MANITOBA ABORIGINAL TREATIES AS VEHICLES FOR SELF-GOVERNMENT: SENTIMENTS AND SKEPTICISM

BY

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A Thesis
Submitted to the Faculty of Graduate Studies
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ABSTRACT

The method likely chosen by the Assembly of Manitoba Chiefs and the federal government negotiators to implement Aboriginal self-government in Manitoba is a framework agreement process. The objectives are to dismantle the Department of Indian Affairs and Northern Development, to develop and recognise Aboriginal governments and to "restore jurisdiction" to those governments. The original "numbered" treaties and the rights derived from them theoretically form the basis of this process. One potential effect of using treaty rights for this change is constitutional entrenchment without formal amendment. This study explores the legal basis of the original numbered treaties and the legal nature of the treaty rights, for the purpose of examining whether executive agreements are the best way to implement Aboriginal self-government in Manitoba. The historical and legal evidence suggests a royal prerogative source for Aboriginal treaties. It is from this basis that questions concerning the mixing of the law of fiduciary obligations with the law surrounding Aboriginal treaties are raised. This leads to an examination of "rights" and their suitability for anchoring a self-government scheme. This study concludes by questioning the legal authority of using executive agreements based on treaty rights to alter fundamentally the Canadian constitution without a formal amendment process.

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INTRODUCTION

It was late December 1869 and William McDougall had been humiliated. He had started out from Ottawa in the last week of September as the newly commissioned Lieutenant-Governor of the North-West Territories, to supervise the transfer of territories from the Hudson's Bay Company to the Dominion of Canada.[1] Trouble started as soon as he crossed the border into Manitoba. He had made it to the Hudson's Bay post just north of the United States border when he was unceremoniously escorted back into the United States by an armed group of Métis.[2] There he stayed until late December, when he returned to Ottawa without having completed his mission. Nevertheless, in the few months that he resided in Pembina there was evidence that through his agents, he initiated contact with Indian bands for the purpose of securing their loyalty.[3]

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1 Erwin Kreutzweiser, *The Red River Insurrection, Its Causes and Events*, (Gardenvale: Garden City Press, 1936) at 11.

2 For a general account of the occurrences, see Alexander Begg, *History of the North-West*, vol. 1 (Toronto: Hunter, Rose, 1894) at 387; Douglas Sprague, *Canada and the Metis, 1869-1885*, (Waterloo: Wilfred Laurier University Press, 1988); George Stanley, *Louis Riel*, (Toronto: Ryerson Press, 1963); and for an earlier history, see Alexander Ross, *The Red River Settlement, 1783 - 1856* (London: Smith, Elder, 1856).

3 H. Bowsfield, *Louis Riel: Rebel of the Western Frontier or Victim of Politics and Prejudice?*, (Toronto: Copp Clark Publishing, 1969) at 32, in a letter from John A. Macdonald to John Rose, 31 December 1869 referring to William McDougall's actions:

> He issued a proclamation under the Great Seal of the new province, formally adding it to the Dominion. He then entered into a series of inglorious intrigues, particulars of which I do not yet know, with the Swamp[sic] Indians near Red River, and with

Treaties and payments were offered in expectation of loyalty and military assistance.[4] It was this context of confusion and rebellion that set the stage for

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> the Sioux Indians at Portage la Prairie, and sent the irrepressible Stoughton Dennis, in his capacity of 'Conservator of the Peace,' as he dubbed him, to surprise the Stone Fort. Dennis took possession of the fort, and held it for a little while....
>
> All this has been done in the direct teeth of instructions, and he has ingeniously contrived to humiliate himself and Canada, to arouse the hopes and pretensions of the insurgents, and to leave them in undisputed possession until next spring. He has, in fact, done all in his power to prevent the success of our emissaries....

Kreutzweiser, *supra* note 1 at 94:

> Prominently occupying McDougall's time during his last days in Pembina were the charges that he was enlisting the aid of the savages in attempting to suppress the Red River insurrection. On December 6 the St. Paul "Press" carried a story from Pembina which said, "However incredible it may appear, it is nevertheless true that Governor McDougall is willing to enlist savages in order to force his yoke upon a Christian people. At Winnipeg I learned that McDougall's emissaries were using every effort to induce the Swampy Indians near the mouth of the Red River to declare for Canada and take up arms in favor of McDougall.

4 Neil Ronaghan, *The Archibald Administration in Manitoba, 1870 - 1872* (Ph.D. Thesis, University of Manitoba, 1986) at 390, concerning a letter from J. S. Dennis to Joseph Monkman, 16 December 1869:

> Dennis's letter to Monkman informed him that it was McDougall's request that Monkman "proceed on a mission to the various bands of the Chippeway tribe in the Country between Red River and Lake Superiour and between Lake Roseau on the south and Lake Saul[sic] and the waters emptying into the East side of Winnipeg on the north", and explain to the "chiefs and warriors" the gross conduct of the "French halfbreeds [sic]" who had "insulted" McDougall and driven him "out of the country".
>
> Monkman was to inform the chiefs that McDougall had "made arrangements", before being turned back by the French Half-breeds, "to hold a Grand Council in the Spring, at which he hoped to shake all the Chiefs by the hand" and "make treaties with them to last forever, by which treaties the Indians would get paid for all their lands which might be required for settlement–and no steps were to be taken by him to sell their lands until the rights of the Indians were ascertained and acknowledged and satisfied by treaty".
>
> Certain points are worthy of comment. At the outset it is doubtful whether McDougall had already "made arrangements" for such a Council. How he expected to have at hand by the spring of 1870 the information necessary for the required

the subsequent treaty negotiations in what was to be Manitoba. This thesis is not concerned with the events that led to creation of the province of Manitoba. Neither is the focus of this thesis historical. Nevertheless the past is intertwined with the use of treaty rights as a legal basis for modern self-government schemes and provides an appropriate starting point. A brief reference to the Manitoba Framework Agreement will illustrate the point.

On 7 December 1994, sixty Manitoba bands and the federal Crown signed the "Framework Agreement".[5] This signing was the result of more than a year's negotiations between the Assembly of Manitoba Chiefs and the federal government.[6] Furthermore, the agreement was only part of an ongoing process:

> We should think about it not in terms of dismantling the Department of Indian Affairs. It is much more than that. It is about giving life and meaning to our treaties. It goes far beyond this notion of getting rid of the department. What we want to do through this process is gain control over our lives. We want to put forth the control and power where it belongs - in the hands of First Nations. That is what this process is about. It is about restoring all the jurisdictions that belong to us, the control that has been

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negotiations is not clear. McDougall did not even know that either his government or prospective settlers would be interested in the land in question, much of which was marginal farmland or bush and Precambrian Shield. Then, at a stroke of the pen, he lifted the scattered family groups of Indian people to the status of entities with whom "treaties" must be made. Furthermore, these "treaties" were to last "forever". Surely this was expecting far too much of fallible human nature, both European and Indian.

McDougall's reasons for using this extraordinary language were soon made clear. He needed allies.

5 Officially entitled: *Framework Agreement on the Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdictions to First Nations Peoples in Manitoba and Recognition of First Nations Governments in Manitoba*. See Appendix I, [hereinafter Framework Agreement].

6 See the Framework Agreement, *ibid.* at 4.

denied by successive governments. And it is the process that will enable us to structure our governments to meet the needs as expressed by our people.[7]

The heart of the Framework Agreement is in the principles that are intended to guide the changes that are to be undertaken. The importance of treaties and treaty rights to the process are best illustrated in these principles. The first principle (5.1) states in part that a:

First Nation's Treaty rights...will in no way be diminished or adversely affected by this process[8]

The second principle (5.2) states in part that the:

...First Nation's Treaty rights...will form the basis for the relationships which will be developed as a result of the process.[9]

Further, principle 5.8 states that

The Crown's fiduciary relationship will continue in accordance with judicial decisions, ...the Treaties and other laws and sources of law, or any of them.[10]

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7 Phil Fontaine, "Message from Phil Fontaine, Grand Chief, Assembly of Manitoba Chiefs", *The Peoples' Decision*, Vol. I, No. 1 (June 1995) at 3.

8 Appendix I at 191.

9 *Ibid.*

10 *Ibid.* at 6.

Treaty "rights" are promised to play a key role in fulfilling the goal of restoring jurisdiction to the "First Nation" communities in Manitoba.[11] Treaty "rights" will not be adversely affected but are expected to form the basis for the new "relationships" between the Crown and the "First Nation". Logically there are two legal questions: what is a treaty and what is the legal nature of these "treaty rights"? The question of how to define a right has led to continuing debates in analytical jurisprudence.[12] That debate finds fertile ground in the "right" of self-government. The concept of fiduciary obligations has also been mixed with the interpretation of treaty rights[13]. Once these questions have been examined, one is in a better position to address the broader questions of whether or not "treaties" and "treaty rights" are the best vehicles for new "relationships" or for

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11 According to the objectives of the Framework Agreement the restoration of jurisdiction is to the "First Nations governments", in effect restoring "self-government".

12 See Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 Yale Law Journal 16, and "Fundamental Legal conceptions as Applied in Judicial Reasoning", (1917) 31 Yale Law Journal 710. This will be discussed fully later in the thesis, but a sample from each side of the "Hohfeld" debate is: Walter W. Cook, "Hohfeld's Contributions to the Science of Law", (1919) 28 Yale Law Journal 721 and Albert Kocourek, "The Hohfeld System of Fundamental Legal Concepts" (1920) 15 Illinois Law Review 24. See also: Roscoe Pound, *Jurisprudence*, Vol. IV (West Publishing Co., Minnesota, 1959) at 39.

13 See R. v. Cote (1996) 138 D.L.R. (4th) 385 at 398 (SCC):

> ...the characterization of the right alternately as an aboriginal right or as a treaty right will not be of any consequence once the existence of the right is established, as the *Sparrow* test for infringement and justification applies with the same force and the same considerations to both species of constitutional rights:

R. v. Sparrow (1990) D.L.R. (4th) 385 at 408 (SCC):

> ...the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.

revitalising old ones. Essential questions of "can it be done?" have overshadowed the questions of "should it be done?", especially regarding potential constitutional amendment.

OUTLINE

The thesis is divided into four chapters. The first chapter focuses on the historical circumstances surrounding the signing of the numbered treaties. The focus is on the powers granted to the treaty commissioners under Canadian law, what the nature of that power was, and its legal source. Canadian jurisprudence relating to treaties is also explored. Treaty Five is dealt with in detail, to provide a concrete example for later analysis. Finally the chapter concludes with a review of the substantive law regarding treaty interpretation and the legal status of parties to a treaty.

From the first chapter, the importance of the royal prerogative as a starting point becomes apparent. This next chapter emphasises the prerogative roots of proclamations, reserve land, and treaties. These topics are of current interest and provide a basis for exploring modern executive agreements with Aboriginal people.

The third chapter deals with the fiduciary concept and its role in treaty relationships between the Crown and Aboriginals. The case law is explored in order to get to the heart of the conflict of fiduciary relationships in an era of Aboriginal self-government. The chapter discusses the prerogative's influence on the fiduciary concept and explores the issue of whether fiduciary relationships are a potential hurdle for the use of executive agreements to implement self-government arrangements.

Chapter Four looks at "rights". It explores some of the debate surrounding rights and duties from an analytical jurisprudential view and takes examples from case law, academic debate, and political statements to illustrate the often confusing usage of the terms right and duty. The analysis is intended to provide a broader perspective and to place the legal discussion in context with current statements of the issue, as well as to define a more legally responsible vocabulary. The final portion of the chapter takes three specific principles from the Manitoba Framework Agreement and uses the Treaty Five "education" right to compare the stated objectives and goals of the Framework Agreement initiative with treaty rights. In particular, this chapter raises concerns about using an executive agreement based on treaty rights to amend the Canadian constitution without a formal process.

TERMINOLOGY

First Nations, Aboriginal, Native, Indian: all of these terms have found their way into the current vocabulary related to Canada's indigenous people. In an attempt at consistency and not to offend, the format used throughout this thesis is: Natives as a noun and Aboriginal as an adjective. However there are exceptions. The term "Indian" may be viewed as anachronistic, yet in some cases to use the term "Native" could be historically misleading. In the nineteenth century the term was usually applied to the Métis, rather than to members of the Ojibway, Cree, or Dakota tribes in the Red River settlement and the North-West. For example:

> ...What was news to Dennis was the Governor's assertion that the natives were a hunting people rooted in the soil. Mactavish said that "as soon as the survey commences, the half breeds and Indians will come forward and assert their right to the land, and possibly stop work till their claim is satisfied."
>
> On August 21, Dennis reported the disturbing news to the Minister of Public Works, William McDougall, saying, "a considerable degree of irritation exists among the native population in view of surveys and settlements being made without the Indian title having been first extinguished...."[14]

Therefore in instances where using the term "Native" could be misleading, the term "Indian" is used. The only other reference to the term "Indian" is in relation to legislation, *e.g.*, *Indian Act*. The term "First Nation" is not used except when it is the identity of choice as part of a name, *e.g.,* Split Lake Cree First Nation.

ABORIGINAL SOURCES AND PERSPECTIVES

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[14] Sprague, *supra* note 2 at 34.

Some attempt has been made to incorporate Aboriginal sources into this thesis (*e.g.* see bibliography: Fontaine, Meade, Price, Treaty 7 Elders and Tribal Council, Henderson). However, I acknowledge that because this thesis was intended to deal with legal concepts rather than historical events, personal interviews with elders and descendants of the original signatories were not attempted. The historical background referred to in the first chapter was not intended to elucidate the Aboriginal perspective but to explain how the treaties were integrated into the general legal system.[15] Unfortunately the most abundant personal accounts over this time period were from government officials such as Lieutenant-Governors Archibald and Morris. These were first hand accounts and although they may represent a "government" or "non-Aboriginal" point of view, with due respect to the oral traditions of Aboriginal people, it was beyond the scope of this thesis to embark upon a search for oral accounts of the signing of the treaties. However, while we may not have much information on the attitudes of Aboriginal people towards the application of Euro-Canadian laws, there is abundant evidence that they were in fact applied.

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15 R. v. Van der Peet [1996] S.C.J. No. 77 at 40:

> In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right... It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure... Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada.

CHAPTER ONE
HISTORICAL AND LEGAL BACKGROUND

> **...I believe that nothing but gross injustice or oppression will induce them [Indians] either to forget the allegiance which they now claim with pride, or molest the white subjects...**[16]
>
> -Wemyss M. Simpson, 1871
> Indian Commissioner

MANITOBA NUMBERED TREATIES

The quest for discovering the legal nature of the Manitoba treaties[17] begins not in the case reports, but in the history books. Documentation surrounding the creation of those numbered treaties that apply in Manitoba may yield clues as to their legal status and purpose. To examine the larger question of the efficacy of using modern executive agreements as vehicles for change within Aboriginal communities, it is logical to inquire into the legal authority of the earlier treaties. What legal force did a treaty have? In other words, what was the source of its legal authority? On whose authority were the treaties signed? Because there has never been Canadian legislation governing treaties with Natives in Manitoba, by what authority did the government and Natives enter into

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16 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Willing & Williamson, 1880), at 43.

17 Treaties and adhesions were entered into from 1871 to 1910 in Manitoba. The breakdown by treaty is as follows: Treaty One - 8 bands, Treaty Two - 9 bands, Treaty Three - 1 band, Treaty Four - 7 bands, Treaty 5 - 29 bands, Treaty Six - 1 band, Treaty Ten - 2 bands, and four bands without treaties. See Minister of Indian Affairs and Northern Development, *First Nations Community Profiles, 1996, Manitoba Region* (Ottawa: Indian and Northern Affairs Canada, 1996) at 154.

the treaties? Since this thesis concerns itself only with Manitoba, we begin shortly after this area became a province.

Lieutenant-Governor Adams George Archibald arrived in Fort Garry on the evening of 2 September, 1870.[18] He carried with him instructions regarding a number of issues, including establishment of formal relations with the First Nations, in his capacity as Lieutenant-Governor of both Manitoba and the North-West Territories:

> **13. You will also make a full report upon the state of the Indian Tribes now in the Province, their numbers, wants and claims; the system heretofore pursued by the Hudson Bay Company in dealing with them, accompanied by any suggestions you may desire to offer with reference to their protection and to the improvement of their condition.[19]**
>
> **1. You will, with as little delay as possible, open communication with the Indian Bands occupying the country lying between Lake Superior and the Province of Manitoba, with a view to the establishment of such friendly relations as may make the route from Thunder Bay to Fort Garry secure at all seasons of the year, and facilitate the settlement of such portions of the country as it may be practicable to improve.**
>
> **2. You will also turn your attention promptly to the condition of the country outside of the Province of Manitoba, on the North and West; and while assuring the Indians of your desire to establish friendly relations with them, you will ascertain and report to His Excellency the course you may think most advisable to pursue, whether by Treaty or otherwise, for the removal of any obstructions that might be presented to the flow of population into the fertile lands that lie between Manitoba and the Rocky Mountains.**

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18 A. G. Archibald to the Honorable The Secretary of State for the Provinces, 3 September 1870, House of Commons Sessional Papers (No 20), 34 Victoria, 1871, at 9.

19 E. A. Meredith, Under Secretary of State for the Provinces to His Honor the Honorable Adams G. Archibald, Lieutenant Governor of the Province of Manitoba, 4 August 1870, House of Commons Sessional Papers (No. 20) at 6.

5. **You will also make a full report upon the state of the Indian Tribes now in the Territories; their numbers, wants and claims, the system heretofore pursued by the Hudson's Bay Company in dealing with them, accompanied by any suggestions you may desire to offer with reference to their protection, and to the improvement of their condition.[20]**

When the new Lieutenant-Governor arrived, the community of Red River was in a considerable state of agitation. 1869 had seen the "Riel Resistance", which forced the federal government to grant Manitoba provincial status. Although the provisional government of the settlement had consisted of both English and French speaking representatives, there was still a great deal of unrest in the community.[21] The execution of Thomas Scott became a large source of hostility, not so much from the "Canadian" residents of Red River, as from neighbouring Ontario.[22] This agitation led to the homicide of Elzear Goulet within the first two weeks of the Lieutenant-Governor's arrival.[23] The Red River Expeditionary Force under the command of Colonel Wolseley preceded the Lieutenant-Governor and was supposed to establish law and order in the

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20 E. A. Meredith, Under Secretary of State for the Provinces to His Honor the Honorable Adams G. Archibald, Lieutenant-Governor of the North West Territories, 4 August 1870, House of Commons Sessional Papers (No. 20) at 8.

21 Alexander Begg, *History of the North-West*, Vol. I (Toronto: Hunter & Co., 1894) at 347.

22 Douglas Sprague, *Canada and the Métis, 1869-1885*, (Waterloo: Wilfred Laurier University Press, 1988) at 67-86. Note that "Canadian" refers to the relatively recent migrants, mainly from Ontario to Red River.

23 A. G. Archibald to Hon. Secretary of State for the Provinces, 17 September 1870, Sessional papers (No. 20), at 15.

community. By some accounts the exact opposite occurred.[24] During all of this the Indian population in the area remained essentially friendly to Canadian authority. This attitude was evidenced by several communications from Native and non-Native alike.[25] Premier among these were two letters from Chief Henry Prince, where the Riel Resistance was described as "the late reign of terror".[26] Further evidence of this was in the words of the Lieutenant-Governor himself upon arriving in Red River:

> **In the course of the journey I could not fail to be impressed with the great embarrassments which a hostile feeling on the part of the Indians could have thrown in the way of the passage of the troops, and we have reason to congratulate ourselves that they have proved loyal to the Crown and resisted the attempts which were made to seduce them from their allegiance.[27]**

It was shortly after this that the first official contact occurred between the government of Canada and the Aboriginal population of the prairies.

