A THEORY OF CROWN TRUST TOWARDS ABORIGINAL PEOPLES

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I. INTRODUCTION

A federal Crown trust obligation towards the aboriginal peoples of Canada is not a novel idea to anyone acquainted with the history of the relations between them. However, the existence of a fiduciary relationship has only recently been recognized by the courts. In *Guerin* v. *R.*,[1] the Supreme Court of Canada acknowledged a judicially-enforceable fiduciary obligation on the Crown to deal with surrendered lands for the benefit of the Indians.

The significance of the *Guerin* decision is difficult to assess. This is due to the fact that although all of the members of the Court agreed with the result, three different characterizations of the relationship between the Crown and the Indians were put forward. Mr. Justice Estey analyzed the relationship in terms of statutory agency;[2] Madame Justice Wilson found an "express trust of specific land for a specific purpose";[3] and Mr. Justice Dickson (now the Chief Justice) found a distinct fiduciary obligation which did not amount to a trust.[4] The *Guerin* decision is of critical importance for its recognition of the existence and enforceability of a fiduciary obligation. It remains for subsequent decisions, however, to develop a coherent theory of Crown responsibility and to give content to this newly-acknowledged fiduciary obligation.

Mr. Justice Dickson's judgment is unhelpful in assessing the nature and parameters of the Crown's fiduciary duty. He strained to avoid finding a trust, insisting that "the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*".[5] At the same time, however, he admitted that if "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".[6] The

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1 (1984), [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin*].

2 *Ibid.* at 391, 13 D.L.R. (4th) at 346.

3 *Ibid.* at 355, 13 D.L.R. (4th) at 360-1, Ritchie and McIntyre JJ. concurring.

4 *Ibid.* at 375-6, 13 D.L.R. (4th) at 334-5, Beetz, Chouinard and Lamer JJ. concurring.

5 *Ibid.* at 387, 13 D.L.R. (4th) at 343.

6 *Ibid.* at 376, 13 D.L.R. (4th) at 334.

Guerin decision clearly raises more questions than it answers.[7] Now that an enforceable fiduciary obligation has been judicially acknowledged, the courts must address issues of source, content, standards and remedies.

The American courts have been struggling with these issues for over 150 years. The seeds of their federal trust responsibility doctrine were sown by Chief Justice Marshall in *Cherokee Nation* v. *Georgia*.[8] He characterized the relationship between the Indians and the United States as that "of a ward to his guardian".[9] This guardianship theory of federal-Indian relations was interpreted in such a way as to create both a duty of protection and a power of interference.[10] Eventually, it was relied upon to enforce fiduciary duties against federal officials in the administration of Indian affairs.[11] Recent decisions have underlined the duty of loyalty[12] and have measured the conduct of the government by the same standards applicable to private trustees.[13]

This paper will examine the development of the American federal trust responsibility doctrine. Such an analysis will be instructive in developing the nascent Canadian concept. Although close attention must be paid to our specific historical and legislative context, the American experience may suggest an approach to answering the questions raised by *Guerin*.

II. Historical Foundations of the Government Trusteeship of Canadian Indians

The underpinnings of the Crown's fiduciary duty can be traced back to the early colonial period. From the beginning of formal relations, the British Crown recognized the "rights" of the aboriginal inhabitants. This recognition was motivated primarily by enlightened self-interest.[14] A code of instructions, issued in 1670 to the colonial governors, articulates the connection between the security of the colonies and fair dealing with the Indians:

> Forasmuch as most of our Colonies do border upon the Indians, and peace is not to be expected without the due observance and preservation of justice to

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[7] *See, e.g.*, J.I. Reynolds & L.F. Harvey, *Re Guerin et al. (The Musqueam Case)* in Indians and the Law II (Vancouver: The Continuing Legal Education Society of British Columbia, 1985) at 1.1.01.

[8] 30 U.S. (5 Pet.) 1 (1831).

[9] *Ibid.* at 16.

[10] *See United States* v. *Kagama*, 118 U.S. 375 (1886) [hereinafter Kagama].

[11] *See Seminole Nation* v. *United States*, 316 U.S. 286 (1942) [hereinafter *Seminole Nation*].

[12] *See, e.g., Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (D.C.) (1973) [hereinafter *Pyramid Lake*]

[13] *Manchester Band of Pomo Indians Inc.* v. *United States*, 363 F. Supp. 1238 (N.D. Cal.) (1973).

[14] *See* the discussion by Norris J.A. in *R.* v. *White* (1964), 52 W.W.R. 193 at 211, 50 D.L.R. (2d) 613 at 630 (B.C.C.A.), *aff'd* 52 D.L.R. (2d) 481 (S.C.C.).

> them, you are in Our name to command all the Governors that they at no time give any just provocation to any of the said Indians that are at peace with us.[15]

This code made special provisions for those Indians who wished to place themselves under British protection. Governors were to do everything in their power to defend the Indians from all who would do violence to their persons, goods or possessions. British subjects who dared to harm them were to be punished severely. In future British Indian policy, the Crown would continue to regard itself as the special protector of the Indian nations.

The concern for peaceful relations was echoed in *The Royal Proclamation* of 1763, wherein it states:

> 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.[16]

This prerogative act, which has the force of statute,[17] guaranteed Indians the possession of their hunting grounds and the protection of the Crown. Not surprisingly, it has been dubbed "the Magna Carta of all the Indians of Canada".[18] Territories reserved for the use of the Indians were delineated and all subjects were strictly forbidden from taking possession of any lands so reserved. A formal policy for the surrender of lands was established.

In formalizing its monopoly over the acquisition of Indian lands, the Crown intended to protect the Indians from unscrupulous speculators and land-hungry colonists. This becomes evident, again through *The Royal Proclamation* of 1763, wherein it is stated:

> 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.[19]

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[15] *Journals of the Legislative Assembly of the Province of Canada* at App. E.E.E., s. 1 (20 March 1844-45) [hereinafter *Journals*].

[16] *The Royal Proclamation*, (7 October, 1763), *reprinted in* R.S.C. 1970, App. II, No. 1, 123 at 127.

[17] "The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians concerned, it has never been repealed." *R.* v. *Lady McMaster* (1926), [1926] Ex. C.R. 68 at 72, Maclean J.

[18] D.C. Scott, *The Administration of Indian Affairs in Canada* (Toronto: Canadian Institute of International Affairs, 1931) at 1.

[19] (7 October, 1763), *reprinted in* R.S.C. 1970, App. II, No. 1, 123 at 128.

By using words of purchase, the Crown implicitly recognized the aboriginal title to the land. Moreover, the mandatory treaty process, established by *The Royal Proclamation*, qualified that title by attaching a limitation on disposition. More importantly, in restricting alienation, the Crown assumed responsibility for the protection and management of Indian proprietary interests, providing, as Professor Sanders notes, "the roots of the trusteeship in Canadian Indian Law".[20]

The basic principles set forth in *The Royal Proclamation* informed all subsequent Indian-Crown dealings. Early Indian legislation was concerned primarily with the protection of reserve lands from trespassers.[21] However, by the 1850's the Government had set for itself the task of ameliorating the condition of the Indians, with a view to equipping them to protect their own interests. What the government had in mind was a programme of cultural and economic assimilation, designed to bring Indian people gradually into the mainstream of colonial life. To this end, the Legislature of the Province of Canada enacted *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*.[22] Elaborated and reiterated well into the twentieth century,[23] this policy involved drastic government interference with virtually every aspect of native existence. The government justified its interference in the following terms:

> They were an untaught, unwary race, among a population ready and able to take every advantage of them. Their lands, their presents and annuities, the produce of the chase, their guns and clothing, whatever they possessed of value, were objects of temptation to the needy settlers and the unprincipled traders, to whom their ignorance of commerce and of the English language, and their remarkable fondness for spirits, yielded them an easy prey. Hence it became necessary for the Government to interfere.[24]

Quite apart from any express statutory recognition of a trust relationship (an issue which will be examined next), it is submitted that the intent to create a fiduciary duty can be inferred from the existence of this self-imposed, comprehensive *civilization* scheme.

