inevitably look to the written treaty, whereas the aboriginal signatories would recount the scope of the negotiations between the parties. Combining the competing Crown and Native conceptions of the written treaties with questions over whether the treaties may be treated as compacts at all effectively prevented the appropriate resolution of treaty disputes until these differences in understanding were recognised and respected by the judiciary.[132]

Until quite recently, aboriginal understandings of treaties were generally not accounted for by the judiciary in its analysis of aboriginal treaties.[133] More recent judicial considerations of treaties have, however, attempted to reconcile the competing views of treaties held by the Crown and the aboriginals.[134] The first step in this process was the judiciary's willingness to look beyond the four corners of the written treaties to their spirit and intent. In *New Zealand Maori Council* v. *A.-G. of New Zealand*, Lord Woolf's statement about the approach to be taken towards the 1840 *Treaty of Waitangi* encapsulates more recent judicial attitudes towards interpreting Crown-aboriginal treaties:

> Both the Act of 1975 and the State-Owned Enterprises Act 1986 refer to the "principles" of the Treaty. In their Lordships' opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty). With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.[135]

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[131]See Henderson, *supra* note 23 at 254-5.

[132]The recognition of the different understandings of the nature of treaties held by the Crown and aboriginal peoples eventually led to the use of extrinsic evidence in appraising the content of Crown-aboriginal treaty agreements. See the discussion in Ch. VII.

[133]See Henderson, *supra* note 23 at 265.

[134]See Macklem, "First Nations Self-Government," *supra* note 122 at 442-3.

[135][1994] 1 A.C. 466 at 475 (P.C.).

The transformation of judicial understandings of treaties is a relatively recent phenomenon. The change in judicial approach to treaties in Canada came about from the judiciary's adoption of canons of treaty interpretation that had been developed in American aboriginal rights jurisprudence in the nineteenth century. These canons of treaty interpretation and their legal implications are discussed in Chapter VII.

VII. The Canons of Aboriginal Treaty Interpretation and Their Legal Implications

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. ... How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.[1]

As discussed in the previous chapter, treaties between the Crown and aboriginal peoples are not always understood in the same way by the parties signing them. Often one party puts forward one construction of a treaty and another party suggests an opposite interpretation. Inevitably, each has evidence to support the interpretation it has proffered. These divergent understandings are based, in part, on their different expectations and world views. However, as the foregoing discussion of Crown-aboriginal treaties illustrates, the representations of the groups and their subsequent actions are highly relevant in establishing the true meaning of a treaty.

This chapter examines judicial attempts at reconciling Crown and aboriginal methods of understanding treaties. The focus in this chapter is on the canons of aboriginal treaty interpretation that govern the contemporary judicial interpretation of treaties. Each of the canons will be examined individually to illustrate the different tasks that they are intended to carry out. While the individual treaty canons perform slightly different roles, they are also part of a grander scheme of establishing a more well-rounded, contextual, and culturally-appropriate understanding of the treaties. In this sense, they have overcome the problems associated with so-called "traditional" methods of treaty interpretation that were prevalent in Canada until the latter half of the twentieth century.

(a) The Problems Associated With "Traditional" Methods of Treaty Interpretation

The important status that treaties now enjoy in Canadian aboriginal rights jurisprudence is the result of a lengthy process of piecemeal judicial recognition of the unique nature of treaties. In the late nineteenth and early twentieth centuries, treaty rights belonging to the aboriginal

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[1] *Worcester* v. *State of Georgia*, 6 Pet. 515 (U.S. 1832) at 582, per M'Lean J. On the canons of treaty interpretation generally, see L.I. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence," (1997), 46 *U.N.B.L.J.* 11.

peoples of Canada were viewed quite differently by the courts. Treaties were regarded as simple promises existing at the sufferance of the Crown. As Lord Watson commented in the Privy Council's decision in *Attorney-General of Ontario* v. *Attorney-General of Canada: Re Indian Claims*:

> Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities ... beyond a promise and agreement, which was nothing more than a personal obligation by its governor ...[2]

By not regarding treaties as binding documents that vested legally enforceable rights in the aboriginal peoples, the Crown could readily ignore the terms of treaties, either by failing to perform the obligations it undertook, or by passing contrary legislation that was deemed to supersede the promises that had been made.

Another problem with the interpretation of treaties at this time was that the preponderance of judicial interpretations of Crown-aboriginal treaties concerned themselves primarily with the literal wording of the documents. By interpreting treaties according to their literal translations, Canadian courts focused solely on the Crown's understanding of the events. The primary evidence that was received by the courts at this time was the written copies of the treaties themselves. On occasion, evidence obtained from written notes, diaries, and official correspondence of British treaty delegates and other governmental officials would also be introduced. The courts generally paid little or no attention to the aboriginal peoples' comprehension of the agreements, as recorded primarily in aboriginal oral histories.

The problem with this approach is that these "traditional" interpretations of the parchment versions of the treaties did not yield a full and accurate account of what actually transpired during treaty negotiations.[3] These written copies of the treaties were authored entirely by the Crown's representatives and written in English. Where translations were provided to the aboriginal peoples, those translations were usually given by the Crown's representatives or by persons that the representatives had appointed for that task, such as clergymen or Métis trappers. Even where the courts did look to contemporary evidence from governmental officials or treaty

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[2][1897] A.C. 199 at 213 (P.C.). Lord Watson's remark was explicitly referred to in at least two subsequent treaty cases. See *R.* v. *Wesley*, [1932] 4 D.L.R. 774 at 788 (Alta. C.A.): "In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements. See *A.-G. Can.* v. *A.G. Ont.* (Indian Annuities case), [1897] A.C. 199, at 213."; *R.* v. *Sikyea* (1964), 43 D.L.R. (2d) 150 at 154 (N.W.T.C.A.), per Johnson J.A.: "While this [Lord Watson's statement] refers only to the annuities payable under the treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing."

representatives, these did not account for aboriginal understandings of the bargains made. This method of treaty interpretation also ignored the fact that treaties were agreements made between the Crown and the aboriginal peoples. The rights guaranteed to aboriginal peoples in the treaties were the result of consensual negotiations between the parties; they were not arbitrarily determined or unilaterally imposed by the Crown. By failing to account for aboriginal perspectives on the meaning of the treaties, the courts ignored the fundamental nature of the dynamic that gave rise to the treaties.

Other factors in the treaty making process also worked to the detriment of aboriginal peoples. In some instances, after negotiations had been concluded and treaty terms were agreed upon, the aboriginal peoples were made to affix their signatures to blank pieces of paper upon which the treaty's terms were to be filled in later.[4] Thus, the aboriginals' "agreement" to such a treaty with the Crown was susceptible to taking any form that the Crown later deemed appropriate. In other situations, treaties were written up prior to negotiations between the parties and agreed upon points that had not been included were simply left out so that new documents

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[3]See the discussion in the section entitled "Large, Liberal, and Generous Interpretation" *infra*.

[4]See H. Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927," in H. Foster and J. McLaren, eds., *Essays in the History of Canadian Law, Vol. VI, British Columbia and the Yukon*, (Toronto: The Osgoode Society for Canadian Legal History and University of Toronto Press, 1995) at 41; *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613 at 651 (B.C.C.A.), per Norris J.A., where the reply of Governor Douglas to the Colonial Secretary on May 16, 1850 shows how the treaty was completed:

> I attached the signatures of the native Chief's and others who subscribed the deed of purchase to a blank sheet on which will be copied the contract or Deed of conveyance, as soon as we receive a proper form, which I beg may be sent out by return Post. The other matters referred to in your letter will be duly attended to.

See also the dissenting judgment of Sheppard J.A., in *White and Bob*, *ibid.* at 622:

> The practice was to pay the Indians the purchase price against their signature by mark on blank paper to be filled in later as a deed. In 1854 the Saalequun tribe so surrendered their lands on Commercial Inlet, 12 miles up the Nanaimo River. For that surrender no deed was made up but the signatures or marks were obtained on blank paper against payment (ex. 8).

Refer as well to *R.* v. *Bartleman* (1984), 12 D.L.R. (4th) 73 at 80 (B.C.C.A.): "It is particularly noteworthy that [James] Douglas said that he attached the signatures of the native chiefs and others who subscribed the deed of purchase to a blank sheet. The written words were to be added later, as soon as the proper form was sent out from London" See also, *ibid.* at 81:

> ... [I]t is readily apparent from the spacing of the texts, in relation to the location of the names, in both of the February, 1852, Saanich purchases, that the names of the heads of families who were parties to the agreement were recorded, with the crosses opposite their names, before the texts of the documents were written in.

would not have to be prepared.[5] In these latter circumstances, the aboriginal signatories were falsely assured that the written treaty presented for signing was, in fact, representative of the agreement that had been reached. The fact that the aboriginals often could not read English or comprehend the technical language of treaties rendered them entirely dependent upon the Crown's representations.

The written versions of Crown-Native treaties sometimes omitted significant points of agreement between the Crown's representatives and the aboriginal signatories.[6] One prominent example of this occurred at the signing of Treaties 1 and 2. These treaties were signed between the Crown and the Chippewa and Swampy Cree Indians in 1871. However, the written version of the treaties ratified by the Privy Council did not include certain terms that had been agreed upon during the negotiations. The Crown's representatives had made promises in addition to what had been included in Treaty One and attached a memorandum indicating these additional promises to the treaty. This fact was later corroborated by Alexander Morris, the Crown's chief negotiator, who noted that the memo had been signed by Commissioner Simpson, Governor Archibald, Mr. St. John and Mr. McKay.[7] When the aboriginal signatories repeatedly asserted that the Crown had made promises in addition to those recorded in the treaty, a revision of the treaties incorporating some of these additional terms was prepared and signed in 1875.[8]

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[5]See the discussion of the statements made by the Treaty No. 9 commissioners to the aboriginal "Yesno" in Ch. VI; *R.* v. *Taylor and Williams* (1979), 55 C.C.C. (2d) 172 at 178 (Ont. Div. Ct.) [hereinafter "*Taylor and Williams, Div. Ct.*"]. Note also the contents of a letter from S.J. Dawson, who had been commissioned to negotiate Treaty No. 3 and acted in a similar capacity in many other treaty negotiations, to H. Reed, Deputy Minister of Indian Affairs in 1895, Public Archives of Canada, RG10, Vol. 3800, file 48, 542, as quoted in W.E. Daugherty, *Treaty Research Report, Treaty #3*, (Treaties and Historical Research Centre, Indian and Northern Affairs, Canada, 1981) at 64:

> I was one of the commissioners appointed by the Government to negotiate a Treaty with the Saulteaux tribe of the Ojibbeway Indians and as such was associated with Mr. W.M. Simpson in 1872, and subsequently acted in the same capacity with Lieut. Governor Morris and Mr. Provencher in 1873. The Treaty was practically completed by myself and Mr. Simpson in 1872, and it was the draft we then made that was finally adopted and signed at the Northwest Angle of the Lake of the Woods in 1873.

[6]See P.A. Cumming and N.H. Mickenberg, *Native Rights in Canada*, Second Edition, (Toronto: Indian-Eskimo Association of Canada, 1972) at 62.

[7]See A. Morris, *The Treaties of Canada with The Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto*, (Toronto: Belfords, Clarke, 1880) at 126.

[8]See Morris' explanation for the revision of Treaties One and Two relating to the need for revising the terms of the original treaties, *ibid.* at 31: "In consequence of misunderstandings having arisen, owing to the Indians alleging that certain promises had been made to them which were not specified in these treaties, a revision of them became necessary, and was effected in 1875 ..."

What is interesting about the revision to these treaties is that while the Crown steadfastly denied that the aboriginal signatories could claim anything outside of the terms of the original treaties, the first clause of the treaty revision, reproduced below, adopted the terms of the memorandum as if they were a part of the treaties. Note also the second clause of the treaty revision, in which the Crown steadfastly maintained that its agreement to incorporate the memorandum was based entirely upon its benevolence rather than out of any binding obligation to do so:

> 1st. That the written memorandum attached to Treaty Number One be considered as part of that Treaty and of Treaty Number Two, and that the Indian Commissioner be instructed to carry out the promises therein contained in so far as they have not yet been carried out, and that the Commissioner be advised to inform the Indians that he has been authorized so to do.
>
> 2nd. That the Indian Commissioner be instructed to inform the Indians, parties to Treaties Numbers One and Two, that, while the Government cannot admit their claim to anything which is not set forth in the treaty and in the memorandum attached thereto, which treaty is binding alike upon the Government and upon the Indians, yet, as there seems to have been some misunderstanding between the Indian Commissioner and the Indians ... the Government out of good feeling to the Indians and as a matter of benevolence, is willing to raise the annual payment to each Indian under Treaties Numbers One and Two from three dollars to five dollars per annum and make payment over and above such sum of five dollars, of twenty dollars each and every year to each Chief, and a suit of clothing every three years to each Chief and each head man ... on the express understanding, however, that each Chief or other Indian who shall receive such increased annuity or annual payment shall be held to abandon all claim whatever again the Government in connection with the so called "outside promises" other than those contained in the memorandum attached to the treaty.[9]

The attachment of the memorandum to Treaties One and Two appears to indicate that these treaties had also been prepared prior to the negotiations with the Chippewa and Swampy Cree representatives. If Treaties One and Two had been written up after the conclusion of

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[9] *Ibid.* at 339. The memorandum had included the following provisions:

> For each Chief that signed the treaty, a dress distinguishing him as Chief.
>
> For braves and for councillors of each Chief, a dress: it being supposed that the braves and councillors will be two for each Chief.
>
> For each Chief, except Yellow Quill, a buggy.
>
> For the braves and councillors of each chief, except Yellow Quill, a buggy.
>
> In lieu of a yoke of oxen for each reserve, a bull for each, and a cow for each Chief; a boar for each reserve, and a sow for each Chief, and a male and female of each kind of animal raised by farmers; these when the Indians are prepared to receive them.
>
> A plow and a harrow for each settler cultivating the ground.
>
> These animals and their issue to be Government property, but to be allowed for the use of the Indians, under the superintendance and control of the Indian Commissioner.
>
> The buggies to be the property of the Indians to whom they are given.
>
> The above contains an inventory of the terms concluded with the Indians.

negotiations, then the memorandum containing the understanding of the Crown's representatives as to the terms of the treaties ought to have been incorporated into the written versions.

In addition to these problems with the text of written treaties, problems of interpretation abounded. The English language and concepts implemented in treaties were not always understood by the aboriginal peoples. Where they were understood, they were not necessarily understood by the aboriginals in the same manner that they were by the Crown's representatives. Attempts at translation by the Crown's representatives were also affected by these problems. The peace and friendship treaties of the Maritimes from the late seventeenth and eighteenth centuries are profound examples of the effects of such a lack of common understanding.[10] These problems inherent in traditional interpretations of treaties are what created the need for the creation of the canons of treaty interpretation that exist today.

(b) The Evolution of the Canons of Aboriginal Treaty Interpretation

The origins of the canons of treaty interpretation may be traced to the United States Supreme Court's decision in *Worcester* v. *Georgia* in 1832.[11] While these principles had become firmly entrenched in American jurisprudence prior to the end of the nineteenth century, they did not achieve the same recognition in Canada for almost 150 years.

This traditional approach to interpreting treaties began to change in the second half of the twentieth century. With the inclusion of section 87 of the *Indian Act* in 1951,[12] treaties became paramount over provincial legislation. Then, in 1964, an 1854 treaty between the Saalequun tribe and Governor James Douglas of British Columbia was recognised as a solemn commitment that carried binding obligations in the British Columbia Court of Appeal's decision in *R.* v. *White and*

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[10]See the discussion in Ch. II; see also W.C. Wicken, '"Heard It From Our Grandfathers": Mi'kmaq Treaty Tradition and the *Syliboy* Case of 1928,' (1995), 44 *U.N.B.L.J.* 145; Wicken, "The Mi'kmaq and Wuastukwiuk Treaties," (1994), 43 *U.N.B.L.J.* 241 [hereinafter "The Mi'kmaq and Wuastukwiuk Treaties,"]; D.N. Paul, *We Were Not the Savages: A Micmac Perspective on the Collision of European and Aboriginal Civilizations*, (Halifax: Nimbus, 1993).

[11]*Supra* note 1.

[12]S.C. 1951, c.29. Section 87 of the 1951 Act is now section 88 of the current Act, R.S.C. 1985, c. I-5. Under section 88, provincial laws of general application that affect "Indianness" are rendered applicable to aboriginal peoples by referential incorporation, subject to the terms of treaties and federal legislation dealing with the same subject matter. Provincial laws of general application that do not affect "Indianness" apply to aboriginal peoples *ex proprio vigore* (of their own force) and are subject only to normal paramountcy rules. See *Dick* v. R. (1985), 23 D.L.R. (4th) 33 (S.C.C.).

Bob.[13] The *White and Bob* decision was a major advance in treaty jurisprudence, especially since the treaty in question did not conform to formal treaty-making practices.

Finally, through the decisions in *R.* v. *Taylor and Williams*[14] and *Nowegijick* v. *R.*[15] the treaty canons were articulated and embraced by the Canadian judiciary. The adoption of these principles marked an end to the "traditional" method of treaty interpretation employed in the majority of previous Canadian judicial pronouncements on the nature of Indian treaties.[16] The subsequent constitutional entrenchment of treaty rights in section 35(1) of the *Constitution Act, 1982*[17] meant that treaties were finally afforded the same solemn recognition at law that they had received during the formative years of Crown-Native relations.

While Canadian aboriginal rights jurisprudence had haltingly recognised the *sui generis* nature of treaties prior to *Taylor and Williams*,[18] the Ontario Divisional Court's judgment in that case marked the initial elucidation of the canons of treaty interpretation in Canada. As Justice Trainor explained:

> In interpreting the treaty, as favourably as possible to the Indians, these considerations should have been followed:
>
> (1) The words used should be given their widest meaning in favour of the Indians.
>
> (2) Any ambiguity is to be construed in favour of the Indians.
>
> (3) Treaties should be construed and interpreted so as to avoid bringing dishonour to the Government and Crown.[19]

Upon further appeal of the case to the Ontario Court of Appeal, MacKinnon A.C.J.O. affirmed these principles of treaty interpretation. In addition, the Associate Chief Justice emphasised the importance of contextual appraisals of the treaties:

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the

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[13]*Supra* note 4.

[14]*Supra* note 5, var'd (1981), 62 C.C.C. (2d) 228 (Ont. C.A.) [hereinafter "*Taylor and Williams, CA*"]

[15](1983), 144 D.L.R. (3d) 193 (S.C.C.).

[16]In cases such as *Sikyea*, *supra* note 2, aff'd [1964] S.C.R. 642, it was held that general federal legislation could remove aboriginal hunting and fishing rights even in the absence of a demonstrated intention by Parliament to do so. See also *R.* v. *George* (1966), 55 D.L.R. (2d) 386 (S.C.C.); *Daniels* v. *R.*, [1968] S.C.R. 517; *R.* v. *Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).

[17]Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11.

[18]See *Francis* v. *The Queen* (1956), 3 D.L.R. (2d) 641 at 652 (S.C.C.); *White and Bob*, *supra* note 4 at 617-18; *Pawis* v. The Queen (1979), 102 D.L.R. (3d) 602 at 607 (F.C.T.D.).

[19]*Taylor and Williams, Div. Ct, supra* note 6.

> surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.[20]

Shortly thereafter, in the *Nowegijick* case, Justice Dickson, as he then was, sanctioned the main thrust of the findings in *Taylor and Williams* by holding that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian."[21]

The adoption of the canons of treaty interpretation in the *Taylor and Williams* and *Nowegijick* decisions significantly improved the judiciary's ability to achieve contextual and culturally-appropriate understandings of the agreements between the Crown and the aboriginal peoples. By providing a more expansive approach to interpreting the treaties, the canons facilitated a more accurate portrayal of them as negotiated compacts. This, in turn, enhanced the recognition and enforceability of promises made therein. The interpretive canons formed the basis of a new regime of treaty interpretation. They provided that treaties are to be given large, liberal, and generous interpretations in favour of the aboriginal peoples; ambiguities in treaties are to be resolved in favour of the aboriginals; treaties ought to be construed as the aboriginal signatories understood them; treaties are to be interpreted in a flexible manner; and that evidence beyond the written terms of the treaties should be used to determine the documents' meaning and intent.

Achieving contextual and culturally-appropriate understandings of Crown-Native treaty negotiations is facilitated by providing large, liberal, and generous interpretations of aboriginal treaties. This interpretive principle is the overarching theme that unites the various canons of aboriginal treaty interpretation that have been developed.

(c) Large, Liberal, and Generous Interpretation

The need for the judiciary to provide large, liberal, and generous interpretations of aboriginal treaties stems from its recognition that literal readings of the treaties do not always provide accurate accounts of the agreements between the parties. A variety of factors influence the determination of what the aboriginal signatories to the treaties understood when they affixed their marks to the parchment presented to them. These factors will be discussed in greater detail in the specific canons of interpretation that exist under the umbrella of "large, liberal, and generous interpretation."

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[20]*Taylor and Williams, CA, supra* note 14 at 232.

[21]*Nowegijick, supra* note 15 at 198.

The large, liberal, and generous interpretation of treaties requires that courts be flexible in their approach to interpreting treaties. It is the antithesis of the traditional method of interpreting treaties that had existed previously. Rather than focusing only on the literal interpretation of a treaty, this approach seeks to place the treaty in the context in which it was signed. Without placing the treaty in an appropriate context, it is difficult to ascertain whether the treaties were truly understood and therefore agreed to at the time they were concluded.[22]

Under a large, liberal, and generous interpretation, the written version of a treaty is no longer the only important element of a court's consideration. It is simply one aspect of the judiciary's investigation. In addition to looking at the written treaty, it is equally important to ascertain the parties' reasons for entering into the agreement as well as their conduct during the treaty negotiations and immediately thereafter. This entails the reception of evidence that provides insight into the understandings possessed by the Crown's representatives and the aboriginal peoples involved. Such evidence may include the understandings of the parties at the time the treaty was signed, as documented by written or oral accounts.[23] It may also include representations made by the parties during the course of those negotiations.