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24 G.F.G. Stanley, *The Collected Writings of Louis Riel,* Vol. I (Edmonton: University of Alberta Press, 1985) at 116.

25 House of Commons Sessional papers (No. 12), at 41. This is an anonymous letter to Col. Dennis stating among other things, that the government could expect "*powerful support at any moment*" from the Indian population. The letter is dated 12 November 1869.

26 Henry Prince to Hon. Mr. Archibald, n.d., Adams G. Archibald Papers, Provincial Archives of Manitoba, M.G. 12 A 1, No. 768; and Wm. H. Prince *et al.*, address to Hon. Adams George Archibald, n.d., Secretary of State for the Provinces Records, N.A.C., R.G. 6 C 1, Vol. 16, File 433.

27 A. G. Archibald to The Secretary of State for the Provinces, 3 September 1870, Sessional papers (No. 20), at 9; see also A.G. Archibald, to the Swampie and Sauteaux Christian Indians and Halfbreeds of the Indian Settlement, 15 September 1870, Secretary of State for the Provinces Records, N.A.C., R.G. 6C1, Vol. 16, File 433.

On 10 September 1870, eight days after his arrival in Red River, Lt.-Gov. Archibald reported that the Aboriginal population was in a great state of "excitement":

> **They are very much demoralized by the transactions of the last few months. They do not seem to see why they should not have some share of the property, which they know to be in the possession of people who are not its owners.[28]**

He further reported that he would be meeting with "these Tribes" at a "very early date". On 13 September 1870 the Lieutenant-Governor reported[29] that he met with "some two hundred Indians". He reported that the inhabitants of the area were anxious to have the Natives depart the area. To this end the Lieutenant-Governor warned them that small-pox had been reported in the area of Portage La Prairie. He also promised to see them in the spring and at that time "conclude a treaty with them of some kind". He met another "large body of Indians" on Thursday, 15 September 1870 at Upper Fort Garry. The outcome he described as being the same as the first meeting. In a later report[30] the

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28 A. G. Archibald to Hon. Secretary of State for the Provinces, 10 September 1870, House of Commons Sessional papers (No. 20), at 11. Archibald initially shared the prejudice of many outsiders who did not appreciate the degree to which the Indians where integrated into the Red River Community. There is no evidence that the Indians were more inclined to appropriate the property of others than were the members of any other group in the settlement.

29 A. G. Archibald to Hon. Secretary of State for the Provinces, 13 September 1870, House of Commons Sessional Papers (No.20) at 15.

30 A. G. Archibald to Hon. Secretary of State for the Provinces, 17 September 1870, House of Commons Sessional Papers (No.20) at 18.

Lieutenant-Governor related that on Friday, 16 September he received word that the second group he had met with were dissatisfied with the results of the first meeting. Lt.-Gov. Archibald agreed to meet the bands once again on Monday, 19 September, with six chiefs apparently representing about 550 people[31]. They were unhappy about the meagre gifts they were given since they had "neither food, clothes nor ammunition"[32]. They were also under the impression that they would be offered a treaty immediately upon the Lieutenant-Governor's arrival.[33] Archibald's concern was that a "regular treaty" could not be entered into since notice had not been given to all communities potentially affected by a treaty. An underlying motive for this delay was to allow time to gather intelligence

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31 See *infra* note 36.

32 *Ibid.*

33 Some explanation can be given for this last series of events. In 1869, prior to Lt. Gov. Archibald's arrival, James McKay Esq., was asked to negotiate with a band described as the "Indians of Portage la Prairie" by Governor William McTavish. James McKay was of mixed European-Native heritage and well acquainted with the local bands, who by 1871 was a member of the Executive Council of Manitoba. The problem was that several Canadian settlers had tried to settle in the area of Rat Creek. As described by Gov. McTavish, the Indians forbade this settlement and the settlers petitioned the Governor for assistance. Gov. McTavish requested McKay to attempt to negotiate an interim agreement which would allow the settlers to settle. This agreement was on the understanding that the settlement would not "interfere with the Indian's right to the land". The result was the Portage Treaty, which very simply stated that the land was leased for three years, within which time the band expected "some arrangement" to be made regarding their land. The terms of the lease were that new Canadian settlers could settle on the east side of Rat Creek and could range three miles landward for building timber or firewood. Obviously, with the arrival of Lt. Gov. Archibald the Portage la Prairie band wanted a treaty. See Alexander Begg, *History of the North-West*, Vol. II (Toronto: Hunter & Co., 1894) at 41 and "Portage Treaty", *The Toronto Globe*, 4 September 1869.

regarding the Indians prior to treaty negotiations.[34] With presents of ammunition and some supplies, the Lieutenant-Governor got this group to return to their "hunting grounds". He reported that:

> **It will be absolutely necessary in the spring to have these Indian claims settled upon a permanent basis; meanwhile, I think the best that could be done has been done to get them away, and avoid the danger to themselves and the settlement which would have attended their remaining here.**

St. Peter's band headed by Henry Prince was the other group petitioning. This largely Christian band had remained loyal to the government during the Resistance and expected compensation.[35] Lt. Gov. Archibald replied that their concerns[36] would be addressed the following spring when provincial affairs were

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34 Adams G. Archibald to J. W. Wright, 27 November 1870, Adams G. Archibald Papers, Provincial Archives of Manitoba, M.G. 12 A 1, No. 114 at 2.

35 Notes of interview between the Lt. Gov. Of Manitobah [sic] and Henry Prince (Mikookinu), chief of the Salteaux and Swampies at St. Peter's Parish school on the morning of Tuesday 13 September 1870, Adams G. Archibald Papers, Provincial Archives of Manitoba, M.G. 12 A 1, No. 22.

36 Note also the Aboriginal assertions regarding the Selkirk Treaty signed in 1817. Unfortunately this only warranted a mention in Lt.-Gov. Archibald's report. He did not mention which Natives complained, and only related that the basis of the complaint was; "Some of the Indians now deny that these men [*Aboriginal signatories to the Selkirk Treaty*] ever were Chiefs or had authority to sign the treaty." (Italics mine). See Morris, *supra* note 16 at 33. The Selkirk Treaty stated (Morris at 143):

> **...the said Chiefs have given, granted and confirmed, and do, by these presents, give, grant and confirm unto our Sovereign Lord the King all that tract of land adjacent to Red River and Ossiniboyne River... .**

However, in a transcription of a meeting between Chief Henry Prince and Lt. Gov. Archibald (*Ibid.*, note 20), Chief Prince stated:

> **... we were never paid for those lands which Lord Selkirk**

more settled.

The promised treaty meeting took place at Lower Fort Garry (The Stone Fort) on 27 July 1871. Mr. Wemyss Simpson, Member of the federal parliament from Algoma, had been appointed Indian Commissioner to negotiate the first treaties. He was a former employee of the Hudson's Bay Company on Lake Superior. In the company of Lieutenant-Governor Archibald, some troops and a "force of constabulary" to prevent liquor traffic, the negotiations proceeded.[37] The matter was becoming urgent as there were instances of settlers and surveyors being obstructed and of general uneasiness due to the large number of settlers arriving.[38]

To understand the original treaties, we begin with Lieutenant-Governor Archibald's opening address to the assembled bands. It made plain the intentions of the Crown to the Indians. The Lieutenant-Governor was following instructions quoted earlier.[39] After explaining why the meeting was delayed for some days, he went on to say:

> "First, Your Great Mother, the Queen, wishes to do justice to all her children alike. She will deal fairly with those of the setting sun, just as she would with those of the rising sun. She wishes order and peace to reign through all her country, and while her arm is strong to punish the wicked

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borrowed from us.

37 Morris, *supra* note 16 at 28.

38 *Ibid.* at 26. This was due to the infringements of the Portage Treaty, see *supra* note 33.

39 See *supra* note 19.

man, her hand is also open to reward the good man everywhere in her Dominions.

"Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

"But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so of your own free will. Many of you, however, are already doing this.[40]

The meeting adjourned so that the bands could select their spokesmen. The following day a most telling occurrence took place.

The Indian representatives were at first concerned with the imprisonment of four Swampy Cree. Apparently they had deserted a Hudson's Bay Company boat, were fined and then imprisoned in default of payment. They petitioned the Lieutenant-Governor for the release of these men before negotiating any treaty. On this Archibald wrote:

On learning the facts I told the Indians that I could not listen to them if they made a demand for the release of the Indians as a matter of right; that every subject of the Queen, whether Indian, half-breed, or white, was equal in the eye of the law; that every offender against the law must be punished, whatever race he belonged to; but I said that on the opening of negotiations with them the Queen would like to see all her Indians taking part in them, and if the whole body present were to ask as a matter of grace and favor, under the circumstances, that their brethren should be released, Her Majesty would be willing to consent to their discharge; she would grant as a favor what she must refuse if asked on any other ground. They replied by saying that they begged it as a matter of favor only. Thereupon I acceded to their request, and directed the discharge of the

[40] Morris, *supra* note 16 at 28.

> four Indians. This was received with great satisfaction. I explained again, that there might be no misunderstanding about it, that henceforth every offender against the law must be punished. They all expressed their acquiescence in what I said. The discharge of the prisoners had an excellent effect.
>
> Next morning the Indians, through one of their spokesmen, declared in presence of the whole body assembled, that from this time they would never raise their voice against the law being enforced.[41]

Following this incident, negotiations proceeded for four more days. On 3 August 1871, Treaty One was signed. Shortly after, on 21 August 1871, Treaty Two was signed at Manitoba Post. The Aboriginal communities affected by Treaty Two desired only to be treated the same as their south-eastern neighbours, with no particular demands made.[42]

JURISDICTION

The last incident related by the Lieutenant-Governor would seem to indicate that English-Canadian law applied to Aboriginals as it did to all members of the community. This was most clearly evident in an address by Chief Henry Prince to Lt. Gov. Archibald. Here the Chief expressed joy at the admission of Manitoba into the Dominion of Canada.[43] He specifically requested

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41 *Ibid.* at 34.

42 *Ibid.* at 42.

43 Wm. H Prince *et al.*, address to Hon. Adams George Archibald, *supra* note 26.

from Archibald that "spiritous liquors be prohibited in our Indian settlement". In his reply, Lt. Gov. Archibald promised to "do what I can to do away with the traffic in intoxicating drink".[44] It would seem reasonable to say the Chief in this case felt that Dominion legislation was required, assuming that they were now citizens of Canada. There was no suggestion that some form of band legislation was contemplated, or any Aboriginal customary law would be cited or invoked. This view was also supported by the text of the treaties themselves. With reference to "her Indian subjects", and "Her Majesty's Indian subjects"[45] contained in both of the first two treaties. More explicitly, in the second treaty there was a specific provision to:

> ...aid and assist the officers of Her Majesty in bringing to justice and punishment, any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.[46]

The following evidence raises the question of Aboriginal people's acknowledgment and submission to English-Canadian law even prior to the treaties being signed. One historian described the attitude of the government representatives regarding the treaties:

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[44] A. G. Archibald to the Swampie and Salteaux Christian Indians and Halfbreeds of the Indian settlement, 15 September 1870, Secretary of State for the Provinces Records, N.A.C., R.G. 6 C 1, Vol. 16, File 433.

[45] Morris, *supra* note 16 at 313, (Treaty Number One).

[46] *Ibid.* at 320, (Treaty Number Two).

> **It is likely that the commissioners felt that it was a mere formality from the government point of view. The government had already made some laws applicable in the area and fully intended to establish further control.**[47]

It is also stated:

> **Yet a Blood chief made a speech in which he both praised the Mounted Police for the benefits they had brought the Indians, and claimed compensation for the wood they had used to the extent of fifty follars[sic] to each chief and thirty dollars to all others. Laird feared that this suggestion might be considered to have been accepted by the commissioners were he not to deny it promptly. Accordingly, he did so, telling the Blood chief that any payment to be made in the matter referred to should come from the Indians for the services of the police.**[48]

Also prior to the signing of the later numbered treaties, the North West Mounted Police had established a federal presence on the western prairie. This presence was apparently welcomed by the Aboriginal inhabitants:

> **"I come from the Great White Queen," Macleod told them via Potts. "I come in friendship." Then he explained that the police would remain at Fort Macleod and would establish law and order over the prairies. They had not come to steal the Indians' land, he said, and when the government wanted any land it would send men to discuss the matter with the Indians and to make treaties.**
>
> **Crowfoot, reputedly the wisest and mightiest of the chiefs, expressed approval. Others said they were glad the redcoats were driving away whisky traders who robbed them of their wives, their horses and**

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47 Richard Price, ed., *The Spirit of the Alberta Indian Treaties*, (Toronto: Butterworth & Co., 1979) at 95.

48 *Ibid.*, at 32. This statement during the Treaty Seven negotiations, seemingly elicited laughter from the assembly, and it is contested whether the Natives were laughing with the commissioners or at them. Regardless, the point was that the Mounted Police were enforcing Canadian law in Indian territory prior to the signing of the treaties. See also Treaty 7 Elders and Tribal Council, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996) at 252.

> **their robes, and whose fire-water caused much trouble.**[49]

Although these instances took place further west, in what is now Alberta, there is evidence that this attitude existed in Manitoba prior to the treaties.[50] In 1845, one such incident between a party of Sioux and the Saulteaux living in the Red River area was described:

> **...a party of Sioux arrived at Red River on a friendly visit to the whites, and after a short stay returned again to their country in safety. A second party that reached Fort Garry on the 31st of August were less fortunate.**
>
> **After a welcome reception, and a few hours passed at the fort, their curiosity was excited by the Roman Catholic cathedral on the opposite side of the river, and they crossed over to visit.... They had no sooner landed - whites, Saulteaux, and Sioux, in a group - than a shot was fired, and instantly two Indians fell dead. The ball, after passing through the Sioux, killed a Saulteaux, and grazed a white man, who narrowly escaped with his life.**
>
> **In the bustle and confusion that ensued, nothing could be learned for some time. The Saulteaux fled; and as soon as the Sioux were lodged safe in the fort, and the two bodies taken in, an inquiry was instituted, when the murderer was discovered to be a Saulteaux. Had the criminal sought his safety in flight, he might have been beyond our reach, before we were aware of it; but no: he was at last discovered by his own people, pointed out, and identified, standing with his back to a fence, not two gun-shots from the fort.**[51]

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49 William & Nora Kelly, *The Royal Canadian Mounted Police, A Century of History*, (Edmonton: Hurtig, 1973) at 45. This account was reported as taking place 1 December 1874.

50 The North-West Mounted Police were not commissioned until 1873.

51 Alexander Ross, *The Red River Settlement, 1783 - 1856*, (London: Smith, Elder, 1856) at 330. This incident, along with numerous other cases can be found in the records of the Quarterly Court of Assiniboia. See <u>The Public Interest</u> v. <u>Capenesseweet</u>, 4 August 1845, Records of the General Quarterly Court of the District of Assiniboia, Provincial Archives of Manitoba, MG 2, B 4-1, Book 1, at 23:

> **Mr. Thom summed up the Evidence and addressed the Jurors, who after due deliberation brought in a verdict finding Capenesseweet Guilty of the murder of Tatunga-okay-enay the Siou and Apetwaywetungk the Saulteau.**

This evidence gives the impression that English-Canadian common law was the governing jurisdiction when considering the treaties of Manitoba.[52] These

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> **The Court thereafter, through M[r.] Thom pronounced against Capenessaweet the sentence of death decreeing him to be hanged by the neck till he was dead on Saturday next the sixth of August current between the hours of eight and twelve in the morning.**

There were also civil cases prior to the treaties, where Indians were suing and being sued. See Ke ce zie way Pecheto v. Joseph Morin, 16 August 1866 Records of the General Quarterly Court of the District of Assiniboia, Provincial Archives of Manitoba, MG 2, B 4-1, Book 3, at 85 where the plaintiff successfully sued for £ 15.0.0, and Widow Que-we-sence v. David Pritchard, 20 August 1868, Records of the General Quarterly Court of the District of Assiniboia, Provincial Archives of Manitoba, MG 2, B 4-1, Book 3, at 139, where the plaintiff successfully sued for the price of a mare. See also Hon[ble] Hudson's Bay Coy v. A'h ne ch'or o'l ning and Ca'r a qu'n e' qa'n, 21 December 1860, Records of the General Quarterly Court of the District of Assiniboia, Provincial Archives of Manitoba, MG 2, B 4-1, Book 2, at 177, an action for debt and desertion with the result that the Indians had to pay £ 11.7.0 and £ 13.1.0 respectively and were imprisoned for one month for desertion. Note that in this case the defendants were living in "Grand Rapid at Lake Winipec[sic]".

52 In saying this I acknowledge that there is passionate argument to the contrary. An example of this argument is in an unpublished position paper by the Sagkeeng First Nation of Manitoba (See Appendix III) which stated:

> **The people of Sagkeeng are party to Treaty # 1. Treaty #1 is an agreement between nations. We are a nation, we entered into Treaty #1 as a nation, we have never given up our inherent right to live under our own laws.**

See also: Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act* Cases", (1992) 21(3) Manitoba Law Journal 343, and James (sakéj) Youngblood Henderson, "Empowering Treaty Federalism", (1994) 58 Saskatchewan Law Review 241. The argument of retained sovereignty also provides the theoretical underpinning for arguments advocating the "inherent right of self-government". See: Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government, Legal and Constitutional Issues* (Ottawa: Canada Communication Group, 1995) at 13; Delia Opekokew, "The Inherent Right of Self-Government as an Aboriginal and Treaty Right", Continuing Legal Education Program, Annual Meeting 1994, *The Inherent Right of Aboriginal Self-Government*, Vol. II, at 2. However, it is difficult to reconcile this approach with the case law, specifically Simon v. The Queen (1985) 24 D.L.R. (4[th]) 390 at 404 (SCC) [hereinafter Simon cited to D.L.R.], R. v. Vincent (1993) 12 O.R. (3d) 427 accounts raise the question of the significant number of Natives that considered themselves subject to English-Canadian law.[53]

MOTIVATIONS

Prior to a legal analysis of the treaties, it is advisable to keep in mind what reasons the treaties had for existing. It is plain to see what the treaties of Manitoba were about, from a governmental standpoint. First and foremost the Dominion was interested in securing a route to the west. It is obvious that all of the reasons for treaty making relate to providing a secure path for immigrants, commerce, and troops. This was addressed in his report to the Secretary of

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at 436 (Ont. CA), Francis v. The Queen (1956) 3 D.L.R. (2d) 641 at 652 (SCC), which have clearly stated that the principles of international law are not determinative on this issue.

53 This view does not necessarily imply disregard for Aboriginal customary law. See Norman Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases", [1984] 4 C.N.L.R. 1 at 1. Note however:

> The majority of reported cases expressly recognizing and applying customary law deal with family law matters, primarily marriage and adoption. Customary law has not been expressly applied to other legal issues of particular interest to aboriginal peoples, such as land use, land claims, and the regulation of hunting and fishing rights.

It is important to realise that for customary law to be "recognised", it requires that validity is given to Canadian common law that grants the recognition. This way Aboriginal customary law can be recognised, but it exists within the common law framework.

State for the Provinces[54] where he gave the opinion that the route he traversed[55] was unsuitable for commercial transport due to the large number of portages.