The role assumed by the Crown as guardian in relation to Indians was judicially recognized long before the *Guerin* decision. One of the most

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[20] D.E. Sanders, THE FRIENDLY CARE AND DIRECTING HAND OF THE GOVERNMENT: A STUDY OF GOVERNMENT TRUSTEESHIP OF INDIANS IN CANADA (1977) at 2 [unpublished] [hereinafter Sanders].

[21] *See, e.g., An Act for the protection of the lands of the Crown in this Province from trespass and injury*, S.U.C. 1792-1840, c. 15; *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, P.C.S. 1850-51, c. 42; *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, P.C.S. 1850-51, c. 74.

[22] P.C.S. 1857, c. 26.

[23] The enfranchisement provisions of the *Indian Act* have only been repealed recently: *see* Bill C-31, *An Act to Amend the Indian Act*, 1st Sess, 33rd Parliament, 1984-85, c. 27, s. 19 (assented to 28 June 1985).

[24] *Journals, supra* note 15.

eloquent statements confirming the Crown's guardianship role was enunciated in the 1939 decision of *Re Kane*, wherein Mr. Justice McArthur stated:

> For reasons which are quite apparent, the Indian has been placed under the guardianship of the Dominion Government. He is its ward, so long as he remains unenfranchised, and the Minister of Interior, as Superintendent General of Indian Affairs, is given control and management of all lands and property of Indians in Canada. They are looked upon and treated as requiring the friendly care and directing hand of the Government in the management of their affairs. They and their property are, so to speak, under the protecting wing of the Dominion Government.[25]

A more authoritative articulation of the guardian-ward relationship can be found in the decision of the Supreme Court of Canada in *St. Ann's Island Shooting and Fishing Club Ltd.* v. *R.*[26] Referring to the surrender and leasing provisions of the *Indian Act,* Mr. Justice Rand, with whom Mr. Justice Estey concurred, stated:

> The language of the statute embodies the accepted view that these aborigenes [*sic*] are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.[27]

Although the Crown-Indian relationship was characterized as a guardianship, the legal implications of the relationship remained ambiguous.

III. Government Trusteeship: A Creature of Statute?

Even a cursory analysis of legislation relating to the management of Indian lands suggests the existence of a trust relationship. Of the pre-Confederation statutes, *An Act for the better protection of the Lands and Property of the Indians in Lower Canada* contains in its preamble the most explicit reference to a trusteeship of Indian reserve lands. This statute authorized the Governor to appoint:

> a Commissioner of Indian Lands for Lower Canada, in whom and in whose successors by the name of the aforesaid, all lands or property in Lower Canada which are or shall be set apart or appropriated to or for the use of any Tribe or Body of Indians, shall be and are hereby vested, in trust for such Tribes or Body, and who shall be held in law to be in the occupation and possession of any lands . . . for the use or benefit of such Tribe or Body.[28]

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25 (1939), [1940] 1 D.L.R. 390 at 397 (N.S. Co. Ct.).
26 (1950), [1950] S.C.R. 211, [1950] 2 D.L.R. 225.
27 *Ibid.* at 219, [1950] 2 D.L.R. at 232.
28 P.C.S. 1850-51, c. 42.

In post-1950 legislation, however, use of the term "trust" to describe the method of holding lands was replaced with the terminology of "use and benefit".[29] Professor Bartlett maintains that this change in wording did not alter the trust status of Indian reserve lands. Citing *Atkinson* v. *Atkinson*[30] and *Isaac* v. *Davey*[31] as authorities for the proposition that the phrase "use and benefit" denotes a trust, he concludes that there is an "equation to be properly made between a 'trust' and lands set apart for the 'use and benefit' of a band".[32]

The *Constitution Act, 1867* assigns legislative jurisdiction over "Indians and Lands reserved for the Indians" to the federal government.[33] Professor Sanders has suggested that this assignment was motivated by a desire to protect the Indians from adverse local interests. He maintains that "[t]he decision to give responsibility to the more distant level of government removed Indian policy from direct competition with local interests."[34] Having inherited incongruous and conflicting legislative measures dealing with Indian people, the federal government undertook the development of a coherent legislative scheme. The *Indian Act, 1876*[35] served to consolidate and make consistent the legislation from previous decades concerning the protection and management of Indian interests. This comprehensive statutory scheme remained substantially unchanged until 1951.[36]

The language and substance of several provisions of the first *Indian Act* suggest the existence of a trust relationship. The Minister of the Interior was appointed Superintendent General of Indian Affairs and was assigned "the control and management of the reserves, lands, moneys, and property of Indians in Canada", in accordance with the provisions of the Act.[37] Reserves were defined as "any tract or tracts of land . . . set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered".[38] Section 20, which provided compensation for lands taken for a public purpose, directed that "the amount awarded in any case shall be paid to the Receiver General for the use of the band of Indians for whose benefit the reserve is held".[39] The Governor in Council was

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[29] D.M. Brans, THE TRUSTEESHIP ROLE OF THE GOVERNMENT OF CANADA (Ottawa: Indian Claims Commission, 1971) at 17.

[30] (1890), 62 L.T. 735 (Q.B.D.).

[31] (1977), [1977] 2 S.C.R. 897, 77 D.L.R. (3d) 481.

[32] R.H. Bartlett, *The Existence of an Express Trust Derived from the Indian Act in Respect of Reserved Lands* (Saskatoon: College of Law, University of Saskatchewan, 1979) at 49 [unpublished] [hereinafter Bartlett].

[33] (U.K.), 30 & 31 Vict., c. 3, s. 91(24) (formerly *British North America Act, 1867*).

[34] Sanders, *supra*, note 20 at 6.

[35] S.C. 1876, c. 18.

[36] *The Indian Act*, S.C. 1950-51, c. 29. For further discussion of these changes, *see* Brans, *supra*, note 29 at 22.

[37] S.C. 1876, c. 18, s. 2.

[38] S.C. 1876, c. 18, s. 3(6).

[39] S.C. 1876, c. 18.

empowered to "direct how, and in what manner, and by whom the moneys arising from sales of Indian lands, and from the property held in trust for the Indians . . . shall be invested".[40] Finally, section 65 provided that the land vested in the Crown in trust be exempt from taxation.[41] From the foregoing, it can be seen that this statute granted sweeping powers of management and disposal in relation to Indian property and that it did so in terms which arguably have technical trust connotations. For these reasons, several commentators have concluded that, on its face, the *Indian Act* creates an express trust.[42]

In addition to specific Indian legislation, there are at least three constitutional documents which employ trust terminology. The 1871 terms of Union of British Columbia and Canada provides that "[t]he charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government."[43] Similarly, when lands were added to the provinces of Quebec and Ontario in 1912, special attention was paid to the trusteeship of the Indians. *The Ontario Boundaries Extension Act* provided "That the trusteeship of Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament."[44] These examples display express legislative recognition of the government trusteeship of Canadian Indians and, more particularly, that it is a responsibility which falls within the federal domain.