Until the recognition that treaties were to be given large, liberal, and generous interpretations, the different interpretations of treaties held by the Crown and aboriginal peoples rarely entered into judicial considerations. Justice Sedgewick's judgment in the *Robinson Treaties Annuities* case was an early and notable recognition of the need for contextual appraisals of treaties:

> Had the rights of the Indians been in question here -- were their claims to the increased annuities disputed -- did that depend upon some difficult question of construction or upon some ambiguity of language -- courts should make every possible intendment in their favour and to that end. They would with the consent of the Crown and of all of our governments strain to their utmost limit all ordinary rules of construction or principles of law -- the governing motive being that in all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must not only be justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.[24]

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[22]See *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 907, per Wilson J., as cited *infra* note 45.

[23]As long as evidence relating to these representations is both necessary and reliable, it ought not matter whether it conforms to the common law's traditional evidentiary requirements. See *R.* v. *Finta* (1994), 112 D.L.R. (4th) 513 (S.C.C.); *R.* v. *B. (K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.); *R.* v. *Smith* (1992), 94 D.L.R. (4th) 590 (S.C.C.); *R.* v. *Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.). Note also the discussion of receiving evidence relating to the identification of aboriginal rights in Lamer C.J.C.'s judgment in *R.* v. *Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.).

[24]*Province of Canada* v. *Dominion of Canada and Province of Quebec: In re Indian Claims*, [1896] 25 S.C.R. 434 at 535 [hereinafter "*Robinson Treaties Annuities, SCC*"]. See also *Attorney-General of Ontario* v.

Much later, in *White and Bob*, Norris J.A. held that an aboriginal treaty "ought to be given its widest meaning in favour of the Indians" as a result of the treaty negotiation process and the different understandings of the treaties by aboriginal and non-aboriginal parties.[25]

These early statements may be seen to have been the forerunner of the large, liberal, and generous interpretations of aboriginal treaties currently used in Canadian aboriginal rights jurisprudence. Along with the development of this interpretive canon came the articulation of related canons, such as the resolution of ambiguities in favour of the aboriginal peoples, that fall under the general rubric of "large, liberal and generous interpretation."

(d) Ambiguities to be Resolved in Favour of Aboriginal Peoples

One of the key aspects of the large, liberal, and generous interpretation of aboriginal treaties is that where ambiguities exist, they are to be resolved in favour of the aboriginal peoples. The basis of this canon of construction is similar to the rationale underlying the use of the *contra proferentem* rule in contract law.[26] The Crown drew up the treaties in its own language while making use of concepts peculiar to its culture and in accordance with its legal system.[27] This interpretive canon prevents the Crown from relying upon an ambiguity to its advantage since it

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Francis (1889), [1870-1890] 2 C.N.L.C. 6 (Ont. Ch.); *R.* v. *Padjena and Quesawa* (1930), [1911-1930] 4 C.N.L.C. 411 at 412-3 (Ont. Div. Ct.); *R.* v. *Cooper* (1968), 1 D.L.R. (3D) 113 (B.C.S.C.) at 115; *R.* v. *George*, *supra* note 16 at 396-7, per Cartwright J.:

> We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.

See also the findings of Culliton C.J.S. in *R.* v. *Johnston* (1966), 56 D.L.R. (2d) 749 at 752 (Sask. C.A.):

> In the interpretation of the clauses of a treaty, one must first look to the words used and give to those words the ordinary meaning that would be attributed to them at the time the treaty was made. To do so, too, it is proper and advisable to have recourse to whatever authoritative record may be available of the discussions surrounding the execution of the treaty.

[25] *Supra* note 4 at 651.

[26] See S.M. Waddams, *The Law of Contracts*, Second Edition, (Toronto: Canada Law Book, 1984) at 345-61.

[27] See the reference to *Jones* v. *Meehan*, 175 U.S. 1 (1899) *infra* note 52.

had opportunities to provide sufficient clarity when it drafted the treaties.[28] The fact that the majority of evidence pertaining to treaties that has been accepted by the courts is derived from the Crown and its representatives[29] lends further support to the use of this interpretive canon.

The use of this interpretive principle in practice is illustrated by the facts in *Taylor and Williams*. In that case, members of the Mississauga tribe had been convicted of taking bullfrogs from unoccupied Crown land during closed season contrary to section 74 of the Ontario *Game and Fish Act*.[30] The appellants' tribe had signed a treaty with the Crown, comprised of a provisional agreement and minutes, in 1818. The agreement had provided for the Crown's purchase of land, but did not refer to a release of the tribe's hunting and fishing rights:

> And the said Buckquaquet, Pishikinse, Pahtosh, Cahgahkishinse, Cahgagewin and Pininse, as well for themselves as for the Chippewa Nation inhabiting and claiming the said tract of land as above described, do freely, fully and voluntarily surrender and convey the same to His Majesty without reservation or limitation in perpetuity.[31]

The tribe's oral tradition held that there was no restriction on their right to hunt and fish within the area covered by the 1818 agreement. As a consequence, the tribe continued to exercise those rights after the treaty was signed. This assertion was not disputed by the Crown. Furthermore, when Chief Bucquaquet expressed to the Superintendent General of Indian Affairs that he did not

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[28]Note the statement made in *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 at 1005 (D. Minn. 1971).

[29]See, for example, Wicken, "The Mi'kmaq and Wuastukwiuk Treaties," *supra* note 10 at 249-50:

> Generally, Europeans were not privy to discussions among sakamows and elders, and thus would not have known of community debates which preceded and followed a treaty signing. ... Because of this lack of interaction between the Mi'kmaq and European colonial officials, we do not know what Mi'kmaq and Wuastukwiuk delegates were told by English officials about the treaty. This in turn forces reliance upon European documentation and European interpretations to understand the treaty's meaning. Indeed, researchers have tended to accept that the English versions of treaties reflect how the Mi'kmaq and Wuastukwiuk understood them. As research on late 19th century treaties signed between Western Native people and the Canadian government has shown, however, there could be a significant difference between the written English document and how Native negotiators understood it.

See also R. Price, ed., *The Spirit of the Alberta Indian Treaties*, (Edmonton: Pica Pica Press, 1987); R. Fumoleau, *As Long As This Land Shall Last*, (Toronto: McClelland & Stewart, 1986); Daugherty, *supra* note 23 at 64. On the use of First Nations' oral evidence, see C. McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past," (1992), 30 *Alta. L. Rev.* 1276.

[30]R.S.O. 1970, c.186.

[31]*Taylor and Williams, CA*, *supra* note 14 at 230.

wish to surrender his people's hunting and fishing rights, the Superintendent replied "The Rivers are open to all & you have an equal right to fish and hunt on them."[32]

The surrender contemplated by the 1818 agreement did not specify whether the aboriginal peoples were to have continued access to the lands in question or if their right to hunt and fish on those lands ceased upon the surrender. Justice Trainor's analysis of the treaty and the negotiations surrounding it led him to find that the treaty did not include a surrender of the tribe's hunting and fishing rights. As he explained:

> In my view, having regard to the following matters: the circumstances of the parties at the time of the execution of the provisional agreement; the aboriginal rights of the Indians and the *Royal Proclamation of 1763*; the tradition of the appellants; the use of the lands by the appellants prior to and subsequent to the provisional agreement; the rules of construction with respect to Indian treaties, including the heavy onus on the Crown; and the fact that a specific reserve was not created, the treaty, being comprised of the provisional agreement and the minutes, specifically reserved to the appellants their rights to hunt and fish on unoccupied Crown lands of the area.[33]

In addition to finding that the treaty's silence on hunting and fishing rights ought not be read to remove those rights, Trainor J. held that the Superintendent's assurance to Chief Bucquaquet that "*you* have an equal right to fish and hunt" did not specify which of the various chiefs and tribes the Superintendent was referring to. Consequently, he determined that the ambiguous term ought to be interpreted in the aboriginals' favour. This finding entailed that the rights were to apply to all the treaty signatories.[34] At the Ontario Court of Appeal, Associate Chief Justice MacKinnon explained the basis for this finding in the following manner:

> From the treaty it can be seen that there was no reservation established for the Indians. It is clear, on the other hand, that both parties expected the Indians to remain on the lands conveyed ... If the Indians were to remain in the area one wonders how they were to survive if their ancient right to hunt and fish for food was not continued.[35]

The notion of resolving treaty ambiguities in favour of the aboriginal peoples led both courts in *Taylor and Williams* to make use of the reserved rights doctrine. This doctrine is premised upon the assumption that treaties did not grant rights to aboriginal peoples, but merely recognised and affirmed pre-existing rights.[36] Based upon this fundamental premise, the reserved

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[32]*Taylor and Williams, Div. Ct., supra* note 5 at 178.

[33]*Ibid.*

[34]*Ibid.* at 178-9.

[35]*Taylor and Williams, CA, supra* note 14 at 235.

[36]See, for example, *United States* v. *Winans*, 198 U.S. 371 (1905). The *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1, which states that the aboriginal interests in all lands "not having been ceded to, or purchased by Us," remain the possession of the aboriginal peoples until such time as they may be interested in

rights doctrine holds that any aboriginal rights which were not specifically extinguished by treaty remain in full force. This entails that rights which were not contemplated by a treaty were also not extinguished by it. The reserved rights doctrine has been described by the American scholar Felix Cohen as "perhaps the most basic principle of all Indian law."[37] It may thus be seen as a cousin both of the interpretive canon requiring treaty ambiguities to be resolved in favour of the Indian parties and the *contra proferentem* rule.

Another close relative of these doctrines is the "clear and plain" test for extinguishing aboriginal and treaty rights. The Supreme Court of Canada has held that for aboriginal and treaty rights to be extinguished, there must be a clear and plain intention of the Crown to extinguish those rights.[38] The onus of proof rests with the party claiming the extinguishment.[39] The nature of the Crown's position vis-à-vis the aboriginal peoples requires that Crown contentions of extinguishment be put to a strict test. Consequently, there must be a clear and precise understanding of what is to be included in a treaty, what is not to be included, and what is to be extinguished. If no such precise understanding exists, the margin for error tilts in favour of the aboriginal peoples because of the historical relationship between the groups. The relative positions of the Crown and the aboriginal peoples also requires that treaties be construed as the aboriginals understood them.

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surrendering those interests, is a clear example of the practical application of the reserved rights doctrine and the Crown's recognition of it. The reserved rights doctrine is also consistent with the common law doctrine of continuity -- under which local law and pre-existing rights of a "conquered" or "settled" people are presumed to continue in the absence of any acts to the contrary by a competent authority -- in that where the aboriginal peoples did not expressly relinquish their rights through the signing of treaties, those rights remain in existence. On this latter point, see J.Y. Henderson, "Empowering Treaty Federalism," (1994), 58 *Sask. L. Rev.* 241 at 267-8.

[37]F.S. Cohen, *Handbook of Federal Indian Law*, (Albuquerque: University of New Mexico Press, 1971) at 122:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions ... is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. ... What is not expressly limited remains within the domain of tribal sovereignty.

[38]See, for example, *Calder* v. *Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145 at 210 (S.C.C.); *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 at 401 (S.C.C.).

[39]See the discussion in *Sparrow*, *supra* note 38.

(e) Treaties Construed as the Aboriginal Peoples Understood Them

It is beyond dispute that aboriginal treaties were not only written in a language that was foreign to aboriginal peoples in Canada, but that they were authored entirely by the Crown's representatives. The nuances of language and the different cultural understandings of land use and "ownership" included in treaties should raise caution flags to those interpreting these documents. As a result, there is a *prima facie* inference that the subtleties of language and the cultural subjectivity of interpretation may have resulted in different understandings of what had been agreed to by the parties during their negotiations.[40]

Contemporary evidence indicates that treaties which made use of terms such as "ownership" or "surrender" may not have been adequately understood by the aboriginal peoples.[41] Therefore, while the aboriginal peoples ostensibly agreed to the terms of the treaties by affixing their marks or totems to the documents, those signatures alone are not sufficient indications that the aboriginals understood the treaties' terms.[42] The fact that treaties were sometimes prepared in advance and later not altered to reflect changes made during negotiations also supports this conclusion.[43] It should be noted that some wampum belts prepared by aboriginal peoples and presented at treaty negotiations were also prepared in advance of the final agreements being reached. Often, though, new wampum belts were presented at the conclusion of treaty negotiations to illustrate the nature of the agreement reached.

To combat these problems and those arising from the vague language and references used in aboriginal treaties,[44] the interpretive principle that treaties are to be construed as the aboriginal peoples understood them was developed. This canon of construction does not mean that only

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[40]See B. Slattery, "Understanding Aboriginal Rights," (1987), 66 *Can. Bar Rev.* 727 at 730 [hereinafter "Understanding Aboriginal Rights"]; M. Jackson, "The Articulation of Native Rights in Canadian Law," (1984), 18 *U.B.C. L. Rev.* 255, esp. at 262-3.

[41]A case in point is *Re Paulette and Registrar of Titles (No. 2)*, (1973), 42 D.L.R. (3d) 8 at 33 (N.W.T.S.C.); see also *ibid.* at 14-17. See also the discussion of the Maritime treaties in Ch. II.

[42]See Hon. A.C. Hamilton, *A New Partnership*, (Ottawa: Minister of Public Works and Government Services of Canada,, 1995) at 52: 'People explained that there are no words in their Aboriginal languages to convey foreign concepts like "extinguishment" or "surrender." They said they had to use words at the time of ratification that described a concept of surrendering one's very being, one's identity. It is hard to quarrel with that.'

[43]See *supra* notes 4-5.

[44]Note the comments made in *Attorney-General of Ontario* v. *Francis*, *supra* note 24 at 9, where the terms of the Robinson-Huron Treaty of 1850 held that a reserve was to be established for "Shawenakishick and his band, a tract of land now occupied by them and contained between two rivers, called Whitefish and Wanabitaseke, seven miles inland." See the discussion of *Francis*, *infra* note 55.

aboriginal understandings of a treaty are relevant in ascertaining its meaning. Rather, this canon recognises that aboriginal understandings, which have long been neglected in treaty interpretation, play a vital role in obtaining a well-rounded, contextual understanding of treaties. Such an endeavour necessitates the reception of evidence beyond the written text of the treaties. As Justice Wilson explained in *R.* v. *Horseman*:

> These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.[45]

Interpreting treaties as the aboriginal peoples understood them also requires that the treaty not be interpreted in a technical or legalistic manner that would tend to benefit the Crown. As the *Report of the Select Committee on Aborigines, 1837* concluded, "a ready pretext for complaint will be found in the ambiguity of the language in which their agreements must be drawn up, and in the superior sagacity which the European will exercise in framing, in interpreting, and in evading them."[46]

The idea that aboriginal treaties ought to be construed as the aboriginal peoples understood them was developed to rectify judicial bias in favour of written evidence relating to the treaties. This evidence, written by the Crown's representatives, only reflected the Crown's understanding of the treaties. Providing greater balance to Crown and aboriginal conceptualisations of the treaties is consistent with the notion that treaties, as mutual compacts between the Crown and aboriginal peoples, ought to be interpreted in a manner that is consistent with the understandings of all the parties at the time the treaty was signed. As indicated in the *Sioui* decision, when interpreting the nature of an agreement between the Crown and aboriginal peoples, it is necessary to strive towards the common intention of the parties and not rely upon the understandings possessed by one of the groups.[47] In striving towards these common intentions, it is not sufficient to look only for overlap between Crown and aboriginal perspectives. If that was the case, where one party adopted a broad understanding of a treaty and the other

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[45]*Horseman*, *supra* note 22 at 907. This topic will be discussed further in the section entitled "The Use of Extrinsic Evidence" *infra*.

[46]*Report of the Select Committee on Aborigines, 1837*, Vol. I, Part II, (Imperial Blue Book, 1837 nr VII. 425, Facsimile Reprint, C. Struik (Pty) Ltd., Cape Town, 1966) at 80.

[47]See *R.* v. *Sioui* (1990), 70 D.L.R. (4th) 427 at 463 (S.C.C.).

adopted a narrow one, finding overlap would be tantamount to adopting the narrow understanding. This result is not in keeping with the desire to achieve an accurate representation of the parties' understandings of their agreements.

The construction of treaties in a technical manner founded solely in European-based law cannot be said to have been a part of this common understanding either.[48] Since the aboriginal peoples often could not read or write English, using the written terms of treaties improperly favours the Crown's understandings over those of the aboriginals.[49] In order to achieve a more equitable understanding of what was communicated by the Crown and what the aboriginals understood, the courts have recently looked to the content of treaty negotiations, as well as historical records and oral evidence documenting the aboriginal peoples' understanding of the words or concepts used in the treaties.

The notion that technical constructions of aboriginal treaties should not be used to the disadvantage of aboriginal peoples was first articulated by the United States Supreme Court in *Worcester* v. *Georgia*. As Chief Justice Marshall explained in relation to the Treaty of Hopewell between the United States and the Cherokee nation:

> Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language should distinguish the word "allotted" from the words "marked out." ... [I]t may very well be supposed that they might not understand the term employed, as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being

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[48]For this reason, the courts have rejected such interpretations as inappropriate and inconsistent with maintaining the honour of the Crown. See *Simon* v. R. (1985), 24 D.L.R. (4th) 390 at 402 (S.C.C.); *R.* v. *Batisse* (1978), 84 D.L.R. (3d) 377 at 384 (Ont. D.C.); *R.* v. *Ireland*, [1991] 2 C.N.L.R. 120 at 128 (Ont. Gen. Div.):

> It is clear that treaties with Indians should be given a liberal interpretation in favour of the Indians. Treaty provisions should not be whittled down by technical excuses; the honour of the Crown is at stake. They are to be construed "not according to the technical meaning of the words, but in the sense that they would naturally be understood by the Indians": *Simon*, *supra*, at p.402.

[49]D. Opekokew and A. Pratt, "The Treaty Right to Education in Saskatchewan," (1992), 12 *Windsor Y.B. Access Just.* 3 at 28.

> For the Indian parties who did not have the ability to read and write, the real treaty *must have been* the oral agreement. The paper document may have been perceived as having equal importance to the Crown's representatives as the ceremonial exchanges of wampum or the smoking of tobacco to signify the solemnity and finality of the agreement; but it could not have been considered as the agreement itself.

See also Slattery, "Understanding Aboriginal Rights," *supra* note 40 at 734-5 n. 27: "The written texts of these treaties must be read with a critical eye. Usually, they were accompanied by extensive oral exchanges, which may have constituted the true agreement. The written version was translated orally to the Indians in a process that allowed ample opportunity for misunderstanding and distortion."

> misunderstood is so apparent, results so necessarily from the whole transaction; that it must, we think, be taken in the sense in which it was most obviously used.[50]

In his concurring judgment, M'Lean J. held that the interpretation of treaties must be consistent with the aboriginal peoples' understanding of their terms.[51] Later, in *Jones* v. *Meehan*, the United States Supreme Court elaborated upon this principle by stating that:

> In construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; ... [T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[52]

In Canada, the statement made in *Worcester* v. *Georgia* was cited, with approval, by Norris J.A. in *White and Bob*.[53] The analysis in *Jones* v. *Meehan* has been affirmed in a number of Canadian cases.[54]

The interpretation of treaties as the aboriginal peoples understood them has played an important role in the resolution of many cases. This is particularly true where vagueness exists. In *Attorney-General of Ontario* v. *Francis*,[55] the main point in dispute was the precise location of a reserve established under the Robinson-Huron Treaty of 1850. The treaty set aside the reserve in the following manner: "Sixth, Shawenakishick and his band, a tract of land now occupied by them and contained between two rivers, called Whitefish and Wanabitaseke, seven miles inland."[56] The vagueness of this provision was specifically noted by Ferguson H.C.J., who explained the difficulty of declaring the boundaries of the reserve, as the plaintiff had requested:

> The words in the schedule of the treaty are certainly very meagre for this purpose. I may first dispose of the concluding words "seven miles inland" by saying that after hearing the evidence that was given in regard to the Indians' understanding, or rather want of understanding,

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[50]*Supra* note 1 at 552-3. See also *ibid.* at 553-4.

[51]As illustrated in the introductory quote to this article, *supra* note 1.

[52]*Supra* note 27 at 11.

[53]*Supra* note 4 at 652.

[54]See, for example, *Robinson Treaties Annuities, SCC*, *supra* note 24 at 535; *Padjena and Quesawa*, *supra* note 24 at 412-13; *Cooper*, *supra* note 24 at 115; *Nowegijick*, *supra* note 15 at 198; *Mitchell* v. *Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 at 201 (S.C.C.); *Sioui*, *supra* note 47 at 435. See also *Daniels* v. *R.*, *supra* note 16 at 14; *Johnston*, *supra* note 24 at 752.

[55]*Supra* note 44.

[56]*Ibid.* at 9.

> of the meaning of the word "mile" ... and the evidence as to the word in their language used by them indiscriminately to signify the measure or distance or any other measure such, for instance, as a bushel; counsel very properly, I think, abandoned any contention resting upon the use of these words.[57]

Since the treaty was vague about the location of the reserve and the aboriginal peoples in question did not understand imperial measurements,[58] the court's determination of the reserve boundaries was established by the aboriginals' understanding of where the reserve was to be located:

> ... I find that it is shown by the evidence, that the band at the time of the treaty were in occupation ... of the parcel of land embraced by the nine marks -- immovable marks -- mentioned by the witness Mongowin the present chief ... and after hearing all that was said by the witness, and all the remarks of counsel, one cannot entertain any doubt but that this tract of land was what these Indians honestly thought they were getting as their reserve, and in my opinion the evidence shows that it is the tract of land they did get as their reserve.[59]

Similarly, in *R.* v. *Bartleman*,[60] the question arose as to the area upon which the Saanich tribe was allowed to hunt under the terms of the North Saanich Indian Treaty of 1852. The accused was a member of the Tsartlip Band and a descendant of at least one of the 1852 treaty signatories. He had been convicted for unlawfully using rim-fired ammunition when hunting for big game, contrary to provincial game legislation. At trial, and upon initial appeal, it was determined that the accused was hunting on lands outside the geographical limits of the treaty. Moreover, the courts held that the area where he had shot a deer was not unoccupied land within the meaning of the treaty. The accused was unaware that the property he was hunting on was privately owned. There had been no signs posted on the land to indicate that he was on private property or that hunting was prohibited.