Secondly, the aim of securing the land to allow for settlement and agriculture was of paramount importance. This 'populate and cultivate' mentality is extensively documented. It was plainly stated in instruction number 2, given to Lt. Gov. Archibald, and also referred to in his report to the Secretary of State for the Provinces[56]. However, the scale of this endeavour was made plain in further correspondence from the Lt. Gov., where he talked about the recruitment of settlers to populate 50,000 acres he hoped would be available by the spring.

The third reason for the treaties was to provide security in the region. At this time the Aboriginal populations still had the potential for raising a significant military force, and had the tactical knowledge and ability to fight any British or Canadian forces. Lt. Gov. Archibald wrote:

> **...so much mischief could have been done by hostile Indians, who in a thousand places could have harassed our troops with entire safety to themselves and have retarded very much their progress westwards**[57]

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54 Adams G. Archibald to the Hon. Secretary of State for the Provinces, 12 November 1870, Records of the Department of Indian Affairs, N.A.C., R.G. 10, vol. 448, at 184343.

55 Namely through Lake of the Woods, up the Winnipeg river to Lake Winnipeg, then following the Red River to the town of Winnipeg. Treaties were therefore needed to extinguish Aboriginal title for the route west.

56 See North West Territories instructions, *supra* note 20 and report to the Secretary of State for the Provinces, *supra* note 54 at 184341.

57 *Ibid.* at 184344.

As well, during the Riel Resistance, the area residents were much concerned with the possibility of an "Indian war". A resident of St. Paul, Minnesota wrote:

> **the main anxiety here is that bloodshed may be averted, or anything like war, for our people are very apprehensive that such a conflict would draw the Indians of both sides into it, and involve our own border in the horrors of an Indian war.**[58]

Finally, the altruistic motivations of "civilizing" and "educating" the Natives were clearly a motivation. The fifth instruction to Lt. Gov. Archibald quoted earlier, described the reason for a report on the "state of the Indian Tribes" to be "the improvement of their condition". However, in the main correspondence between the Lt. Gov. and Ottawa, there was little mention of such altruistic motivations.

LEGAL BASIS

The federal government's motivations for treaties were reasonably clear, but there is no evidence to suggest that legal considerations played any part in choosing treaties as a method for dealing with Natives. There are traditionally

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[58] Extracts of a letter addressed to the Secretary of State for the Provinces, by a gentleman resident at St. Paul, Minnesota, 26 November 1869, Sessional Papers (No. 12), 33 Victoria, A. 1870, at 41.

three ways a government can exercise power.[59] Statutes would seem to have been one method of proceeding, which could have taken different forms. Aboriginal title could have been legislatively extinguished without negotiation of any kind. The Treaty Commissioners could have been empowered through a statute instead of commissioned[60] or the treaties could have been ratified by statute after negotiations finished. There is no evidence that any of these methods were considered, but we know by the absence of legislation that treaties were not concluded in this manner.

Powers relating to contract would also have been a reasonable way of proceeding. Yet any contract would had to have been made either with each Indian separately or with some form of group. However, contracting with a group of Indians at that time was questionable since there was no legal affirmation of a band.[61] As for contracting with individuals, there seems no doubt that this would have been legally possible[62], but there is no evidence that this was ever

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59 According to *Halsbury's Laws of England*, Vol. VIII(2), 4th ed., (London: Butterworths, 1990) at 243, executive power can be exercised in one of three ways: statutes, royal prerogative, or common law powers deriving from the legal personality of the Crown. Examples of the last method include "powers or capacities of ownership and contract".

60 Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in council, on the 20th May, 1870, House of Commons Sessional Papers (No. 20) 34 Victoria, 1871 at 2.

61 Even recently a band has not been deemed a person in law, nor a corporation. See Jack Woodward, *Native Law*, (Toronto: Carswell 1989) at 15; and, Pawis v. The Queen [1980] 103 D.L.R. (3d) 603 at 612 (F.C.T.D.).

62 See *supra* note 51 where before the treaties Natives had legal standing to sue and be sued. See also Sanderson v. Heap (1909) 19 Manitoba Reports 122 at 125 (KB) and Prince v. Tracey [1913] 13 D.L.R. 818 at 822 (KB).

considered. From a practical point of view classifying treaties as contracts is currently academic, because current jurisprudence has stated that treaties are similar in nature to, but not actual, contracts.[63] Note that in the Pawis[64] decision the court stated that treaties were "tantamount to a contract", but went on to hold that an action for breach of contract could not be maintained due to three aspects of the treaty. These were: 1) rights are assigned to a collective, not individuals; 2) causes of action are too old; and, 3) the government cannot contract to limit parliamentary legislative power. This left only the prerogative powers of the Crown as an option.

Why is this important now? As we will see in the next chapter, treaties based in the royal prerogative put them in a weak legal position, but overcame the difficulty in "contracting" with a band. Also, prior to 1982 and the protection of s. 35 in the *Constitution Act, 1982*, it was doubtful that treaties could be enforced by the courts.[65] Therefore an investigation of the royal prerogative is

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[63] See: Simon, *supra* note 52 at 404, R. v. Badger [1996] 2 C.N.L.R. 77 at 105 (S.C.C.), Town of Hay River v. The Queen (1980) 101 D.L.R. (3d) 184 (F.C.T.D.).

[64] See *supra* note 61 at 607.

[65] See Attorney-General for the Dominion of Canada v. Attorney General for Ontario [1896] Appeal Cases 199 at 213 (PC):

> Their Lordships have no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities... no right which gave them any interest in the territory which they surrendered... and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.

Sikyea v. The Queen [1965] 2 Canadian Criminal Cases 129 (SCC):

necessary to understand the basis for the legal enforceablity of treaties. This is pertinent in light of more recent judicial findings that treaties are neither contracts nor treaties in the international law sense, but are *sui generis*.[66] Therefore if neither the rules of contract nor international law apply, or only partially apply, then what should guide the judicial interpretation? If Aboriginal treaties are truly *sui generis*, then it becomes vitally important to establish the legal and historical bases upon which they were created.[67] It seems far too easy

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> ...a treaty Indian shooting a wild duck out of season for food, in reliance on the terms of the treaty, is guilty of an offence against the Act in spite of the treaty and regardless of the fact that such treaty was entered into after the enactment of the Act.

In the Sikvea case the act in question was the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179. Note the protection given by s. 88 of the *Indian Act* R.S.C. 1985, c. I-5 against provincial laws conflicting with treaty provisions. See also Guerin v. The Queen (1983) 143 D.L.R. (3d) 416 at 470 (FCA):

> ...the words "in trust" in the surrender document were intended to do no more than indicate that the surrender was for the benefit of the Indians and conferred an authority to deal with the land in a certain manner for their benefit. They were not intended to impose an equitable obligation or duty to deal with the land in a certain manner. For these reasons, I am of the opinion that the surrender did not create a true trust and does not, therefore, afford a basis for liability based on a breach of trust.

66 The two leading legal models used to describe Aboriginal treaties are contract law and public international law of treaties. See, Robert Reiter, *The Law of Canadian Indian Treaties*, (Edmonton: Juris Analytica Publishing Inc., 1995) at III-4. Despite similarities, the courts have held that Aboriginal treaties are not international law treaties. See Francis v. R. [1956] S.C.R. 618, 3 D.L.R. (2d) 641 at 652; Simon, *supra* note 52 at 404; R. v. Vincent (1993) 12 O.R. (3d) 427 at 441 (CA); Pawis, *supra* note 61. Aboriginal treaties are not contracts either. See Pawis, *ibid.* at 607 (F.C.T.D.), Town of Hay River, *supra* note 63.

67 For a different view see Owen Griffiths, "*Sui* Semantics and *Generis* Gratuities: The Conundrum of Crown Fiduciary Obligations to Aboriginal Peoples", (1995) 6 Windsor Review of Legal and Social Issues 39 at 65. Griffiths strenuously argued that by definition, Aboriginal legal concepts labeled *sui generis* are incapable of being described in "Canadian legal lexicon". Therefore to correctly define a *sui generis* concept in this context would be "the way the Indians understood -- as the right to perpetuate the culture as only Indians know how". Unfortunately Griffiths did not elaborate on a practical method to effect this

to say the treaties are *sui generis,* leaving the courts floundering for precedent, forced to take those aspects of contract law or international law that they choose, without regard to where the legal authority came from in the first place. Since the answer seems to be the royal prerogative, we must first examine one treaty and the legal interpretive rules surrounding treaties, to provide the context for an analysis of the royal prerogative. Treaty Five is the best choice, because it not only affected the largest number of Aboriginal people in Manitoba, but also contained explicit reference to hunting, fishing and education rights.

TREATY FIVE

The vast area that Treaty Five covered was ceded in two different periods. Initially signed on 20 and 24 September 1875, these dates corresponded to the arrival of the treaty party in the settlements of Berens River and Norway House, respectively. Alexander Morris was Lieutenant-Governor and present at the initial signing. With the adhesions shortly after in 1876, this treaty covered an area of approximately 100, 000 square miles, around Lake Winnipeg. The motivation was to open the territory for the development of water transportation[68]. The more northerly regions of Treaty Five were dealt with by

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theory.

[68] Morris, *supra* note 16 at 143.

adhesions occurring in 1908-10. By that time mining interest in these areas had increased the priority of treating with the northern bands.[69] As well, the boundaries of Manitoba were being considered for extension, and by 1907 survey crews were at work north of the original Treaty Five area, a source of concern for Northern bands.[70]

The Indian Promises

Before detailing what Indians received in Treaty Five, it is important to examine what they gave up. The most important aspect of these treaties for the Crown was to gain unencumbered title and control of the land occupied by the Natives.[71] Not surprisingly therefore, this became the first issue dealt with in the treaty. It stated that the Saulteaux, Swampy Cree tribes and all other Indians inhabiting the treaty district:

> Do hereby cede, release, surrender, and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors

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69 Kenneth S. Coates & William R. Morrison, *Treaty Five Research Report, 1875-1908*, (Ottawa: Minister of Indian Affairs & Northern Development, 1987) at 36 & 44. By the turn of the century the government was actively pursuing the construction of a rail line from southern Manitoba to a proposed port on Hudson's Bay.

70 *Ibid.* at 54. Note that the boundaries of Manitoba were extended from the 53rd to the 60th parallels in 1912.

71 *Ibid.*

> **forever, all their rights, titles and privileges whatsoever to the lands included within the following limits**[72]

and also

> **all their rights, titles and privileges whatsoever to all other lands wherever situated in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions situated and being within the Dominion of Canada**[73]

These were the provisions which removed the "Indian title" from all of the lands covered in Treaty Five. It was from these ceded lands that the Crown created the reserve land base.[74]

The next Aboriginal promise gave the Crown, successors, and subjects free navigation of all lakes and rivers, as well as free access to the shores. This was followed by a provision that allowed Her Majesty the right to "deal" with any settlers within the bounds of any reserve lands, as she deemed fit.

The next promise was:

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72 Morris, *supra* note 16 at 344.

73 *Ibid*.

74 *Ibid*. the treaty provision reads:

> **And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada;**

the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained[75]

This was the concept first outlined in the Royal Proclamation, 1763, as the basis for European-Indian relations. Although the Royal Proclamation did not apply in the Treaty Five area[76], the influence as a basis for the land relationship was obvious. The *Indian Act* of 1868[77] already contained this concept, so regardless of the treaty provision this rule would still apply.[78] This idea of the Crown intermediary between Natives and the rest of the world regarding reserve land

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75 *Ibid.* at 345.

76 No doubt the Royal Proclamation reflected the fundamental premise of British Imperial policy which was carried forward and implemented by *Indian Act* provisions and the numbered treaties. However, in Manitoba the Royal Proclamation did not have any legal impact . The proclamation text stated that it did not apply to areas under the control of the Hudson's Bay Company. This was held in Sigeareak v. R. [1966] 57 D.L.R. (2d) 536 (SCC) and mentioned in Calder v. A.G. (B.C.) (1973), 34 D.L.R. (3d) 145 at 203 (SCC) There is some academic comment to the contrary. See J. Woodward, *supra* note 61 at 76 and Brian Slattery, ***The Land Rights of Indigenous Canadian Peoples*** (1979) (Doctoral thesis, Oxford University, 1979) at 361. However the weight of judicial opinion would seem to make this issue clear.

77 *An Act providing for the organization for the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance lands,* S.C. 1868, c. 42, ss. 1,5,6,8(1), (2), (9). See also Bruce A. Clark, *Indian Title in Canada*, (Toronto: Carswell, 1987) at 90. Note also *An Act to amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia*, S.C. 1874, c.21.

78 Note *An Act respecting the Management of the Indian Lands and Property*, S.P.C. 1860, c. 151. Section 4 stated that only the consent of the chiefs was required for land surrender. It wasn't until 1876 in *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, c. 18, that a majority of the adult members of each band was required for a valid surrender.

transactions is now legislated in s. 37 of the *Indian Act*.[79] In a related provision, Treaty Five provided:

> **It is further agreed between Her Majesty and her said Indians, that such sections of the reserves above indicated as may at any time be required for public works or buildings, of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvement thereon;**[80]

The next two provisions that the Natives accepted related to liquor:

> **Her Majesty further agrees with her said Indians, that within the boundary of Indian reserves, until otherwise determined by her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to be enacted, to preserve her Indian subjects inhabiting the reserves or living elsewhere within her North-West Territories, from the evil influence of the use of intoxicating liquors, shall be strictly enforced;**[81]

Related to the hunting and fishing provisions[82], Natives further agreed to the limitation of the hunting and fishing "rights" recognised in the treaty, specifically:

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79 R.S.C. 1985, c. I-5.

80 Morris, *supra* note 16 at 346.

81 Morris, *supra* note 16 at 346. Note that although this may not seem like *something* Natives were *giving* up, this provision would seem to clearly extinguish any claim to an *inherent* aboriginal jurisdiction over liquor laws.

82 *Infra* at 38.

subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government;[83]

Finally, there were a number of promises[84] made by the chiefs on their own behalf and as representatives of all Indians inhabiting the treaty area. Specifically the promises were[85]:

And the undersigned Chiefs, on their own behalf, and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will, in all respects, obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or

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83 Morris, *supra* note 16 at 346. Similar to note 81 above, this provision has the bands accepting government regulations over their hunting practices and in the process giving up their previously unlimited hunting and fishing activities.

84 It is arguable that these promises lack constitutional protection. S. 35(1) *Constitution Act*, 1982 R.S.C. 1985, App. II, No. 44 stated:

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

It is only the rights "of the aboriginal people of Canada" which are protected. The Crown rights flowing from the treaties are not mentioned in s. 35. In this way s. 35 can be misunderstood to cast a blanket of constitutional entrenchment over all of the treaty promises. This distinction becomes important when looking at amendments to the treaty. Obviously it will be much more difficult to amend the Crown promises to the Natives than it will be to amend the reverse. However, just because Aboriginal promises made in Treaty Five were not constitutionally entrenched, this does not take away the gravity and significance of those promises. Constitutional entrenchment served to protect the treaty promises for Aboriginal people against legislative amendment or extinguishment.

85 Morris, *supra* note 16 at 347.

whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts; and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or traveling through the said tracts or any part thereof: and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.[86]

The Crown Promises

The first promise the Crown made to the Indians in Treaty Five was:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided all such reserves shall not exceed in all one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families... .[87]

This promise was made with the proviso to respect lands then under cultivation by Natives subject to the treaty. The treaty then goes on to describe the bands, specifically Poplar River, Norway House, and the breakaway band located near Fisher River.[88] All the bands subject to this treaty were given 160 acres of land

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86 *Ibid.*

87 *Ibid.* at 344. The paragraph goes on to set out the boundaries of each particular reserve

88 The Fisher River band was a breakaway from Norway House band that was given land near Fisher River under this treaty. Morris, *supra* note 16 at 344-5

per family of five, except for the Fisher River band, which received 100 acres of land per family of five.[89]

The next promise made by the Crown was to give each man, woman and child a present of five dollars "in extinguishment of all claims heretofore preferred".[90] This was over and above the annuities mentioned later.

The third promise related to education.[91] It stated:

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[89] The 160 acres was less than the 640 acres given in Treaty Four and Six signed the year before and the year after respectively. The reason for the disparity in the land allotments concerned the value of the land given up. In a letter (*Ibid.*, at 162) to Morris, Thomas Howard stated:

> But I at last made them understand the difference between their position and the Plain Indians, by pointing out that the land they would surrender would be useless to the Queen, while what the Plain Indians gave up would be of value to her for homes for her white children.

The same logic would explain the lesser amount given to the Fisher River band. However, the land subject to Treaty Three in the North-West Angle was of a similar type as Treaty Five, yet it gave one square mile per family of five (Morris, *supra* note 16 at 323).

[90] In Treaty One and Two, $3.00 per person was given with no extinguishment statement. In Treaty Three, $12.00 was given with an included extinguishment clause like that of Treaty Five. Treaty Four was more complex in that the Chief received $25.00, headmen $15.00, and all others received $12.00, with no extinguishment clause. Treaty Six used the same pattern as Treaty Three.

[91] In Treaty One and Two (Morris, *supra* note 16 at 315 and 319 respectively) the provision stated:

> And further, Her Majesty agrees to maintain a school on each reserve hereby made, whenever the Indians of the reserve should desire it.

Treaty Three and Treaty Six (Morris, *ibid.* at 323 and 353 respectively) had the identical provision to Treaty Five, whereas Treaty Four (Morris, *ibid.* at 333) stated:

> Further, Her Majesty agrees to maintain a school in the reserve, allotted to each band, as soon as they settle on said reserve, and are prepared for a teacher.

And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.[92]

The fourth promise was also important stating:

Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described.[93]

The word "avocation" in modern parlance means "employment or business"[94]. Therefore to today's reader of the treaty, the Crown promise arguably could be understood to mean commercial hunting and fishing. However, legally speaking the definition of avocation is quite different. Black's defines "avocation" as:

A calling away, a diversion; suggesting idea of smaller affairs of life, or subordinate or occasional employments, or hobbies, as distinguished from one's ordinary or principal occupation.[95]

As well, an older edition Oxford Dictionary defines "avocation" as a "distraction; minor occupation"[96]. Clearly the word that should have been used if the drafters

92 Morris, *supra* note 16 at 346.

93 *Ibid.*

94 Webster's Dictionary, (Ivyland: POP-M,1991) at 43.

95 *Black's Law Dictionary*, 5th ed., (St. Paul: West Publishing Co., 1979) at 124.

96 *Oxford English Dictionary*, 5th ed.(Oxford: Clarendon Press, 1984) at 80.

meant to state commercial purposes, would have been "vocation". As we will see[97], it was the understanding of the Aboriginal parties which was most significant in the interpretation of treaty terms[98]. Therefore the actual word used in the treaty may be irrelevant if a band can show that it was understood to mean occupation and that the Aboriginal people engaged in commercial hunting and fishing at the time the treaty was made.

The final aspect of the hunting and fishing provision, was the territory covered. In the treaty the hunting and fishing area referred to included the whole of the treaty area. The *Natural Resources Transfer Agreement*[99] unilaterally changed these treaty provisions. The agreements were between the federal government and each of the three prairie provinces. They specifically stated that[100]:

> **13. 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**

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97 *Infra at* 55.

98 On this point it is interesting to note that in *A Dictionary of the Cree Language*, 1st ed. (Toronto: Church of England, 1938) there is no Cree translation for "avocation". However there are two words for "vocation", those being (work) Uto'skawin and (calling) nuto'mikosewin. This dictionary, although published in 1938, was based upon the work of Rev. E.A. Watkins in 1865. It would be interesting to know which word James McKay used to translate the treaty in 1875.