A new *Indian Act*[45] was passed on September 4, 1951, following an intensive study of the matter by a parliamentary committee.[46] This legislation introduced a subsection which, although implicit in all previous enactments, had never received express articulation. Subsection 18(1) states:

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

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[40] S.C. 1876, c. 18, s. 59.

[41] S.C. 1876, c. 18.

[42] *See* Bartlett, *supra*, note 32 at 52; Brans, *supra*, note 29 at 33; D.R. Lowry, *Native Trusts: The Position of the Government of Canada as Trustee for Indians, a Preliminary Analysis* (1973) at 49 [unpublished] (paper prepared for the Indian Claims Commission and the Union of Nova Scotia Indians).

[43] *Order in Council Respecting the Province of British Columbia*, S.C. 1872, lxxxiv, *reprinted in* R.S.C. 1970, App. II, No. 10, 279 at 284 (16 May, 1871).

[44] *The Ontario Boundaries Extension Act*, S.C. 1912, c. 40, s. 2(c). A similar provision is contained in *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, s. 2(e).

[45] *The Indian Act*, S.C. 1950-51, c. 29.

[46] *See Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons Appointed to Examine the Indian Act* (Ottawa: King's Printer, 1946). *See also* Canada, Treaties and Historical Research Centre, *The Historical Development of the Indian Act* (Indian and Northern Affairs, August 1978) at xi.

> Council may determine whether any purpose for which lands in a reserve are to be used is for the use and benefit of the band.[47]

This subsection has become the focal point of the assertion that the *Indian Act* creates an express trust with the federal Crown as trustee for reserve lands. It was upon this section that the Musqueam Band based its charge that "the federal Crown was in breach of its trust obligation in respect of the leasing of approximately 162 acres of reserve land to the Shaughnessy Heights Golf Club of Vancouver".[48]

IV. A Closer Look at Guerin

On November 1, 1984, the Supreme Court of Canada rendered its decision in *Guerin*, unanimously allowing the appeal. However, three separate judgments were delivered, each containing a different characterization of the relationship between the federal Crown and the Indians.

Mr. Justice Estey was of the view that the action "should be disposed of on the very simple basis of the law of agency".[49] He was unable to convince any other member of the Court of the appropriateness of applying the doctrines of the law of agency to native rights. In fact, Mr. Justice Dickson flatly rejected the agency analogy, pointing out that "not only does the Crown's authority to act on the Band's behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal".[50]

Apart from the technical flaws in Mr. Justice Estey's analysis, his characterization of the relationship between the Crown and the Indians is strikingly ahistorical. His conclusion that the Crown "becomes the appointed agent of the Indians to develop and exploit, under the direction of the Indians and for their benefit, the usufructuary interest",[51] has been severely criticized by Professor Bartlett. He writes:

> Such a characterization of the role of the Crown requires a flight of fantasy far removed from the historic dispossession of Indian traditional lands and the establishment and subsequent alienation of Indian reserves by the Crown. An agent is ordinarily understood as subject to instructions from the principal. The Crown historically exercised total control over the management and disposition of reserve lands.[52]

Given that no other member of the Court found the agency analysis persuasive, it is unlikely that it will be employed in subsequent elaboration of the fiduciary duty.

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47 *The Indian Act*, S.C. 1950-51, c. 29.

48 *Guerin, supra*, note 1 at 365, 13 D.L.R. (4th) at 326.

49 *Ibid.* at 391, 13 D.L.R. (4th) at 346.

50 *Ibid.* at 387, 13 D.L.R. (4th) at 343.

51 *Ibid.* at 393, 13 D.L.R. (4th) at 347.

52 R.H. Bartlett, *You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: Guerin v. The Queen* (1984-85) 49 Sask. L. Rev. 367 at 372.

Madame Justice Wilson exhibited a greater understanding of the nature of the historical relationship between the Crown and the Indians. This is aptly demonstrated by her interpretation of subsection 18(1) of the *Indian Act* as an "acknowledgement of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest".[53] She finds that section 18 confirms a pre-existing fiduciary obligation on the Crown "to protect and preserve the Bands' interests from invasion or destruction".[54] This fiduciary obligation is grounded in the nature of the aboriginal title of Indian people. However, the existence of this general duty does not, of itself, create a trusteeship of Indian lands. In her opinion a trust *per se* is only created when the land is surrendered, at which point "the fiduciary duty which existed at large under the section to hold the land in the reserve for the use and benefit of the Band crystallized . . . into an express trust of specific land for a specific purpose".[55] The merits of this analysis will become apparent by examining the judgment delivered by Mr. Justice Dickson.

The nature of Indian title is a touchstone in Mr. Justice Dickson's analysis, just as it was in Madame Justice Wilson's. The existence of aboriginal title, *simpliciter*, does not give rise to a special relationship between the Indians and the Crown. Rather, it is the statutory framework that imposes an obligation on the Crown by rendering the Indian title "inalienable except upon surrender to the Crown".[56] Mr. Justice Dickson refuses to equate this obligation with a trust in the private law sense, preferring to call it simply a fiduciary duty. However, the effect of this distinction is somewhat ambiguous since he states that "[i]f, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the extent as if such a trust were in effect".[57]

The implications of finding a fiduciary duty are difficult to distinguish from those which would attend the creation of a trust. According to Mr. Justice Dickson:

> The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny that the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach.[58]

Mr. Justice Dickson purports to rest his distinction upon the lack of a trust corpus, maintaining that upon an unconditional surrender "[n]o property

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[53] *Guerin, supra*, note 1 at 349, 13 D.L.R. (4th) at 356-7.
[54] *Ibid.* at 350, 13 D.L.R. (4th) at 357.
[55] *Ibid.* at 355, 13 D.L.R. (4th) at 361.
[56] *Ibid.* at 376, 13 D.L.R. (4th) at 334.
[57] *Ibid.*
[58] *Ibid.* at 386-7, 13 D.L.R. (4th) at 342.

interest is transferred which could constitute the trust *res*".[59] In this, he appears to have overlooked the fact that the surrender in this case was conditional ("in trust to lease") and he has ignored the authorities which recognize that such a surrender leaves a reversionary interest in the band.[60]

Mr. Justice Dickson's judgment does little to clarify the nature of the relationship between the Indians and the Crown. In rejecting an express trust characterization, he rejects an approach which is rooted in a highly developed area of the law and which could provide concrete standards and remedies. Instead, we are told that "the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*".[61] The prescriptive implications of this characterization are obviously uncertain.

In his initial formulation of the fiduciary principle, Mr. Justice Dickson appears to cast a wide net when he states:

> [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[62]

So stated, this principle would apply to the Crown because it has unilaterally undertaken powers of management and of disposition of Indian proprietary interests. Furthermore, the Crown has established a comprehensive statutory scheme which impinges upon virtually every aspect of native existence. However, after having articulated this expansive notion of fiduciary duty, Mr. Justice Dickson proceeds to restrict the scope of its application by suggesting that the fiduciary duty is not triggered until a surrender occurs. Accordingly, "[w]hen, 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."[63]

This view limits the scope of the Crown's responsibility in two important ways. Firstly, the duty is not a continuing one, so that prior to a surrender the Crown can exercise its powers of management with impunity. Secondly, the duty relates only to proprietary interests, so that the Crown can not be held responsible for harming interests which are not of a strictly proprietary nature. Hence, the scope of the fiduciary duty which Mr. Justice Dickson outlines is not coextensive with the powers unilaterally assumed by the Crown.