Bartleman maintained that the North Saanich Treaty allowed him to hunt on unoccupied Crown lands. The treaty stated that the Saanich people were to have continued access to hunt on unoccupied lands and to carry on their fisheries as they had previously. Furthermore, correspondence between James Douglas, chief factor of the Hudson's Bay Company at Fort Victoria, and Archibald Barclay, the Company's secretary, indicated that treaties with the aboriginal peoples on Vancouver Island were to preserve their ability to hunt on unoccupied lands and to fish "with the same freedom as when they were the sole occupants of the country."[61] The

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[57] *Ibid.* at 13.

[58] *Ibid.* at 17-18: "They did not and do not know what is meant by a mile, or a league, or the difference between the two measures, nor indeed any measure that to us would be a measure at all."

[59] *Ibid.* at 16-17.

[60] *Supra* note 22.

[61] *Ibid.* at 79.

land upon which Bartleman shot the deer was admitted by the Crown to be within traditional Saanich hunting grounds. The Crown also accepted the validity of Saanich oral tradition which held that the 1852 treaty bestowed a right to hunt on unoccupied lands in all their traditional hunting locations. Because of that belief, the Saanich people had continued to hunt on their traditional hunting grounds after 1852.

Lambert J.A. allowed the appeal and set aside Bartleman's conviction. In doing so, he followed the method of analysis used in *Taylor and Williams*. His judgment was also consistent with the reserved rights doctrine. This is indicated by his statement that: "... [T]he treaty itself confirmed all the traditional hunting rights; and ... did not set aside the hunting rights outside the ceded land, leaving them to be dealt with at some other time, in some other way."[62] While Justice Lambert found that there were a number of possible interpretations of the treaty, he adhered to the one that was consistent with Saanich oral tradition and the Saanich peoples' understanding of the treaty at the time it was signed. As he explained:

> None of the ceded lands, with the possible exception of North Saanich and Sooke, in the 11 Fort Victoria treaties, was itself big enough to sustain a hunting or foraging economy for even a comparatively small number of people. Every tribe hunted over the land of other tribes. Every tribe knew that every other tribe was making a similar treaty. ... [T]here would have been no protection at all for a hunting and fishing economy for any tribe if its rights to hunt and fish over the neighbouring land of the other tribes were all being extinguished. ... [I]t is almost inconceivable that Douglas could have explained to the Indians that all their rights to hunt and fish would continue as before, and that rights to hunt in the particular treaty area would be guaranteed by the treaty, but that rights to hunt outside that area would not be guaranteed but would depend on what the future held in store. And it is equally inconceivable that the Indians would have willingly accepted such an agreement.[63]

From these cases, it may be seen that adhering to aboriginal understandings of treaties neither corrupts the nature of the agreements entered into nor results in an unacceptably biased vision of those treaties. Rather, looking to aboriginal understandings of the treaties in addition to those held by the Crown provides a reliable and accurate method by which the judiciary may conceptualise the agreements made between the parties in their proper context.[64] As the *Bartleman* case indicates, in ascertaining the meaning and intent of treaties, the aboriginal understanding must also include the reasonable expectations of the aboriginal peoples in light of existing historical, political, social, and economic factors when the treaties were signed. Such an

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[62]*Ibid.* at 89.
[63]*Ibid.* at 90.

analysis must not, however, allow treaty promises or rights to be frozen in time or restricted to the manner in which they existed when the treaties were signed. Judicial analysis of aboriginal understandings and expectations must remain flexible enough to reflect the changing circumstances under which the treaties continue to operate. It must also provide for the evolution of treaty rights.[65]

(f) Treaties Interpreted in a Flexible Manner

Treaties are living, evolving agreements. Consequently, the Supreme Court of Canada has held that treaties should "be interpreted in a flexible way that is sensitive to the evolution of changes."[66] Both the rights and obligations existing under treaties are also of a continuing nature.[67] The continued existence of treaty rights does not mean, however, that they are restricted to the manner or method in which they were exercised when the treaty was signed. For example, where hunting practices recognised by treaty may have been exercised only with a bow and arrow when the treaty was signed, that does not preclude the contemporary use of a shotgun or other weapon in the exercise of those same rights. The notion that treaty rights may be exercised only in the manner in which they existed at the time of the treaty is what is known as "frozen rights" theory. This theory has been expressly rejected on a number of occasions, but most strikingly by the Supreme Court of Canada in the *Sparrow* case.[68]

In *Sparrow*, the Supreme Court rejected previous analysis of the meaning of section 35(1) of the *Constitution Act, 1982* and its protecting of "existing" aboriginal and treaty rights. The Court did not find that the word "existing" meant existing in the form they took on 17 April 1982. Instead, the Court's unanimous decision held that the concept of "existing" aboriginal and treaty rights excluded rights which had been extinguished prior to that date, but included all other rights

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[64]See also the debate over resolving ambiguities in favour of aboriginal understandings in *Mitchell*, *supra* note 54, and the discussion of the case in L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) Ch. XIII [hereinafter "*Parallel Paths*"].

[65]See the principles of treaty interpretation enunciated by the Supreme Court of Canada in *R.* v. *Badger* (1996), 133 D.L.R. (4th) 324 (S.C.C.). See also the method of analysis in *Sioui*, *supra* note 47, where the Supreme Court paid particular attention to the context in which the treaty in question was signed in order to ascertain its status in law and subsequent effects.

[66]*Simon*, *supra* note 48 at 403.

[67]*Town of Hay River* v. *R.* (1979), 101 D.L.R. (3d) 184 at 186 (F.C.T.D.).

[68]*Supra* note 38.

in their full and original form.[69] This entails that rights which had not been extinguished prior to 17 April 1982, including those rights which had been heavily regulated, were given constitutional affirmation and protection in their form prior to their regulation. The constitutional guarantee in section 35(1) protects aboriginal and treaty rights, not their regulation.[70]

The Supreme Court's decision in *Sparrow* does not mean that existing aboriginal and treaty rights that were regulated prior to 17 April 1982 reverted to their unregulated form on that date. It simply states that any regulation of an existing aboriginal or treaty right prior to 17 April 1982 does not receive the benefit of the protection given to that right by section 35(1). In imparting protection to aboriginal and treaty rights, section 35(1) severs any existing regulation of those rights from the rights themselves. The regulation may, however, be deemed to be valid under the *Sparrow* justificatory test.[71] The Supreme Court's rejection of frozen rights theory in *Sparrow* was based, in part, on Slattery's observation that 'the word "existing" ... suggests that the rights in question are affirmed in a contemporary form rather than in their primeval simplicity and vigour.'[72] The Court's adoption of Slattery's approach suggests its agreement with the protection of aboriginal rights rather than their regulation.[73] As the *Sparrow* court explained, 'Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.'[74]

The *Sparrow* judgment recognises that temporal considerations should not be the sole determinants of aboriginal and treaty rights. Judicial understandings of aboriginal and treaty rights based on the length of time they have been practiced -- or whether they existed prior to European contact -- are incapable of recognising rights that are no less important than long-practiced rights, but which are of newer genesis. As dynamic, evolving rights, aboriginal and treaty rights ought not be restricted to their "primeval simplicity and vigour." Rather, they must

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[69]*Ibid.* at 396-7.

[70]B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights," (1982-3), 8 *Queen's L.J.* 232 at 243, 264.

[71]For an analysis of the *Sparrow* justificatory test and how it has been modified by recent Supreme Court of Canada decisions, such as *R.* v. *Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C.), see K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?" (1997), 8(2) *Constitutional Forum* 33.

[72]Slattery, "Understanding Aboriginal Rights," *supra* note 40 at 782.

[73]See *Sparrow*, *supra* note 38 at 397: 'Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.' Indeed, the guarantee in section 35(1) refers to aboriginal and treaty rights themselves, not their regulation.

[74]*Ibid.*, at 397.

be allowed to adapt to changing circumstances. This fact was ignored by the majority decision of the Supreme Court of Canada in *R.* v. *Van der Peet*.[75]

Van der Peet was an aboriginal fishing rights case in which the appellant, a member of the Sto:lo nation, was charged with selling ten salmon for $50 while fishing under the authority of an Indian food fishing licence. The appellant claimed an aboriginal right to sell fish. In establishing the framework for the analysis of the right claimed by the appellant, Chief Justice Lamer, for the majority, emphasised the importance of adopting a purposive approach to section 35(1). This purposive approach entailed giving section 35(1) a generous and liberal interpretation in favour of the aboriginal peoples, which he found stemmed from the fiduciary nature of Crown-Native relations. Thus, any doubt or ambiguity as to what ought to fall within section 35(1) was to be resolved in favour of the aboriginal peoples.[76] The Chief Justice's decision in *Van der Peet* may clearly be seen to bring the canons of treaty interpretation into the aboriginal rights realm.

Lamer C.J.C.'s judgment held that an aboriginal activity could only be considered to be an aboriginal right if it was an element of a practice, tradition, or custom integral to the distinctive culture of the aboriginal group claiming the right that could be traced to pre-contact practices.[77] However, this conclusion is inconsistent both with the generous and liberal interpretation of rights endorsed by the Chief Justice and the fiduciary nature of Crown-Native relations. If the fact of European settlement created the cultural and physical need for the Sto:lo people to engage in the sale or barter of fish, then that activity ought to be recognised as a protected aboriginal right regardless of whether it was induced by European influences.

The notion that treaties must be interpreted in a flexible manner should apply equally to the continuation of rights, as discussed in *Van der Peet*. A contextually-appropriate understanding of aboriginal or treaty rights, such as fishing rights, must include the means necessary for the realisation of those rights. Where an aboriginal group has a recognised right to fish, protecting that right would necessitate, for example, preventing the building of a marina upstream from where those fishing rights are exercised that destroys the fishing stock.[78] To hold otherwise would render any protection of the right in question meaningless.

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[75][1996] 4 C.N.L.R. 177 (S.C.C.).

[76]*Ibid.* at 192.

[77]*Ibid.* at 209.

[78]See *Saanichton Marina Ltd.* v. *Claxton* (1989), 36 B.C.L.R. (2d) 79 (C.A.). For an informative commentary on this case, see H. Foster, "The Saanichton Bay Marine Case: Imperial Law, Colonial History, and Competing Theories of Aboriginal Title," (1989), 23 *U.B.C. L. Rev.* 629.

In *Van der Peet*, Chief Justice Lamer canvassed this issue in relation to aboriginal fishing rights. He distinguished between "primary" and "incidental" aboriginal rights, holding that incidental rights that "piggyback" on primary rights are not deserving of constitutional protection.[79] However, Lamer C.J.C.'s analysis of "incidental" rights in *Van der Peet* appears to contradict the Supreme Court's unanimous judgment in *Simon* v. *R.*[80] In *Simon*, the court held that the treaty right of an aboriginal person to hunt included the ability to engage in "those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds."[81]

The flexible interpretation of treaties articulated by the Supreme Court in cases such as *Simon*, or, for that matter, the generous and liberal interpretation of aboriginal rights argued for by Chief Justice Lamer in *Van der Peet*,[82] requires that so-called "incidental" rights be protected because they are vital to the exercise of the rights that are explicitly protected. Where seemingly extraneous matters are vital to the adequate exercise of aboriginal or treaty rights, they must be included as parts of those rights. These sentiments would appear to accord with Lamer C.J.C.'s professed adherence to giving section 35(1) a generous and liberal interpretation in favour of aboriginal peoples in *Van der Peet*. Although a strict interpretation of aboriginal treaties would ostensibly preclude such incidental rights from receiving constitutional protection, allowing for the flexible interpretation of aboriginal treaties articulated by the Supreme Court requires that these rights be afforded the same protection where they are necessary to the exercise of the rights that are explicitly dealt with in the treaties. To ascertain whether there is a need to provide protection to these incidental rights, it is necessary to discover their connection to the rights described in the

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[79]According to the Chief Justice, "primary" rights are those rights that are essential elements of a practice, tradition, or custom integral to the distinctive culture of the aboriginal group claiming the rights. "Incidental" rights may be practices associated with the primary rights (although they need not be), but are neither a part of them nor are they otherwise integral to the distinctive culture of the aboriginal group exercising the right.

The judiciary's compartmentalisation of aboriginal practices into "integral" rights and "incidental" rights demonstrates a profound inability or reluctance to recognise that aboriginal rights ought to be understood as broad, theoretical constructs. This notion is recognised in L'Heureux-Dube J.'s dissenting judgment in *Van der Peet*, *supra* note 75 at 232, where she states that aboriginal rights are notionally incapable of being encapsulated by particular practices, traditions, or customs, but are more abstract and profound concepts from which specific practices, traditions, or customs are derived. The compartmentalisation of aboriginal rights in the manner exhibited by the majority judgment in *Van der Peet* deflects attention away from what ought to be the true issue at hand, namely the ability of aboriginal peoples to determine the precise methods by which they will make use of or implement their larger, abstract rights.

[80]*Supra* note 48.

[81]*Ibid.* at 403.

[82]*Supra* note 75 at 192.

treaties. Often, this requires the reception of evidence extrinsic to the written terms of the treaties themselves.

(g) The Use of Extrinsic Evidence

The use of extrinsic evidence in the interpretation of aboriginal treaties is premised entirely upon the notion that the written version of treaties are generally unable to provide a contextual understanding of the agreement between the parties. The problems associated with relying exclusively upon the written text of these treaties has been illustrated throughout this chapter. Using extrinsic evidence in judicial considerations allows the courts to obtain information relating to the context of treaty negotiations through aboriginal oral history, written accounts by treaty negotiators, and other material. Cases such as *Taylor and Williams* and *Bartleman* demonstrate the usefulness of extrinsic evidence in the judicial interpretation of aboriginal treaties.

Although it is generally accepted that the use of extrinsic evidence is allowable, and even necessary, to provide an appropriate understanding of the background to the treaty, the case of *R.* v. *Horse*[83] marked a notable limitation to this general practice. The accused in *Horse* were treaty Indians who had been charged with using a spotlight for the purposes of hunting wildlife. The use of spotlights when hunting contravened section 37 of the Saskatchewan *Wildlife Act*. The accused had been hunting on private farm lands without permission from the owners at the time they were charged. They claimed that Treaty No. 6 allowed them to hunt for food on private land without permission. Furthermore, they maintained that they were allowed to hunt over lands taken up for settlement under a "joint use concept" by which settled lands were to be used jointly by the settlers and the aboriginal treaty signatories. In support of their contentions, the accused relied upon the record of Treaty No. 6 negotiations chronicled by the Crown's chief negotiator, Alexander Morris.[84] They relied, in particular, upon the following passage:

> [Chief Tee-Tee-Quay-Say said at 215:] "... We want to be at liberty to hunt on any place as usual ..."
>
> [Lieutenant Governor Morris replied at 218] "You want to be at liberty to hunt as before. I told you we did not want to take that means of living from you, you have it the same as before, only this, if a man, whether Indian or Half-breed, had a good field of grain, you would not destroy it with your hunt ..."[85]

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[83](1988), 47 D.L.R. (4th) 526 (S.C.C.).

[84]See Morris, *supra* note 7.

[85]*Supra* note 83 at 536-7.

The Crown, meanwhile, relied upon the written version of Treaty No. 6 itself. The treaty stated that "the said Indians shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered ... saving and excepting such tracts as may from time to time be required or taken up for settlement."[86]

Justice Estey, delivering the judgment for the court, expressed reservations about the accused's use of the Morris record in interpreting the treaty.[87] He held that the treaty was not ambiguous as to where the aboriginals could hunt. Rather, he found that the treaty expressly forbade hunting on lands "taken up for settlement."[88] Consequently, Justice Estey held that extrinsic evidence was not to be used where an ambiguity did not exist in a treaty or where the effect of including such extrinsic evidence would alter the terms of a treaty by addition or deletion.[89] In reaching this conclusion he distinguished the earlier Supreme Court of Canada precedents in *Nowegijick* and *Simon*.

Estey J.'s limitation of the use of extrinsic evidence was premised upon his exclusive reliance on common law interpretations of aboriginal treaties and treaty rights. His rigid adherence to common law-based methods of treaty interpretation is evidenced by his invocation of the parol evidence rule and a major text on the common law of evidence in support of his assertions. Justice Estey's judgment in *Horse* also demonstrates his willingness to accept the written terms of treaties at face value without considering the special circumstances under which treaties were negotiated. He dismissed differences in power, language, culture, and their associated conceptualisations as having any effect upon the accuracy of the written documents.[90] For the reasons discussed earlier, such an assertion simply cannot be accepted.[91]

Retreating from the tenor of judgments such as *Horse* requires the judiciary to accept, without reservation, the need to look beyond the written text of treaties in favour of a contextual

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[86]Morris, *supra* note 7 at 353.

[87]*Horse*, *supra* note 83 at 537.

[88]*Ibid.*

[89]*Ibid.*

[90]Presumably, and incredibly, Estey J.'s reliance upon the written versions of the treaties also applied to treaties whose terms were written in after the aboriginal signatories had affixed their marks to blank pages.

[91]Curiously, Estey J. did not adhere to his own exhortation about the use of extrinsic evidence in *Horse*. After declaring that such evidence was to be used only where there was an ambiguity in the treaty -- of which he declared that no such ambiguity existed in Treaty No. 6 -- he cited the Morris text and its discussion of treaties other than Treaty No. 6 to support his notion that the treaty did not provide the appellants with the rights they had claimed. See *Horse*, *supra* note 83 at 542.

appraisal of their meaning. This necessitates the reception of evidence of treaty negotiations and the parties' understandings of those negotiations. To arrive at an accurate picture of what transpired during treaty negotiations also requires that where extrinsic evidence is used it be critically appraised. What have traditionally been described as "secondary" sources by the courts,[92] namely governmental records and the correspondence of governmental officials, are plagued by a variety of problems. Their function was to report on the success or lack thereof of governmental endeavours to conclude the treaties. They did not try to understand aboriginal perspectives on what transpired during treaty negotiations. Furthermore, the characterisations of aboriginal societies in these sources were generally permeated with European value-laded biases.

To arrive at a more well-rounded, contextual, and culturally-appropriate understanding of aboriginal treaties, it is imperative to understand the limitations inherent in these sources as well as the courts' traditional bias against evidence generated by aboriginal peoples. Governmental records, correspondence, and aboriginal oral evidence ought to be afforded the same stature as the written versions of the treaties. Moreover, written accounts of treaties and negotiations should not be favoured over oral accounts, as the law of evidence is wont to do. Such an exercise of cultural relativism runs contrary to the canons of treaty interpretation discussed herein. Furthermore, it is based upon the misconceived notion that written sources are inherently more accurate or reliable than oral accounts. Obtaining a more well-rounded and accurate picture of what transpired during treaty negotiations simply cannot be achieved without the reception of evidence from the descendants of the aboriginal peoples who were party to those treaties. The Supreme Court of Canada's recent decision in *Badger* explicitly recognises the importance of using extrinsic evidence to achieve a well-rounded understanding of Indian treaties.[93]

In *Badger*, three Treaty No. 8 Indians were charged under the Alberta *Wildlife Act* while hunting moose on privately owned land within the boundaries of lands that had been surrendered under the treaty. The treaty, signed in 1899, provided for the right to hunt over the territories surrendered, save for lands that had been taken up for settlement, mining, lumbering, trading, or other purposes. However, in 1930, the federal government promulgated the Alberta *Natural*

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[92]These sources have generally been distinguished by the judiciary from what it has traditionally considered to be primary sources, namely the written treaties themselves. It is suggested here that these other sources, which also include aboriginal accounts and understandings, ought to be considered to have the same stature and importance as the written versions of the treaties.

[93]*Supra* note 65.

Resource Transfer Agreement, 1930 (hereinafter "NRTA"),[94] whose terms overlapped with the guarantees made in Treaty No. 8. In addition to transferring authority over lands and resources from the federal government to the province, the NRTA provided for the application of provincial game laws to the aboriginal peoples.[95] The NRTA allowed for the exercise of aboriginal hunting for food during all seasons on all unoccupied Crown lands and any other lands to which the aboriginal peoples had a right of access. The key question before the Court in *Badger* was whether the appellants had a right of access to the private lands they were hunting on when they were charged. More specifically, the Court had to determine whether the lands were "taken up" in the manner contemplated by the treaty.