99 *The Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26 (art. 12 in Alta., Sask., and art. 13 in Man.).

100 See Woodward, *supra* note 61 at 319.

> **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.**[101]

Several separate monetary promises can be grouped together. Each of these promises were similar in nature, in that a given sum of money was promised to various members of a band. To begin with:

> **and shall in every year ensuing the date hereof, at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of five dollars per head yearly;**[102]

Also:

> **It is further agreed between Her Majesty and the said Indians that the sum of five hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians, in manner following, that is to say: - In the reasonable discretion as regards the distribution thereof among the Indians inhabiting the several reserves or otherwise included herein, of Her Majesty's Indian Agent having the supervision of this treaty;**[103]

Later the document stated:

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101 *Constitution Act*, 1930, R.S.C. 1985, App. II, No. 26, (Sched.) Memorandum 1, art. 13. Note that R. v. Horseman [1990] 3 C.N.L.R. 95 at 117 (SCC) put an end to any arguments regarding the numbered treaties allowing commercial hunting.

102 Morris, *supra* note 16 at 346.

103 *Ibid.*

It is further agreed between Her Majesty and the said Indians, that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, shall receive fifteen dollars per annum;[104]

The final promise made in Treaty Five was the grant of chattels. The first and largest was the grant "once and for all" of a reasonably long list of farming implements[105]. Included in this list were items such as axes, saws, ploughs, and harrows. Also included was enough seeds of wheat, barley, potatoes, and oats to "plant the land actually broken up for cultivation by such band"[106]. Next, the chief and three subordinate officers were to receive a suit of clothing once every three years. Finally, a flag and medal were given to the chief in recognition of the execution of the treaty.[107]

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104 *Ibid.* at 347.

105 *Ibid.* at 346 for the complete list.

106 *Ibid.* at 347.

107 It could be argued that a band gave up any claim to true sovereignty by accepting the flag, or that the medal indicated the status of the chief as an officer of the Crown. However, these arguments go beyond the present analysis and do not directly relate to the Manitoba Framework Agreement. However, note that the suit of clothing was referred to as a "uniform", Morris, *supra* note 16 at 133. Note also the significance placed on the medals given, *Ibid.* at 74:

> **CHIEF - "I will now show you a medal that was given to those who made a treaty at Red River by the Commissioner. *He* said it was silver, but *I* do not think it is. I should be ashamed to carry it on my breast over my heart. I think it would disgrace the Queen, my mother, to wear her image on so base a metal as this. [Here the Chief held up the medal and struck it with the back of his knife. The result was anything but the 'true ring,' and made every man ashamed of the petty meanness that had been practised.] Let the medals you give us be of silver - medals that shall be worthy of the high position our Mother the Queen occupies."**

Accepting the flag also raises the question of accepting the Queen's law, see

These promises can be divided into continuing obligations by the Crown and one-time grants. The continuing obligations will be the promises potentially affected in 1997 by the Framework Agreement. These divide into three major obligations and five minor obligations, based on the greatest potential pecuniary gain that would be inherent in the promise.

There were three minor continuing obligations.[108] These were all the continuing payments to band members, chief and council. Also included in the list was the triennial suit of clothing awarded to chief and council, and finally the five hundred dollars for ammunition and net twine. Although the payments of five, twenty-five, and fifteen dollars might have been significant in the 1800's, these continued payments are now only symbolic.

EXISTENCE AND EXTINCTION

So far we have seen historical accounts and the provisions of an actual treaty. However, the courts have imposed their own rules to determine which

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Morris, *ibid.* at 73:

> GOVERNOR - "the Queen will have policemen to preserve order, and murderers and men guilty of crime will be punished in this country just the same as she punishes them herself."

108 This categorisation is entirely subjective, for the purpose of showing what is of modern concern. Minor obligations could have significant repercussions today, see *ibid.*

treaties will be recognised and upheld by the law. The identified requirements for a valid treaty are:

> **(iii) Benefits both the Crown and the Indians (consideration)**
> **(iv) The intention of the parties is to have mutually binding obligations (*which would be solemnly respected*)**
> **(v) Ceding of land is not a necessary element for an Indian treaty, for instance, the Maritime peace treaties. Indian treaties could include any agreements concluded by the Crown with the Indians as these agreements are interpreted liberally in favour of Indians with the Crown having the onus of showing that they are not treaties**
> **(vii) Indian treaties create continuing rights which are passed on to the successors of the people who originally entered the agreement.**[109]

In Sioui the Court referred to five specific factors which helped determine whether the parties intended to enter into a binding treaty:

> **1. Continuous exercise of a right in the past and at present;**
> **2. The reasons why the Crown made a commitment;**
> **3. The situation prevailing at the time the document was signed**
> **4. Evidence of relations of mutual respect and esteem between the negotiators, and**
> **5. The subsequent conduct of the parties.**[110]

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109 Reiter, *supra* note 66 at III-2. Note that criteria (i) "The common understanding of parties to the document at the time it was executed", and (ii) "made by persons in authority", are elaborated in the following pages and (vi) "Indian treaties are not international treaties" was more of an interpretive principle than a criteria for a valid treaty. Note also that criteria (iii) and (iv) come from Simon, *supra* note 52 (Italics mine), while (v) comes from Nowegijick v. R. [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, and (vii) comes from the Town of Hay River v. R., *supra* note 63.

110. Sioui, (1990) 56 C.C.C. (3d) 225 (SCC) [hereinafter Sioui cited to C.C.C.] at 240.

All of these criteria are used by the courts to determine whether a document is a treaty, because to date strictly oral agreements have never been judicially determined.[111] Clearly the Supreme Court in both Simon and Sioui is advocating a liberal interpretation of what constitutes a "treaty". In particular, the Supreme Court in Simon quoted Norris J.A. of the British Columbia Court of Appeal, saying in part:

> **..."treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes.[112]**

This statement cast a broad net to potentially encompass a wide variety of documents.[113]

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111 See R. v. Cote (1993) 107 D.L.R. (4th) 28 at 47. In this case the *Treaty of Swegatchy* was the subject of judicial scrutiny. The treaty was written at one point but "all written traces" of the treaty disappeared. This is not the same question as a purely oral agreement, but presumably similar rules would apply. Note that the Supreme Court of Canada did not add anything to this particular point since they "assumed without deciding" the existence of the treaty, see R. v. Cote (1996) 138 D.L.R. (4th) 385 at 419. The only other thing that comes close to this question were oral promises made in the negotiations of Treaty One and Two, which were later incorporated as adhesions to those treaties in 1875. These adhesions have never been the subject of litigation.

112 Simon, *supra* note 52 at 408.

113 In the two leading cases, Simon, *ibid.*, and Sioui, *supra* note 110, treaty rights were raised as defenses to charges under provincial acts. In both cases the Crown called the validity of the treaty into question. The courts therefore had to determine what is a treaty for purposes of s.88 of the *Indian Act*, R.S.C. 1985, c. I-5, which reads:

> **Subject to the terms of any treaty and any other Act of Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in**

The Simon and Sioui cases are also central to an understanding of how treaty rights might be extinguished. In Simon two arguments for extinguishment were advanced by the Crown: breach of a fundamental provision and extinguishment by occupation. The fundamental provision that was allegedly breached was the promise to remain at peace, which was said to have been breached by the resumption of hostilities between the Micmac and British in 1753. This argument derived from international law, based on the rule that treaties are terminated when hostilities begin or resume. The Court held, however, that:

> the province, except to the extent that those laws are inconsistent with this Act or any order, rule regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under the Act.

The constitutional question set by Chief Justice Dickson in Simon, but not in Sioui, was:

> Are the hunting rights referred to in the document entitled "Treaty of Articles of Peace and Friendship Renewed" and executed November 22, 1752, existing treaty rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*?

Nevertheless, the Supreme Court declined to answer this question on the basis that s. 88 applied to suspend the provincial legislation, making the constitutional question unnecessary to this case. It would seem unlikely a court could interpret "treaty" for purposes of the *Indian Act* different than that of s. 35(1) of the *Constitution Act, 1982*. If a document is enough of a "treaty" to over-ride provincial laws of general application, it would be contrary to the object and purpose of s. 35(1) to then exclude the rights from constitutional protection. This proposition found supported in R. v. Vincent, *supra* note 52 at 435 where the court held:

> In our opinion, by choosing the word "treaties" for para. 35(1), the framers intended the word to have the meaning already recognized in Canadian court decisions.

> **While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.**[114]

Instead of restricting itself to just this international law comparison, the Court commented generally on breach of fundamental provisions:

> **It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions.**[115]

This was clearly an *obiter dictum*, as the Court immediately stated that this was not necessary to decide the case.

On the second ground the Crown argued that through occupation by the "white man" under Crown grant or lease, the Aboriginal rights had been extinguished outside of reserve territory. The Court refused to decide the case on the simple assertion of adverse occupation:

> **Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises.**[116]

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114 Simon, *supra* note 52 at 404.

115 *Ibid.;* also R. v. Johnson (1990) 122 N.S.R. (2d) 280 (Pr. Ct.). Note that this case was affirmed at (1993) 120 N.S.R. (2d) 414. However the lower court's conclusion regarding the termination of the treaty was not mentioned in the Court of Appeal's reasoning, which instead relied on a close reading of the particular article to come to their conclusion.

116 Simon, *supra* note 52 at 405.

It was held that the Crown failed to meet the demand for "strict proof", and that the treaty was not shown to have been extinguished. In a bold statement, the Supreme Court in Sioui went so far as to say:

> **The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary consent to its extinguishment.**[117]

JUDICIAL TREATY INTERPRETATION

Generally[118]

The Supreme Court of Canada in Nowegijick[119] set the standard for treaty interpretation.[120] In this tax case the Court held:

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117 Sioui, *supra* note 110 at 254. This is a very interesting and unique assertion, as it could imply that even a breach of fundamental terms could not amount to extinguishment without Aboriginal consent.

118 Reiter, *supra* note 66 at III-10.

119 This is not a treaty case, but it is favourably cited in Simon, *supra* note 52 at 402, and Sioui, *supra* note 110 at 233.

120 [1983] 144 D.L.R. (3d) 193 at 198 (SCC).

> **It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian.**[121]

This statement was reiterated in Simon and again in Sioui. When revisiting this statement in Sioui the Court explained it by citing the United States Supreme Court in Jones v. Meehan.[122] In the passage cited by the Supreme Court of Canada, lack of experience in the English language, specifically in legal jargon, was a prime reason for this rule of interpretation. However, the Court went on to say:

> **The Indian people are today much better versed in the art of negotiation with public authorities than they were when the United States Supreme Court handed down its decision in *Jones*. As the document in question was signed over a hundred years before that decision, these considerations argue all the more strongly for the courts to adopt a generous and liberal approach.**[123]

If the basis for the favourable interpretation doctrine was lack of resources and education of the Aboriginal party to the agreement, then this passage would seem to imply that if that underlying reason is removed, so to should the interpretive rule. This further implies that an inversely proportional relationship exists between the education and resources of the band and the principle of

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121 *Ibid.*

122 175 U.S. 1 (1899).

123 Sioui, *supra* note 110.

generous and liberal interpretation of the agreement. Specifically, the better the professional representation for the band, the less liberal and generous should be the interpretive rule. This is exactly what was held in Eastmain Band v. James Bay and Northern Quebec Agreement (Administrator)[124]. Here the Court held at pg. 25:

> **We must be careful, in construing a document as modern as the 1975 Agreement, that we do not blindly follow the principles laid down by the Supreme Court in analyzing treaties entered into in an earlier era. The principle that ambiguities must be construed in favour of the aboriginals rests, in the case of historic treaties, on the unique vulnerability of the aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position, in languages and with legal concepts which were foreign to them and without adequate representation:**

And went on to hold on the same page:

> **In this case, there was simply no such vulnerability. The Agreement is the product of a long and difficult process of negotiation. The benefits received and concessions made by the aboriginal parties were received and given freely, after serious thought, in a situation which was, to use their counsel's expression, one of "give and take".**

At what point does this rule become inapplicable? The recent Royal Commission stated:

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124 Eastmain Band v. James Bay and Northern Quebec Agreement (Administrator) (1992) 99 D.L.R. (4th) 16 (FCA).

> **We do not suggest that there is a sharp dividing line between these classes of agreements. The historical context of the relationship between Aboriginal and non-Aboriginal people is relevant to all treaties, as is the general fiduciary relationship between Aboriginal peoples and the Crown described in *Sparrow*. The treaties made before the twentieth century are clearly historical, as are the numbered treaties made in relatively remote parts of Canada early in this century (Treaties 8, 9, 10, and 11). Treaties made in 1975 and later can be characterized as modern. However, each treaty is unique, and as the courts have said, the factual context of each treaty must be considered when approaching issues of interpretation.**[125]

There are communities today that may not be able to afford adequate representation. If such representation was not provided to them, it would seem fair to reactivate the interpretive rule in favour of Aboriginal parties.

INTENT

In Sioui the court held:

> **In my view, the treaty essentially has to be interpreted by determining the intention of the parties on the territorial question at the time it was concluded. It is not sufficient to note that the treaty is silent on this point. We must also undertake the task of interpreting the treaty on the territorial question with the same generous approach toward the Indians that applied in considering earlier questions. Now as then, we must do our utmost to act in the spirit of *Simon*.**[126]

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125 Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol. II, part 1, (Ottawa: Canada Communication Group, 1996) at 27.

126 Sioui, *supra* note 110 at 258.

Federal Government

The common law requirements regarding the competency of the Crown's representative to sign a treaty were dealt with in Simon. The Court started its discussion by completely rejecting the reasoning of R. v. Syliboy.[127] In Simon the Supreme Court of Canada had a window of opportunity, in that the treaty under consideration had been judicially considered eight times, with only Syliboy rejecting the treaty's validity. Regarding capacity, the Court stated:

> It is fair to assume that the Micmac would have believed that Governor Hopson, acting on behalf of His Majesty the King, had the necessary authority to enter into a valid treaty with them.[128]

Here the Court set out a subjective capacity test. The question that must be asked to determine Crown capacity is: did the band representatives believe that the local governmental authority was acting on behalf of the Crown?

When this topic was revisited in Sioui, the court had a more difficult time because there were no judicial rulings on the alleged treaty in question. In this case the Court elaborated on the test to be applied:

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127 Simon, *supra* note 52 at 400; R. v. Syliboy [1929] 1 D.L.R. 307 (N.S. Co. Ct). Patterson J. held that Indians were essentially possessions, the interest in which passed to whichever "civilized nation" was in power.

128 Simon, *ibid.* at 401.

> **To arrive at the conclusion that a person had the capacity to enter into a treaty with the Indians, he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.**[129]

Here the Court clearly stated a modified objective test. By inserting a reasonableness standard, the Court removed the main subjective element, *i.e.*, the Aboriginal belief in the capacity of the Crown representative regardless of the reasonableness of that belief. However, it did allow for an exploration of the facts which might have contributed to belief in that capacity. This differed from a pure objective test, which would simply ask: given this particular Crown representative, would a reasonable person think he had capacity to bind the Crown? Instead, the Court set out the modified objective test: given this Crown representative, would the reasonable band representative believe that he had the capacity to bind the Crown? This is a subtle but important difference. In the Sioui case, the court then went on to examine General Murray's actual authority, and then that authority as it would have appeared to the Huron. The court found that General Murray had actual authority to sign for the Crown, as well as apparent authority from the viewpoint of the Hurons.[130]

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129 Sioui, *supra* note 110 at 236.

130 *Ibid.* at 237.

Band

The Simon case simply accepted the proposition that the then Micmac chief and three other signatories were representatives of the Micmac people.[131] No further evidence was cited, and no explanations were offered for the conclusion. In the Sioui case however, the Court did enter an analysis of Aboriginal capacity.[132] This centered on the Crown argument that to have capacity, the Natives must claim "historical occupation or possession of the lands in question".[133] The court rejected this argument as it applied here, saying;

> There is no reason why an agreement concerning something other than a territory, such as an agreement about political or social rights, cannot be a treaty within the meaning of s. 88 of the *Indian Act*.[134]

This has been the only legal capacity argument raised to date. As mentioned earlier, the interpretive rule giving a broad and generous interpretation to treaties was applied in these cases. The Court in Sioui did not cite any evidence

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131 Simon, *supra* note 52 at 401. Regarding the accused in this case, the Supreme Court of Canada held that direct descendancy did not have to be proved. The fact that the accused was a "Shubenacadie - Micmac Indian, living in the same area as the original Micmac Indian tribe" was sufficient evidence to allow him to raise the treaty in his defence.

132 Sioui, *supra* note 110 at 238.

133 *Ibid.*

134 *Ibid.*

that the four band members acted on behalf of the band, nor that the chief was acting as spokesman for the entire Micmac nation. Despite the apparent lack of evidence the Court had no problem finding the requisite capacity.

Historical Evidence[135]

To find capacity, the court relied on putting the treaty in a historical context. Historical evidence, such as accounts of the circumstances which existed at the time of the treaty signing, were used. Examples in the Sioui case included citing the work of F.X. Garneau, *Histoire du Canada Francais* (1969), vol. 3, and *Governor Murray's Journal of the Siege of Quebec (1939)*. There is significant danger in relying on this type of secondary, scholarly evidence to interpret treaties. Despite the fact that courts allow the introduction of oral evidence,[136] there is a greater weight of European documentation from that period of history, and it is non-Aboriginal historians who interpret Aboriginal history. There are obvious language barriers that must be crossed, along with the cultural barriers, for accurate interpretation and reporting. As a rule,

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135 In this section I restrict my comments to examples of legal discrepancies that have occurred relating to the judicial interpretation of "history". There is no intention to enter into a philosophical debate. On that topic as it relates to Native law see: Joel Fortune, "Construing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History", (1993) 51(1) University of Toronto, Faculty of Law Review 80.

136 R. v. Taylor and Williams (1981) 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (CA).

secondary historical writings should be admitted only in keeping with the Court's cautionary words:

> **As this court recently noted in *R. v. Horse* (1988), 39 C.C.C. (3d) 97 at p. 108, 47 D.L.R. (4th) 526 at p. 537, [1988] 1 S.C.R. 187, extrinsic evidence is not to be used as an aid to interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words form the written agreement.**[137]

Does secondary historical evidence need to be used at all? Despite the warnings in Sioui, there seems to be some confusion over the test to be applied. The Sioui court adopted a subjective test for the interpretation of treaty rights. This position can be stated in the question: "what did the original parties at the time, intend the rights to be?". The opposing position would be an objective test, which would place the focus on what the words mean now. Historical evidence might still be used, but it would only go to clarify what a reasonable interpretation of the treaty rights might be. This test could be stated as: "what is a reasonable interpretation of the terms of the treaty?". This is exactly what happened in Simon. Instead of the volume of historical data examined in Sioui,

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137 Sioui, *supra* note 110 at 243. However, note R. v. Badger, *supra* note 63 at 95 (SCC):

> **The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement.**

Although not overruling Horse, this statement would seem to imply that historical evidence (they did not distinguish between primary or secondary evidence) would be required in almost every treaty case to determine "the full extent of the oral agreement".

the court determined the scope and nature of the treaty rights within two pages. The court did not go beyond the treaty's text itself.