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59 *Ibid.* at 386, 13 D.L.R. (4th) at 342.

60 *See Corporation of Surrey* v. *Peace Arch Enterprises* (1970), 74 W.W.R. 380 (B.C.C.A.); *Western Indus. Contractors Ltd.* v. *Sarcee Dev. Ltd.* (1979), 15 Alta. R. 309 *(sub nom. Western Int'l Contractors Ltd. v. Sarcee Devs. Ltd.)*, [1979] 3 W.W.R. 631 (C.A.). For a critique of Dickson J.'s treatment of the nature of Indian title, *see* J. Hurley, *The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen*, (1985) 30 McGILL L.J. 559 [hereinafter Hurley].

61 *Guerin, supra*, note 1 at 387, 13 D.L.R. (4th) at 343.

62 *Ibid.* at 384, 13 D.L.R. (4th) at 341.

63 *Ibid.* at 385, 13 D.L.R. (4th) at 341-2.

It is submitted that the approach of Madame Justice Wilson incorporates the better view of the true nature of the relationship between the Crown and the Indians. According to her, the fiduciary duty, which exists independently of subsection 18(1), is a continuing one.[64] As such, it operates to regulate the Crown's management of the Indian interest in unsurrendered lands. In this pre-surrender stage, the duty is of a general, protective nature. However, upon surrender the fiduciary obligation crystallizes into "an express trust of specific land for a specific purpose".[65] This approach imposes upon the Crown a general responsibility for its management of reserve lands and a strict accountability for its disposition of surrendered lands. Thus, it is the view of Madame Justice Wilson that a fiduciary responsibility of some nature runs parallel to *all* the powers unilaterally assumed.

Regardless of which approach is utilized, it will of course be necessary to flesh out the general quality of the fiduciary obligation that is common to both. Although Mr. Justice Dickson insisted that the fiduciary obligation owed to the Indians is *sui generis*,[66] it is submitted that there is a body of jurisprudence which can be of some assistance in defining the obligation. This jurisprudence, the American trust responsibility doctrine, will now be examined.

V. The American Federal-Indian Trust Relationship

The American courts have been developing a theory of federal trust responsibility towards Indians for well over a century. It is submitted that recourse to the law generated by this doctrine is easily justified. To begin with, Canadian and American jurisdictions share a common inheritance of law, namely, British colonial law. It was the policy of the British Crown throughout colonial North America to monopolize the alienation of Indian lands. This practice was codified in the provisions of *The Royal Proclamation* of 1763.[67] The basic principles confirmed therein, especially the general recognition of Indian title and its inalienability except upon surrender to the Crown, informed all subsequent Indian-Crown dealings. In discussing the impact of the American Revolution upon the established tenets of British Indian policy, Professor Slattery concludes:

> The American courts were heir to a developed legal system well adapted to local circumstances, a system which the Revolution, in many respects, did little to disturb. In this area, as in others, the American judges gave expression to the law as it had been understood in the days of British rule. They did

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[64] *Ibid.* at 348ff, 13 D.L.R. (4th) at 356ff. While s. 18 does not *per se* create a fiduciary obligation in the Crown, it recognizes the existence of such an obligation.

[65] *Ibid.* at 355, 13 D.L.R. (4th) at 361.

[66] *Ibid.* at 387, 13 D.L.R. (4th) at 343.

[67] (7 October, 1763), *reprinted in* R.S.C. 1970, App. II, No. 1, 123.

> not state new doctrine in their views on the status of Indian peoples and their lands; they reaffirmed a longstanding position.[68]

This common inheritance of British colonial law makes the American jurisprudence particularly pertinent to a discussion of the Canadian Indian-government relationship.

Canadian courts have long recognized the relevance of American decisions in the area of native law. The decision of the Supreme Court of Canada in *Calder* v. *A.G. British Columbia*[69] is a notable example. The judgments of both Mr. Justice Hall and Mr. Justice Judson contain many references to American cases. Mr. Justice Hall, in his dissenting judgment, refers to the judgment delivered by Chief Justice Marshall of the United States Supreme Court in *Johnson* v. *M'Intosh*[70] as "the *locus classicus* of the principles governing aboriginal title".[71] Mr. Justice Judson notes the acceptability of the practice of referring to American native law when he states that "[t]he reasons for judgment delivered in the Canadian Courts in the *St. Catherines* case were strongly influenced by two early judgments delivered in the Supreme Court of the United States by Chief Justice Marshall — *Johnson and Graham's Lessee v. M'Intosh* . . . and *Worcester v. State of Georgia.*"[72]

More recently, the Supreme Court of Canada has applied the reasoning of the United States Supreme Court almost as a matter of course. In *Nowegijick* v. *M.N.R.*,[73] a case concerning the construction of section 87 of the *Indian Act*,[74] Mr. Justice Dickson cited *Jones* v. *Meehan*[75] as an authority for the proposition that Indian treaties "must . . . be construed, not according to the technical meaning of their words . . . but in the sense in which they would naturally be understood by the Indians".[76] In view of the judicial recognition of the relevance of American jurisprudence with respect to native law, it is submitted that the American federal trust responsibility doctrine warrants close examination.

The place to begin is with the United States Supreme Court decision in *Johnson* v. *M'Intosh*.[77] Although this case does not address the trust obligation *per se*, it does lay the foundations of the federal-Indian relationship. The case involved competing grants of land — one from the chiefs of certain tribes prior to a formal surrender and one from the United

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68 B. Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquistion of Their Territories* (D. Phil., Oxford, 1979) at 125 [unpublished].

69 (1973), [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [hereinafter *Calder*].

70 21 U.S. (8 Wheat.) 543 (1823).

71 *Calder, supra*, note 69 at 380, 34 D.L.R. (3d) at 193.

72 *Ibid.* at 320, 34 D.L.R. (3d) at 151.

73 (1983), [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193 [hereinafter *Nowegijick*].

74 R.S.C. 1970, c. I-6.

75 175 U.S. 1 (1899).

76 *Nowegijick, supra*, note 73 at 36, 144 D.L.R. (3d) at 198 (citing *Jones* v. *Meehan*, *ibid.* at 11).

77 Supra, note 70.

States government after the land had been ceded by treaty. The issue was whether the title granted to unsurrendered land (that is, the aboriginal title) could be legally recognized. Chief Justice Marshall, in delivering the opinion of the Court, discussed the effect of the European doctrine of discovery upon aboriginal title:

> They [the natives] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[78]

In his concluding remarks, the Chief Justice readily admitted that this characterization of the Indian interest in land was motivated by the need to reconcile Indian occupancy with the common law system of land tenure. He concluded that:

> [T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.[79]

Although it is the doctrine of discovery and not *The Royal Proclamation*[80] which is relied upon to reach these conclusions,[81] the principles embodied in the latter are echoed in the judicial articulation of the Indians' claim to possession of their lands and of their inability to alienate the same, except upon surrender to the federal government.

Chief Justice Marshall had occasion to readdress the issue of the sovereignty of Indian nations in *Cherokee Nation* v. *Georgia*.[82] In this case, the tribe sought to enjoin the enforcement of Georgia statutes in its territory. The decision contains the first judicial formulation of the trust responsibility doctrine. The Chief Justice characterized the relationship between the Indians and the United States government in the following manner:

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[78] *Ibid.* at 574.