To ascertain whether the lands on which the appellants had been hunting were, in fact, "taken up," the Court held that it had to account for the perspective of the aboriginal signatories at the time of the treaty. The mere fact that the lands were privately owned was not sufficient to deem them off-limits for aboriginal hunting. Justice Cory found that evidence led at trial indicated that in 1899, the Treaty No. 8 Indians would have understood that land was "taken up" when it was put to a use that was incompatible with hunting. While they would not have understood the concept of private ownership, they would have understood that lands were "taken up" when buildings or fences were erected, or the lands were visibly being used as farms. The presence of abandoned buildings would not necessarily signify that lands were "taken up" so as to prohibit the exercise of treaty hunting rights.[96] Justice Cory also found that the oral history of the Treaty No. 8 Indians revealed a similar understanding of the treaty and its promises.[97] Thus, he concluded that interpreting the treaty according to the aboriginals' understanding of its terms entailed that the geographical limitation to be imposed on treaty hunting rights was to be based on the concept of "visible, incompatible land use."[98]

In addition to looking to aboriginal understandings to ascertain what lands treaty hunting rights could not be exercised on, Justice Cory also considered aboriginal understandings of conservation in his judgment. He cited such understandings in existence at the time Treaty No. 8 was signed to buttress his conclusion that the aboriginals would have understood and accepted the

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[94]S.C. 1930, c. 3.
[95]*Ibid.* s. 12.
[96]*Badger*, *supra* note 65 at 345.
[97]*Ibid.* at 347-8.
[98]*Ibid.* at 345.

form of regulation on their hunting rights that was imposed by the Alberta *Wildlife Act* and rendered applicable by section 12 of the NRTA.[99] The Court in *Badger* may, therefore, be seen to have found that any limitations on the promises contained in Treaty No. 8 had to be understood in conjunction with the aboriginal peoples' understanding of the treaty. In so doing, the Supreme Court appears to have quieted the argument against using extrinsic evidence made in *Horse*. More importantly, the *Badger* decision indicates the Supreme Court's affirmation of the canons of aboriginal treaty interpretation discussed herein.[100]

(h) Conclusion

This chapter has attempted to elucidate the canons of aboriginal treaty interpretation and provide them with more substance to secure their role as vital elements of Canadian aboriginal rights jurisprudence. It has attempted to illustrate that they exist to rectify difficulties in arriving at culturally-appropriate understandings of Crown-Native treaties. These canons build upon the parties' attitudes towards treaty-making and the negotiation process. They also build upon the parties' interpretations of these agreements once they had been concluded.

Treaties are time- and context-specific entities that must be examined in light of the circumstances under which they arose and the parties' respective understandings of their terms. The canons of treaty interpretation acknowledge the importance of context in treaty analysis by emphasising the need to look beyond the written versions of treaties to their spirit and intent. By looking at the underlying bases of these interpretive canons, their presence in contemporary jurisprudence may be more fully appreciated.

Recognising these interpretive principles as permanent and vital fixtures in Canadian treaty jurisprudence is consistent with the important place of Crown-Native treaties within Canadian law. The lofty status of treaties has been recognised by the inclusion of treaty rights in section

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[99]*Ibid.* at 352. It is suggested, though, that determining, on the one hand, that the aboriginal signatories understood that conservation was a legitimate basis for limiting treaty hunting rights and concluding, on the other, that implementing Crown legislation for that purpose would be understood as an instrument of conservationist purposes by the aboriginals is a more complicated link that Cory J. suggests in *Badger* and requires more evidence than that provided in his judgment.

[100]The *Badger* decision is also noteworthy for the majority decision's reversal of the precedent established in the *Horseman* case, *supra* note 22, where it was held that the NRTA extinguished or replaced Treaty No. 8 hunting rights. Rather than finding that the NRTA's contemplation of aboriginal hunting rights superseded those in Treaty No. 8, the majority judgment determined that the NRTA only modified the treaty rights where they came

35(1) of the *Constitution Act, 1982*. Understanding these canons as integral elements of treaty jurisprudence requires, however, that the judiciary give more than token attention to them. While it is important to articulate these principles, they must be properly applied if they are to have any meaningful effect. To simply pay lip-service to them while rendering decisions that ignore their theoretical premises or abandon them altogether runs contrary to the premises underlying these doctrines. It also rids these canons of their intended functions within treaty jurisprudence.

Part of the problem with judicial use of these canons is that while the principles are well-known, their reasons for being are not. Even where courts have explicitly supported their use, they have generally not explained why these principles exist and what functions they serve. Simply affirming that treaties are to be given large, liberal, and generous interpretations does not explain why such interpretations are necessary or what obstacles are to be overcome by the use of this premise. These canons exist for specific reasons that reveal much about the basis of treaty relationships and the historical attitudes of the Crown and aboriginal peoples towards them.

The unique nature of Crown-aboriginal relations generally, as well as treaty relationships between the groups, demonstrate the need for a purposive, or pro-active, implementation of these treaty canons. This assertion finds support from the recent Supreme Court decision in *Badger*. Like other principles of aboriginal law, these canons do not exist in a vacuum. It could be argued that the Crown's fiduciary obligations to aboriginal peoples -- which shape and inform the understanding of treaty rights in section 35(1) of the *Constitution Act, 1982* -- provide a constitutional imperative to ensure that these canons are properly implemented, insofar as they foster the best interests of the aboriginal peoples.[101] However, as the next chapter will discuss, this is not the only area of confluence between Crown-Native fiduciary and treaty relations.

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into conflict with the NRTA. See *Badger*, *supra* note 65, at 342-3. Sopinka J.'s minority judgment in *Badger* did side with *Horseman*'s findings on this matter, however: see *ibid.* at 331, 361.

[101]For greater discussion of the Crown's fiduciary duty to aboriginal peoples, see Rotman, *Parallel Paths*, *supra* note 64; Rotman, "Provincial Fiduciary Obligations to Aboriginal Peoples: The Nexus Between Governmental Power and Responsibility," (1994), 32 *Osgoode Hall L.J.* 735; Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*," (1997), 8(2) *Constitutional Forum* 40; P.W. Hutchins, D. Schulze, and C. Hilling, "When Do Fiduciary Obligations to Aboriginal Peoples Arise?" (1995), 59 *Sask. L. Rev.* 97.

VIII. Contextualising Aboriginal Rights Jurisprudence: The Nexus Between Crown-Native Fiduciary and Treaty Relations

> The promises of protection and the creation of a fiduciary relationship, to say nothing of the establishment of territories where Aboriginal peoples expected they could live their lives as they had done in the past, are essential to the relationship that Aboriginal peoples thought they had through earlier treaties.[1]

It has been suggested in this dissertation that Canadian aboriginal rights jurisprudence has suffered from the judiciary's treatment of aboriginal and treaty rights in a vacuum. A fully contextual approach to aboriginal and treaty rights requires a unified method of analysis that melds hitherto separately-treated issues. This chapter seeks to demonstrate that aboriginal and treaty rights issues are far more integrated than existing jurisprudence has recognised. It will focus on the issues of Crown-Native fiduciary and treaty relations to accomplish this task.

Generally, Crown-Native fiduciary and treaty relations have been treated as separate and distinct topics. However, there are many common ties between them. These ties strongly suggest that when considering one topic, one cannot ignore the implications of the other. It is suggested here that a more appropriate understanding of Crown-Native fiduciary and treaty relations may be obtained if they are viewed not solely on the microscopic level of individual relations, but as part of the larger relationship between the Crown and aboriginal peoples that exists on a macroscopic level. This macroscopic approach also unites the contemporary effects of Crown-Native fiduciary relations and aboriginal treaties with the historic principles and events that gave rise to them. This is the final stage of the unified and integrated methodology articulated in Chapter I.

(a) Engaging a Unified and Integrated Approach To Aboriginal and Treaty Rights: The Example of Crown-Native Fiduciary and Treaty Relations

To examine the nexus between Crown-Native fiduciary and treaty relations in a manner befitting their inter relatedness, one must deconstruct some commonly-held understandings of those relations. Traditionally, the judiciary has viewed Crown-Native fiduciary relations as

inherently hierarchical. It has characterised these relationships by the aboriginal peoples' contemporary dependence upon the Crown. Meanwhile, the courts have trivialised the solemn nature of aboriginal treaties to such a degree that they have allowed treaty rights to be ignored or to be overridden by legislation. Previous chapters have argued that these interpretations are incorrect.

The formative years of Crown-Native interaction entailed mutual responsibilities and benefits. Those relations created legally-binding obligations of a fiduciary nature that remain to this day. In Chapter IV, it was argued that Crown-Native fiduciary relations are comprised of general and specific fiduciary relations. These general and specific fiduciary relations, in turn, give rise to general and specific duties owed by the Crown to the aboriginal peoples. These two types of relations and duties are symbiotic. While they are distinct from one another, they also draw from each other. For example, the general Crown-Native fiduciary relationship has a direct impact upon the nature of specific fiduciary duties, such as the duty arising upon the surrender of aboriginal lands.

Fiduciary law should also be seen to apply to treaties and treaty negotiations. While the judiciary has not yet ruled on the fiduciary character of treaties,[2] it is readily apparent that the Crown's general fiduciary duty to the aboriginal peoples is equally pertinent to treaties. The Crown's general fiduciary duty requires it to refrain from engaging in sharp practice or other unscrupulous means. In the context of treaty negotiations, this should apply to the Crown's misrepresentation of the terms of treaties or to situations where it omitted terms from the written treaties that had already been orally agreed upon.[3] The relative power of the parties is not a relevant factor. Where the Crown was under a pre-existing fiduciary obligation to the aboriginal peoples, it was obliged to act in good faith in the negotiation of specific agreements regardless of whether the parties were on an equal or unequal footing at the time. Deviating from the fiduciary standard of utmost good faith during treaty negotiations could render the Crown liable for a breach of its general fiduciary duty. One example of such a deviation is the Crown's appointment

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[1]Hon. A.C. Hamilton, *A New Partnership*, (Ottawa: Minister of Public Works and Government Services Canada, 1995) at 9.

[2]See *ibid.* at 93-4.

[3]See *R.* v. *Badger* (1996), 133 D.L.R. (4th) 324 at 331-2 (S.C.C.) per Sopinka J.; J.Y. Henderson, "Empowering Treaty Federalism," (1994), 58 *Sask. L. Rev.* 241 at 291.

of non-recognised persons as chiefs for the sole purpose of having them sign treaties after the authorised representatives of the aboriginal peoples had refused to sign.[4]

Once a treaty was signed, a number of new, specific fiduciary obligations arguably came into being that were based upon the promises and guarantees contained within the treaty.[5] These obligations are specific to the treaty and apply to the aboriginal signatories and their descendants.[6] These fiduciary duties may pertain to the entirety of the treaty or to specific elements, such as the setting aside of a reserve based on an allotment of a specified amount of land per individual or family. Where a treaty promises the setting aside of a reserve, the Crown is duty-bound to create the reserve in the place and manner in which it had agreed to do so. The obligation thus incurred is both a treaty and fiduciary obligation. Because this obligation is fiduciary in nature, the Crown cannot escape its duty to set aside the reserve by invoking jurisdictional issues, such as the division of powers between federal and provincial Crowns.

The Privy Council's decision in *St. Catherine's Milling and Lumber Co.* v. *The Queen* held that the federal Crown possessed exclusive power to obtain surrenders of aboriginal lands and create reserves under section 91(24) of the *Constitution Act, 1867*.[7] Meanwhile, exclusive proprietary and administrative rights over surrendered Indian lands were said to vest in the Crown in right of the province in which the lands were located via section 109 of the Act.[8] Therefore, while the federal Crown could promise a reserve in a treaty, it would be unable to use surrendered lands for that purpose without provincial cooperation. When this issue came up in *Ontario Mining Company Ltd.* v. *Seybold*, the Privy Council held that Ontario was only under an "honourable engagement" to cooperate with the federal government in setting aside reserves promised under Treaty No. 3.[9] This ruling would appear to allow the federal and provincial

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[4]See *Re Paulette and Registrar of Titles (No. 2)* (1973), 42 D.L.R. (3d) 8 (N.W.T.S.C.).

[5]See, for example, Henderson, *supra* note 3 at 263, 297.

[6]It could be argued, however, that the obligations that are specific to particular treaties may become generally applicable to other aboriginal peoples not party to that treaty through Crown practice. One such argument could be made with regard to the medicine chest clause in Treaty No. 6. Crown practice after the signing of Treaty No. 6 has been to provide health care to all status Indians, not just the descendants of Treaty No. 6. Thus, it could be argued that the spirit and intent of the other treaties, which did not include medicine chest clauses, nevertheless includes the right to Crown-sponsored health care.

[7]Formerly the *British North America Act, 1867*, (U.K.) 30 & 31 Vict., c. 3.

[8]See (1888), 14 App. Cas. 46 at 59 (P.C.).

[9][1903] A.C. 73 at 82-3 (P.C.).

Crowns to escape treaty obligations to set aside reserves.[10] It is submitted that the Crowns' fiduciary obligations stemming from the treaty would preclude such an occurrence.[11]

Treaties signed between the Crown and aboriginal peoples are solemn and binding agreements. In *R.* v. *Sioui*, the Supreme Court of Canada stated that a treaty exists where there is an agreement between aboriginal peoples and the Crown that demonstrates "the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity."[12] The solemn nature of the agreements created mutual obligations and fostered the parties' reliance upon each other to fulfill those obligations. The rights contained in the treaties are legally enforceable in their own right by virtue of section 35(1) of the *Constitution Act, 1982*.[13] However, the mutual obligations created by the treaties and the parties' reliance upon each other to fulfill those obligations entails that they be carried out with the strict standard of care required of a fiduciary.[14] Thus, treaty obligations are also concrete manifestations of Crown-Native fiduciary relations.

The fiduciary nature of a relationship describes both the law governing its existence as well as the bundle of rights, duties, and obligations that stem from such a relationship. Fiduciary relationships are an amalgam of particular rights, duties, and obligations. Yet, to exist in a meaningful way, they require the enforcement of the parties' mutual obligations and benefits.

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[10]Insofar as the provincial obligation was only a honourable one, not a legal one and the federal Crown, though seemingly obligated to fulfill the terms of the treaty it negotiated, could seemingly escape liability by citing its lack of power over the surrendered lands.

[11]See the more detailed discussion of this topic in L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, (Toronto: University of Toronto Press, 1996) Ch. XII.

[12](1990), 70 D.L.R. (4th) 427 at 441 (S.C.C.).

[13]Enacted as Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11.

[14]The statements made by Sir William Johnson in a letter to the Lords of Trade in 1756 demonstrate his understanding of the exacting nature of the obligations undertaken by Britain through its agreements entered into with the aboriginal peoples:

> At this critical and interesting conjuncture I am sensible the utmost attention be paid to our Indian Alliance and no measures left untried that may have the least tendancy [*sic*] to strengthen and increase it. Wherefore I would humbly propose a steady and uniform method of conduct, a religious regard to our engagements with them a more unanimous and vigorous extension of our strength than hitherto, and a tender care to protect them and all their Lands against the insults and encroachments of the Common enemy as the most and only effectual method to attach them firmly to the British Interest, and engage them to act heartily in our favour at this or any other time.

"Sir William Johnson to the Lords of Trade, Fort Johnson, 8 March 1756," as reproduced in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New York*, 11 vols., (Albany: Weed, Parsons, 1853-1861) VII at 43 [hereinafter "*NYCD*"].

This situation creates a legal equilibrium achieved through the balancing of theoretically equal and opposite forces. While fiduciaries have a duty to act with honesty, integrity and *uberrima fides* towards their beneficiaries' best interests, the beneficiaries have a correlative right to rely upon their fiduciaries' duties without having to inquire into their fiduciaries' activities.[15] Consequently, where both the fiduciary and beneficiary in any given fiduciary relationship act in accordance with their respective entitlements and responsibilities, the integrity of the relationship is maintained through the balancing of those reciprocal rights and obligations. Within the context of Crown-Native treaty relationships, the continuation of treaty relations requires a balancing of the reciprocal rights and obligations arising under the nature of the agreements entered into.

If, as suggested earlier, specific fiduciary obligations arise upon the signing of treaties, it could be questioned where treaty obligations end and fiduciary obligations begins. While it is important to maintain a distinction between fiduciary and treaty obligations, to the aboriginal peoples who rely on the fulfillment of those obligations, describing them as treaty obligations or fiduciary obligations is not as important as the manner in which those obligations are fulfilled. Within the context of duties arising under aboriginal treaties, the notions of fiduciary and treaty obligations share much in common. The combination of treaty and fiduciary obligations in this manner is one example of the contextual and integrated approach to aboriginal and treaty rights discussed earlier. Treaties between the Crown and aboriginal peoples do not arise in a vacuum. Rather, they result from the nature of the interaction between the groups. Therefore, the negotiation of a treaty cannot be divorced from the general fiduciary relationship which exists between the Crown and Native peoples. At the same time, the specific fiduciary obligations created by the treaty cannot be isolated from the Crown's general fiduciary obligations to aboriginal peoples.

As mentioned in Chapter II, it is entirely possible for the Crown to owe both a general and one or more specific fiduciary duties to an aboriginal group a result of its intercourse with those people. The Crown's fiduciary obligations to aboriginal peoples may be recognised either in the totality of its relationships or in specific events or circumstances, such as treaties. Crown-Native fiduciary relationships and treaties are part and parcel of the larger superstructure of Crown-

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[15]See *Midcon Oil & Gas Limited* v. *New British Dominion Oil Company Limited* (1958), 12 D.L.R. (2d) 705 at 716 (S.C.C.); *Carl B. Potter Ltd.* v. *Mercantile Bank of Canada* (1980), 8 E.T.R. 219 at 228 (S.C.C.); T. Frankel, "Fiduciary Law," (1983), 71 *Calif. L. Rev.* 795 at 824; M.V. Ellis, *Fiduciary Duties in Canada*, (Toronto: De Boo, 1988) at 2-22.

Native relations. This superstructure gives context and substance to the theoretical or philosophical elements of fiduciary and treaty relationships. When examined on this macroscopic level, the common law's isolated treatment of fiduciary and treaty relationships is inappropriate.[16]

(b) Treaty Obligations, the Canons of Aboriginal Treaty Interpretation and the Crown-Native Fiduciary Relationship

In the late nineteenth and early twentieth centuries, the majority of judicial determinations of aboriginal and treaty rights in Canada came about because governmental or private interests hinged upon their resolution.[17] In those decisions, the courts made exclusive use of common law conceptualisations of the issues at hand while disregarding corresponding aboriginal understandings. Approximately one hundred years later, aboriginal perspectives are just beginning to receive consideration in judicial analyses of aboriginal rights. The adoption of the canons of aboriginal treaty interpretation indicates that the judiciary has seen fit to incorporate aboriginal perspectives on the nature and extent of their rights into modern Canadian aboriginal rights jurisprudence.[18]

Although these principles of treaty interpretation aim to facilitate contextual and culturally-appropriate understandings of Crown-Native treaties, they are also directly relevant to the Crown's fiduciary obligations to aboriginal peoples. As discussed above, there is a great degree of overlap between Crown-Native fiduciary and treaty relations. Moreover, the canons of treaty interpretation were explicitly incorporated into the understanding of section 35(1) and the Crown's fiduciary obligations to the aboriginal peoples thereunder by the Supreme Court of Canada in *R.* v. *Sparrow*[19] and, later, by the Ontario Court of Appeal in *R.* v. *Vincent*.[20]

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[16]That is not to say that there are no distinctions between the two forms of relations, only that these distinctions have been emphasised at the expense of the significant interrelationship between them.

[17]See, for example, *St. Catherine's Milling, supra* note 8; *Seybold, supra* note 9; *Province of Ontario* v. *Dominion of Canada and Province of Quebec: In re Indian Claims* (The *Robinson Treaties Annuities* Case), [1897] A.C. 199 (P.C.); *Dominion of Canada* v. *Province of Ontario* (The *Treaty No. 3 Annuities* Case), [1910] A.C. 637 (P.C.); *Attorney-General for Quebec* v. *Attorney-General for Canada, Re Indian Lands* (The *Star Chrome* Case) (1920), 56 D.L.R. 373 (P.C.)

[18]See the discussion in Ch. VII; see also L.I. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence," (1997), 46 *U.N.B.L.J.* (forthcoming).

[19](1990), 70 D.L.R. (4th) 385 at 408 (S.C.C.).

[20][1993] 2 C.N.L.R. 165 at 179 (Ont. C.A.).

In *Sparrow*, the Supreme Court explained that the primary design of section 35(1) was to provide constitutional recognition and affirmation of aboriginal and treaty rights. Consequently, it held that the interpretation of section 35(1) had to be consistent with that fundamental purpose. For this reason, the Court held that section 35(1) had to be construed in a purposive, pro-active way.[21] Furthermore, the Court explained that the words contained in section 35(1) were to be given a generous and liberal interpretation.[22] The Supreme Court followed the earlier decisions of the British Columbia Court of Appeal in *Sparrow*[23] and the Ontario Court of Appeal in *R.* v. *Agawa* in making this determination.[24] Thus, the Supreme Court's judgment in *Sparrow* combined the canons of treaty interpretation with the principles underlying Crown-Native fiduciary relations and the historical Crown-Native relationship. This is reflected in various statements made by the Court, such as its exhortation that the "contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[25]

In the course of its judgment in *Vincent*, the Ontario Court of Appeal held that the interpretive principles enunciated in *Nowegijick* v. *R.* -- namely that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian"[26] -- were a fundamental aspect of the Crown's fiduciary duty.[27] Although no basis for this inclusion was made explicit in *Vincent*, it is a logical extension from the Supreme Court of Canada's judgment in *Sparrow*. In that case, the Court had explained that "the principles ... derived from *Nowegijick*, *Taylor and Williams* and *Guerin* should guide the interpretation of s. 35(1)."[28] Since section 35(1) was found by the Court in *Sparrow* to include the Crown's fiduciary obligation to Native peoples, the canons of aboriginal treaty interpretation, as formulated in *Nowegijick* and *Taylor and Williams*, were held by the Court of Appeal in *Vincent* to themselves be a part of the Crown's duty.

More recently, the Supreme Court of Canada blended the canons of treaty interpretation, the Crown's fiduciary obligation, and section 35(1) by applying the "large, liberal, and generous

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[21]*Sparrow*, *supra* note 19 at 407. See the discussion of the purposive nature of the Crown's fiduciary duty in Ch. V.

[22]*Ibid.*

[23](1986), 36 D.L.R. (4th) 246 (B.C.C.A.).

[24](1988), 65 O.R. (2nd) 505 (C.A.).

[25]*Sparrow*, *supra* note 19 at 408.

[26](1983), 144 D.L.R. (3d) 193 at 198 (S.C.C.).

[27]See *Vincent*, *supra* note 20 at 179. See also the discussion of *Badger*, *infra*.