The Supreme Court's warning about the use of extrinsic historical evidence places the law in a curious state. At present the test regarding intention seems to be an objective test, which all but removes intention as a consideration. As shown in Simon[138] and stated in Sioui, intention should only be looked at when there is some ambiguity in the text of the treaties. If the Court determines that there is ambiguity, then a subjective intention test should be administered. Once that occurs there would seem to be little limit on the amount or source of extrinsic evidence that can be brought to bear on the question.[139]

Despite these strong words from the Supreme Court of Canada, the case of R. v. Johnson[140] released a few months prior to Sioui, clearly shows how these tests have been interpreted. Johnson was a Micmac accused of selling tobacco without a registration certificate, and not remitting required tax returns. Johnson used the *1752 Treaty* as a basis for the right to sell tobacco without holding a valid registration certificate and without filing the required tax returns.

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138 Simon, *supra* note 52 at 402.

139 Note also Ontario (Attorney-General) v. Bear Island Foundation (1989) 68 O.R. (2d) 394 (CA), where there were 120 sitting days and more than 3,000 exhibits entered at trial. Although all of this evidence did not just relate to the treaty in question.

140 R. v. Johnson (1990) 122 N.S.R. (2d) 280 (Prov. Ct.) [hereinafter Johnson cited to N.S.R.]. Note that this case was affirmed by the Nova Scotia Court of Appeal at (1994) 120 N.S.R. (2d). However the Appeal Court did not comment on the validity of the abrogation argument, but instead focused its attention on the wording of a specific article in the treaty to decide the appeal on this point.

The *1752 Treaty* was the treaty considered by the Supreme Court of Canada in R. v. Simon. The Supreme Court had held in that case the *1752 Treaty* was an "existing" treaty and had not been shown to have been abrogated by the resumption of hostilities between the Micmac and British. The Johnson case is interesting for two reasons. The issue of judicial interpretation of historical data is an area of unsettled law which this case illustrates perfectly. The second issue is, what proof is required to hold that a treaty has been extinguished? We know from Simon that it must be "strict proof", and we know from Sioui that whoever had the capacity to sign the treaty is the only one that can consent to its extinguishment. MacDougall, P.C.J. accepted the evidence of the sole historian called as an expert witness by the Crown in this case. After commenting on the "essential" nature of historical evidence in treaty cases, he went on to say that the deficiency in the Simon case was the absence of an expert witness. The court then applied the following test:

> **To understand the intention of the parties in respect of treaties or hostilities it is necessary to understand their aims and aspirations.**[141]

The Judge then stated:

> **...I think it is necessary in a court of law that the standard of proof to draw these conclusions in specific instances be much higher. I gave little weight to the conclusions drawn by the Crown witness with respect to**

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[141] *Ibid.* at 286.

> **isolated instances and focused instead on the entirety of the evidence to discern what was in the minds of the parties at the time.**[142]

Here the court clearly applied a subjective test, *i.e.*, no inquiry into the reasonableness of the belief. The only references given for specific historical evidence was the *Proclamation of 1756*, a letter from Governor Lawrence dated 11 May 1760, and the biography and autobiography of Abbé LeLoutre, a French clergyman who had lived with the Micmac. The biography and autobiography, MacDougall P.C.J. described:

> **give the only reasonable background within which to interpret the events of the period.**[143]

It was upon this evidence that the learned judge held that the *1752 Treaty* had been abrogated.

This brings us back to the first issue mentioned, namely the use of historical evidence in treaty cases. Setting aside the *res judicata* arguments which were not dealt with in a substantial manner, this case highlights all of the dangers of judicially "deciding" history. There was no defense evidence called. The sole historian, Dr. Patterson, was called by the Crown. The only specific evidence cited by the judge was non-Aboriginal in origin, dated 1756 and later.

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142 *Ibid.*

143 *Ibid.* at 287.

Upon this basis the trial judge applied a subjective test to find that the treaty rights had been extinguished. Five years earlier the same treaty was considered by the Supreme Court of Canada:

> **I conclude from the foregoing that the Treaty of 1752 was not terminated by subsequent hostilities in 1753. The treaty is of as much force and effect today as it was at the time it was concluded.**[144]

Fifty-six years before the Supreme Court of Canada dealt with it, the same treaty was judicially interpreted:

> **First, did the Indians of Nova Scotia have status to enter into a treaty? And second, did Governor Hopson have authority to enter into one with them? Both questions must I think be answered in the negative.**[145]

Could these rules be applied to self-government executive agreements? If the Manitoba Framework Agreement is put into place substantially as is, twenty years later could extrinsic evidence be used to question the terms of that treaty? Is there a time limit on what constitutes "historic" evidence? Should the negotiators not only worry about actual terms of the agreement, but concern themselves with ensuring enough evidence is presented about the negotiations

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144 Simon, *supra* note 52 at 405. Note that I am not asserting an opinion one way or the other concerning the veracity of the treaty's alleged abrogation. The point is that the result of judicially interpreted history can produce contradictory results and unequal evidentiary requirements, especially if "new" evidence is continually "unearthed".

145 R. v. Syliboy, *supra* note 127 at 313.

and the understanding of the parties at the time? It could be that the Eastmain principle would govern in these questions. However, the Johnson and Simon cases showed that previous decisions regarding treaties are not necessarily binding, and depend upon the extrinsic evidence presented. How much this will be true in the future is pure speculation, but is it beyond the possible?

CONCLUSIONS

The examination of historical evidence indicates that English-Canadian law was applicable to Treaty Indians in Manitoba, and was accepted by them. Treaties were chosen as the method of official interaction between the Crown and bands. This was done for a variety of reasons, the least of which were legal. Federal legislation was never used in relation to Manitoba Aboriginal treaties, and treaties do not fit the legal requirements for a contract.[146] Therefore the only other portion of executive power remaining was the royal prerogative, which meant a weak legal position for treaties prior to the constitutional protection of s. 35.

To provide context for the subsequent examination of the royal prerogative power, judicial treaty interpretation has been reviewed. The review focused on existence and extinguishment requirements and the rules regarding

[146] See *supra* note 66.

interpretation of their terms. Connections between these interpretive rules and royal prerogative interpretive rules will be suggested in the next chapter. It will further suggest that Aboriginal treaties could be subject to judicial review as part of the royal prerogative powers. This is one area where the use of treaties for self-government purposes could be questioned.

CHAPTER TWO
THE ROYAL PREROGATIVE

> **There has been no more fruitful cause of dispute and debate in reference to the government of the British colonies than the lack of a proper understanding of that branch of English law which relates to the prerogatives of the Crown; and in our Canadian federal system the same want of appreciation of the essential principles which underlie that law has given rise to notable disputes...[147]**
>
> **-The Hon. W.H.P. Clement, 1916**

ORIGIN AND NATURE OF THE ROYAL PREROGATIVE

The Basic Concept

De prerogativa regis is said to be "as ancient as the law itself".[148] The executive branch of government can exercise power in three ways: statutes, royal prerogative, or powers inherent in the persona of the Crown.[149] A broad definition of the royal prerogative is:

> **every act which the executive government can lawfully do without the**

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147 W.H.P. Clement, *The Law of the Canadian Constitution*, (Toronto: Carswell, 1916) at 116-117.

148 Joseph Chitty, *A Treatise on the Law of the Prerogative of the Crown and the Relative Duties and Rights of the Subject*, (Westmead: Gregg International, 1968) at 4.

149 Earl of Halsbury, ed., *Halsbury's Laws of England*, Vol. VIII(2), 1st ed., (London: Butterworths, 1907) at 243. Note that there are also prerogative immunities. See Peter Hogg, *Constitutional Law of Canada*, 3rd ed., (Scarborough: Carswell, 1992) at 15.

authority of an Act of Parliament is done by virtue of the prerogative.[150]

The problem with this definition was the inclusion of powers the Crown[151] possessed by virtue of its legal personality.[152] Therefore a modification to the earlier definition was:

> **that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others; and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer.**[153]

This supreme executive power and duty existed in the individual monarch "for the sake of unanimity, strength, and dispatch."[154] Examples of the royal prerogative abound: pardoning criminal offenders, power to declare war, the creation of currency, power to make treaties, power to issue proclamations, and

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150 Albert Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., (London: MacMillan, 1959) at 455.

151 See B.S. Markesinis, "The Royal Prerogative Re-Visited", [1973] The Cambridge Law Journal 287 at 293, who argued that the term "royal" and the prerogatives association with the "Crown" is an "unnecessary anachronism":

> **What then had started as a royal prerogative became to all intents and purposes government or even prime ministerial prerogative.**

Although this was a valid point, I will continue to refer to the "royal prerogative" due to the popularity of the use of this term.

152 Examples of this would include powers of contract or ownership that are shared with everyone in common and exist by virtue of the Crown as a legal person.

153 Chitty, *supra* note 148 at 4.

154 *Ibid.* at 3.

power to grant passports.[155]

The royal prerogative was not above or separate from the law, but subject to it. In fact the prerogative was said to be "granted by the laws of the realm".[156] The seriousness of this statement is illustrated in the comment:

> **The King holds his Prerogative by the Law & if that be abolisht[sic], the Title is left to be disrupted by the sword, & he who has the sharpest, will prove to have the best Title.**[157]

It is on this point that the prerogative has found its greatest criticisms. As Evatt stated:

> **In more modern times...the attack on the Prerogative turns out to be an attack on Executive caprice as opposed to Parliamentary enactment.**[158]

The potential for abuse of the prerogative has been one of the greatest concerns. The idea that one individual, or in modern times a group of individuals in the executive branch of government, could use the royal

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155 See generally Chitty, *supra* note 148 at 1, and Paul Lorden, *Crown Law*, (Toronto: Butterworths, 1991) at 75.

156 G.R. Elton, *The Tudor Constitution, Documents and Commentary*, (Cambridge: University Press, 1960) at 17. See also: Case of Proclamations (1611) 77 E.R. 1352 (K.B.) at 1354:

> **Also it was resolved, that the King hath no prerogative, but that which the law of the land allows him.**

157 Howard Nenner, *By Colour of Law, Legal Culture and Constitutional Politics in England, 1660-1689*, (Chicago: University of Chicago Press, 1977) at 51 quoting Shaftsbury.

158 H.V. Evatt, *The Royal Prerogative*, (Sydney: Law Book, 1987); I should note that by "modern times" he is presumably referring to the 1920's when the thesis was written.

prerogative powers as an instrument of oppression, was obviously a great concern. The judiciary has sometimes found occasion to expound this point. Lord Shaw in 1917 stated:

> **If once again and ever so slightly the (Royal) Prerogative gets into association with Executive acts done apart from clear Parliamentary authority, it will be an evil day; that way lies Revolution. Do not let the thing which has been done - in my opinion a violent thing - be associated for one moment with, or at any point said to be supported by, Royal Prerogative.**[159]

To meet such concerns, convention and jurisprudence developed, limiting the extent of the sovereign's powers. The first rule was that the prerogative was subject to the law. As Chitty described it:

> **It is a fundamental general rule, that the King cannot sanction any act forbidden by law: it is in that point of view that his Majesty is under, and not above, the laws; that he is bound by them equally with his subjects.**[160]

Following closely is the idea that the prerogative is "a beneficial

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159 R. v. Halliday [1917] A.C. 260 at 286; This refers to the detention without trial of a German born British subject during World War I.

160 Chitty, *supra* note 148 at 5. See also: Case of Proclamations, *supra* note 156 at 1353:

> **Note, the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.**

instrument for the furtherance of the public weal".[161] Since the prerogative powers were, by definition, exercised in areas which the legislature had not established control, it became crucial that they only be exercised in a benevolent manner. As the Supreme Court of Canada held:

> These prerogatives of the Crown must not be treated as personal to the sovereign; they are great constitutional rights, conferred on the sovereign, upon principles of public policy, for the benefit of the people, and not as it is said, 'for the private gratification of the sovereign'[162]

Finally, the prerogative is always subject to legislation.[163] A rare Canadian statement speaking to this relationship was made in Clement's text on constitutional law:

> for it must be remembered that in so far as the executive powers of the Crown are regulated by Imperial statute the statute governs....[164]

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161 Ruffy-Arnell v. The King [1922] 1 K.B. 599 at 609, quoted in Evatt, *supra* note 158 at 10.

162 R. v. McLeod (1883) 8 S.C.R. 1 at 26.

163 I use the term "always" in the sense that every occasion where legislation came into conflict with prerogative instruments, the legislation would prevail. I do not mean that this legislative superiority was "always" the rule. Prerogative powers predate legislative bodies, when monarchs held feudal power. The history of the prerogative is in many ways the history of our present day constitutional monarchy. See generally, Elton, *supra* note 156, and Nenner, *supra* note 157.

164 Clement, *supra* note 146 at 116. Note that although this quote does not address the prerogative specifically, it does illustrate the relationship between executive and legislative power in Canada. See also Hogg, Peter, *supra* note 149 at 15.

The Prerogative Applied to the Colonies

The royal prerogative was transported to new areas of the globe by British colonisation:

> **It is therefore safe to conclude as a general proposition of law that the Prerogative rights of the Crown attach in all portions of the British Empire subject to the prevalence of English law.**[165]

As well, Halsbury's Laws of England (first edition) stated:

> **The prerogative is not confined to the British Islands, but extends to the colonies as fully in all respects as to England, unless otherwise prescribed by imperial or colonial enactment.**[166]

This proposition was also supported many years later:

> **As a general rule, the prerogative of the Crown in Canada exists to the same extent as in England. The *Constitution Act, 1867* did not detract from or in any way affect its form and content.**[167]

However, did the division of powers extend to the prerogative? The

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165 Evatt, *supra* note 158 at 86. See also R v. Bank of Nova Scotia (1885) 11 S.C.R. 1 at 10.

166 Lord Hailsham of Marylebone, ed., *Halsbury's Laws of England,* Vol. VIII(2), 4th ed., (London: Butterworths, 1990) at 372.

167 Lorden, *supra* note 155 at 61; See also R. v Bank of Nova Scotia (1885), 11 S.C.R. 1 at 19.

answer lay in the *Queen's Counsel Case* where MacLennan J.A., stated:

> **Her Majesty is part of the Government of the Provinces in the same sense as she is part of the Government of the Dominions. That being so, it follows that the portion of legislation and government assigned to the Provinces are to be exercised by the respective Lieutenant Governors as representing Her Majesty, precisely as those belonging to the Dominion are to be exercised by the Governor General. In short, the effect of the *British North America Act* is to distribute Prerogative powers as well as powers of legislation between the Dominion and the Provinces.**[168]

This followed the reasoning in Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, where Lord Watson held:

> **and a Lieutenant-Governor, when appointed, is as much the representative of her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.**[169]

The executive heads of colonial governments could exercise prerogative powers identical to that which existed in England. This meant that new prerogatives could not be created, but must follow from those inherited by the English Crown:

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[168] A.G. for the Dominion of Canada v. A.G. for the Province of Ontario (1896) 23 Ontario Appeal Reports 792 at 799 (Ont. CA), affirmed [1897] A.C. 247 at 253 (PC):

> ...the Lieutenant-Governor... is entrusted with the whole executive powers, authorities, and functions which before the Union had been vested in or were exercisable by the Governor or Lieutenant-Governor of the Province of Canada, in so far as these powers, authorities, and functions may be necessary for the government and administration of the new Province of Ontario.

[169] Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick [1892] A.C. 437 at 443 (PC).

> it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on citizens...without any statutory authority are now well settled and incapable of extension.[170]

THE PREROGATIVE AND RESERVE LANDS

It is reasonably clear in law that the underlying power to set aside reserve lands[171] flows from the royal prerogative. To begin with, there is no legislation that deals with the creation of Manitoba "Indian reserves". The *Indian Act* does not provide for the creation of reserves, and the *Dominion Lands Act*[172] in force from 1872 to 1950[173], has only provided the means to withdraw reserve lands from operation of that act. Evidently, substantial confusion surrounded the initial creation and survey of reserve lands[174]:

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170 British Broadcasting Corporation v. Johns [1965] Ch. 32, 79 (CA). This is a debatable proposition. See George Winterton, "The Prerogative in Novel Situations", (1983) 99 The Law Quarterly Review 407.

171 "Reserve" is defined in s. 2 of the *Indian Act*, R.S.C. 1985, c. I-5 as:

> a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band

Note also that s. 91(24) *Constitution Act, 1867* R.S.C. 1985, App. II, No. 5, refers to "lands reserved for the Indians".

172 R.S.C. 1886, c.54.

173 This act was replaced by the *Territorial Lands Act*, S.C. 1950, c. 22.

174 J. Gallo, *Draft - Research Methodology for Treaty Land Entitlement*, (Ottawa: Office of the Treaty Commissioner, 1994) [unpublished] at 8.

So it would appear that any one can make a reserve and, as a matter of fact, this right appears to be used freely by all employees of the Indian Department in the North West [175]

The Privy Council in St. Catherine's Milling and Lumber Company v. The Queen[176] held that the federal government did not possess proprietary rights in "land reserved for Indians" under s. 91(24) of the *Constitution Act 1867*, but only the authority to legislate in relation to this. This case involved a purported lumber licence from the Dominion Government to the St. Catherine's Milling and Lumber Company. The province of Ontario sued for an injunction and damages on grounds that it had the exclusive authority to issue timber licences on Crown lands within the borders. The province won the case on the basis of s. 109 of the *Constitution Act, 1867*.[177] Once Aboriginal title to lands had been validly surrendered, the underlying title was in the provincial Crown, unencumbered by any Aboriginal interest. The federal Crown that had paid for the costs of making the treaty, did not "purchase" any interest in the land from the Natives, but merely removed a burden on the provincial Crown's title.

The Privy Council held in Ontario Mining Co. v. Seybold[178] that in creating a valid reserve:

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175 *Ibid.* at 11.

176 St. Catherine's Milling and Lumber Company v. The Queen [1889] 14 A.C. 46 at 57.

177 *Ibid.* at 57.

178 Ontario Mining Co. v. Seybold [1903] A.C. 73 (P.C.).

> The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two Governments.[178]

The Privy Council did not deal specifically with the royal prerogative as a source of both provincial and federal powers. This case was in a similar vein to the St. Catherine's case, in that the two parties claimed mineral rights to the same land, one under a grant from the Dominion, the other under a grant from the province of Ontario. The land that was the subject of the case was claimed to be reserve land, which was meant to provide investment funds for the band . The difference with the St. Catherine's case was that the disputed land was subject to the North-West Angle Treaty, and the Dominion argued it fell under their jurisdiction as "lands reserved for the Indians". The Privy Council decided the case relying heavily on the St. Catherine's reasoning, specifically that the Dominion had legislative authority; but this did not carry with it any proprietary interest, which lay with the Province of Ontario. Therefore there was no reserve land since the federal Crown did not have the power to set it aside. However, this decision fell within the regular rules of prerogative operating in Canada. As explained earlier, the prerogative powers follow the division of legislative powers set out in the *Constitution Act 1867*. Therefore, to explain the Privy Council's decision further, the federal executive has the prerogative power to accept the surrender of Aboriginal title, while the provincial executive had the prerogative

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[178] *Ibid.* at 82-83.

power to dispose of Crown land.[180]

This analysis was supported by the Federal Court decision in Hay River (Town) v. R.,[181] where the court held that in the territories:

> **the authority to set apart Crown Lands for an Indian reserve in the Northwest Territories appears to remain based entirely on the Royal prerogative, not subject to any statutory limitation.**[182]

In this instance the underlying title to the land was in the federal Crown because of the lack of provincial interest. In this manner the federal executive could exercise prerogative power to grant Crown land.