[79] *Ibid.* at 591-2.

[80] (7 October, 1763), *reprinted in* R.S.C. 1970, App. II, No. 1, 123.

[81] Later in his judgment, Marshall C.J. describes *The Royal Proclamation* of 1763 as an "additional objection" to the purported conveyance of Indian lands to private individuals. *Supra*, note 70 at 594. He goes on to confirm that "[t]he authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our courts". *Ibid.* at 597.

[82] *Supra*, note 8.

> [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.
> . . . [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[83]

The source of this guardian-ward relationship is not specified. Rather, the guardianship analogy seems to be a natural incident of Marshall's perception of the relative weakness and dependency of the Indian nations. He writes that "[t]hey look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."[84] Further, it is unclear whether the Chief Justice intended the guardianship to impose enforceable obligations upon the United States government.[85] However, despite these ambiguities, *Cherokee Nation* v. *Georgia* "became the foundation for the trust doctrine in federal Indian law".[86]

A year later, in the second Cherokee case, *Worcester* v. *Georgia*,[87] Chief Justice Marshall expanded upon the nature of the federal-Indian relationship. At issue was the applicability of Georgia statutes to persons residing on Cherokee lands. The treaties between the United States and the Cherokees were interpreted as extending protection from the former to the latter, without the latter abandoning their national character. The Chief Justice observed that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self-government, by associating with a stronger and taking its protection".[88] In addition, he construed the federal acts regulating trade and intercourse with Indian nations as a guarantee of tribal self-government. This he summarized as follows:

> All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.[89]

The Chief Justice viewed the treaties and federal legislation as affording the Cherokees a special *protectorate* status. Apart from the congressional

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[83] *Ibid.* at 16-7.
[84] *Ibid.* at 17.
[85] *See* Note, *Rethinking the Trust Doctrine in Federal Indian Law* (1984) 98 HARV. L. REV. 422 at 425.
[86] *Ibid.*
[87] 31 U.S. (6 Pet.) 515 (1832).
[88] *Ibid.* at 560-1.
[89] *Ibid.* at 557.

power to regulate trade, they enjoyed autonomy in managing their internal affairs. *Worcester* v. *Georgia* is regarded as having articulated the underlying purpose of Marshall's guardianship concept. In the words of Professor Chambers, "Marshall correctly discerned that the basic guarantee of the United States was the territorial and governmental integrity of the tribes".[90]

In the 150 years since its initial formulation, the trust responsibility doctrine has undergone significant elaboration. Judicial attempts to define the scope and meaning of the trust responsibility have varied in emphasis and approach. Professor Chambers warns against expecting "monolithic unity".[91] At the same time, however, he offers a framework for analyzing the doctrine's evolution by identifying three basic lines of cases. The first, naturally, consists of the Marshall decisions which, as we have seen, set the foundations of the federal-tribal relationship. The second set of cases invoke Marshall's concept of guardianship as a source of federal "plenary" power. The third line of cases, in turn, construe the federal power as giving rise to concomitant enforceable duties.

The tone for the second set of cases was set by the decision of the Supreme Court of the United States in the *Kagama*[92] case. At issue was the constitutionality of the *Major Crimes Act*[93] which purported to establish a body of criminal law applicable to tribal members on reservations. The federal-Indian fiduciary relationship was relied upon by the Court in upholding the validity of the legislation. Mr. Justice Miller, in delivering the opinion of the Court, proclaimed:

> These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.[94]

Having confirmed the exercise of federal power over Indian affairs on the basis of the fiduciary obligation, *Kagama* established the guardianship as an extra-constitutional source of power.[95]

The scope of this federal power proved quite expansive indeed. Even treaty terms did not impose a barrier to the exercise of the plenary power. Perhaps the most notorious case of the era, *Lone Wolf* v. *Hitchcock*,[96] established that Congress could unilaterally abrogate treaty rights. The case involved an attempt by tribal members to enjoin the enforcement of an

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[90] R.P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians* (1975) 27 STAN. L. REV. 1213 at 1246 [hereinafter Chambers].

[91] *Ibid.*

[92] *Supra*, note 10.

[93] 18 U.S.C. 1153 (1970).

[94] *Kagama, supra*, note 10 at 383-4 [emphasis in the original].

[95] Chambers, *supra*, note 90 at 1223.

[96] 187 U.S. 553 (1903).

allotment statute on the grounds that it conflicted with a treaty which expressly prohibited further cession of reserve lands without tribal consent. The Court refused to uphold the claim, arguing that a treaty could not "materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians".[97] It is difficult to reconcile this approach with the basic guarantee of territorial integrity affirmed in *Cherokee Nation* v. *Georgia*. Rather, it seems that the Court is paying lip service to the idea of guardianship while violating the spirit of the doctrine.

The third line of cases identified by Chambers represents a return to the tenor of Marshall's analysis. This process was initiated by the decision of the Supreme Court of the United States in *Lane* v. *Pueblo of Santa Rosa*.[98] By enjoining the Secretary of the Interior from disposing of tribal lands as public lands of the United States, the Court recognized that the power of the executive was not unlimited. The guardianship doctrine could not be used to justify disposing of Indian lands under public land laws for "[t]hat would not be an exercise of guardianship, but an act of confiscation".[99]

The potential of the guardianship theory to generate Indian rights was realized in *Cramer* v. *United States*.[100] There, the Supreme Court voided a federal land patent which had purported to transfer Indian-occupied land to a railway. The significant feature of this case is that the land was not protected by either treaty or statute. Nonetheless, relying upon the protective aspect of the guardianship doctrine, the Court found that the tribal possessory rights were protected. After acknowledging that "it has been the policy of the Federal government from the beginning to respect the Indian right of occupancy",[101] the Court concluded that "[t]o hold that by doing so, they acquired no possessory rights to which the government would accord protection, would be contrary to the whole spirit of the traditional American policy towards these dependent wards of the nation."[102]

The restrictions which the federal guardianship imposed upon executive action were elaborated in *United States* v. *Creek Nation*.[103] In this case, the Supreme Court awarded damages for a wrongful appropriation of reserve land by the government. The Court grounded its decision in the federal guardianship concept, stating:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the

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97 *Ibid.* at 564.

98 249 U.S. 110 (1919) [hereinafter *Lane*].

99 *Ibid.* at 113. *See also Shoshone Tribe* v. *United States*, 299 U.S. 476 at 498 (1937), wherein Cardozo J. stated: "Spoliation is not management."

100 261 U.S. 219 (1923) [hereinafter *Cramer*].

101 *Ibid.* at 227.

102 *Ibid.* at 229.

103 295 U.S. 103 (1935) [hereinafter *Creek Nation*].