[28]*Sparrow*, *supra* note 19 at 408.

interpretation" canon to aboriginal rights in *R.* v. *Van der Peet*.[29] In his majority judgment, Chief Justice Lamer emphasised the importance of adopting a purposive approach to section 35(1), as had been suggested in *Sparrow*.[30] According to Lamer C.J.C., this purposive approach entailed giving section 35(1) a generous and liberal interpretation in favour of the aboriginal peoples. Although he noted that this interpretive principle was first articulated in the context of treaty rights, he held that it arose from the fiduciary nature of Crown-Native relations.[31] This fiduciary relationship and its implication of the honour of the Crown meant that section 35(1) and all other constitutional or statutory provisions protecting aboriginal interests had to be given generous and liberal interpretations.[32] Further, the Chief Justice held that the Crown-Native fiduciary relationship entailed that any doubt or ambiguity regarding what properly falls within section 35(1) was to be resolved in favour of the aboriginal peoples.[33]

The use of large, liberal, and generous interpretations of aboriginal treaties, the resolution of ambiguities in favour of the aboriginal peoples, and the reception of extrinsic evidence are just some of the means whereby the impact of linguistic and cultural barriers between the Crown and the aboriginal peoples, as well as the unequal power relations between them, may be lessened. These canons work in conjunction with the Crown's fiduciary obligations to the aboriginal peoples. The Crown's fiduciary duty prohibits it from using its superior bargaining position to the detriment of its aboriginal beneficiaries. These principles of treaty interpretation reveal where the Crown has abused its power in this manner, such as through the unilateral inclusion of treaty terms, the misrepresentation of the nature of agreements or their effects upon the aboriginal peoples, or the failure to include agreed-upon terms in the written version of the final agreement. The incorporation of aboriginal understandings through the canons of treaty interpretation allows the judiciary to more accurately consider the nature of the Crown's obligations, In turn, the judiciary is better equipped to determine whether the Crown has successfully fulfilled or discharged these obligations. This statement holds true whether the Crown's obligations arise under the terms of treaties or from Crown-Native relations more generally.

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[29][1996] 4 C.N.L.R. 177 (S.C.C.). See the discussion of *Van der Peet* in Chs. I and VII.
[30]*Ibid.* at 190.
[31]*Ibid.* at 192.
[32]*Ibid.*
[33]*Ibid.*

While both Crown-Native fiduciary and treaty relations stem from the historical interaction between the parties, the treaties in Canada arose only after the fiduciary nature of Crown-Native intercourse had been established. Indeed, as Chapter II documents, political, military, and trading alliances between the parties were entrenched long before the signing of formal treaties between the groups. Therefore, when the treaties were negotiated, they were negotiated under the auspices of the general Crown-Native fiduciary relationship. This is why Crown-Native treaty relations ought to be viewed in light of the principles pertinent to the law of fiduciaries. Treaties signed between the groups should have been negotiated by the Crown with the utmost good faith and been consistent with the best interests of the aboriginal peoples. This would entail that no sharp practice be engaged in by the Crown, that the aboriginal peoples not be lied to or taken advantage of in the treaty process, and that the bargains concluded be equitable. Thus, where the Crown did not subscribe to the utmost good faith or act in the best interests of its aboriginal beneficiaries when concluding treaties, it could be found in breach of its duty to them.

There would appear to be nothing contentious about holding the Crown to good faith dealings in treaty negotiations. However, the application of fiduciary standards to the Crown's actions in treaty negotiations could prove to be troublesome in other respects. For instance, could the Crown engage in treaty negotiations at all if it was required to act in the aboriginal peoples' best interests? The simple answer is yes, but not in the manner that most of the treaties were concluded or adhered to by the Crown. When dealing with so-called land surrender treaties, for example, it must first be ascertained whether the aboriginal peoples understood those treaties as contemplating the surrender of land rights or if the aboriginals believed that they were simply sharing their lands with the Crown. The Crown's representations to the aboriginal peoples must also be factored into this determination.

If it is determined that, in a particular treaty situation, the aboriginal peoples agreed to surrender land, that finding would not result in an automatic breach of the Crown's duty. If it may be demonstrated that the aboriginals understood the implications of surrender, agreed to it, received adequate compensation -- such as lump sum payments, annuities, goods and services,[34] a reasonable allotment of reserve lands, and/or a guarantee that they could continue their traditional lifestyles without interference (albeit in a modified fashion) -- and the treaty was consistent with

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[34]This would include provisions of grain, seed, livestock, guns and ammunition, twine, a schoolhouse or educational services, or a medicine chest/medical services.

their best interests, there would not necessarily be a breach of the Crown's fiduciary obligation as long as the Crown fulfilled its end of the bargain.[35] If the Crown failed to provide the compensation promised or did not protect aboriginal rights and practices, then it would, *prima facie*, be in breach of its fiduciary obligations. It should be noted that when many treaties were negotiated, the aboriginal peoples were having difficulty surviving because of declining amounts of animals, fish, birds, and timber caused by non-aboriginal settlement.[36]

If, on the other hand, it is determined that the Crown represented to the aboriginals that they could continue to live as if no treaty had been signed, but later took possession of the land contemplated by the treaty and forced them onto reserves, that would amount to a breach of the Crown's fiduciary duty. This type of situation appears to have existed in a number of treaty contexts, including Treaties 3, 6, 7, 8, 9, 10, and 11 as documented in Chapter VI. The Crown's duty of good faith and avoidance of sharp practice would not permit it to misrepresent the nature of a treaty without resulting in a breach of duty.

A related problem is that as a fiduciary, the Crown would also be bound to avoid situations where its interests and those of the aboriginal peoples were in conflict. This is difficult, if not impossible, to avoid in treaty negotiations. However, it could be lessened significantly if fair bargains were the rule rather than the exception. Therefore, the Crown could not endeavour to obtain the greatest benefits from the aboriginal peoples in exchange for the lowest possible cost without acting in conflict of interest. The Crown could also not use its fiduciary position to require the aboriginal peoples to surrender lands to it. By positioning itself as a requisite intermediary in the surrender of aboriginal land interests, the Crown could be seen as fulfilling its fiduciary obligations by ensuring that the aboriginal peoples' interests are properly served. However, as indicated in Chapter V's discussion of the Crown's conflict of interest, the necessity of having the aboriginal peoples surrender their interests to the Crown before these may be transferred to a third party is not necessary and places the Crown squarely in a conflict of interest.

An additional aspect of the Crown's fiduciary obligations to the aboriginal peoples requires that it provide full disclosure of its actions while acting in its fiduciary capacity. Subsequently, where the Crown obtained surrenders of land from the aboriginal peoples and was

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[35]It is difficult to come to a conclusive answer to this hypothetical in the absence of more detail about the aboriginal peoples' circumstances at the time of the treaty.

[36]Whether these problems themselves resulted in a breach of the Crown's duty is a different question that cannot be entertained in the absence of specific facts or circumstances.

either to turn over the profits from their sale to the aboriginals or use those profits to finance annuities or other treaty obligations,[37] the Crown was under a duty to account for the sale proceeds. Meanwhile, the nature of the Crown's general fiduciary obligation to act in the best interests of the aboriginal peoples, as well as the specific fiduciary obligation to use the moneys raised for the exclusive benefit of the aboriginal treaty signatories, render the Crown liable to transfer all such moneys to the aboriginal peoples or to expend it on their behalf.

The Crown's duty of disclosure would also require it to inform an aboriginal group of the presence of valuable mineral deposits on the aboriginals' lands. The Crown would be in breach of its fiduciary obligations if it did not inform the aboriginals of this information, just as if the Crown had secured a surrender of mineral rights from an aboriginal group for its own benefit or that of a third party.[38] As a fiduciary, the Crown may not profit personally from such a transaction, benefit a third party at the expense of the aboriginal peoples, or create the opportunity for personal or third party gain without the aboriginals' informed consent.[39] The Crown is also under a duty not to ignore its beneficiaries' wishes where those wishes are expressly known.[40]

As a fiduciary to the aboriginal peoples, the Crown had a responsibility to ensure that its participation in the treaty-making process was consistent with the nature of its fiduciary obligations. It is suggested, however, that the Crown's fiduciary responsibility stretches beyond the mere letter of the treaties to include their spirit and intent.[41] This is consistent with the notion of interpreting treaties according to the aboriginals' understanding of them -- as expressed by the canons of treaty interpretation. The Crown's fiduciary duty to the aboriginal peoples therefore renders it liable for any deviation from the fiduciary's standard of conduct in the course of its relations with the aboriginal peoples, including its actions in negotiating and signing treaties or in fulfilling their terms.

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[37]Such as the provision of clothing, animals, implements, or religious and educational instruction.

[38]See *Blueberry River Indian Band* v. *Canada* (1995), 130 D.L.R. (4th) 193 (S.C.C.).

[39]See the discussion in Ch. V.

[40]For example, the Crown's actions in obtaining the surrender of lands under Treaty No. 3 from the Saulteaux Indians to secure a right of way for the transnational railroad and to open up settlement in the west could be seen as a breach of its fiduciary obligations if the Saulteaux were not interested in surrendering those lands outright, but only in providing the Crown with a right-of-way though their territory. See the discussion of this point in Ch. VII.

[41]See also B.H. Wildsmith, "Treaty Responsibilities: A Co-Relational Model," (1992), *U.B.C. L.* Rev. Special Edition on Aboriginal Justice 324 at 332.

(c) Treaties, Fiduciary Obligations, and the *Natural Resource Transfer Agreements, 1930*

One situation where the Crown would appear to have breached its fiduciary obligations to the aboriginal peoples in relation to treaty responsibilities occurred with the passage of the *Natural Resources Transfer Agreements, 1930* (hereinafter "NRTA").[42] These agreements transferred the beneficial ownership of land and natural resources from the federal Crown to the provincial Crowns of Manitoba, Saskatchewan, and Alberta. However, as the ensuing discussion of case law on the NRTA will reveal, it is unclear whether the NRTA's effects on existing treaties between the Crown and aboriginal peoples were considered by the Crown when it promulgated the NRTA.

The primary reason for the enactment of the NRTA was to redress inequalities between the provinces of Manitoba, Saskatchewan, and Alberta and the other Canadian provinces. When these three provinces were admitted into Confederation, they did so on less favourable terms than the other provinces had. The other provinces had retained the beneficial interest in Crown lands existing within their boundaries, including mineral and resource rights, through the operation of section 109 of the *Constitution Act, 1867* or the *British Columbia Terms of Union, 1871*.[43] The statutes admitting Manitoba, Saskatchewan, and Alberta into Confederation did not grant those same rights. Thus, the NRTA gave those provinces the same interest in Crown lands existing within their boundaries as that possessed by the other provinces.

The transfer of lands and resources through the NRTA was not unconditional. Each of Manitoba, Saskatchewan, and Alberta had to make land available to the federal Crown to fulfill its outstanding treaty land entitlements[44] owed to the aboriginal peoples:

> All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate

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[42]While the abbreviation used is singular, any subsequent references to "NRTA" are to be read to apply equally to each of the three transfer agreements. Where reference is intended to be made to only one of the transfer agreements, that distinction will be made in the text.

[43]Formerly entitled Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871. See R.S.C. 1985, App. II, No. 10.

[44]Treaty land entitlements are promises of land made to aboriginal groups in treaties, such as a grant of a designated amount of land (i.e. one half-acre) to each individual in a signatory band.

> Minister of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.[45]

In addition, the NRTA provided for the application of provincial game laws to the aboriginal peoples residing in those provinces:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[46]

A number of hunting and fishing rights cases have focused on the application of the NRTA to existing treaty rights. Many treaties were affected by the promulgation of the NRTA -- specifically Treaties 1 and 2 and 4 through 8. Because of the later date of many of these treaties, hunting and fishing was practiced on a wider scale in these treaty areas than in areas covered by some older treaties. Consequently, the NRTA's effect upon the rights that had been protected in treaties was quite significant for the aboriginal peoples in those areas. Nevertheless, until the recent Supreme Court of Canada decision in *R.* v. *Badger*,[47] the judiciary was consistent in its findings that the NRTA extinguished certain treaty rights guaranteed to the aboriginal peoples in the treaties they made with the Crown.

One of the most recent judicial considerations of the NRTA's effects on treaty rights prior to *Badger* was the Supreme Court of Canada's decision in *R.* v. *Horseman*.[48] Mr. Horseman was a descendant of parties to Treaty No. 8. He was charged with selling a grizzly bear hide without having first obtained a licence under section 18 of the Alberta *Wildlife Act*.[49] Section 42 of the *Wildlife Act* made it illegal for any person to traffic in wildlife except where provided for in the Act itself, such as where a licence was obtained under section 18. Horseman argued that the *Wildlife Act* did not apply to him. Moreover, he contended that he had a commercial right to hunt under the terms of Treaty No. 8. The Crown maintained that the Act applied to Horseman

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[45]See S.C. 1930, c. 29, s. 11, S.C. 1930, c. 41, s. 10, and S.C. 1930, c. 3, s. 10, which were incorporated into the *Constitution Act, 1930* (U.K.), 20-21 Geo. V., c. 26.

[46]S.C. 1930, c. 29, s. 13, S.C. 1930, c. 41, s. 12, and S.C. 1930, c. 3, s. 12.

[47]*Supra* note 3.

[48][1990] 1 S.C.R. 901.

[49]R.S.A. 1980, c. W-9.

because of section 12 of the Alberta NRTA.[50] It insisted that the *Wildlife Act*, through the Alberta NRTA, eliminated Horseman's rights to commercial hunting under Treaty No. 8.

The Supreme Court unanimously agreed that Treaty No. 8 did contain a commercial right to hunt.[51] The relevant portion of Treaty No. 8 stated that:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[52]

However, Justice Cory, for the majority, held that the combined effects of the Alberta NRTA and the Alberta *Wildlife Act* eliminated this commercial hunting right. Specifically, he determined that, in accordance with the precedents established in *Frank* v. *The Queen*,[53] *R.* v. *Sutherland*,[54] and *Moosehunter* v. *The Queen*,[55] the NRTA "merged and consolidated" existing treaty rights into a uniform set of hunting and fishing rights for all treaty aboriginal nations in Manitoba, Saskatchewan, and Alberta.[56] This uniform set of rights did not include the right to hunt for commercial purposes.

Although Justice Cory conceded that "it might be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 agreement without consultation with and concurrence of the native peoples affected," he nevertheless determined that "the power of the federal government to unilaterally make such a modification is unquestioned and has not been challenged in this case."[57] He buttressed his conclusion, in part, by noting that Treaty No. 8 expressly limited the hunting and fishing rights guaranteed by it. Indeed, Treaty No. 8 did state

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[50]See *supra* note 46.

[51]Insofar as a commercial hunting right meant allowing aboriginal peoples under Treaty No. 8 to sell their proceeds of hunting: *Horseman*, *supra* note 48 at 919, per Wilson J., dissenting, and at 928, per Cory J. It should be noted, however, that Wilson J. found that Horseman's actions were inconsistent with a purely commercial endeavour, but were concerned with his support and subsistence, and thus limited the scope of her findings accordingly. Cory J., on the other hand, simply held that Treaty No. 8 conferred a commercial hunting right upon those covered by it.

[52]*Ibid.* at 927.

[53](1977), 75 D.L.R. (3d) 481 (S.C.C.).

[54](1980),113 D.L.R. (3d) 374 (S.C.C.).

[55](1981), 123 D.L.R. (3d) 95 (S.C.C.).

[56]*Horseman*, *supra* note 48 at 932-3.

[57]*Ibid.* at 934.

that the rights contained therein were "subject to such regulations as may from time to time be made by the Government of the country."[58]

The Supreme Court's majority decision in *Horseman* found that the "merger and consolidation" of existing treaty rights by the NRTA extended the area within each province in which aboriginal peoples could exercise their rights to hunt or fish for food to all unoccupied Crown lands and all other lands upon which aboriginal peoples had a right of access.[59] The majority also held that the NRTA expanded the scope of aboriginal hunting rights. They determined that the NRTA allowed aboriginal peoples to hunt with means beyond those available to others, including using night lights and dogs.[60] Furthermore, the majority judgment in *Horseman* found that treaty aboriginal peoples were not limited to hunting only in certain times of the year or in the type of game they could kill, as other individuals were. From the majority's perspective, the elimination of commercial hunting rights was more than made up for by the corresponding *quid pro quo* granted by the Crown via the NRTA.[61]

Justice Wilson was critical of what she perceived as Justice Cory's cavalier attitude towards the nature of the treaty in his judgment in *Horseman*. In particular, she objected to his lack of emphasis on the treaty's function to preserve and protect the aboriginals' hunting rights. She emphasised the solemn nature of that agreement, as well as stressing the importance of using

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[58]*Ibid.* at 935. Indeed, this boilerplate phrase was used extensively in aboriginal treaties in relation to hunting and fishing rights.

[59]*Ibid.* at 936.

[60]*Ibid* at 933.

[61]*Ibid.* The basis of Cory J.'s *quid pro quo* argument is without merit. The hunting areas covered by the NRTA were no broader than the aboriginal signatories' traditional hunting territories. Moreover, their future hunting could not be limited to the methods they used in 1930, as this would constitute an adherence to "frozen rights" theory that was explicitly rejected by the Supreme Court of Canada in *Sparrow*, *supra* note 19 at 396-7. See also the dissenting judgment of Wilson J. in *Horseman*, *supra* note 48 at 921-2:

> ... [I]n my view the historical evidence suggests both that the Indians had been guaranteed the right to hunt for their support and subsistence in the manner that they wished some four decades before the Transfer Agreement was ratified and that it is doubtful whether the provinces were ever in a legitimate constitutional position to regulate that form of hunting prior to the Transfer Agreement. As a result, I have difficulty in accepting my colleague's conclusion that the Transfer Agreement involved some sort of expansion of these hunting rights. Moreover, it seems to me somewhat disingenuous to attempt to justify any unilateral "cutting down of hunting rights" by the use of terminology connoting a reciprocal process in which contracting parties engage in a mutual exchange of promises.

Even if there had been a true *quid pro quo*, it was not agreed to by the aboriginal peoples, nor had they been consulted about it. The solemn nature of Crown-Native treaties requires that any modification of treaty rights be done with the consent of the aboriginal peoples affected: see *Sioui*, *supra* note 12 at 456; see also the discussion in Ch. IX.

a large, liberal, and generous interpretation in considering the effects of the Alberta NRTA upon it.[62] As she stated:

> In my view, the interpretive principles set out in *Nowegijick* and *Simon* are fundamentally sound and have considerable significance for this appeal. Any assessment of the impact of the Transfer Agreement on the rights that Treaty 8 Indians were assured in the treaty would continue to be protected cannot ignore the fact that Treaty 8 embodied a "solemn engagement". Accordingly, when interpreting the Transfer Agreement between the federal and provincial governments we must keep in mind the solemn commitment made to the Treaty 8 Indians by the federal government in 1899. We should not readily assume that the federal government intended to renege on the commitment it had made. Rather, we should give it an interpretation, if this is possible on the language, which will implement and be fully consistent with that commitment.[63]

Justice Wilson placed significant emphasis upon aboriginal understandings of the negotiations leading up to the conclusion of Treaty No. 8. She found that the aboriginal signatories were quite concerned about the treaty's effects on their ability to hunt and fish.[64] This message was also found in the Treaty No. 8 commissioners' report:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, *we had to solemnly assure them that only such laws as to hunting as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be free to hunt and fish after the treaty as they would be if they never entered into it.*[65]

Justice Wilson's analysis of the historical context of Treaty No. 8 led her to conclude that it was a solemn engagement that promised the aboriginal signatories that they would continue to have unlimited access to wildlife. She found that the sole basis for the aboriginal peoples signing the treaty was the Crown's promise that their rights would be protected:

> ... [T]he Treaty 8 commissioners, historians who have studied Treaty 8, and Treaty 8 Indians of several different generations unanimously affirm that the government of Canada's promise that hunting, fishing and trapping rights would be protected forever was the sine qua non for obtaining the Indians' agreement to enter into Treaty 8. Hunting, fishing and trapping lay at the centre of their way of life. Provided that the source of their livelihood was protected,

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[62] *Horseman*, *supra* note 48 at 906-8.

[63] *Ibid.* at 907-8.

[64] Justice Wilson made this determination after reviewing the following sources: R. Fumoleau, *As Long As This Land Shall Last*, (Toronto: McClelland and Stewart, 1976); R. Daniel, "The Spirit and Terms of Treaty Eight," in R. Price, ed., *The Spirit of the Alberta Indian Treaties*, (Edmonton: Pica Pica Press, 1987); A. Ray, *Commentary on Economic History of Treaty 8 Area*, unpublished report, 13 June 1985, as cited in *Horseman*, *supra* note 48.

[65] *Horseman*, *supra* note 48 at 910 [Emphasis added by Wilson J.]. See also the references cited by Wilson J., *ibid.* at 910-11.

> the Indians were prepared to allow the government of Canada to "have title" to the land in the Treaty 8 area.[66]

In accordance with the large, liberal, and generous interpretation of treaties stressed by Justice Wilson, she held that Treaty No. 8 was a solemn commitment to protect the aboriginal signatories' livelihood. Furthermore, since the treaty provided that the rights protected under it could be subject to future, undefined limitation, she determined that the Crown was under an obligation to ensure that any such regulations would be consistent with the treaty's protection of the aboriginals' way of life.[67]

Justice Wilson cited a number of sources which viewed the NRTA as entailing the protection of aboriginal hunting, fishing, and trapping rights -- existing as either aboriginal or treaty rights -- by limiting the provinces' ability to regulate those rights.[68] While she acknowledged that existing Supreme Court precedents had stated that the court was not in a position to question unambiguous federal governmental decisions to modify its treaty obligations,[69] she questioned whether the NRTA was an unambiguous decision by the federal Crown to renege on its treaty obligations.[70] She concluded that the Alberta NRTA was not intended to extinguish or curtail rights existing under Treaty No. 8 and that the precedents cited by Justice Cory to support this conclusion did not, in fact, do so.[71] Instead, the NRTA was intended to provide some restriction upon commercial and sport hunting in order to preserve certain species. It did not, however, restrict the ability of Treaty No. 8 Indians to hunt for "support and subsistence," which included the ability to exchange or sell meat to support themselves and their families.[72] Justice Wilson held that these restrictions imposed by the NRTA were consistent with the spirit and intent of Treaty No. 8, under which the Crown had an

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[66]*Ibid.* at 911-12. See also *Badger*, *supra* note 3 at 339: "... [I]t is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap."