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180 This necessarily implies that to create a new reserve in a province both royal prerogative powers must be exercised together. Note Attorney-General for Quebec v. Nipissing Central Railway Company and Attorney-General Canada [1926] Appeal Cases 715 at 724 (PC):

> **...that the power to legislate in respect of any matter must necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights; and it may be added that where (as in this case) the legislative power cannot be effectually exercised without affecting the proprietary rights both of individuals in a Province and the Provincial Government, the power so to affect those rights is necessarily involved in the legislative power.**

This case concerned the federal power to expropriate provincial lands for the purpose of building a railway. It seems that this case could provide authority for the federal government to have enacted a similar statute regarding the creation of reserves which would have dispensed with the need to cooperate with the province.

181 Hay River (Town) v. R. (1980) 101 D.L.R. (3d) 184 (FCTD). Note that the Yukon and North West Territories, as well as the prairie provinces prior to 1930 were different in that the federal government owned the land and possessed jurisdiction under both s. 91(1A) as well as s. 91(24).

182 *Ibid.* at 186.

TREATIES AND THE ROYAL PREROGATIVE

Earlier it was shown that Native treaties had their legal basis in the royal prerogative.[183] When the rules of judicial treaty interpretation are compared to the rules governing the royal prerogative, links between the two become apparent. Prior to s. 35 of the *Constitution Act, 1982*[184] treaty rights could be unilaterally affected by statute.[185] This accords exactly with the rule that prerogative instruments could always be overridden by statute.

Also, the fundamental principle of treaty interpretation, specifically that treaties should be liberally construed with doubts resolved in favour of the Aboriginal, has a clear prerogative predecessor. Chitty described a prerogative grant as normally interpreted in favour of the king.[186] However, he went on to say that this was "subject to many limitations and exceptions."[187] Specifically, treaties could fall under two of these exceptions, namely:

> In the second place, the construction and leaning shall be in favor of the subject, if the grant shew that it was not made at the solicitation of the grantee , but *ex speciali gratia, certa scientia, et mero motu regis.*

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183 See *supra* Chapter One at 26.

184 R.S.C. 1985, App. II, No. 44.

185 See: Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1979) 107 D.L.R. (3d) 513 at 551 (FCTD); Logan v. Styers et al. (1959) 20 D.L.R. (2d) 416 at 424 (Ont. HC); Sikyea v. The Queen [1965] 2 C.C.C. 129 (SCC); R. v. Sparrow (1990) 70 D.L.R. (4th) 385 at 400 (SCC).

186 Chitty, *supra* note 148 at 393.

187 *Ibid.*

> **Though these words do not of themselves protect the grantee against false recitals, &c.**
>
> **In the third place, if the King's grants are upon a valuable consideration, they shall be construed strictly for the patentee for the honor of the King.**[188]

The third exception clearly fit the value of the consideration which flowed to the Crown from extinguishment of the Aboriginal title.

This interpretive principle also complemented the other major rule that the royal prerogative be exercised for the benefit of the people. The notion that the royal prerogative must not be used for "executive caprice" or "the private gratification of the sovereign", is similar to modern judicial descriptions of treaties. Compare, for example, the last part of the above quote regarding consideration with the vocabulary used in the following descriptions:

> **(c) As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;**[189]

And:

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188 *Ibid.* at 394. See *Black's Law Dictionary*, 5th ed., (St. Paul: West Publishing, 1979) at 516 that defines *Ex mero motu*:

> **Of his own mere motion; of his own accord; voluntarily and without prompting or request. In England, royal letters patent which are granted at the Crown's own instance, and without request made.**

189 Saanichton Marina Ltd. v. Claxton (1989) 36 B.C.L.R. (2d) 79 at 84 (BCCA) listing the general principles of treaty interpretation.

> **Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or Aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.[190]**

The similarity of wording is unmistakable. The fundamental principles of the royal prerogative and the conditions surrounding its use, suggest a further link to the judicial interpretation rules for treaties. Moreover, this connection raises some interesting issues. If treaties are acknowledged as the prerogative instruments they are, it would seem logical that they would be subject to the same rules of judicial review as other manifestations of the royal prerogative.

JUDICIAL REVIEW

The judiciary has traditionally been reluctant to question the executive exercise of prerogative powers:

> ***The Case of Proclamations*** **decided that the mere claim of the holder of a power was not conclusive and that it was for the courts to decide on its existence and true extent. But the courts also laid down the principle that, though they will inquire into the existence and ambit of the prerogative, they will not question the mode or manner of user of admitted**

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190 Here the Supreme Court of Canada in R. v. Badger [1996] 2 C.N.L.R. 77 at 92 set out further principles of treaty interpretation.

prerogatives.[191]

However, two cases decided in the 1980's had significant impact on the opportunity for judicial review of the prerogative.[192] The first was a House of Lords decision, C.C.S.U. v. Minister for Civil Service.[193] Lord Diplock gave three grounds to support judicial review of the prerogative: illegality, irrationality, and procedural impropriety.[194] Unfortunately the case did not require a decision on whether a direct exercise of the prerogative would allow judicial review. Since the case stemmed from administrative actions, the question regarding judicial review of direct prerogative powers remained open at common law. Specifically, the Minister for Civil Service (who was actually Prime Minister Margaret Thatcher), issued an Order in Council banning members of the Government Communications Headquarters (GCHQ) from union membership. This was done without prior consultation with the union or its members. The GCHQ was part of the British national defence scheme, monitoring foreign communication. It was not created by statute, but through the royal prerogative. The main issue in the

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191 B.S. Markesinis, "The Royal Prerogative Re-Visited", *supra* note 151 at 293. See also The Case of Proclamations, *supra* note 156, and Darnel's Case (1627) 3 St.Tr. 1. A substantial number of cases have supported this view; R. v. Allen (1862) 121 E.R. 929; Chandler v. D.P.P. [1964] A.C. 763 (HL); Blackburn v. Attorney-General [1971] 1 W.L.R. 1037 (CA).

192 See generally Evatt, *supra* note 158 at Ch. XXIV; and, Lordon, *supra* note 155 at 72-74.

193 C.C.S.U. v. Minister for Civil Service [1984] 3 W.L.R. 1174 (*sub. nom.* The GCHQ case) [hereinafter CCSU].

194 *Ibid.* at 1196-1197.

case was whether a duty to act fairly applied to a minister issuing Orders in Council pursuant to a prerogative power. The court did find that powers derived from the prerogative could be subject to review, although not in this case because the minister weighed national defence considerations against the duty to act fairly. However, this case only involved administration of an agency created pursuant to royal prerogative powers. The question that still remains is: can a direct exercise of a prerogative power be reviewed by the courts? For example, could the courts review the creation of the GCHQ? Although strictly *obiter dictum*, Lord Fraser stated:

> **I therefore assume, without deciding, that his first proposition is correct and that all powers exercised directly under the prerogative are immune from challenge in the courts.**[195]

However, in Canada[196] the Supreme Court held in Operation Dismantle v. R.[197] that the direct exercise of prerogative powers is subject to review under s. 32(1)(a) of the *Canadian Charter of Rights and Freedoms*[198]. In this case, the

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195 CCSU, *supra* note 193 at 1185.

196 The Privy Council implicitly reviewed the exercise of royal prerogative powers in Canada in Bonanza Creek Gold Mining Company, Limited v. The King [1916] 1 A.C. 566 at 580. However, this review concerned the scope of a province's prerogative power to create a company. This should be clearly distinguished from an inquiry into the content of the executive decision or the manner in which it was arrived at, *e.g.*, whether it conforms to a duty of fairness. See also Philip Allott, "The Courts and the Executive: Four House of Lords Decisions" [1977] The Cambridge Law Journal 255 at 264.

197 Operation Dismantle v. R. [1985] 1 S.C.R. 441 at 464.

198 R.S.C. 1985, App. II, No. 44.

Supreme Court examined whether the Cabinet decision to allow the testing of the cruise missile in Canada violated s. 7 of the *Charter*. Operation Dismantle was an anti-nuclear group which sought an injunction to stop the missile testing. The federal government gave two lines of defence. The first argued that the decision to allow the testing was within the royal prerogative and therefore exempt from judicial review. The second argued that this decision was a political question and should not be subject to review by the courts. It is only the first line of argument which concerns the present discussion.

The government reasoned that s. 32(1)(a) of the *Charter* applied "to the Parliament and government of Canada in respect of all matters within the authority of Parliament", which implied review of powers statutorily derived. The majority held that there was no reason in principle to divide Cabinet decisions made pursuant to statute from those made pursuant to the royal prerogative. Therefore powers exercised under the royal prerogative would be subject to review by the courts for compliance with the *Charter*.[190]

If treaties enjoyed any protection from judicial review these cases would appear to have changed that. Two potential areas become immediately apparent. The first would be a review of treaties under the *Charter*. One

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[190] This view was affirmed in Air Canada v. British Columbia (Attorney General) [1986] 2 S.C.R. 539 at 545:

> **All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives.**

immediate consideration would be s. 25.[200] This section, however, would not appear to block judicial review on *Charter* grounds, as long as that review did not result in the abrogation or derogation of any Aboriginal, treaty, or other right pertaining to the Aboriginal people of Canada.[201]

The second area of interest is the enforcement of administrative law duties arising from these executive agreements, *i.e.*, the duty of fairness .[202] The G.C.H.Q. was an administrative body created by exercise of the royal prerogative. This would be comparable to an Aboriginal administrative body created by the royal prerogative. In the CCSU case the Minister issuing an Order-in-Council under prerogative power was held to a duty of fairness. Would an Aboriginal institution recognised by treaty be subject to similar administrative law duties? Could this have an impact on the exclusivity of an Aboriginal

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200 S. 25 stated:

> 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; and
>
> (b) any rights of freedoms that now exist by way of land claims agreements or may be so acquired

201 I cannot detail this observation further and must admit to being unable to supply any concrete examples of how this stream of analysis might affect a modem self-government agreement. Someone more versed in *Charter* law may be able to provide a more complete analysis of this.

202 See CCSU, *supra* note 193.

legislature?[203]

THE ROYAL PREROGATIVE AND FIDUCIARY OBLIGATIONS

Beyond judicial review and rules of treaty interpretation, the royal prerogative suggests further connections with contemporary jurisprudence, specifically the fiduciary duties imposed on the Crown.

When discussing the origins of fiduciary duties of the Crown, many commentators point to the *Royal Proclamation, 1763*,[204] but few have examined the jurisprudence on the Crown-Native relationship, prior to Guerin.[205] Even

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203 The House of Commons is obviously not subject to judicial review regarding the "fairness" of legislation, like that of an administrative tribunal. S.A. De Smith, Lord Woolf & J. Jowell, ed., *Judicial Review of Administrative Action*, 5th ed., (London: Sweet & Maxwell, 1995) at 401. But could an Aboriginal legislature be subjected to judicial review due to its legal recognition using the royal prerogative? Note also the difference between "recognition" and "creation" by royal prerogative. This is the same difference between an "inherent" and a "delegated" right. This difference will be dealt with more substantially in the final chapter.

204 See William McMurtry, and Alan Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective", [1986] 3 C.N.L.R. 19 at 26; Brian Slattery, "Understanding Aboriginal Rights", (1987) 66 The Canadian Bar Review 727 at 753; Darlene Johnston, "A Theory of Crown Trust Towards Aborigianl Peoples" (1986)18(2) Ottawa Law Review 307 at 310; Michael Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27(1) U.B.C. Law Review 19 at 29; John Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin* v. *The Queen*", (1985) 30 McGill Law Journal 559 at 568.

205 See Leonard Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility" (1994) 32(4) Osgoode Hall Law Journal 735 at 740; and Richard Bartlett, "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: *Guerin v. The Queen*", (1984-85) 49 Saskatchewan Law Review 301 at 305. The approach taken by

when this examination has been undertaken, it was done for the purpose of supporting the Guerin decision and its finding of fiduciary duties on the Crown. For example, Bartlett stated about Canada (A.G.) v. Giroux[206]:

> **Duff J. concluded that the Commissioner, their "statutory tutor," was the "trustee of the Indian title." He founded the fiduciary relationship between the Crown and the Indians on the powers of control and management vested in the Commissioner.[207]**

With respect, nowhere in Duff J.'s judgment did he mention a fiduciary relationship. The problem here was equating the term "trustee" or "in trust for" with the modern Guerin like fiduciary duties. If one takes the perspective of trying to justify the Guerin judgment, then earlier cases which described the Crown-Native relationship in equitable terms such as "trustee" would seem to provide powerful support. The difficulty, however, is that this view takes the cases totally out of context.

It was true that Duff J. made numerous references to the nature of Crown responsibilities to Aboriginal people using the vocabulary of equity.[208] However,

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both of these authors was to examine the previous case law, for the purpose of finding examples of earlier "fiduciary obligations".

206 Canada (A.G.) v. Giroux (1916), 53 S.C.R. 172.

207 Bartlett, *supra* note 205 at 304.

208 See *supra* note 206 at 195-197. An abbreviated version of the facts are as follows. In 1869 the Montagnais Band surrendered to the Crown, for sale, a portion of reserve lands including the subject of the litigation, lot No. 3. A portion of lot No. 3 was then sold to David Philippe in 1878 who was a "status Indian". After falling behind in payments, the half-lot was sold at a sheriff's sale to a Mr. Bouchard. The argument centered on whether Mr. Philippe could buy

cases from the Privy Council, both prior to and after Giroux, made the legal nature of these responsibilities clear. In St. Catherine's Milling and Lumber Company v. The Queen[209] the Privy Council characterised the Native interest in land as a "personal and usufructuary right, dependent upon the good will of the Sovereign". Later in Henry v. The King the Exchequer Court held:

> **The Crown, however, does not in respect of Indian lands and moneys stand in the position of an ordinary trustee. In the first place the Crown does not personally execute the trust. Its administration thereof is vested in a department of Government, over which a Minister of the Crown responsible to Parliament presides. That has been the position of Indian affairs since the year 1860... and whenever in respect of such matters any power, authority or discretion is vested in and exercised by the Governor in Council, or in the Superintendent General of Indian Affairs, Parliament alone has the authority to review the decision come to or the action taken.[210]**

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back a portion of surrendered reserve land. The Crown alleged that since Mr. Philippe was an "Indian" he only possessed the land as if "located" there by the Crown, and did not own it in fee simple. Therefore the sheriff's sale was void since Mr. Philippe did not have good title, which resulted in the Crown having continued ownership in the land. The key issue in this case was whether sale of surrendered land to an "Indian" was prohibited by the *Indian Act*, 39 Vict., chap. 18. On this issue, the unanimous court held that an "Indian" was no different from anyone else in their ability to purchase surrendered reserve land, and that the purchase by an "Indian" did not somehow revert the land back under Crown control. Note that this made the majority of Duff J.'s comments concerning the Crown's "trust" responsibilities *obiter dicta*, since the land was no longer Crown land.

209 St. Catherine's Milling and Lumber Company v. The Queen, *supra* note 176 at 54. This famous case decided that title to surrendered land could be transmitted to the Crown in right of the province. The case involved the conflict over which logging permit, federal or provincial, was valid in the surrendered territory.

210 Henry v. The King (1905) 9 Exchequer Court Reports 417 at 443. This case involved an error over a debt that the Province of Canada refused to acknowledge. This error saw the sum of $68, 672.01 credited to the band's account held by the Crown, when in actuality the Province of Canada had not paid this debt. This caused a discrepancy between the Department of Indian Affairs and the Department of Finance. The band thought they were being paid yearly from the interest on this money, when in fact they were being paid from capital previously in the account. Nothing was said about this to the band until

Finally, in Attorney-General for Quebec v. Attorney-General for Canada the Privy Council had opportunity to comment on the responsibilities of the Indian Commissioner:

> **...the intent of the statute appears to be, in other words, that the rights and powers committed to him are not committed to him as the delegate of the Legislature, but as the officer who for convenience of administration is appointed to represent the Crown for the purpose of managing the property for the benefit of the Indians. If this be the correct view, then, whatever be the nature or quantum of the Commissioner's interest, it is held by him in his capacity of officer of the Crown and his title is still the title of the Crown... It is not unimportant, however, to notice that the term "vest" is of elastic import; and a declaration that lands are "vested" in a public body for public purposes may pass only such powers of control and management and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively.[211]**

Furthermore:

> **The object of the Act of 1850, as declared in the recitals already quoted, is to make better provision for preventing encroachments upon the lands appropriated to the use of Indian tribes and for the defence of their rights and privileges, language which does not point to an intention of enlarging or in any way altering the quality of the interest conferred upon the**

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the account was entirely used up and all payments stopped. The issue to be decided was if the Crown was liable as a trustee of the fund.

211 Attorney-General for Quebec v. Attorney-General for Canada [1921] 1 Appeal Cases 401 at 409. This case involved a question of title to property surrendered by the Abenakis in Quebec. The Abenakis surrendered the land in 1882 to "Her majesty the Queen". In 1887 the Dominion granted the lands by letters patent to a Mr. Tetu of Montreal. The lands passed hands several times until they wound up purchased by the Star Chrome Mining Co. from a Mrs. Thompson. Star Chrome sued Mrs. Thompson for a rescission of sale as they alleged that the property belonged to the Province of Quebec after the surrender. The Privy Council followed the St. Catherine's case in holding that the land did revert to the province after surrender.

Indians.[212]

These judgments held the Crown responsibilities to be in the nature of an officer of the Crown discharging his duties. In this sense the word "trust" can be misleading:

> **The word "trust" is used in various contexts which have no relationship to the legal meaning of the term.... Similarly, with ministers and other public officials, the Crown may entrust them with property perhaps providing that they shall hold it "in trust" for the benefit of some person or body of persons.... This governmental obligation, or "trust in the higher sense," was not a true trust in the conventional sense. It created no fiduciary obligation, and was not justiciable in the courts.[213]**

In light of these cases it seems rather tenuous to attach Bartlett's meaning to Duff J.'s vocabulary. Nevertheless, the unenforceable obligation did eventually give way to enforceable fiduciary duties. The passing from one to the other has been a relatively recent development.[214]

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212 *Ibid.* at 410.

213 Jill Martin, ed., *Hanbury and Maudsley, Modern Equity*, 13th ed., (London: Stevens & Sons, 1989) at 72. See also Kinloch v. Secretary of State for India,(1882) 7 A.C. 619 at 625 (H of L), where Lord Selborne, L.C., held:

> **Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust-a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by , the ordinary Courts of Equity; in the higher sense they are not.**

214 See Guerin v. The Queen, (1984) 13 D.L.R. (4th) 321(SCC) [hereinafter Guerin].

Despite being a great leap in concept, it seems a very short advancement of vocabulary to move from the "duty of fairness" and "upholding the honour of the King", to specific fiduciary duties imposed upon the Crown. *Black's Law Dictionary* defined "honorary" as:

> **In other contents or usages, it means attached to or growing out of some honor or dignity or honorable office, or else it imports an obligation or duty growing out of honor or trust only, as distinguished from legal accountability.**[215]

The cross-over from unenforceable moral obligation to equitable duty occurred in Guerin v. The Queen.[216] The facts in this case are well known: the federal Crown leased part of the Musqueam Indian Band's surrendered reserve land to a golf club at less than the terms upon which the band had agreed during the surrender. To find liability the court was forced to turn to equity. In Dickson J.'s view a "true trust" could not be found, because there was no trust corpus since the "Indian title" or rights in the land disappeared at the moment of surrender.[217] Therefore, the only other option left to Justice Dickson was to ground liability in a fiduciary duty owed by the Crown to the band.[218] The difficulty with this line of

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215 *Black's Law Dictionary*, 5th ed., (St. Paul: West Publishing Co., 1979) at 663.