> control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to *limitations inhering in such a guardianship* and to pertinent constitutional restrictions.[104]

The effect of cases such as *Lane, Cramer* and *Creek Nation* was to emphasize the protection rather than the interventionist features of the guardianship. However, it should be noted that these cases dealt with challenges to executive, not congressional, action. Writing in 1975, Professor Chambers concluded that congressional action in the context of the trust responsibility was not subject to judicial review. He noted:

> The basic holdings of the *Kagama-Lone Wolf* lines of cases, however, as they concern the power of Congress, survive intact today. For while Courts recognize that Congress has a trust responsibility they uniformly regard it as essentially a moral obligation, without justiciable standards for its enforcement.[105]

However, in 1977 the case of *Delaware Tribal Business Comm.* v. *Weeks* squarely raised the issue of "whether congressional exercise of control over tribal property is final and not subject to judicial scrutiny".[106] The Court was faced with a claim by the Kansas Delawares that their exclusion from the distribution of funds under an act of Congress violated the Due Process Clause of the Fifth Amendment. Although in the end the legislation was upheld, the Court rejected the argument that the federal Indian legislation was immune from judicial scrutiny. The Court held that the standard to be applied was whether the challenged legislation was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians".[107] Arguably, this decision constrains congressional action which is inconsistent with its guardianship role.

In order to appreciate the nature of the obligation owed to the Indians under the trust doctrine, it is necessary to identify the standards by which the government is to be judged. The seminal case in this regard is *Seminole Nation* v. *United States*[108] which involved an alleged violation of treaty obligations concerning the payment of annuities. In sustaining the tribe's claim, the Supreme Court of the United States articulated the nature of the government's obligation in the following manner:

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. . . . In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself

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[104] *Ibid.* at 109-10 [emphasis added].
[105] *Supra*, note 90 at 1227.
[106] 430 U.S. 73 at 83 (1977).
[107] *Ibid.* at 85, (citing *Morton* v. *Mancari*, 417 U.S. 535 at 555 (1974)).
[108] *Supra*, note 11.

> with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[109]

With the applicability of fiduciary principles to the Government's administration of Indian affairs thus established, it remained for subsequent decisions to identify the duties owed in specific situations.

The government has been judged by particularly rigorous standards with respect to its management of Indian trust funds. Two years after the *Seminole Nation* decision, the Court of Claims in *Menominee Tribe* v. *United States*[110] held that the government was under an obligation to make trust property productive of income. Although the tribe relied upon a special jurisdictional statute providing that "the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary",[111] the Court noted that the legislation "adds little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee".[112] The Court went on to hold that the government had breached its trust obligations by exhausting interest-bearing accounts before drawing on non-interest-bearing accounts and was therefore liable for the interest lost as a result of this "wrongful handling".[113]

The government's fiduciary duties in relation to the management of tribal trust funds have been reiterated in the district court decision in *Manchester Band of Pomo Indians* v. *United States*.[114] The issue was whether the investment decisions made by the government complied with its statutory and judicially created trust obligations owed to the Band. The Court began with the proposition that "[i]t is unquestioned that the United States has a solemn trust obligation to the Indian people".[115] Turning to the manner in which this obligation is to be discharged, the Court observed that "[i]t is well established that conduct of the Government as a trustee is measured by the same standards applicable to private trustees. . . . Accordingly, the Government as trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."[116] As a corollary, the Court noted that "the trustee is accountable for any profit made by him arising out of the administration of the trust.".[117] Finally, the Court cited the principle that "the trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive".[118] Applying these standards to the government-managed

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109 *Ibid.* at 296-7.
110 101 Ct. Cl. 10 (1944).
111 *Ibid.* at 10ff.
112 *Ibid.* at 18-9.
113 *Ibid.* at 20.
114 363 F. Supp. 1238 (N.D. Cal.) (1973).
115 *Ibid.* at 1243.
116 *Ibid.* at 1245.
117 *Ibid.*
118 *Ibid.*

trusts, the Court concluded that by failing to pay interest on tribal funds invested in treasury accounts, the government-defendants "breached their solemn fiduciary duty owed to the Band to manage properly their trust funds, and are therefore liable".[119]

Perhaps the most problematic aspect of government trusteeship is the potential for conflict of interest situations. It often happens that different government branches propose projects which directly prejudice tribal interests. Governmental resolution of these administrative conflicts typically do not accord with strict fiduciary standards. In a 1970 message to Congress on reorganizing federal programs for American Indians, President Nixon recognized that the government was in a conflict of interest position:

> The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee. . . . There is considerable evidence that the Indians are the losers when such situations arise.[120]

Legislation establishing an independent legal agency to advocate Indian rights cases was recommended as a possible solution to the problem. Such legislation, however, has yet to be accepted by Congress.[121]

In the meantime, the Courts have attempted to define the nature of the duty of loyalty owed by the government to the Indians. The Court of Claims dealt with this question in *Navajo Tribe of Indians* v. *United States*,[122] which involved a conflict of interest. During World War II, an oil company acquired a lease of tribal lands for oil and gas purposes. Upon discovery of a helium-bearing non-combustible gas which it had no interest in producing, the company indicated to the Bureau of Mines its intention to surrender the lease to the tribe. Without informing the Band of this opportunity, the Bureau proceeded to secure the lease for its own benefit and began producing the helium.[123] Satisfied that a conflict of interest existed within the Department of the Interior, the Court was of the opinion that "the various dealings must be carefully scrutinized".[124] Although the claim that the actions of the Bureau were in the national interest was not questioned, the actions were held to be inconsistent with the government's duty to the tribe. Analogizing to "a fiduciary who learns

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[119] *Ibid.* at 1247.

[120] *President Nixon's July 8 message to Congress on reorganizing Federal Programs for American Indians*, 1970 CONG. Q. ALMANAC, Vol. XXVI, 101-A at 104-A (July 8 1970). The above quotation is also reproduced in an article on Indian law. *See* W.T. Gross, *Tribal Resources: Federal Trust Responsibility* (1981) 9 AM. IND. L. REV. 309 at 316 [hereinafter Gross].

[121] Gross, *ibid.*

[122] 364 F.2d 320 (1966) [hereinafter *Navajo Tribe*].

[123] The Bureau of Mines and the Bureau of Indian Affairs are both agencies within the Department of the Interior.

[124] *Navajo Tribe, supra*, note 122 at 323.

of an opportunity, prevents the beneficiary from getting it, and seizes it for himself",[125] the Court concluded that the government had breached its duty of loyalty and they sustained the tribe's claim for compensation.

The duty of loyalty has received its most forceful articulation in the District Court decision of *Pyramid Lake Paiute Tribe of Indians* v. *Morton*.[126] This case is concerned with federal regulations which impacted negatively upon tribal water resources rather than with the management of Indian trust property. Located on the Paiute reservation, Pyramid Lake is the Tribe's principle source of livelihood. In 1972, the Secretary of the Interior issued a regulation implementing a federal dam and reclamation project which lowered the lake's water level. As a result, the lake's fishery was endangered and its value as a trust asset was diminished. The Tribe alleged that the Secretary had failed to fulfill his trust responsibilities by "illegally and unnecessarily diverting water from Pyramid Lake".[127]

In asking itself whether the regulation could be justified on a rational basis, the Court recognized that the Secretary's action was necessarily controlled by three factors: 1) the contractual rights of the Irrigation District; 2) certain applicable court decrees; and 3) the Secretary's trust responsibilities to the Indians. In reviewing the Secretary's resolution of the conflicting demands, the Court concluded that he had misconstrued the legal requirements governing his actions, stating "[a] judgment call was simply not permissible. . . . The burden rested on the Secretary to justify any diversion of water from the Tribe with precision. It was not his function to attempt an accommodation."[128] In the opinion of the Court, "[t]he Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe".[129]

It should be noted that the duty of loyalty was not framed so strictly as to prohibit the Secretary from authorizing any water diversions, since that would have meant ignoring completely the other legitimate considerations. Rather, the Secretary was required to demonstrate "an adequate recognition of his fiduciary duty to the Tribe".[130] The Court was unable to discern any such recognition. To begin with, the grounds for the Secretary's action were not disclosed. More importantly, the Court was satisfied that water could be conserved for Pyramid Lake without offending the existing decrees and contractual rights. As a result, the Secretary was ordered to submit to the Court an amended regulation in which "the amount of water diverted shall be wholly consistent with the Secretary's fiduciary duty to the Tribe".[131]

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125 *Ibid.* at 324.
126 *Supra*, note 12.
127 *Ibid.* at 255.
128 *Ibid.* at 256.
129 *Ibid.*
130 *Ibid.* at 257.
131 *Ibid.* at 258.