[67]*Horseman*, *supra* note 48, at 912-13.

[68]See for example, G.V. La Forest, *Natural Resources and Public Property Under the Canadian Constitution*, (Toronto: University of Toronto Press, 1969) at 180; *R.* v. *Smith*, [1935] 3 D.L.R. 703 at 705-6 (Sask. C.A.); *R.* v. *Strongquill*, [1953] 2 D.L.R. 264 at 269 (Sask. C.A.); *Prince* v. *R.*, [1964] S.C.R. 81 at 84; *Frank*, *supra* note 53 at 484-5.

[69]She cited *R.* v. *Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), *R.* v. *George* (1966), 55 D.L.R. (2d) 386 (S.C.C.), and *Moosehunter*, *supra* note 55.

[70]*Horseman*, *supra* note 48 at 916.

[71]See *supra* notes 53-55.

[72]*Horseman*, *supra* note 48 at 919-20. One exception noted by Wilson J. would be in situations where such a restriction was required for the preservation of species threatened with extinction.

obligation to protect the rights that it had guaranteed to the aboriginal signatories and their descendants.

The Supreme Court's judgment in *Horseman* was subsequently considered in the *Badger* case.[73] *Badger*, like *Horseman*, was concerned with the effect of the Alberta NRTA on Treaty No. 8 hunting rights. However, unlike *Horseman*, the facts in *Badger* focused on the rights of treaty Indians to hunt on private lands. The treaty had provided for the right to hunt over the territories surrendered, save for lands that had been taken up for settlement, mining, lumbering, trading, or other purposes. The NRTA, meanwhile, allowed for the exercise of aboriginal hunting for food during all seasons on all unoccupied Crown lands and any other lands to which the aboriginal peoples had a right of access. The key question for the court to determine in *Badger* was whether the appellants had a right of access to the private lands they were hunting on when they were charged in light of the different messages provided by Treaty No. 8 and the NRTA.

The first of the appellants, Mr. Badger, had been charged with shooting a moose outside of hunting season on brush land with willow regrowth and scrub. There were no fences or signs posted on the land indicating that it was private property. There was, however, a farm house located a quarter of a mile from where Mr. Badger shot the moose. Moreover, the farm house did not appear to be abandoned. The second appellant, Mr. Kiyawasew, was charged with hunting without a licence. He had shot a moose on a snow-covered field without fences. He had testified that he had passed old, run-down barns and that signs were posted on the land, but he was unable to read them from the road. Evidence indicated that, in the fall, a crop had been harvested from the field he was hunting on. The third appellant, Mr. Ominayak, was also charged with hunting without a licence. He was hunting on uncleared muskeg, with no fences, signs, or buildings in the vicinity of where he shot his moose. The appeals of Messrs. Badger and Kiyawasew were dismissed. The Court found that the land they had been hunting on was visibly being used and thus constituted land to which they had no right of access either under Treaty No. 8 or the NRTA.[74] The Court's consideration of the other issues raised by the appeal focused on the situation involving Mr. Ominayak.

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[73]*Supra* note 3. Refer to the discussion of *Badger* in Ch. VII.

[74]The court found that the treaty right to hunt for food extended to private land, but only to private land where such hunting would not be incompatible with the use that the land was being put to. The test established by the Supreme Court in *Badger* to make this determination was what it referred to as the "visible, incompatible use" test. See *ibid.* at 343-51.

The primary judgment in *Badger*, like *Horseman*, was rendered by Justice Cory. It agreed with *Horseman*'s primary finding that the hunting rights under Treaty No. 8 had been merged and consolidated by the NRTA. Cory J. found that this merger and consolidation eliminated the commercial aspect of those rights and expanded the scope of the territory over which the right to hunt for food could be pursued. However, deviating from his judgment in *Horseman*, Justice Cory found that the NRTA did not extinguish or replace the hunting rights guaranteed under the treaty. Instead, he held that the NRTA merely modified those rights where they came into conflict with the NRTA. As he explained:

> ... [T]he existence of the NRTA has not deprived Treaty No. 8 of legal significance. Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. Treaty rights can only be amended where it is clear that effect was intended. ... [T]he Treaty No. 8 right to hunt has only been altered or modified by the NRTA to the extent that the NRTA evinces a clear intention to effect such a modification. ... Unless there is a direct conflict between the NRTA and a treaty, the NRTA will not have modified the treaty rights.[75]

Justice Cory found that the rights guaranteed under Treaty No. 8 were not unlimited and were explicitly made subject to future regulation. As he explained, the existence of conservationist legislation in effect at the time Treaty No. 8 was signed indicated that conservation was a legitimate basis for limiting treaty rights and was understood by the Indians as such.[76] Justice Cory determined that paragraph 12 of the Alberta NRTA explicitly contemplated the limiting of hunting through provincial legislation designed for conservation purposes. However, he held that the licensing scheme established by the Alberta *Wildlife Act* unreasonably limited the aboriginals' exercise of their treaty rights to hunt for food. The Act had required treaty Indians to apply and pay for the privilege of exercising rights that had already been guaranteed to them by treaty.

Since the court held that treaty rights are not absolute and that the treaty expressly contemplated future regulation, it found that the justificatory test established in *Sparrow* should determine whether the provincial regulations enacted pursuant to the Alberta NRTA amounted to a justifiable infringement of treaty rights. However, no evidence had been led to justify the application of the regulations to Mr. Ominayak's situation. Moreover, the question of

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[75]*Ibid.* at 342-3.

[76]*Ibid.* at 352. This point had been made earlier by Cory J. in his majority decision in *Horseman*: see *Horseman*, *supra* note 48 at 935. See the commentary in Ch. VII, note 99.

justification was not addressed by the lower courts. Because of these shortcomings, a new trial was ordered.

The additional reasons provided by Justice Sopinka agreed with the disposition of the appeal and the reasons thereof provided by Justice Cory, aside from his handling of the relationship between Treaty No. 8, the NRTA, and section 35(1) of the *Constitution Act, 1982*. Rather than viewing the NRTA as amending the rights contained in the treaty, as Justice Cory had, Justice Sopinka sided with Cory J.'s majority decision in *Horseman* in finding that the NRTA replaced the treaty rights entirely:

> To characterize the NRTA as modifying the Treaty is to treat it as an amending document to the Treaty. This clearly was not the intent of the NRTA. ... If the NRTA merely modified the Treaty, an Indian hunting on Treaty lands could claim the right under the Treaty while an Indian hunting in other parts of the province could claim only under the NRTA. ... It might be suggested that the NRTA both amended the Treaty and, as an independent constitutional document, amended the Constitution. If this were the intent, it is difficult to understand why all the terms of the Treaty relating to the right to hunt for food were replicated in the NRTA.[77]

Consequently, after the passage of the NRTA, Justice Sopinka determined that it was the sole source of the right of aboriginal peoples to hunt for food that had previously been provided in Treaty No. 8:

> ... [T]he proper characterization of the relationship between the NRTA and the Treaty rights is that the sole source for a claim involving the right to hunt for food is the NRTA. The Treaty rights have been subsumed in a document of a higher order. The Treaty may be relied on for the purpose of assisting in the interpretation of the NRTA, but it has no other legal significance.[78]

Since the NRTA was deemed to be the sole source of the aboriginal right to hunt for food, Justice Sopinka held that that right was not a treaty right protected by section 35(1). The right still received constitutional protection, but as a result of the fact that the NRTA was, itself, a constitutional document. Although the rights asserted by the appellants were found by Justice Sopinka not to be section 35(1) treaty rights, he held that the canons of treaty interpretation were nevertheless applicable since they arose "out of the nature of the relationship between the Crown and aboriginal peoples."[79] He found that the NRTA's protection of aboriginal rights to hunt for food was not absolute, but was expressly subject to justifiable limitation. Such limitation included

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[77] *Badger, supra* note 3 at 330.
[78] *Ibid.* at 331.
[79] *Ibid.*

legislation premised on conservationist practices and principles.[80] The determination of whether the constitutionally-protected rights of aboriginals to hunt for food under the NRTA could be limited by legislation was to be made by analogy to the *Sparrow* justificatory test:

> Although the *Sparrow* test was developed in the context of s. 35(1), the basic thrust of the test, to protect aboriginal rights but also to permit governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights, applies equally well to the regulatory authority granted to the provinces under para. 12 of the NRTA as to federal power to legislate in respect of Indians.[81]

The decisions in *Horseman* and *Badger* demonstrate the judiciary's acceptance of the Crown's ability to unilaterally extinguish or alter treaty rights. This conclusion was reached by the Supreme Court despite its recognition of the solemnity of treaties and the necessity of upholding the honour of the Crown throughout its dealings with the aboriginal peoples.[82] The decisions in *Horseman* and *Badger* run contrary to the understanding of treaties suggested in Chapters I and VI -- namely, that they are solemn commitments that cannot be unilaterally altered by the Crown, whether by constitutional amendment like the NRTA or simple legislation. Moreover, these decisions are incompatible with the Crown's general fiduciary duty to act in the best interests of aboriginal peoples as well as its specific obligations to the aboriginal peoples under the various treaties affected by the NRTA. Maintaining the honour of the Crown and avoiding sharp practice in all dealings with aboriginal peoples is clearly offended by finding that the NRTA may unilaterally override or alter the nature of solemn, pre-existing agreements. This was recognised by the additional reasons provided by Kerans J.A. in the Alberta Court of Appeal's disposition of *Badger*:

> ... I find the approach taken by the majority in *Horseman* about the effect of the *Constitution Act, 1930* upon treaty rights deeply troubling ... My concern is that whatever happened in 1930 happened without the participation of one party to the Treaty. The aboriginal Canadians were not invited to participate in the negotiations leading to the 1930 agreement. I incline to the view that they did not believe they were changing any native rights. I fear the notion of "merger and consolidation" is the result of a patina applied by a later generation of judicial interpretation. That is the reason for my disquiet, and for these additional reasons.[83]

If the Crown may unilaterally extinguish or alter the terms of solemn and binding treaties, it cannot simultaneously act in the best interests of the aboriginal peoples. Consequently, the Supreme Court's sanction of such activity in *Horseman* and *Badger* runs contrary to the nature of

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[80]*Ibid.* at 332.

[81]*Ibid.* at 333-4.

[82]See *ibid.* at 331, per Sopinka J., and at 340, per Cory J.

[83](1993), 8 Alta. L.R. (3d) 354 at 361 (C.A.).

the Crown's position as fiduciary. The Crown's ability to engage in such activities runs contrary to the representations made by the Crown in the treaties and during their negotiation. It is also inconsistent with the notion that beneficiaries may rely on their fiduciaries' fidelity to their best interests and not inquire into any deviation from that standard.[84] In the context of the NRTA's effect on treaties, this entails that the aboriginal peoples should be able to rely on the Crown's protection of their treaty rights without having to inquire into whether the Crown remained faithful to its treaty representations. By undertaking specific obligations in the treaties, the Crown, as fiduciary, cannot alter those obligations through the NRTA without obtaining the consent of its beneficiaries. Finally, the constitutional affirmation and protection of aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*, which incorporates the Crown's fiduciary duty to Native peoples, is offended by the Crown's powers as described in *Horseman* and *Badger*. While Canadian courts have ruled that it was within the legislative ability of the Crown to extinguish, modify, or alter aboriginal or treaty rights prior to 17 April 1982,[85] those courts have never answered whether taking such action offends the Crown's pre-existing fiduciary obligations to the aboriginal peoples.

In its decision in *Guerin*, the Supreme Court found that the Crown's fiduciary obligations to aboriginal peoples were rooted, in part, in the *Royal Proclamation of 1763*.[86] It has been argued in this dissertation that the Crown's obligations predate the Proclamation and that the Proclamation was merely an affirmation of pre-existing obligations.[87] Therefore, in rooting the Crown's duty in the Proclamation, the fiduciary duty found to exist in *Guerin* may be traced back to the early stages of the formative years of Crown-Native relations, or, at the very least, to the *Treaty of Albany, 1664*.

Whether the Crown's duty is traced back to the *Treaty of Albany* or the *Royal Proclamation of 1763*, it is clear that the Crown possessed fiduciary obligations to the aboriginal peoples at the time the NRTA was promulgated. Even if the Crown was unaware of the fiduciary nature of its obligations in 1930 -- given the fact that those duties were only described as fiduciary in 1984 -- or that treaties entail fiduciary responsibility, it should have recognised that the solemn nature of treaties carried with them legally binding obligations. The solemn nature of the treaties

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[84]See *supra* note 15.

[85]Note, for example, *Simon* v. *R.* (1984), 24 D.L.R. (4th) 390 at 409 (S.C.C.); *Sikyea*, *supra* note 69 at 154.

[86]*Guerin* v. *R.* (1984), 13 D.L.R. (4th) 321 at 340 (S.C.C.).

[87]See the discussion on this point in Ch. I and III.

should preclude the Crown from unilaterally altering its historical treaty commitments. Alternatively, the Crown's fiduciary obligations provide a basis for remedial aid where the Crown does breach them.[88]

In the *Guerin* and *Sparrow* decisions, the Supreme Court of Canada recognised and solidified the existence of the Crown's fiduciary duty to aboriginal peoples. In *Sparrow*, the Court held that the Crown's fiduciary duty in section 35(1) of the *Constitution Act, 1982* tempered the Crown's section 91(24) powers.[89] As the Court explained:

> Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with section 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any governmental regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick* ... and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin* ...[90]

This finding entails that the Crown's ability to legislate in respect of aboriginal peoples, whether by statute or constitutional amendment, is subject to the Crown's fiduciary duty to the aboriginal peoples. The logical implication of this holding is that the Crown cannot legislate in respect of the aboriginal peoples in a manner contrary to its fiduciary obligations to them. An exception to this general statement exists, however, where a governmental legislative initiative is justified under the justificatory test established in *Sparrow*.

By virtue of the implications of the *Guerin* and *Sparrow* decisions illustrated above, contemporary courts are obliged to render the application of the NRTA subject to the Crown's fiduciary obligations. This statement holds true despite the fact that the Crown may not have been aware of the fiduciary nature of its duties at that time. While this may appear to be an historical anachronism created by the common law, the precise name given to the Crown-Native relationship is not what is important; rather it is the ramifications of the parties' interaction and whether that gives rise to legally enforceable obligations. This notion is consistent with the theoretical underpinnings of fiduciary doctrine, in which a relationship's dynamics cause it to be fiduciary, not whether the relationship fits into already-established categories of fiduciary

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[88]It should be noted, though, that the Canadian judiciary generally did not recognise treaty obligations as binding in law at that time. See, for example, *Attorney-General of Ontario* v. *Attorney-General of Canada: Re Indian Claims* (the *Robinson Treaties Annuities* case), [1897] A.C. 199 at 213 (P.C.); *R.* v. *Wesley*, [1932] 4 D.L.R. 774 at 788 (Alta. C.A.).

[89]*Sparrow*, *supra* note 19 at 409.

[90]*Ibid.*

relations.[91] The dynamics of early Crown-Native relations, as described in previous chapters, gave rise to fiduciary relations between the parties as a result of their mutual reliance on each other and their obligations to each other for trade, political, and military purposes.

By upholding the Crown's ability to unilaterally eliminate or override existing treaty rights, the Supreme Court in *Badger* effectively sanctioned the Crown's breach of its general fiduciary duty to act in the best interests of aboriginal peoples as well as its specific obligations under Treaty No. 8. Maintaining the honour of the Crown and avoiding sharp practice in all dealings with the aboriginal peoples, principles explicitly endorsed in *Badger*,[92] are clearly offended by finding that the NRTA may, without consultation or consent, override or alter the nature of solemn, pre-existing agreements.[93] Equally important, the incorporation of the Crown's fiduciary duty in section 35(1) of the *Constitution Act, 1982* is offended by the Crown's powers as described in *Badger*.

The passage of legislation that directly contravenes or offends existing aboriginal and treaty rights, or the obligations of the Crown to preserve and protect those rights, is inconsistent with the Crown's historical undertakings to protect the aboriginal peoples. The federal Crown's exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867* is not unlimited. The section 91(24) power has been held by the Supreme Court of Canada in *Sparrow* to be tempered by section 35(1)'s recognition and affirmation of aboriginal and treaty rights, as well as by the Crown's fiduciary obligations.[94] While this state of affairs is unquestioned post-1982, the pre-existing nature of the Crown's fiduciary duty and the protections included in section 35(1) -- which merely affirmed pre-existing Crown obligations predating the *Royal Proclamation of 1763*[95] -- ought to render this readily-accepted principle equally applicable to matters arising prior to 1982. Therefore, if section 35(1) is to be understood as a continuation of pre-existing Crown undertakings to respect and protect aboriginal and treaty rights,[96] then the Canadian judiciary's findings with respect to pre-1982 changes to aboriginal and treaty rights is incorrect.

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[91]L.I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding," (1996), 34 *Alta. L. Rev.* 821 at 829-31.

[92]*Supra* note 3 at 331, per Sopinka J., and 340, per Cory J.

[93]Refer back to the comments by Kerans J.A., *supra* note 83.

[94]See the discussion of this point, *infra*.

[95]This notion was raised in Ch. III and will be discussed further in Ch. IX.

[96]As suggested in Ch. I and which will be discussed further in Ch. IX.

The *Sparrow* decision clearly demonstrates that the Crown's section 91(24) powers are not absolute. It requires federal legislation that infringes aboriginal rights to pass a justificatory standard before it may be implemented.[97] In so doing, *Sparrow* has instituted limitations on the federal Crown's ability to legislate in respect of "Indians, and Lands reserved for the Indians" that were not previously recognised. Yet, the test outlined in *Sparrow* ought to be viewed as part of a larger framework that more accurately accounts for the Crown's obligations to aboriginal peoples.[98] This larger framework recognises that the Crown's obligations predate the creation of section 91(24) in 1867. Scrutinising the Crown's activities under this framework renders the Crown's promulgation of the NRTA as a means to limit pre-existing treaty rights questionable.

A similar concern exists regarding Canada's adherence to the *Migratory Birds Convention, 1916*[99] vis-à-vis promises made to the aboriginal peoples in Treaty No. 11 in 1921. Much like Treaty No. 8, Treaty No. 11 provided that the aboriginal signatories "shall have the right to pursue their usual vocations of hunting, trapping, and fishing throughout the tract surrendered as heretofore described." Like Treaty No. 8, the rights guaranteed in Treaty No. 11 were subject to "such regulations as may from time to time be made by the Government of the Country," and excepted tracts taken up for settlement, mining, lumbering, trading, or other purposes. However, just as the aboriginal signatories to Treaty No. 8 had been assured that their hunting and fishing privileges would remain the same after the treaty as they had been previously, the Treaty No. 11 commissioner, H.A. Conroy, also reported that he had assured the aboriginals that their ability to hunt, trap, and fish would be unaffected by the treaty:

> The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case ... and, in fact, that more twine for nets and more ammunition were given under the terms of this treaty than under any of the preceding ones; this went a long way to calm their fears.[100]

As Johnson J.A. stated in *R.* v. *Sikyea*, a case concerning the ability of Treaty No. 11 Indians to hunt migratory birds, "there is nothing in this [treaty commissioners'] report which would indicate

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[97]See the discussion in Ch. IX.

[98]Although this argument is less convincing when one accounts for the modifications to the *Sparrow* test in *R.* v. *Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C.). See the discussion of *Gladstone* in Ch. V; see also K. McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified," (1997), 8(2) Constitutional Forum 33 at 39.

[99]Specifically the sanction, ratification, and confirmation of the Convention by Canada via the *Migratory Birds Convention Act, 1917* (Can.), c. 8 and, later the Convention's implementation in Canadian law through the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179.

that the Indians were told that their right to shoot migratory birds had already been taken away from them."[101] Moreover, he explained that "It is of some importance that while the Indians in the Northwest Territories continued to shoot ducks at all seasons for food [in contravention of the *Migratory Birds Convention Act* regulations], it is only recently that any attempt has been made to enforce the Act."[102]

There are differences between the situations involving the NRTA and the *Migratory Birds Convention Act*. The primary difference between the effects of the NRTA on treaty rights versus that of the *Migratory Birds Convention Act* is that the latter preceded the signing of Treaty No. 11, whereas the treaties affected by the NRTA were already in existence when the legislation was promulgated. Nevertheless, Commissioner Conroy's assurances to the aboriginals that their hunting rights would remain unaffected by the treaty mitigates against concluding that the Crown could ignore those assurances through regulations implemented under the *Migratory Birds Convention Act* . Whether the situation contemplated in *Sikyea* may have been, as Johnson J.A. suggested, "a case of the left hand having forgotten what the right hand had done"[103] is immaterial. Such a situation would still not entail that the Crown, in concluding a treaty under false pretenses, was not bound to redress the situation. It was within the ability of the Crown, for example, to exempt the Treaty No. 11 Indians from the application of the *Migratory Birds Convention Act* and its regulations.

In light of the Supreme Court of Canada's edict in *Sparrow*, the effects of the NRTA and the *Migratory Birds Convention Act* on aboriginal treaty rights cannot be perfunctorily dismissed by statements such as that made by Justice Cory in *Horseman* that "the power of the federal

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[100]*Treaty No. 11 (June 27, 1921) and Adhesion (July 17, 1922) with Reports, Etc.* (Ottawa: Queen's Printer, 1957) at 3.