216 (1984) 13 D.L.R. (4th) 321.

217 Guerin, *supra* note 214 at 342. See also, Smith et al. v. The Queen (1983), 147 D.L.R. (3d) 237.

218 Although royal prerogative rules may have influenced the moral obligation, or even "political trust", the royal prerogative did not play any substantive legal role in the cross-over to enforceable equitable obligations in this decision. Although

reasoning was that fiduciary obligations did not normally arise in public law areas, but instead were confined to private law. To sidestep this difficulty the majority stated:

> **The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is none the less in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.**[219]

In this way the Supreme Court of Canada was able to attach liability by describing the relationship as *sui generis,* which meant that unique rules could be applied.[220] In this case the "relationship" was specific to the situation, namely

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reserve land is still created by operation of the royal prerogative, surrendered reserve land was covered by s. 18(1) of the *Indian Act* which stated:

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

219 *Ibid.* at 341.

220 Note that the court was unanimous in result only. Justice Estey based his reasoning on agency law, holding that the Crown was an agent of the band. This position has been subject to serious criticism based on the Crown's never having held any duty to take direction from the band and the band not being party to the ultimate lease. See: Bartlett, *supra* note 205; John Hurley, *supra* note 204 at 565; Darlene Johnston, *supra* note 204 at 314. Justice Wilson held that the Crown was under a fiduciary duty concerning unsurrendered reserve land, which crystalised into an express trust upon surrender. The fiduciary duty was potentially unenforceable until the reserve land was surrendered, and then the normal rules of trust would apply. This reasoning has met with criticism ranging from mild disagreement (See Bartlett, *ibid.* at 370) to qualified approval (See Hurley, *ibid.* at 564 and Johnston, *ibid.* at 315). However, time has been the most determinative on this issue. It was in R. v. Sparrow, *supra* note 185 at 408

the surrendered land that the federal department had leased at lesser terms than that agreed to by the band. This is evidenced in the above quote by the words "with respect to that interest", *i.e.*, the interest in the surrendered land. It was to this specific situation that fiduciary duties were attached.

Later, R. v. Sparrow expanded the scope of the fiduciary description:

> **That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.**[221]

Here the court described the Crown-Aboriginal relationship as "trust-like" and defined by the "historic relationship". It was interesting that this "fiduciary relationship" should be defined by the "historic relationship".[222] What then started as applying equity to base liability under specific circumstances in Guerin, expanded to describe and define the Crown-Aboriginal relationship as a

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that Justice Dickson affirmed his view of the *sui generis* nature of the fiduciary relationship.

221 R. v. Sparrow, *Ibid.*, at 408. Note that it was later stated that the way to attain legislative objectives must "uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal people." (Sparrow at 410) Although this "guiding principle" was confined to s. 35(1) questions, the scope of s. 35(1) dealing with "aboriginal and treaty rights" made this fiduciary relationship applicable to a wide range of Crown-Aboriginal relationships. Also note the similarity to earlier quotes describing the royal prerogative.

222 This description begs the question of a common "historic relationship" for all people affected by s. 35, but the Supreme Court of Canada did not make this distinction in either Guerin, *supra* note 214 or Sparrow, *ibid.*

whole in Sparrow. Very little commentary exists that questioned the wisdom of embracing fiduciary obligations to solve these problems.[223] Instead, the lion's share of commentary accepted the fiduciary description without question.[224] Moreover, as will be discussed next, this fiduciary description was then judicially embraced and applied to describe virtually all Crown-Aboriginal dealings, without regard to potential problems.

CONCLUSIONS

The rules surrounding the royal prerogative would appear to have had some influence on the development of both treaty interpretation and the original

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223 See: J. Paul Salembier, "Crown Fiduciary Duty, Indian Title and the Lost Treasure of I.R. 172: The Legacy of *Apsassin* v. *The Queen*", [1996] 3 Canadian Native Law Reporter 1; David Owen, "Fiduciary obligations and Aboriginal Peoples: Devolution in Action" [1994] 3 Canadian Native Law Reporter 1.

224 In fact, the majority of the following authors advocated an expansion of the Crown's fiduciary obligations. See: Bartlett, *supra* note 205; Hurley, *supra* note 204; Johnston, *supra* note 204; Richard Bartlett, "The Fiduciary Obligations of the Crown to the Indians" (1989) 53 Saskatchewan Law Review 301; Clay 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(4) Alberta Law Review 1277; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 The Canadian Bar Review 261; Michael Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 University of British Columbia Law Review 19; Alain Lafontaine, " Basic Principles, Coexistence of the Fiduciary Obligations of the Crown and the Aboriginal Right to Self-Government" (Canadian Bar Association conference - *UFO's - Unidentified Fiduciary Obligations*, Winnipeg, Manitoba, May 28, 1994) [unpublished]; Rotman, *supra* note 205; Owen Griffiths, "Case Comment on *Blueberry River*: Is the Crown Fiduciary Obligation in the Currents of Change? [1996] 3 Canadian Native Law Reporter 25.

non-enforceable Crown obligations. Of present concern was the impact this influence had on treaties and ultimately self-government agreements. As discussed earlier in the chapter, since self-government agreements are tantamount to modern treaties, and still are exercises of the royal prerogative, it is uncertain what effects the current jurisprudence on judicial review would have on these self-government agreements. It is possible that those cases would allow a degree of judicial review that many bands might find unacceptable.

The imposition of fiduciary duties on the Crown is a relatively recent development in the law. This chapter has suggested strong connections in the vocabulary used to describe the royal prerogative, the unenforceable obligation the Crown had towards Natives and then eventually the fiduciary duties imposed. Fiduciary duties have been applied to almost all aspects of the Crown-Aboriginal relationship and pose a potential difficulty to the reconciliation of "autonomous" bands with duties of loyalty and supervision from the Crown. The next chapter will explore the theories of the fiduciary duties on the Crown to see if reconciliation of these two inherently contradictory notions are possible.

CHAPTER THREE
FIDUCIARY OBLIGATIONS

> **The general fiduciary obligation imposed on such fiduciaries sets the boundaries to their freedom within their powers. It points to the end towards which they must bend their exertions-the service of their beneficiaries' interests. But, as will be seen, this general obligation in practice does little more than describe compendiously a series of quite specific duties which prescribe in detail what the fiduciary must or must not do if he is to serve those interests properly.[225]**
>
> **-P.D. Finn**

INTRODUCTION

It did not take long after Guerin for an increase in the application of a sort of fiduciary 'mantra' to occur. Therefore, Guerin must be examined and then the expansion and contortions to which the label "fiduciary" has been stretched.

There were two bases upon which Dickson J. set the fiduciary obligations of the Crown:

> **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.[226]**

The statutory scheme that Dickson J. referred to was:

> **An Indian band is prohibited from directly transferring its interest to a**

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225 Paul Finn, *Fiduciary Obligations*, (Sidney: Law Book, 1977) at 3.

226 Guerin v. The Queen (1984) 13 Dominion Law Reports (4th) 321 at 334 (SCC).

> **third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763 (R.S.C. 1970, App. II, No. 1). It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[227]**

The other basis was Aboriginal title to the land, which he described in the following passages[228]:

> **The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown.**
>
> **Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.**
>
> **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 *res* .... .**

Justice Dickson (later Chief Justice) tied the fiduciary obligations of the Crown into the requirement that bands surrender land only to the Crown, and the "Indian title" to land. It should have been fair from this reasoning to say that the fiduciary obligations at their broadest relate to "Indian" land and the surrender of

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227 *Ibid.*

228 *Ibid.* at 334, 336, and 342 respectively.

it.[229] As related in the preceding chapter, that was not the case. Leading up to Sparrow there was uncertainty as to the scope of the fiduciary obligations, which prompted one judge to state:

> **With respect to the fiduciary duty itself, the plaintiffs rely heavily on the decision of the Supreme Court of Canada in *Guerin* v. *The Queen* [*supra*] and to a lesser extent, the decision in *Kruger et al.* v. *Canada*, [*supra*]. It will be noted that these cases principally dealt with the obligation of the Crown to deal with Indian reserve land, surrendered to it or taken by expropriation, in the best interests of the Indians. Whether one can extrapolate from that principle a general obligation of the Crown as fiduciary or, to put it at its broadest, as trustee of the aboriginal title in lands whose fee simple is now owned by a province or by private parties, to provide funding whenever requested by the beneficiary for the latter to bring actions for the protection of the trust *res*, remains to be seen.**[230]

With R. v. Sparrow[231] the Supreme Court of Canada vastly extended the application of the fiduciary duty. The expansion was not in the definition of the

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229 See David Owen, "Fiduciary obligations and Aboriginal Peoples: Devolution in Action" [1994] 3 Canadian Native Law Reporter 1 at 9. He reasoned that there were five "levels of existence" for the fiduciary obligation as described in Guerin. The broadest he described as relating to "the pre-existing legal right to land held by Aboriginal peoples", whereas the narrowest he described as applying "after surrender in the terms understood to be part of the surrender by the band, even if not set out in the surrender document".

230 Ominayak and Lubicon Lake Indian Band v. Canada (1987) 11 Federal Trial Reports 75 at 79 (FCTD).

231 R. v. Sparrow (1990) 70 D.L.R. (4th) 385 at 408. As quoted in the earlier chapter, Chief Justice Dickson stated for a unanimous court:

> **That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.**

fiduciary relationship, since the court relied on Guerin to define the obligation.[232] The real expansion came when the court applied the fiduciary principle as an interpretive guideline to s. 35(1) of the *Constitution Act*.[233] In this way the fiduciary was potentially applicable to all questions of "aboriginal and treaty rights", which really meant fiduciary obligations were to be applied in many cases. On top of this, by relying on the Guerin definition of the fiduciary "relationship", the *sui generis* characterisation was likewise incorporated into the mix.

Before examining the application of the *sui generis* fiduciary relationship, it is useful to briefly review "non-*sui generis*" or traditional law surrounding fiduciary obligations. This review can then be compared to principles set down regarding fiduciary obligations applied to the Crown-Aboriginal relationship.

THE LAW OF "NON-SUI GENERIS" FIDUCIARY DUTIES

It is crucial to differentiate the broad principles from the concrete application of fiduciary duties:

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232 *Ibid.*

233 R.S.C. 1985, App. II, No. 44, which stated:

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

> **Once one looks to the rules and principles which actually have been evolved, it quickly becomes apparent that it is pointless to describe a person - or for that matter a power - as being fiduciary unless at the same time it is said for the purposes of which particular rules and principles that description is being used.**[234]

Moreover, the law of fiduciary obligations is prone to over-generalising and sermonising concepts of loyalty, honour, and honesty, often at the expense of critical thought.[235] However, the courts have addressed this problem:

> **To perform this function, as well as to add practical substance to the obligation itself, the courts have had to include and to evolve a number of quite specific duties under the umbrella of the general obligation.**[236]

These duties are:

> **1. A duty not to delegate discretions;**
> **2. A duty not to act under another's dictation;**
> **3. A duty not to place "fetters" on discretions;**
> **4. A duty to consider whether a discretion should be exercised;**
> **5. A duty not to act for his own benefit, or for the benefit of any third person;**
> **6. A duty to treat beneficiaries equally where they have similar rights;**
> **7. A duty to treat beneficiaries fairly where they have dissimilar rights; and**
> **8. A duty not to act capriciously or totally unreasonably.**[237]

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234 Finn, *supra* note 225 at 1.

235 G. La Forest, "Overview of Fiduciary Duties", (*The 1993 Isaac Pitblado Lectures*, Winnipeg, Manitoba, 1993) [unpublished] 1 at 2.

236 Finn, *supra* note 225 at 15.

237 *Ibid.*

One of the most basic propositions regarding a fiduciary relationship is:

> **If a fiduciary obtains a benefit for himself at the expense of his beneficiary, there is no difficulty. The case is one of unjust enrichment, and generally speaking, an action in the nature of a quasi-contractual action will lie.**[238]

Furthermore, these duties must be carried out with "utmost diligence", with regard to strict standards of performance.[239]

The question then becomes: in what situations are these strict duties to be applied? In the leading case of Frame v. Smith, Madam Justice Wilson set out a guide to describe a fiduciary relationship:

> **Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:**
>
> **(1) The fiduciary has scope for the exercise of some discretion or power.**
> **(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests**
> **(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.**[240]

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238 Hanbury, & Maudsley, *Modern Equity*, by Jill Martin, ed., 13th ed., (London: Stevens & Sons, 1989) at 575 [hereinafter *Modern Equity*].

239 *Ibid.*, at 459.

240 Frame v. Smith [1987] 2 S.C.R. 99 at 136. This case decided whether a father has a right of action against his former wife and her present husband for interfering with his access to his children. Justice Wilson's opinion was dissenting in result only. The majority did not disagree with her fiduciary analytical scheme. Wilson J.'s analytical scheme was cited with approval by the Supreme Court of Canada in LAC Minerals Ltd. v. International Corona Resources Ltd. (1989) 61 D.L.R. (4th) 14 at 27 and 62 [hereinafter LAC Minerals

It is simple to confuse the notion of a *fiduciary's power* and a *fiduciary duty*.[241] When Madam Justice Wilson speaks of the fiduciary holding a power over the beneficiary, one should not assume that that power dictates the finding of a fiduciary relationship. The finding of a power is only one of three requirements for a fiduciary duty. If a fiduciary *duty* is found, it is only as a derivative jural relationship from the *power*. The power is then fettered by the fiduciary duty of the beneficiary.

Vulnerability is the third consideration in the tripartite test. This consideration received attention in the case of LAC Minerals Ltd. v. International Corona Resources Ltd.[242]. In discussing relative vulnerability, Justice La Forest stated:

> **The argument was not that commercial parties negotiating at arm's length are *per se* fiduciaries, but rather that through a certain course of dealings a fiduciary relationship arose as a matter of fact. As I noted earlier, in these circumstances the presence or absence of vulnerability, while an important criteria, is not a necessary one if it can otherwise be shown that**

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cited to D.L.R.].

241 See *Modern Equity*, *supra* note 238. She defined a duty as "an obligation which *must* be carried out" and a power which "is discretionary, it may be exercised, or it may not."

242 See Lac Minerals *supra* note 240 at 27. LAC Minerals owned mining rights on land that it was in the process of exploring. International Corona approached LAC Minerals regarding possible partnership or joint venture on that land. During the course of negotiations Lac Minerals released the results of its drilling that indicated probable mineral deposits on adjacent property. Subsequently Lac Minerals tried to acquire the mining rights to the adjacent property, only to find that International Corona out bid them and developed a mine of its own. The issue was whether a fiduciary relationship had been created.

one party had a reasonable basis for expecting that the other party would act in its best interests.[243]

Vulnerability will be discussed in greater depth later in the chapter.

CONFLICT BETWEEN *SUI GENERIS* AND NON-*SUI GENERIS* APPLICATIONS OF FIDUCIARY PRINCIPLES

Since its inception in Guerin, the fiduciary obligation imposed on the Crown has been judicially curtailed in the reserve land context. The first such curtailment occurred in Kruger et al. v. Canada[244]. In this case the court analysed the expropriation of reserve land in terms of fiduciary principles, which extended the application of fiduciary obligations from surrendered land in Guerin[245]. The majority described the fiduciary duty on the Crown, to "ensure that the Indians were properly compensated for the loss of their lands", and then held that duty to the following standard:

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243 La Forest, *supra* note 235 at 7.

244 Kruger et al. v. Canada [1986] 17 D.L.R. (4th) 591 at 654 (FCA) [hereinafter Kruger cited to D.L.R.].

245 Two parcels of land were the subject of the dispute. The first parcel was wanted for the construction of an airport by the Department of Transport (DOT). The Indian Agent offered a lease to DOT, where the band had surrendered the land on the lease terms. DOT disliked the rent, so proceeded to expropriate the land with compensation approved by Order in Council. The second parcel of land was wanted by the Department of National Defence, but the band wanted $25,000 compensation. DOT again expropriated the land. Due to a legal opinion which stated that band land could not be expropriated but only surrendered, the DOT asked the band to surrender the land. In a dubious series of events, the band surrendered the land for $15,000 compensation.

> **... and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.**[246]

The majority held that a balancing test should be applied against the fiduciary duty to act in the best interest of the band and the public interest:

> **If the submissions advanced by the appellants were to prevail, the only way that the Crown could successfully escape a charge of breach of fiduciary duty in such circumstances would have been, in each case, to have acceded in full to their demands or to withdraw from the transactions entirely. The competing obligations on the Crown could not permit such a result. The Crown was in the position that it was obliged to ensure that the best interests of all for whom its officials had responsibility were protected.**[247]

In other words, the Crown has other interests to protect beyond the bands; and as long as it acts fairly and honestly in performance of its function, it will never be held in breach of its fiduciary duty to the band. This was in stark contrast to the normal conflict of interest duty imposed on a fiduciary.[248] One can imagine the result of a case where a fiduciary pleads as his defence that he did not acquire the best deal for his beneficiary because he had to balance other

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246 Kruger, *supra* note 244 at 647.

247 Kruger, *supra* note 244 at 654. This reasoning has invited criticism on grounds that the fiduciary duty is incumbent on the Crown as a whole. See John Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin* v. *The Queen*", (1985) 30 McGill Law Journal 559 at 600.

248 See Owen, *supra* note 229 at 11 where he stated:

> **... nowhere in the literature on fiduciary relationships is there any mention of balancing the best interests of the beneficiary with the considerations of other parties.**

parties' interests. The majority held that no breach of duty occurred on the facts and regardless, it would have been barred by the limitation period. Heald J. concurring in the result, but dissenting on the fiduciary duty issue, held that a breach of the fiduciary obligations occurred but agreed that the limitation period had run out. It was on the conflict of interest point that Heald J. said:

> **This situation resulted in competing considerations. Accordingly, the federal Crown was in a conflict of interest in respect of its fiduciary relationship with the Indians. The law is clear that "...one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside" and that "Equity fashioned the rule that no man may allow his duty to conflict with his interest." On this basis, the federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing consideration s by different departments of government.**[249]

The conflict of interest issue raised in the Kruger case can be compared with Apsassin v. The Queen[250], the most recent Supreme Court of Canada decision on the *sui generis* fiduciary obligations of the Crown. Apsassin again involved the surrender of reserve land. In 1940 the band surrendered mineral rights to the Crown "in trust for lease"[251]. At the end of World War II the federal government was making agricultural land available to returning veterans. The

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249 Kruger, *supra* note 244 at 608.

250 Sub. nom. Blueberry River Indian Band v. The Queen [1995] 4 S.C.R. 344, 130 Dominion Law Reports (4th) 193, [1996] 2 Canadian Native Law Reporter 25. [Hereinafter Apsassin, cited to C.N.L.R]. Note that the case has been more often referred to as "Apsassin" in the reports and literature, so that is the reference I will use.

251 Apsassin, *ibid.* at 30.

band's reserve was purchased as part of this program since it contained good agricultural land. In 1945 the band surrendered the reserve to the Crown for a price of $70,000, which was subsequently sold to the Director, *Veterans' Land Act* in 1948. The money was partially used to purchase lands closer to the band's trap lines in 1950. In 1948 gas was discovered near the original reserve. By 1949 oil companies were interested in exploring the original reserve, and the question of who owned the mineral rights arose. After discussions between the Department of Indian Affairs (DIA) and the Director, *Veterans' Land Act* (DVLA) it was decided that the mineral rights were transferred in the 1945 surrender, since they were not explicitly removed from the transaction. The failure to retain the mineral rights for the band was described as "inadvertence"[252]. In 1952 gas was discovered with an approximate value of three hundred million dollars.