The decision in *Pyramid Lake* is significant for two reasons. First, it extends the application of fiduciary standards beyond traditional trust fund management. Second, it suggests an affirmative duty, owed primarily by the Department of the Interior, to protect tribal trust property from injury by other federal projects.[132] However, it should not be read as suggesting that the existence of a conflict of interest *per se* constitutes a breach of the government's duty of loyalty. Once a genuine conflict of interest has been established, the Court subjects the government action to close scrutiny to ensure that in the resolution of the conflict the government has given appropriate weight to the fiduciary duty owed to the Indians.

A recent United States Supreme Court decision, *Nevada* v. *United States*,[133] has gone so far as to suggest that even in providing representation for both sides in a single lawsuit, the government does not thereby compromise its obligation to the Indians. The Court was of the opinion that where Congress has imposed dual responsibilities upon the Secretary of the Interior, an analogy to standards applied to private trustees cannot be regarded as conclusive. The Court concluded that:

> In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary *solely by representing potentially conflicting interests* without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.[134]

At the same time, however, the Court reiterated that "[t]he United States undoubtedly owes a strong fiduciary duty to its Indian wards",[135] and that if, in the course of representing both interests, the government in fact violated its obligations to the tribe, the tribe would have a remedy against it.[136]

Although the Court tempers the rigorous standards of the fiduciary by recognizing in this particular context that the government has a statutory duty to represent different interests, it by no means jettisons the application of the law of private trustees to the federal-Indian relationship. The Court observes that "where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States".[137] So we see that forty years after its landmark decision in *Seminole Nation*, the United States

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132 Chambers, *supra*, note 90 at 1234.
133 103 S. Ct. 2906 (1983).
134 *Ibid.* at 2917 [emphasis added].
135 *Ibid.* at 2924.
136 *Ibid.* at 2925, n. 16.
137 *Ibid.* at 2924.

Supreme Court has reaffirmed "the distinctive obligation of trust incumbent upon the Government"[138] in its dealings with Indian people.

Before concluding this examination of the American federal trust responsibility, another recent Supreme Court decision should be considered. In *United States* v. *Mitchell*,[139] the Supreme Court of the United States affirmed a Court of Claims decision holding the government accountable for breach of fiduciary duties in its management of timber resources on allotted lands on the Quinault Reservation. The noteworthy feature of this case is its recognition of two possible sources of the government's fiduciary duty.[140] The first source, express statutory obligation, is straightforward. The second, government assumption of control over Indian property, suggests an expansive theory of the trust relationship with far-reaching implications. As an independent rationale for its decision, the Court stated that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians".[141] The judgment adds little to the judicial recognition of the existence of a general trust relationship between the United States and the Indian people. Its significance lies in its potential for articulating specific management duties implicit in the legislation governing Indian affairs. Under this theory, a pattern of pervasive federal control in a given area would perfect a corresponding inchoate fiduciary obligation. This basis for identifying where an obligation arises is both rational and certain.

VI. Comparisons and Conclusions

The existence of a unique fiduciary relationship between the United States and its Indian peoples has long been acknowledged by the legislative, executive and judicial branches of that government. In its *Report on Trust Responsibilities*, the American Indian Policy Review Commission observed that the proposition that the United States is in the position of a trustee to Indian tribes is "so well established as to need little more than a

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[138] *Seminole Nation, supra*, note 11 at 296.

[139] 103 S. Ct. 2961 (1983) [hereinafter *Mitchell II*]. This case is not to be confused with *United States* v. *Mitchell*, 445 U.S. 535 (1980), wherein the Supreme Court reversed the Court of Claims ruling that the *Indian General Allotment Act* (25 U.S.C. 332 (1970) created a fiduciary duty on the United States to manage timber resources and thereby provided authority for recovery of damages. The Supreme Court remanded the case for consideration of alternative grounds for liability. On remand, the Court of Claims ruled that timber management statutes and regulations imposed fiduciary duties and implicitly required compensation for damages sustained as a result of the Government's breach of its duties. This ruling was affirmed by the Supreme Court in *Mitchell II*.

[140] *See* K.T. Ellwanger, *Money Damages for Breach of the Federal-Indian Trust Relationship after Mitchell II* (1984) 59 Wash. L. Rev. 675 at 681 [hereinafter Ellwanger].

[141] *Mitchell II, supra*, note 139 at 2972.

statement''.[142] The initial characterization of the federal-Indian relationship resulted from a judicial analogy to guardianship. Beginning with the foundational decisions by Mr. Justice Marshall in the 1830's, the American courts have played a leading role in articulating the nature and scope of federal trust responsibility. By contrast, the fiduciary obligation of the Canadian government has only recently received judicial recognition in the Supreme Court of Canada's decision in *Guerin*. In the Canadian context, the trust relationship is, perhaps, more a creature of statute. The *Guerin* decision, on its narrowest reading, was grounded in an interpretation of section 18 of the *Indian Act*.[143] It remains to be seen if the Canadian courts will recognize an enforceable fiduciary obligation in the absence of statutory provisions.[144]

In spite of the temporal difference in judicial recognition of the trust relationship in the two jurisdictions and the different emphasis placed on statutes, there are significant parallels discernible in the American and Canadian positions. To begin with, the foundation of both government-Indian relationships can be traced back to early British colonial Indian policy. The primary tenets of this policy include a general recognition of Indian title to unceded land and a Crown monopoly over the acquisition of such land. In restricting the alienation of Indian lands, the Crown assumed responsibility for the protection and management of Indian proprietary interests. It is this assumption of responsibility which is regarded as the cornerstone of the government-Indian relationship in both the United States and Canada. Moreover, the concept of guardianship has been relied upon by both governments to justify extensive legislative intervention in Indian affairs.

Admittedly, the American experience exhibits a more blatant manipulation of the doctrine to establish an extra-constitutional source of power.

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[142] Task Force on Trust Responsibilities, Federal-Indian Relations, and Treaty Review, *Final Report to the American Indian Policy Review Commission* (Washington, D.C.: U.S. Government Printing Office, 1976) at 175.

[143] R.S.C. 1970, c. I-6.