[101]*Sikyea*, *supra* note 69 at 159. Note also the statement made by Morrow J. in *Re Paulette*, *supra* note 4 at 33 concerning representations made regarding Treaties 8 and 11:

> Throughout the hearings before me there was a common thread in the testimony -- that the Indians were repeatedly assured they were not to be deprived of their hunting, fishing and trapping rights. To me, hearing the witnesses at first hand ... many of whom were there at the signing, some of them having been directly involved in the treaty making, it is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in the territories that their traditional use of the lands was not affected.

[102]*Sikyea*, *supra* note 69 at 159.

[103]*Ibid.* at 158. See also *ibid.* where Johnson J.A. stated that "I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked ..."

government to unilaterally make such a modification is unquestioned."[104] The *Sparrow* decision infringes upon the Crown's ability to unilaterally alter treaty rights existing as of 17 April 1982. Meanwhile, the Crown's pre-existing and continuing fiduciary obligations to the aboriginal peoples would prevent the Crown from departing from the promises it had agreed to and included in a treaty. Insofar as these fiduciary obligations arose long before section 35(1), and that section 35(1) ought to be viewed as a contemporary, albeit constitutional, affirmation of long-held principles and obligations, the Crown's ability to extinguish treaty rights prior to 17 April 1982 should not be seen as absolute, as *Sikyea* and *Horseman* suggest.

The majority decision in *Horseman* is not particularly sensitive to the historical context of events around the time of Treaty No. 8 and the NRTA. As such, it stands in strong opposition to the Supreme Court's contemporaneous judgments in *Sioui* and *Sparrow*. The Supreme Court's judgments in *Badger* are somewhat more faithful to the history of negotiations leading up to Treaty No. 8, as well as the basis for the NRTA's implementation. The majority's change in approach from *Horseman* to *Badger* may be traced directly to Justice Wilson's dissenting judgment in *Horseman*. She stressed that the Crown was obliged to foster conditions that would protect the rights it had guaranteed to the aboriginals in Treaty No. 8. Justice Wilson's emphasis on viewing the NRTA in light of the treaties it affected and the rights enshrined in them is illustrated, to varying degrees, in both judgments in *Badger*.[105] As Justice Cory stated in *Badger*, the purpose of the NRTA was to permit the provinces to enact regulations designed to promote the conservation of resources,[106] not to arbitrarily limit or otherwise infringe upon aboriginal treaty rights.[107]

(d) Conclusion

Although treaties may not have been regarded as nation-to-nation agreements by the Crown, that has no bearing on the binding nature of the treaties as indicated in the representations

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[104]*Horseman*, *supra* note 48 at 934. A similar statement was made by Johnson J.A. in *Sikyea*, *supra* note 69 at 154.

[105]See for example, *Badger*, *supra* note 3 at 353: "It must still be determined whether the manner in which the licensing scheme is administered conflicts with the hunting right provided under Treaty No. 8 as modified by the NRTA. This analysis should take into account the wording of the treaty and the NRTA."

[106]Indeed, the NRTA expressly contemplates the protection of existing aboriginal treaty rights. See paragraph 12 of the Alberta NRTA, which is premised upon the desire "to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence."

made by the Crown's negotiators. Indeed, the Western post-Confederation treaties were not characterised by the Crown as being any different in nature than the post-Confederation treaties signed in the East or pre-Confederation treaties.[108] The Crown represented these later treaties as nation-to-nation alliances or partnerships with the aboriginals, just as it had with earlier treaties. This fact is evidenced by the statements made to the aboriginals in the various treaties.[109] The Crown further represented that the aboriginals would be free to continue their ways of life as if there had been no treaty.[110] These Western Canadian treaties therefore ought to be regarded as entailing solemn and binding responsibilities of a lasting nature essentially similar to those contained in the earlier treaties. Insofar as beneficiaries are entitled to rely on their fiduciaries' fidelity to their best interests and need not inquire into any deviation from that standard, the aboriginal peoples ought to be able to rely on the Crown's continued representations of treaties as nation-to-nation agreements even if the Crown no longer regarded the treaties in that manner.[111]

The NRTA was a unilateral enactment by the federal government. The government did not consult the aboriginal peoples about the potential effects of the NRTA upon their rights or obtain their consent to it. Consequently, the legislation cannot be read to have an adverse impact upon existing treaty rights without resulting in a *prima facie* breach of the Crown's general and specific fiduciary obligations. While the *Sparrow* decision held that the Crown's fiduciary obligations were included in section 35(1) of the *Constitution Act, 1982*, they existed long before the promulgation of section 35(1). Thus, the Crown's fiduciary obligations maintain a separate existence from section 35(1). Consequently, the Crown's *prima facie* breach of fiduciary duty by enacting the NRTA would have existed even in the absence of section 35(1), during the period from 1930 up to 17 April 1982. The incorporation of the Crown's fiduciary duty into section 35(1) merely enhanced the need to consult with the aboriginal peoples or to obtain their consent

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[107]*Badger*, *supra* note 3 at 353, per Cory J. and at 330, per Sopinka J.

[108]See Henderson, *supra* note 3 at 249, 258-60, 277-8.

[109]See the discussion of the Crown's representations in its treaties with the aboriginal peoples from the *Treaty of Albany*, Covenant Chain and Maritime treaties in Ch. II to the *Treaty of Niagara* in Ch. III and the later treaties in Ch. VI and VII.

[110]See A. Morris, *The Treaties of Canada with The Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto*, (Toronto: Belfords, Clarke, 1880); Price, *supra* note 64; Fumoleau, *supra* note 64; H. Cardinal, *The Unjust Society*, (Edmonton: Hurtig, 1969); M. Jackson, "The Articulation of Native Rights in Canadian Law," (1984), 18 *U.B.C. L. Rev.* 255; Henderson, *supra* note 3.

[111]See *supra* note 15.

in situations where governmental legislative initiatives had the potential to adversely affect section 35(1) rights.

The promulgation of section 35(1) and its prohibition on the extinguishment of aboriginal and treaty rights does not entail that Crown legislation may never infringe upon those rights. Rather, legislation that adversely affects the existence of such rights will be subjected to a justificatory standard to determine whether the infringement was permissible under the circumstances in question. The standard for such legislative initiatives must, however, account for the Crown's pre-existing fiduciary duties in its balancing of governmental objectives versus the constitutionally-mandated need to protect section 35(1) rights. As will be discussed further in the next chapter, section 35(1) creates a constitutionally-based framework for the protection of aboriginal and treaty rights and the Crown's obligations to safeguard those rights.

IX. Conclusion

> Judges have, by the nature of their office, a particular concern with the normative structure of a community through time. The very means by which they justify their decisions require that they reflect upon the substance of previous judgements, that they care about consistency over time and across contemporaneous judgements, and that they take seriously the law's claim to be a framework of justice. [1]

The primary function of this dissertation has been to establish the framework for a unified, contextual, and culturally-appropriate understanding of aboriginal and treaty rights. Earlier chapters have argued that much of the present jurisprudence is premised upon improper assumptions about Crown-Native relations. These assumptions have created a faulty basis upon which to make appraisals of aboriginal and treaty rights. Judicial failures to regard the context in which aboriginal and treaty rights have existed and continue to exist have also been posited herein as major obstacle to the courts' ability to adequately deal with those issues. With limited exceptions in the area of treaties, the courts have also not been particularly sensitive to aboriginal interpretations of their rights. To construct a framework that is better suited for understanding aboriginal and treaty rights, it has been necessary to provide a foundation that more adequately reflects the *sui generis* nature of those rights and Crown-Native relations generally.

Part I of this work sought to provide this foundation by dispelling some misconceptions about the nature of Crown-Native relations. British claims to aboriginal lands based on papal bulls, royal charters, or notions of discovery, conquest, or settlement were proven to have been ineffective under the *jus gentium* or the practical realities of sixteenth and seventeenth century North America. Instead, Britain's power in North America was demonstrated to have arisen as a result of the co-operation and assistance of the aboriginal peoples. Meanwhile, the principles of peace, friendship, and respect respect that were depicted in the Two-Row Wampum that accompanied the *Treaty of Albany* were shown to have played a fundamental role in the establishment and continuation of Crown-aboriginal relations. By examining Crown-Native relations in an appropriate context, it was possible to reveal their true nature.

Emphasising the context of Crown-Native relations has been suggested to be more reflective of the character of the parties' interaction than the Canadian judiciary's analysis of

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[1] J. Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*," (1995), 17 *Sydney L. Rev.* 5 at 27-8.

individual relationships in a vacuum. Thus, Crown-Native fiduciary and treaty relations should not be viewed only as autonomous entities. The discussion of the Crown-Native fiduciary relationship in Part II and the status and effect of treaties and treaty negotiations in Part III was geared towards demonstrating their respective places both on the microscopic level and within the larger aboriginal rights superstructure, or the macroscopic level.

The Crown-Native fiduciary relationship was built on the historical interaction between the parties during the formative years of their interaction. The fiduciary nature of Crown-Native relations was shown to have emanated from the parties' reliance upon each other through a variety of trade, military, and political partnerships. The groups' power to affect each other's interests and their respective vulnerability to that power created this fiduciary relationship. The rights and responsibilities encapsulated by the Crown-Native fiduciary relationship may be seen in the early treaties between the parties, such as the *Treaty of Albany* and the Covenant Chain alliance, as well as in later documents, such as the *Royal Proclamation of 1763* and the *Treaty of Niagara*.

It has been suggested that the early interaction between the parties created an inchoate fiduciary relationship that was crystallised during the formative years of Crown-aboriginal relations. This formative period, in turn, was argued to be the basis of modern Crown-Native fiduciary relations. The Crown's obligations under this relationship and the fiduciary principles that govern the Crown's actions were illustrated in Chapter IV. Meanwhile, Chapter V considered some of the key issues surrounding the application of fiduciary doctrine to Crown-Native relations. It also contemplated the legal implications of characterising those relations as fiduciary.

Crown-Native treaty relations were argued to be fundamental aspects of the interaction between the groups. The examination of Crown-Native treaties in Part III emphasised the necessity to account for both parties' understandings of the purpose and intent of those agreements. Chapter VI focused on the understandings of treaties held by the Crown and the aboriginal peoples. It enhanced these understandings by placing the treaties in an historical and culturally-appropriate context drawn, in part, from the discussion in Part I. Chapter VII looked to the law's method of interpreting Crown-aboriginal treaties in the nineteenth and twentieth centuries. It encapsulated both traditional approaches to treaty interpretation as well as more

modern techniques. The focus of the latter was the canons of treaty interpretation that govern the contemporary judicial interpretation of treaties.

Part IV of the dissertation illustrated the integration of aboriginal and treaty rights issues by highlighting the confluence of Crown-Native fiduciary and treaty relations. Because of the common historical interaction between the Crown and aboriginal peoples that provides the background to their fiduciary and treaty relations, it has been argued that it is inappropriate to regard one form of these relations without looking to the other. The Crown's general and specific fiduciary obligations have been shown to be engaged by Crown-Native treaty relations. Meanwhile Crown-Native treaty relations were demonstrated to give rise to new fiduciary obligations. Indeed, treaties were contended to be concrete manifestations of individual fiduciary relationships between the Crown and aboriginal peoples. Chapter VIII's examination of this confluence suggested the need for a *sui generis* approach to aboriginal and treaty rights that would assist in the implementation of a unified, contextual, and culturally-appropriate framework for understanding those rights. This suggestion built upon the discussion of Crown-aboriginal fiduciary and treaty relations in Parts II and III and the history of Crown-Native relations in Part I.

From these chapters, it may be seen that the early interaction between the Crown and the aboriginal peoples provided the impetus for further relations between the groups. These relations grew and became increasingly complex during the formative years of Crown-Native intercourse. The formative years of Crown-Native relations solidified and expanded the fiduciary and treaty relationships between the groups that continue to the present day. All of these issues may be seen to converge in section 35(1) of the *Constitution Act, 1982*. It is the latest installment in a long line of Crown affirmations to the aboriginal peoples of its intention to fulfill its historical commitments to them.

(a) Section 35(1): The Latest Chapter in Crown-Native Relations

Section 35(1) carries on from the Crown's representations and promises made over the history of Crown-aboriginal relations. These representations include those contained in various treaties signed between the Crown and Native peoples and in policy documents like the *Royal Proclamation of 1763* and other instructions to colonial governors discussed in Chapter III.

Therefore, section 35(1)'s affirmation and protection of aboriginal and treaty rights is not a new understanding of aboriginal and treaty rights, but an affirmation of the understanding of those rights that may be seen in a variety of historical sources.

Placed within its proper context, section 35(1) may be seen to be a continuation of the principles of peace, friendship, and respect that has existed as a fundamental element of Crown-Native relations from the early stages of the parties' interaction. Thus, section 35(1) should be understood to adopt the propositions addressed in earlier chapters, such as the solemn status of treaties and the binding nature of the Crown's fiduciary obligations on its section 91(24) powers. For these reasons, the term "existing" contained within section 35(1) ought to include those aboriginal and treaty rights that can be factually demonstrated to exist in light of the history of Crown-Native relations. This includes all aboriginal and treaty rights wrongfully extinguished in breach of the Crown's fiduciary and treaty obligations to the aboriginal peoples.

As discussed in Chapter IV, the Supreme Court of Canada held in *Sparrow* that the concept of "existing" aboriginal and treaty rights excluded rights which had been extinguished prior to that date, but included all other rights in their full and original form.[2] This entails that all rights which had not been extinguished prior to 17 April 1982, including those rights which had been all but extinguished through governmental regulation, were given constitutional affirmation and protection in the form they enjoyed prior to their regulation. Chapter VIII's discussion of the *Horseman*[3] and *Sikyea*[4] cases has argued that the Crown's pre-existing and continuing fiduciary and treaty obligations to the aboriginal peoples prevent the Crown from extinguishing aboriginal or treaty rights in a manner inconsistent with those obligations. Aboriginal and treaty rights are to be viewed in connection with the cultural and physical survival of aboriginal peoples.[5] This mode of definition transcends strictly temporal considerations. Instead, it focuses on the continued vitality of aboriginal societies. This stands in marked contrast to the recent Supreme Court of

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[2] *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 at 396-7 (S.C.C.).

[3][1990] 1 S.C.R. 901. While the Supreme Court's majority decision in *R.* v. *Badger* (1996), 133 D.L.R. (4th) 324 (S.C.C.) departed somewhat from the principles formulated in *Horseman*, the majority decision in *Badger* agreed with the *Horseman* decision that the Alberta *Natural Resources Transfer Agreement, 1930* did eliminate the aboriginals' commercial rights through its merger and consolidation of existing rights.

[4](1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.).

[5]*Sparrow*, *supra* note 2 at 402.

Canada decisions in the *Van der Peet* trilogy,[6] in which the Court held that aboriginal rights under section 35(1) could only be rights traced directly to pre-contact practices.[7]

As Lyon suggests, "s. 35 entrenches existing rights, not existing precedents and methods of interpretation."[8] Therefore, where aboriginal or treaty rights were wrongfully extinguished prior to 1982, those rights ought to be recognised as "existing" and should now receive constitutional protection.[9] Where the wording of a statute failed to indicate Parliament's intent to extinguish certain aboriginal or treaty rights prior to 1982, even where the statute was incompatible with the continued existence of those rights, the rights were not clearly and plainly extinguished as required by law.[10] Consequently, they continue to exist and deserve constitutional protection under section 35(1).[11]

The inclusion of aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982* provides the Crown with a constitutional responsibility to act in a manner consistent with the furtherance of those rights. This responsibility affects both the federal and provincial Crowns.[12] In light of *Sparrow*'s suggestion that section 35(1) ought to be construed in a purposive way,[13]

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[6]*R.* v. *Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.); *R.* v. *Gladstone*, [1996] 4 C.N.L.R. 65 (S.C.C.); *R.* v. *N.T.C. Smokehouse*, [1996] 4 C.N.L.R. 130 (S.C.C.).

[7]See the discussion in L.I. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*," (1997), 8 *Constitutional Forum* 40; Rotman, "Aboriginal Rights Law, Year in Review: The 1995-96 Term," (1997), 12 *J. L. and Social Pol'y* 34.

[8]N. Lyon, "Constitutional Issues in Native Law," in B.W. Morse, ed., *Aboriginal Peoples and the Law*, (Ottawa: Carleton University Press, 1985) at 418.

[9]See B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights," (1982-83), 8 *Queen's L.J.* 232 at 243 [hereinafter "Constitutional Guarantee"].

[10]*Sparrow*, *supra* note 2 at 401; *Calder* v. *Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145 at 210 (S.C.C.).

[11]See Slattery, "Constitutional Guarantee," *supra* note 9 at 264. See also *ibid.*: "... [I]n order to determine what treaty rights are covered by section 35 one looks to the texts of treaties in force as of 17 April 1982, not to legislation. In a nutshell, section 35 recognizes and affirms existing treaty rights not existing statutory rights." The "clear and plain" extinguishment test has most recently been reaffirmed by the Supreme Court in *Badger*, *supra* note 3.

[12]Note Dickson C.J.C.'s comments in *Mitchell* v. *Peguis Indian Band* (1990), 71 D.L.R. (4th) 193 at 210 (S.C.C.). See also the commentary by the Royal Commission on Aboriginal Peoples in *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment*, (Ottawa: Minister of Supply and Services, 1995) at 7:

> ... [P]rovincial and territorial governments ought to work together with the federal government and Aboriginal nations to reach agreements that recognize and affirm Aboriginal rights. While Parliament has special responsibilities with respect to "Indians, and Lands reserved for the Indians," the task of achieving lasting co-existence between Aboriginal and non-Aboriginal systems of land tenure and governance also involves provincial and territorial governments. Indeed this task goes to the heart of the future of Aboriginal-Crown relations in Canada, and in this respect all governments -- federal, provincial, territorial, and Aboriginal -- bear fundamental responsibilities in shaping our future together.

[13]See *Sparrow*, *supra* note 2 at 407.

this entails an obligation to actively promote or further the rights protected within section 35(1).[14] A duty to act purposively does not require the Crown to seek prior court approval of legislative or policy initiatives which affect aboriginal peoples. Rather, it requires the Crown to act where its action is necessary or appropriate to the fulfillment of its duty. If the Crown is unsure whether it must act in a specific instance, it is bound to make appropriate inquiries.[15] Above all, the purposive nature of the Crown's fiduciary duty insists that the Crown must maintain its honour, integrity, and avoid sharp practice in all of its dealings with the aboriginal peoples.[16] Combining the purposive nature of section 35(1) with the Crown's fiduciary and treaty obligations requires that the Crown not only take positive action to give greater shape and content to aboriginal rights, but also facilitate timely and equitable settlements of aboriginal rights disputes. As the Federal Court, Trial Division explained in *Pacific Fishermen's Defence Alliance* v. *Canada*:

> Subsection 35(1) of the Constitution Act, 1982 recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. It is, therefore, the duty of the federal government to negotiate with Indians in an attempt to settle those rights. ... The government's task is to determine, define, recognize and affirm whatever aboriginal rights existed.[17]

Section 35(1) should be regarded as the constitutionalisation of the principles of peace, friendship, and respect that were developed during the formative years of Crown-Native relations. As a continuation of historical Crown commitments to the aboriginal peoples, section 35(1) protects aboriginal and treaty rights and incorporates Crown-Native fiduciary relations. As previous chapters have demonstrated, treaty rights and Crown-Native fiduciary relations are both rooted in the formative years of Crown-Native interaction. Aboriginal rights also owe their modern recognition by the common law to this formative period.[18]

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[14]This latter notion has since been affirmed by the Federal Court of Appeal in *Eastmain Band* v. *Canada (Federal Administrator)*, [1993] 3 C.N.L.R. 55 (F.C.A.). See also *Hunter* v. *Southam* (1984), 11 D.L.R. (4th) 641 at 650 (S.C.C.), where Dickson C.J.C. stated that the *Charter of Rights and Freedoms* is a purposive document and must be interpreted accordingly. While section 35(1) exists outside of the *Charter*, the point being made by Dickson C.J.C. about the purpose of the *Charter* -- namely, that it is "to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines" -- is equally applicable to the purpose of section 35(1), since section 35(1) acts in place of the *Charter* vis-à-vis the protection of aboriginal and treaty rights.

[15]N. Lyon, *Aboriginal Peoples and Constitutional Reform In The 90's*, Background Studies, York University Constitutional Reform Project, Study No. 7, (North York: Centre for Public Law and Policy, 1992) at 9 [hereinafter "*Aboriginal Peoples and Constitutional Reform*"].

[16]This is emphasised through the *Sparrow* court's reliance upon the precedent established in *R.* v. *Taylor and Williams* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.).

[17][1987] 3 F.C. 272 at 280-1 (F.C.T.D.).

[18]While aboriginal rights originated prior to this period -- and are now required to have originated prior to this period if they are to receive constitutional protection as dictated by the test established in *Van der Peet*, *supra*

As discussed in Chapter VIII, this constitutionalisation of the Crown's fiduciary obligations to the aboriginal peoples tempers the federal Crown's exclusive legislative power over "Indians, and Lands reserved for the Indians" in section 91(24) of the *Constitution Act, 1867*.[19] Section 35(1) provides that the Crown must only exercise its legislative powers in a manner consistent with its fiduciary and treaty obligations to the aboriginal peoples. Insofar as these obligations arose out of relations based on peace, friendship, and respect and act as a constitutional guideline for Crown conduct, it is difficult to conceive of section 35(1) as being anything other than the reaffirmation of the principles which have been argued to exist at the heart of Crown-Native relations.

The initial relationship between Britain and the aboriginal peoples was shown to have emanated from the former's dependency on the latter. The early treaties between the parties, such as the *Treaty of Albany* and the Covenant Chain alliance, revealed that the parties' relationship was based upon the principles of peace, friendship, and respect. These principles should continue to inform contemporary Crown-Native relations and the legal implications that stem therefrom despite the changes in Crown-Native relations. The Crown's representations to the aboriginal peoples in the post-Confederation treaties illustrated in Chapters VI, VII, and VII provide strong support for this conclusion.

It is argued that these foundational principles are the basis for the unified, contextual, and culturally-appropriate understanding of aboriginal and treaty rights proposed herein. Thus, when this dissertation suggests the need to return to the underlying bases of Crown-Native relations, it looks to a combination of Crown and aboriginal perspectives obtained through written and oral documentation. It does not look at the skewed vision of those relations constructed on the strength of documents that fail to account for aboriginal perspectives. The principles of peace, friendship, and respect ought not be regarded as historical relics, but as vibrant elements of continuing Crown-Native relations. It is suggested here that section 35(1) of the *Constitution Act, 1982* incorporates these same principles within its protection of aboriginal and treaty rights.

While section 35(1) deals explicitly with aboriginal and treaty rights, it does so in a manner which respects their unique nature. The *sui generis* nature of aboriginal and treaty rights has been

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note 6 -- they were incorporated into the common law at this time. See the discussion of the Doctrine of Continuity in Ch. II.

[19](U.K.), 30 & 31 Vict., c. 3 (formerly the *British North America Act, 1867*). Refer back to the discussion of this point in Ch. VIII.

recognised by the Supreme Court of Canada on a number of occasions.[20] The combined effect of the historical intercourse between the Crown and aboriginal peoples and the resultant fiduciary and treaty relations emanating therefrom may be seen to provide the basis for a *sui generis* approach to aboriginal and treaty rights. This *sui generis* approach envisages a cohabitation of common law and aboriginal perspectives.[21] Thus, courts must be careful not to make use only of common law conceptions in their analyses of aboriginal and treaty rights.[22]

A noteworthy instance of a court's exclusive reliance on common law concepts to understand aboriginal rights is the *Re Southern Rhodesia* case.[23] In that case, Lord Sumner had to consider the meaning of aboriginal rights to land. He found that those rights could only constitute "ownership" in the common law understanding of the term if they ascribed to the characteristics of private property under the common law.[24] This determination clearly exudes a bias in favour of common law understandings of rights. Determining that land ownership exists only where it adheres to common law concepts improperly privileges these concepts over indigenous land laws that have been incorporated into the common law through the Doctrine of Continuity.[25] Lord Sumner's failure to account for aboriginal perspectives is amplified in his often-quoted commentary on the difference between aboriginal legal conceptions and those originating under the common law:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people the shadow of the rights known to our law and then transmute it into the substance of transferable rights of property as we know them ... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied

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[20]See, for example, *Guerin* v. *R.* (1984), 13 D.L.R. (4th) 321 at 339, 341, 343 (S.C.C.); *Simon* v. *R.* (1985), 24 D.L.R. (4th) 390 (S.C.C.); *Paul* v. *Canadian Pacific Ltd.* (1989), 53 D.L.R. (4th) 487 (S.C.C.); *Sparrow*, *supra* note 2; *R.* v. *Sioui* (1990), 70 D.L.R. (4th) 427 (S.C.C.); *Mitchell* v. *Peguis Indian Band*, *supra* note 12.

[21]See B. Slattery, "Understanding Aboriginal Rights," (1987), 66 *Can. Bar Rev.* 727 at 745; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*, (Ottawa: Minister of Supply and Services Canada, 1993) at 20; J. Borrows and L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997), 36 *Alta. L. Rev.* (forthcoming).

[22]As suggested by the Supreme Court of Canada in *Sparrow*, *supra* note 2 at 411. See also *Guerin*, *supra* note 20; *Mabo* v. *Queensland [No. 2]* (1992), 175 C.L.R. 1 at 29-30 (H.C. Aust.), per Brennan J., and at 109, per Deane and Gaudron JJ. See also the discussion of *Amodu Tijani* v. *The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.), *infra*.

[23]*Re Southern Rhodesia*, [1919] A.C. 211 (P.C.).

[24]*Ibid.* at 233.

[25]See the discussion in Ch. II.

> and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest ...[26]

In contrast to *Re Southern Rhodesia*, the Privy Council's decision two years later in *Amodu Tijani* v. *The Secretary, Southern Nigeria*[27] indicated the common law's ability to affirm and give effect to rights held under indigenous law. Tijani, an Idejo White Cap Chief of the colony of Lagos, claimed compensation for the government's expropriation of land under a Public Lands Ordinance. The Privy Council held that Tijani was entitled to compensation for his transfer of full ownership of the land,[28] along with his title to receive rent or tribute, to the Governor of Lagos. In delivering the Privy Council's judgment, Viscount Haldane recognised that aboriginal land rights were both unique and theoretically dissimilar to common law notions of lands ownership. On the basis of this observation, he warned about the danger of construing aboriginal title solely according to common law notions:

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.[29]

Viscount Haldane held that to properly ascertain indigenous peoples' land rights, it was necessary to consider indigenous history and patterns of land usage rather than importing the common law's preconceived notions of property rights. As he explained, "Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."[30]

In drawing upon both common law concepts and aboriginal perspectives in *Amodu Tijani*, Viscount Haldane demonstrated a sensitivity to aboriginal difference that is not always found in common law appraisals of aboriginal and treaty rights. The *sui generis* approach proposed herein follows the tenor of decisions such as *Amodu Tijani* and *Guerin*, where Justice Dickson, as he then was, explained that:

> ... [I]n describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has

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[26]*Re Southern Rhodesia*, *supra* note 23 at 233-4.

[27]*Amodu Tijani*, *supra* note 22.

[28]Under what was described as a "communal usufructuary occupation, which may be so complete as to reduce any radical title in the Sovereign to one which only extends to comparatively limited rights of administrative interference." See *ibid.* at 409-10.

[29]*Ibid.* at 402-3.

[30]*Ibid.* at 404.

> described native title [as either a beneficial interest or a personal, usufructuary right], but an appearance of conflict has none the less arisen because in neither case is the categorization quite correct.[31]

The *sui generis* approach to aboriginal and treaty rights acts as a bridge between common law and aboriginal legal systems. It should not be viewed as being housed exclusively in either common law or aboriginal perspectives. This *sui generis* approach provides for the greater incorporation of contextual and culturally-appropriate means of understanding and analysing aboriginal and treaty rights.

Regarding aboriginal and treaty rights as *sui generis* provides the common law with interpretive principles to guide its foray into uncharted waters. This is particularly important when dealing with aboriginal and treaty rights, insofar as they are unique within the common law. The principles that are to be applied should be as unique as the rights themselves. Since aboriginal and treaty rights are heavily dependent upon context, the method of understanding them should be similarly context-driven. This entails accounting for the historical, political, social, and legal contexts within which those rights have existed and continue to exist. This chapter suggests that this *sui generis* approach -- which has been argued for throughout this dissertation -- has been incorporated in section 35(1) of the *Constitution Act, 1982*.

The very existence of section 35(1) of the *Constitution Act, 1982* assumes the recognition of aboriginal and treaty rights as important aspects of the Canadian constitutional structure. Had these rights not been understood to be vital aspects of aboriginal peoples' lives and sense of being, there would have been no need to have included them within the repatriated constitutional package. Section 35(1) is, as Greschner describes it, "a promise of constitutional space for aboriginal peoples to be aboriginal."[32] It provides a constitutionally-mandated imperative to reject judicial practices vis-à-vis Crown-Native relations that are rooted in acontextual or compartmentalised terms. It also provides the basis for replacing colonialist understandings of aboriginal and treaty rights that viewed those rights as unenforceable at law and dependent upon the goodwill of the Crown.

Section 35(1) brings all of the relevant provisions relating to aboriginal peoples and their rights together in one place. As a constitutional provision, it is capable of continuous

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[31]*Guerin, supra* note 20 at 339.

[32]D. Greschner, "Aboriginal Women, the Constitution and Criminal Justice," (1992), *U.B.C. L. Rev.* Special Edition on Aboriginal Justice 338 at 342.

modification in accordance with the rejection of the frozen rights theory of aboriginal rights in *Sparrow* and the "living tree" analogy of the Canadian constitution.[33] Section 35(1) is, therefore, ideally suited as a meeting ground for aboriginal aspirations and Crown obligations.[34] Through section 35(1), aboriginal peoples ought to be able to realise the recognition and protection of their rights that had been promised to them by Crown representations over the course of Crown-Native relations in North America. The legally enforceable nature of section 35(1) ought to enable the aboriginal peoples to coerce the Crown into honouring its historical commitments.

(b) Conclusion

Through the adoption of the contextual approach suggested herein and its incorporation into section 35(1), the principles of peace, friendship, and respect may retake their appropriate place at the foundation of Crown-Native relations in Canada. Those principles must first be freed from the restraints improperly imposed on them by years of judicial compartmentalisation of aboriginal and treaty rights. To do this, the Canadian judiciary needs to move away from precedents rooted in bygone eras that do not reflect the Canadian situation.[35] The judiciary's ability to depart from inappropriate precedents in aboriginal rights matters was discussed by Justice Brennan in his judgment in *Mabo* v. *Queensland [No. 2]*.[36]

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[33]See, for example, *Edwards* v. *Attorney-General of Canada*, [1930] A.C. 123 at 136 (P.C.): "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."; *Hunter* v. *Southam*, *supra* note 14 at 649, citing *Edwards*:

> A constitution ... is drafted with an eye to the future. Its function is to provide a continuous 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.

[34]See also Lyon, *Aboriginal Peoples and Constitutional Reform*, *supra* note 15 at 5.

[35]See P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination," (1991), 36 *McGill L.J.* 382 at 395:

> Traditional notions of property, contract, legislative supremacy, and constitutional right must be questioned and reconceptualized so as to reshape the law's relation to native people and to permit Canada's First Nations to devise institutional arrangements that conform to and celebrate native forms of life. Current ways of knowing are not so much part of the solution as part of the problem, and reform requires the creation of new ways of legal understanding that embrace native difference.

[36]*Supra* note 22.

In *Mabo*, an Australian case, the Meriam people sought declarations as to their aboriginal rights to their traditional lands in the Murray Islands. The Murray Islands had been formally annexed to Queensland in July, 1879 pursuant to Letters Patent issued by Queen Victoria in October, 1878. Thereafter, the islands were treated as Crown lands. The government of Queensland had considered the islands to be reserved for the use of the Meriam people, subject to specific exceptions. The Meriam people asserted that they retained aboriginal title to the lands in question. Consequently, they claimed that the lands were subject to their title and thus did not belong to the Crown.

The majority decision in *Mabo* held that the Murray Islands were not Crown lands, but remained subject to the title of the Meriam people. The Meriam people were held to be entitled to the possession, occupation, use, and enjoyment of their traditional lands against all potential claimants.[37] Their title was held to be subject to extinguishment by the valid exercise of power by the Queensland Parliament or its Governor in Council, though. In his judgment, Justice Brennan questioned the legitimacy of common law precedents that did not adhere to contemporary notions of justice and the acceptance of aboriginal difference. As he explained:

> Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. ... No case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.[38]

Extending this principle to the Canadian situation ought to entail that Canadian courts abandon the compartmentalisation of aboriginal and treaty rights that was representative of past jurisprudence in favour of a more well-rounded approach that properly accounts for Crown and aboriginal perspectives. This would enable the judiciary to understand aboriginal and treaty rights in a more contextual and culturally-appropriate manner than it has previously.

The Canadian judiciary's ability to comprehend aboriginal rights and issues using appropriate forms of reference requires a loosening of the manner in which the courts have generally assessed such matters of fact. Traditional common law rules, such as the law of evidence, are ingrained with notions of law and order that inhibit the courts' ability to provide full and informed decisions about aboriginal and treaty rights. The common law of evidence is

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[37]With the exception of certain parcels of land which had been validly appropriated for administrative purposes inconsistent with the Meriam people's continued enjoyment of their rights and privileges existing under their aboriginal title.

premised on the values and experiences of Western cultures. It is based upon an adversarial system, as well as in assumptions about the superior reliability or trustworthiness of written, as opposed to oral, records. While common law rules of evidence may be appropriate for matters originating entirely within common law cultures, they cannot account for the needs or requirements of cultures with different values, priorities, and modes of organisation. The bias exhibited by the common law of evidence towards literacy is not based on the inherent superiority of written versus oral record keeping, but on the values and practices of the cultures within which it originated. This fact has not always been recognised by Canadian courts, as the statements of Justice Muldoon in *Sawridge Band* v. *Canada* illustrate:

> ... [W]ithout any means of keeping a written record the probabilities lead to the conclusion that myth or oral history would not yield any objectively reliable reason or knowledge ... That surely is the trouble with oral history. It just does not lie easily in the mouth of the folk who transmit oral history to relate that *their* ancestors were ever venal, criminal, cruel, mean-spirited, unjust, cowardly, perfidious, bigoted or indeed, aught but noble, brave, fair and generous, etc. etc.
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> In no time at all historical stories, if ever accurate, soon become mortally skewed propaganda, without objective verity. ... So ancestor advocacy or ancestor worship is one of the most counter-productive, racist, hateful and backward-looking of all human characteristics, or religion, or what passes for thought. ... So saying, the Court is most emphatically not mocking or belittling those who assert that, because their ancestors never developed writing, oral history is their only means of keeping their history alive. *It would always be best to put the stories into writing at the earliest possible time in order to avoid some of the embellishments which render oral history so unreliable.*[39] [Emphasis added]

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[38]*Ibid.* at 29, 30.

[39][1995] 4 C.N.L.R. 121 at 195, 196 (F.C.T.D.). In contrast to what Muldoon J. characterises as the inherent unreliability of oral history, see J. Borrows, "With or Without You: First Nations Law (in Canada)," (1996), 41 *McGill L.J.* 630 at 648:

> ... First Nations stories, however, can also be distinguished from Common law precedents in both form and content because of the way they are recorded and applied. First Nations use an oral tradition to chronicle important information. ... As such, the application of these memories and words is quite different from the application of Common law precedent. Non-ceremonial stories can change from one telling to another, but such changes do not mean that the story's truth is lost; rather modification recognizes that context is always changing, requiring a constant reinterpretation of many of the account's elements. First Nations stories take this form because there is an attempt to convey contextual meaning relevant to the times and needs of the listeners.

See also G. Valencia-Weber, "Tribal Courts: Custom and Innovative Law," (1994), 24 *New Mexico L. Rev.* 227 at 229:

> In the tribal society, past and present are inseparable as the continuation of a story anchored in values enduring in contemporary life ... In the creation of American Indian common law, in the longstanding and emerging tribal courts, custom serves in conjunction with appropriate principles from federal and state law.

In order to obtain the type of evidence necessary to adequately deal with aboriginal and treaty rights, it will be necessary for the courts to receive evidence from aboriginal peoples that may not correspond, in either shape or form, to accepted methods of obtaining evidence in the common law tradition. Such evidence, where it is both necessary and reliable, ought to be given its proper due and placed on an equal footing with evidence obtained in compliance with common law evidentiary rules. Indeed, as recent jurisprudence indicates, the judiciary is perfectly capable of receiving such evidence in situations where it is sufficiently warranted.[40] Insofar as aboriginal rights are based in aboriginal laws and customs that exist within traditional stories and oral histories, there is a positive onus upon the judiciary to provide for the reception of aboriginal storytelling and oral history.[41]

The framework proposed in this dissertation has important ramifications for understanding aboriginal and treaty rights. It prescribes a different approach to those rights that is more reflective of their *sui generis* nature and of the history of Crown-Native relations. It also has serious implications for understanding section 35(1) of the *Constitution Act, 1982*. The Supreme Court of Canada has now had two opportunities to consider section 35(1). The first came in the *Sparrow* case.[42] The second came only recently in the *Van der Peet* trilogy.[43] Whatever sensitivity to aboriginal difference existed in the *Sparrow* decision was effectively eliminated by the Court in the *Van der Peet* trilogy through the frozen rights approach adopted in the latter.[44] In light of the arguments made in this dissertation, this situation creates the need for the Court's reconsideration of aboriginal and treaty rights and their protection by section 35(1).

If section 35(1) is to have any truly meaningful effect, the Supreme Court must endeavour to give it greater definition. If the Court takes another six years to consider its substance -- as it did between its judgments in *Sparrow* and *Van der Peet* -- section 35(1)'s promise to protect aboriginal and treaty rights could be forever marginalised. Such an effect would be inconsistent with the government's intention in placing section 35(1) in the *Constitution Act, 1982*. It would

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[40]See *R.* v. *Finta* (1994), 112 D.L.R. (4th) 513 (S.C.C.); *R.* v. *B. (K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.); *R.* v. *Smith* (1992), 94 D.L.R. (4th) 590 (S.C.C.); *R.* v. *Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.). Note also the discussion of receiving evidence relating to the identification of aboriginal rights in Lamer C.J.C.'s judgment in *Van der Peet*, *supra* note 6.

[41]Borrows, *supra* note 39.

[42]*Supra* note 2.

[43]*Supra* note 6.

[44]For further commentary on this point, see the references *supra* note 7; see also the discussion in Ch. V of how the *Gladstone* decision has altered the *Sparrow* justificatory test.

also be inconsistent with that section's purposive nature. It is suggested that the Court consider the approach formulated herein when it next confronts section 35(1). At that point, Canadian aboriginal rights jurisprudence may truly move towards a more unified, historically- and culturally-appropriate method of dealing with aboriginal and treaty rights in a manner that befits their rightful position in the Canadian political and legal order.

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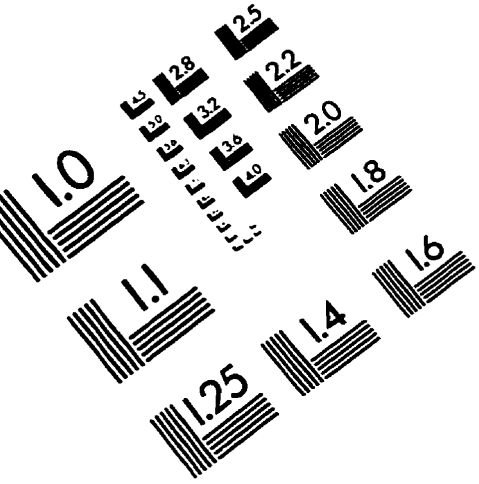

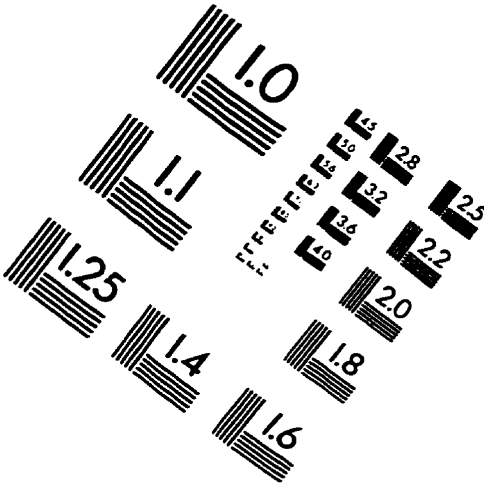

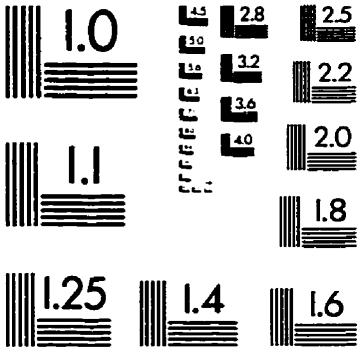

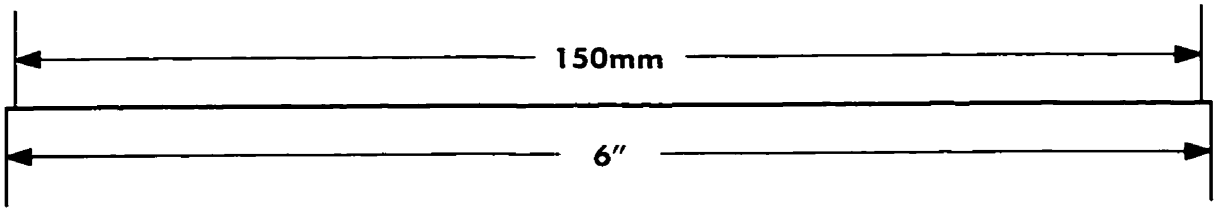

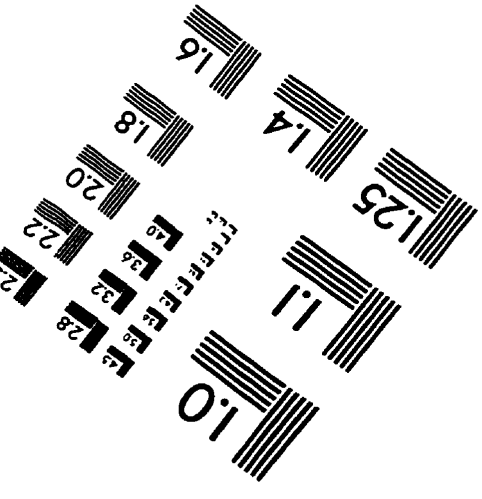

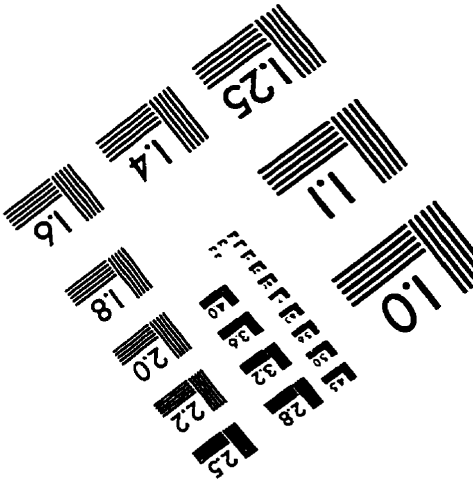

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