[144] In one recent case, Gibbs J. suggested that unless a surrender requirement was triggered, no fiduciary relationship would arise. Since, in his opinion, the disputed lands were not subject to such a requirement, the fiduciary duty did not come into play. *See MacMillan Bloedel Ltd.* v. *Mullin* (1985), [1985] 2 W.W.R. 722 at 741-2, [1985] 2 C.N.L.R. 26 at 44-5 (B.C.S.C.), *rev'd in part* 61 B.C.L.R. 145, [1985 3 W.W.R. 577 (C.A.) (On appeal, no reference was made to *Guerin*). In Ontario, Steele J. distinguished *Guerin* on the ground that it "dealt only with damages for the breach of a fiduciary relationship and not the extinguishment of Indian rights". In his opinion, the *Guerin* principle did not prevent the unilateral extinguishment of Indian title in traditional tribal lands. Once again, the suggestion is that, in the absence of a surrender requirement, no fiduciary duty arises. *See A.G. Ontario* v. *Bear Island Foundation* (1985), 49 O.R. (2d) 353 at 481, 15 D.L.R. (4th) 321 at 449 (H.C.) (this decision is on appeal, Court No. 45/85). In *Kruger* v. *R.*, (1985), [1985] 3 C.N.L.R. 15 at 41, 17 D.L.R. (4th) 591 at 647 (F.C.A.D.), the Federal Court of Appeal applied the *Guerin* principle in a non-surrender context. Crown expropriation of reserve lands was held to create "the same kind of fiduciary obligation, vis-a-vis the Indians, as would have been created if their lands had been surrendered. For a discussion of *Kruger* v. *R.*, *see* Hurley, *supra*, note 60 at 592-5.

In view of its broad legislative jurisdiction in relation to Indians under subsection 91(24) of the *Constitution Act*,[145] the Canadian government did not have to resort to such tactics. This is not to say that the Canadian courts would not have accepted an argument like that put forward in the *Kagama* line of cases. In fact, there is a Canadian equivalent to *Kagama*. In *R.* v. *Sikyea*,[146] it was held that Indian treaty rights could be unilaterally abrogated by Parliament. In delivering the opinion for the Court of Appeal, Mr. Justice Johnson said:

> It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement," like any other, can, of course, be breached, and there is no law of which I am aware that would prevent parliament [sic] by legislation, properly within s. 91 of the B.N.A. Act, 1867, ch. 3, from doing so.[147]

Again, in light of its legislative jurisdiction, the Canadian government did not have to ground its treaty-abrogation powers in the guardianship doctrine.

With the Supreme Court of Canada's decision in *Guerin*, the fiduciary obligation has become a judicially-recognized source of Indian rights in Canadian law. At this stage the legal implications of the trust relationship are largely unexplored. Although Mr. Justice Dickson asserted that the fiduciary obligation owed to the Indians is *sui generis*, it is submitted that the wealth of American jurisprudence concerning the federal trust responsibility will be instructive in elaborating the nascent Canadian concept. *Guerin* recognizes the existence of a fiduciary duty to deal with surrendered lands for the benefit of the Indians. The American cases have established that a trust responsibility attaches to a wide range of tribal property.[148] The expansive approach of the American courts in this regard should be of persuasive value to the Canadian courts in their task of defining what constitutes Indian trust property.

Perhaps the most useful element of the American jurisprudence lies in its definition of the required standard of conduct for federal officials and Congress. During the twentieth century the American courts have applied trust principles in a wide variety of situations to establish specific duties. The result has been to impose upon the government obligations which are closely analogous to those of a private fiduciary. It is now unquestioned that the government has a duty to use reasonable care and skill in preserving tribal assets. Beyond this, there is a duty to make the trust property productive. Of critical importance will be the cases dealing with the duty of loyalty, since, by its nature, government trusteeship is inevitably exposed to conflicts of interest. The American courts have held that the

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[145] (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

[146] (1964), 46 W.W.R. 65, 43 D.L.R. (2d) 150 0(N.W.T.C.A.), *aff'd* [1964] S.C.R. 642, 50 D.L.R. 80.

[147] *Ibid.*, 46 W.W.R. at 69, 43 D.L.R. (2d) at 154.

[148] This has included land, minerals, water, timber and trust funds.

government cannot misappropriate trust assets to its own benefit.[149] In situations where the government is faced with competing legitimate responsibilities, its actions must stand up to careful judicial scrutiny and must exhibit an appropriate recognition of its fiduciary duty to Indian people. In the Canadian context, the scope for conflict of interest situations is easily established: Indian hunting rights have been overridden by the *Migratory Birds Convention Act*;[150] Indian fishing rights have been infringed by the *Fisheries Act*;[151] and Indian property rights have succumbed to federal expropriation legislation.[152] In view of the scope for conflicts of interest, it is submitted that unless the government's fiduciary obligation encompasses a duty of loyalty, the trust relationship will exist more in form than in substance.[153]

Finally, it is suggested that the approach adopted by the United States Supreme Court in *Mitchell II* could provide an equitable and coherent theory of Crown responsibility in relation to Canadian Indians. The Court in *Mitchell II* held that where the government assumes control over tribal property a fiduciary relationship necessarily arises. The attraction of this argument is that it results in a duty which is congruent with the power exercised. The normative appeal of this approach has been recognized by American commentators. One writer observes:

> [O]nce the government has assumed responsibilities in Indian affairs, those responsibilities can define the scope of its trust duties. Once having undertaken control in specific areas of Indian affairs, the government should be held to the high standard of care appropriate to its fiduciary relationship with Indians. Logic and fairness both suggest that the government should be responsible to the extent of the fiduciary responsibility actually assumed.[154]

Some support for this approach can be found in the judgment of Mr. Justice Dickson in the *Guerin* case. When discussing the *indicia* of a fiduciary relationship, he formulated the following principle:

> [W]here by statute, agreement, or perhaps by *unilateral undertaking*, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a

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149 *See generally Navajo Tribe, supra*, note 122.

150 R.S.C. 1970, c. M-12. *See R.* v. *Sikyea, supra*, note 146; *R.* v. *George* (1966), [1966] S.C.R. 267, 55 D.L.R. (2d) 386.

151 R.S.C. 1970, c. F-14. *See R.* v. *Derriksan* (1976), [1976] 6 W.W.R. 480, 16 N.R. 231 (S.C.C.).

152 *Indian Act*, R.S.C. 1970, c. I-6, s. 35.

153 In *Kruger* v. *R.*, Urie J. assumed without deciding, that the conflict of interest rules governing trustees applied to the Crown's fiduciary duty towards Indians, *supra*, note 144 at 42, 17 D.L.R. (4th) at 647-8. The majority stopped short of conceding that a conflict of interest existed. Heald J. (dissenting in part) was more prepared to accept that a duty of loyalty existed under the circumstances, holding that the Crown was required to act "exclusively for the benefit" of the Indians. *Ibid.* at 76, 17 D.L.R. (4th) at 608. For a discussion of this aspect of *Kruger* v. *R.*, *see* Hurley, *supra*, note 60 at 600-1.

154 Ellwanger, *supra*, note 140 at 686.

> fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[155]

Through its legislation dealing with Indians, the Canadian government has unilaterally undertaken to regulate almost every aspect of Indian existence. Under this comprehensive statutory scheme, the Minister of Indian Affairs is accorded sweeping discretionary powers. The application of a control theory of trust responsibility would lead to the recognition of a fiduciary duty coextensive with the government's pervasive pattern of control. This approach would provide a guide for defining the contours of the federal Crown's fiduciary responsibilities that is both sensible and just. However wide the discretion granted by statute, the court would be able to ensure that it is exercised correctly. Only in this manner, it is submitted, may the Indians still be "convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent".[156]

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[155] *Supra*, note 1 at 384, 13 D.L.R. (4th) at 341 [emphasis added].

[156] *The Royal Proclamation*, (7 October, 1763), *reprinted in* R.S.C. 1970, App. II, No. 1, 123 at 128.