The Supreme Court of Canada found that the Crown breached its fiduciary duty to the band by inadvertently transferring the mineral rights and then not revoking the transfer when it had the opportunity to do so. The justices split on the reasoning behind this result. Gonthier J., speaking for the majority held that it was most important to give effect to the intentions of the band. Therefore since the band intended to fully divest itself of the original reserve in the 1945 surrender, it could not go back and try to reclaim the mineral rights.[253]

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252 *Ibid.* at 38.

253 The majority based this intention on the fact that the band was fully informed that the 1945 surrender was to be absolute in giving up all rights to the land forever (*Ibid.* at 32).

According to the majority, the breach of the fiduciary duty occurred when the DIA failed to exempt the mineral rights from the 1948 sale to DVLA.[254] The DIA also missed the opportunity to reverse their mistake.[255]

McLachlin J., speaking for the minority took a much more technical view. She reasoned that since the mineral rights had been previously surrendered in 1940, they were exempt from the 1945 surrender.[256] As the 1940 surrender only allowed the Crown to lease the mineral rights, the Crown was in breach of its fiduciary duties by selling the land to DVLA.

Similar to the conflict of interest issue from Kruger, the Crown again found itself defending its actions when dealing with another governmental department.

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254 DIA had a long-running policy of leasing bands' mineral rights. The fact that gas was discovered near the reserve in 1948, and that the oil companies were willing to pay for exploration rights on the original reserve should have but DIA on notice that the mineral rights were potentially valuable.

255 S. 64 of the *Indian Act* R.S.C. 1927, c. 98, stated:

> **64. If the Superintendent General is satisfied that any purchaser of lessee of any Indian lands, or any person claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of the sale or lease, or if any such sale or lease has been made or issued in error or mistake, he may cancel such sale or lease and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made.**

See Gonthier J., at 36 and McLachlin J., at 62.

256 McLachlin J. also reasoned that the 1927 *Indian Act* did not allow for "re-surrender" of the reserve land. This reasoning has attracted strong criticism since it seems to imply that once reserve land is surrendered there can be no revocation. See J. Paul Salembier, "Crown Fiduciary Duty, Indian Title and the Lost Treasure of I.R. 172: The Legacy of *Apsassin* v. *The Queen*", [1996] 3 C.N.L.R. 1.

The conflict of interest issue was brought up by McLachlin J.[257] She held that the onus was on the Crown to show that its "personal interest did not benefit from its fiduciary powers".[258] Since the Crown adduced evidence to show that the price of $70,000 was reasonable, the burden of proof shifted to the band to show that this price was unreasonable. Since the band did not adduce such evidence, no breach of the fiduciary obligation was held to have occurred. Although a "normal" fiduciary standard was applied, the scrutiny the Crown came under was questioned.[259]

Another departure from the normal standards of a fiduciary occurred with the majority relying on an "intention-based approach". This approach was stated by Gonthier J.:

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257 Note that this issue was also discussed at the Court of Appeal (1993) 100 D.L.R. (4th) 505 at 542 (FCA), where Marceau J.A. stated:

> Very exceptional circumstances would be required to place the Crown in a real conflict of interest, since the essence of the Crown is to serve the public and satisfy various public interests, no to acquire for itself.

258 Apsassin , *supra* note 250 at 45.

259 McLachlin J.'s reasoning has met criticism with her focus. By focusing on the fair value of the land, the attention was diverted from the question of whether a benefit was gained by the Crown. This also leads to questions concerning the divisibility of the Crown. Until 1944 the Department of Indian Affairs and the Department of Veterans Affairs shared the same minister. McLachlin J. held that the fiduciary duty did not apply to the DVLA as it would cause "practical problems" (Apsassin , *supra* note 250 at 61). The concern is that the Crown could evade its fiduciary responsibilities due to this Crown divisibility. See Owen Griffiths, "Case Comment on *Blueberry River*: Is the Crown Ficuiary Obligation in the Currents of Change?", [1996] 3 C.N.L.R. 25 at 40. Unfortunately no practical examples are given, showing how the Crown would accomplish this evasion. Being that the Crown did not escape liability in Apsassin, it is hard to envision a situation that the court would not see through.

> **An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the benefit of the Aboriginal peoples. However, one can well imagine situation where that same approach would be detrimental, frustrating the well-considered plans of the Aboriginals .**[280]

There are two closely related issues that arise from this. The first is the suggestion that Aboriginal peoples are "autonomous actors". In this respect the so called fiduciary duties seem much more like mere agency. In this view, the extent of the fiduciary duty was to explain fully the consequences of the surrender. In this manner the only way to breach the duty was:

> **... if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.**[281]

This was obviously a clear departure from the "normal" fiduciary duties stated earlier.[282] Using this approach also allowed the court to rely on more dubious

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[280] Apsassin, *supra* note 250 at 31.

[281] *Ibid.*, at 34.

[282] In particular this approach seems to conflict with the duties: not to delegate discretion, not to act under another's dictation, and not to fetter discretion. See *supra* note 237.

grounds to infer the intentions.[283]

Secondly, it was unlike a "normal" fiduciary relationship to allow the fiduciary to abandon responsibility to the beneficiary, with the beneficiaries permission.[284] Yet this was exactly what the majority held, stating:

> The DIA's failure to continue the leasing arrangement could be excused if the Department had received a clear mandate from the Band to sell the mineral rights.[285]

This "intentions based approach" illustrated the difficulty in applying fiduciary principles to bands. A close look at Gonthier J.'s words showed a view that bands are "autonomous", and were fully capable of making decisions for themselves involving "well-considered plans". Yet in this case the band "lived in

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[283] McLachlin J. made it very clear that the trial judge "did not make an explicit finding of fact as to whether the Band gave full, free and informed consent to the surrender of the mineral rights in 1945"(at 54). The only evidence regarding the intent to give up the mineral rights surrender of 1940 came from a witness who stated "No mention of mineral rights were made at the meeting"(at 55). The meeting referred to was the surrender meeting in 1945. See Griffiths, *supra* note 259 at 37.

[284] See J. Paul Salembier, supra note 256 at 8. He stated:

> Therefore, if a band were to instruct the Crown to withdraw from a proposed transaction, although the fiduciary obligations specific to the surrender would arguably continue, the fiduciary relationship would be subject to the additional overriding encumbrance that no power was to be exercised under the relationship pending further notice from the band.

Salembier stated that this resembles agency where the principal is free to vary the terms of the relationship. This is opposed to a trust situation where a fiduciary is normally obliged to act within the confines of the trust instrument, and may not be unilaterally changed by the beneficiary.

[285] Apsassin, *supra* note 250 at 35.

abject poverty and ill-health between 1945 and 1961".[266] The irony of this case was that the band was pleading that the Crown breached its fiduciary duty by allowing the band to surrender the land at all.[267] The reality was that this impoverished condition should never happen again, because the real value of this judgment was an estimated 300 million dollars, to be later established at the Federal Court, Trial Division. Given this, was it then reasonable to apply the same fiduciary relationship between the band and the Crown in 1945 and 1995? Gonthier J.'s words clearly contemplate this, and the "intention-based approach" was clearly a move to respect the autonomy and sophistication of a modern community. However, the divergence that has occurred from "normal" fiduciary standards was evidence of the increasing strain the current law is put to, trying to impose historic-based legal paradigms onto modern bands. There is no clear answer to this problem, but it should not continue to be evaded.

THE UNDERTAKING

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266 *Ibid.*, at 46.

267 With respect to the facts in this case, this argument seemed to be based on a crystal ball requirement on the Crown. According to the band's argument the Crown had a duty to prevent them from the foolish surrender of their land (at 39). This would seem to require the Crown to clairvoyantly determine that the reserve land might be worth three hundred million dollars, and therefore prevent the band from accomplishing their immediate goal of getting a reserve closer to their trap lines.

One method which has attempted to define the fiduciary nature of the Crown-Aboriginal relationship was through an analysis of the undertaking.[268] This methodology stated that for any fiduciary relationship to exist there must be an undertaking by one party to act for the other in some manner.[269] It was argued that through the identification and delineation of the undertaking a better understanding of the duties and scope of the fiduciary's power will result.[270]

Of the two, Bryant's examination of fiduciary obligations uses this method most elaborately. A main question he addressed was whether the Crown's undertaking to Natives was of the general nature that grounds all fiduciary claims, or of a specific nature which has to be established for every fiduciary claim? Did the Crown make a general undertaking that every relation with an Aboriginal person was encompassed in the cloak of fiduciary obligations or is the Crown subject to several distinct obligations?[271] No specific examples were cited for this, possibly because Bryant preferred the general undertaking which he described:

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268 See: Owen, *supra* note 229, and Michael Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law", (1993) 27(1) University of British Columbia Law Review 19.

269 Bryant *ibid.*, at 25.

270 Owen, *supra* note 229 at 2, and Bryant *ibid.*

271 Bryant's analysis is almost identical to the discussion of a general fiduciary obligation vs. a more limited application of fiduciary principles that arose from Guerin (see earlier discussion above at 92 and Chapter Two at 80). I question whether simply changing the focus of attention from the obligation to the undertaking adds to the dialogue. By framing his discussion in these terms, it seems Bryant's preferred "omnibus undertaking" is a foregone conclusion, given that Sparrow decided that a general fiduciary obligation is owed regarding Aboriginal and treaty rights.

> **...one could characterize the relationship as grounded in an omnibus undertaking, which is recognized by several statutes and treaties, and most notably by the *Royal Proclamation, 1763*. The undertaking was to act in the best interests of aboriginal peoples in the treatment of their lands, and in turn, self-management of those lands.**[272]

One problem with this view of fiduciary obligations was the questionable practicality of the analysis. Does describing the undertaking as "to act in the best interests of aboriginal peoples" say anything new? Will searching through Guerin, Sparrow, and now Apsassin looking to find an undertaking, help? Probably not. The reason was that in reality the government never made any undertakings in the nature of a trust document. An otherwise perfectly valid question, when dealing with a trust instrument for example, breaks down in the Native law context because the courts have all tried to avoid such clear definition.[273] The result was that proponents of this theory assigned implied

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272 Bryant, *supra* note 268 at 34. Note that this is premised on Professor Slattery's thesis that the Crown-Aboriginal relationship is a:

> **particular instance of the Crown's overall trust responsibilities to the peoples of Canada, which have deep roots in our distinctive constitutional traditions.**

Bryant at 28 quoting: Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Canadian Bar Review 271 at 275.

273 Salembier, *supra* note 256 at 1, where he describes Apsassin:

> **However, while the end result is almost Solomonic in the way in which it compromises between rejection of the band's claim and an award of the full amount claimed, it is otherwise intellectually unsatisfying in that it fails to illuminate the Crown/Indian fiduciary relationship or rationalize the concepts central to the surrender of Indian land that are at the core of the decision.**

undertakings.[274] In this way an implied undertaking was simply another way of trying to define the scope of the fiduciary's power, to understand the extent of the duties owed, hardly a new question.

OBLIGATIONS AND DUTIES[275]

The General Obligation

Slattery stated that liability could be found on breach of a "general duty":

> **The Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands. This general fiduciary duty has its**

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274 Bryant, *supra* note 268 at 27.

275 I choose the word "obligation" with some trepidation. *Black's Law Dictionary*, 5th Ed., (St. Paul: West Publishing Co., 1979) at 968, began its definition of "obligation":

> **A generic word, derived from the Latin substantive "obligatio," having many, wide and varied meanings, according to the context in which it is used.**

I used this term in the following discussion to distinguish a legal duty from something less. By "something less" I mean a non-legally enforceable duty. An analogy could be drawn to the word "convention" used in Canadian constitutional law. See Peter Hogg, *Constitutional Law of Canada*, (Scarborough: Carswell, 1992) at 17, where he defined "convention" as:

> **Conventions are rules of the constitution that are not enforced by the law courts. Because they are not enforced by the law courts, they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution, they are an important concern of the constitutional lawyer.**

origins in the Crown's historical commitment to protect native peoples from the inroads of British settlers, in return for a native undertaking to renounce the use of force to defend themselves and to accept instead the protection of the Crown as its subjects.[276]

There are many who agree that such a general duty should be the basis for Crown liability.[277] This view was also close to the "general undertaking" that Bryant preferred. Nevertheless, there were two problems with this approach: the past and the future.

Proponents of this "general duty" view have invariably grounded the origins of the duty in the past relationship between the Crown and Natives. There were many expressions of this throughout the case law[278], but perhaps the best description would be the "general historic obligation". The problem with this approach was the complete disregard for the legal status of that duty historically. In line with the past judgments, the obligation should be unenforceable to the

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276 See Brian Slattery, "Understanding Aboriginal Rights" (1987)66 Canadian Bar Review 726 at 753.

277 See also: Owen Griffiths, "*Sui* Semantics and *Generis* Gratuities: The Conundrum of Crown Fiduciary obligations to Aboriginal Peoples", (1995) 6 Windsor Rev. L. & Soc. Issues (4th) 39 at 87; W.R. McMurty, and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective", [1990] 3 C.N.L.R. 19 at 20; P.W. Hutchins, D. Schulze, and C. Hilling, "When Do Fiduciary Obligations to Aboriginal Peoples Arise", (1995) 59 Sask. Law Review 97 at 104; Darlene Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples", (1986) 18(2) Ottawa Law Review 307 at 332; L. Rotman, "Provincial Fiduciary Obligations To First Nations: The Nexus Between Governmental Power and Responsibility" (1995) 32 Osgoode Hall Law J. 736 at 738.

278 In Sparrow, *supra* note 231 at 413, Dickson J. described it as "That is, the honour of the Crown is at stake in dealings with aboriginal peoples". Slattery, *supra* note 278 described it "This general fiduciary duty has its origins in the Crown's historical commitment to protect native peoples".

extent that a band could not base an action on it alone. The historic duty to act in the best interest of Natives was only deemed to be judicially enforceable in Guerin in 1984. Prior to that, it was deemed an unenforceable obligation.[279]

Looking from a "general duty" perspective also did not help in reconciling these obligations in an era of self-government.[280] It was possible that the Supreme Court of Canada rapidly became aware of the difficulties in reconciling previous case law with the wide array of situations that bands presently find themselves in.[281] One of the greatest debates that face this area of the law will

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279 See Henry v. The King (1905) 9 Exchequer Court Reports 417 at 443 where the court held:

> The Crown, however, does not in respect of Indian lands and moneys stand in the position of an ordinary trustee. In the first place the Crown does not personally execute the trust. Its administration thereof is vested in a department of Government, over which a Minister of the Crown responsible to Parliament presides...
>
> ...and whenever in respect of such matters any power, authority or discretion is vested in and exercised by the Governor in Council, or in the Superintendent General of Indian Affairs, Parliament alone has the authority to review the decision come to or the action taken. In all such cases the court has no jurisdiction.

280 Bryant, *supra* note 268 at 29 made the unsubstantiated and undocumented assertion:

> In other words, if the Crown protected the alienability of aboriginal land, it essentially undertook to guarantee aboriginal self-government and, in turn, the many aboriginal rights implicated by self-government.

This conclusion was seemingly based upon the argument that there is a general fiduciary undertaking that included Slattery's theory of an overall trust responsibility to the people of Canada. Unfortunately Bryant does not expound beyond making the above statement, which does not explain how or why the "general duty" guarantees Aboriginal self-government.

281 See Gonthier J.'s remarks, *supra* note 250 at 16. The basis for his "intention-based approach" was to give substance to the informed decisions of an "autonomous band". Although not explicitly stated by Gonthier J., it is reasonable

ask how it can be maintained in the face of self-governing entities? Therefore we go from Henry, where the Crown held absolute discretion over band money with the band having no hope of judicial review of that discretion, to Apsassin where it was argued the Crown should have fiduciary duties imposed upon them over an "autonomous" band.[282]

The Specific Duties

Taking a purely moral view of the facts of Guerin or Apsassin, one cannot

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to speculate that he was addressing the apparent paradox of reconciling fiduciary obligations with an otherwise self-governing band. Gonthier J. did say that his approach was forward looking so as not to frustrate "well-considered plans of the Aboriginals" (Apsassin, *ibid.* at 31). As an example of the wide array of conditions compare the Opaskwayak Cree Nation near The Pas, Manitoba, which operates a multi-million dollar shopping mall and hotel on the reserve, with Barren Lands First Nation or Red Sucker Lake First Nation that still trucks water to barrels beside the houses and are without sewage disposal. See Indian and Northern Affairs Canada, *First Nations Community Profiles, 1996* (Ottawa: Minister of Indian Affairs and Northern Development, 1996) at 5 and 94.

282 Note that *Black's Law Dictionary*, supra note 275, defined "autonomy":

> **The political independence of a nation; the right (and condition) of power of self-government. The negation of a state of political influence from without or from foreign powers.**

There is no better example of this modern arrangement than the Manitoba Framework Agreement which stated in principle 5.8 that "the Crown's fiduciary relationship will continue...", and then in 5.11 stated that "First Nations governments in Manitoba will be able to undertake legislative, executive, administrative and judicial functions...".

help but sympathise with people who have been poorly treated.[283] As the old equitable maxim goes: equity will not suffer a wrong to be without a remedy.[284]

To address the facts that cry out for remedy, but to avoid the tendency towards the judge-made rules surrounding *sui generis* fiduciary obligations, there has been some call to apply the normal law of trusts to these cases.[285] These arguments find strength from Wilson J.'s dissent in Guerin:

> **Rather 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 upon the surrender into an express trust of specific land for a specific purpose.[286]**

Gonthier J. in Apsassin, although dancing around the issue, gave support to the

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[283] The facts of Apsassin prompted one writer to comment:

> **The facts of the *Apsassin* case, like those of its progenitor *Guerin* v. *The Queen*, chronicle a sad and sorry tale, at least as considered from the point of view of the plaintiff bands, and, as in *Guerin*, it is difficult to imagine how such facts could fail to elicit at least some judicial sympathy.**

See Salembier, *supra* note 256 at 2.

[284] *Modern Equity*, *supra* note 238 at 27.

[285] See Salembier, *supra* note 256 at 19 and Richard Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Saskatchewan Law Review 301 at 319. They both argue that Dickson J.'s reasoning in Guerin, that held the Native interest in reserve land was not a proprietary interest, was questionable. They argue that a proprietary trust model would allow greater certainty in the law, and provide more flexible use of the land by bands. See also John Hurley, *supra* note 247 argued that the effect of imposing fiduciary duties is the same as that of a trust. Specifically the conditions of breach and the quantum of damages would be the same for the fiduciary duty as for a trust.

[286] Guerin, *supra* note 226, at 361. Note that Ritchie J., and MacIntyre J. concurred with Wilson J. on these points.

"true-trust" view:

> **I should add that by reasons should be not interpreted to equate a trust in Indian land with a common law trust. I am well aware that this issue was not resolved in *Guerin* v. *The Queen*... ...In this case, both the 1940 and 1945 surrenders were framed as trusts, and the parties therefore intended to create a trust-like relationship. Thus, for lack of a better label, I think that it is appropriate to refer to these surrenders as trusts in Indian land.**[287]

Although a "true-trust" approach would add certainty to this area of law, it is not a perfect solution, since it would cut down on the flexibility to meet unusual fact situations. This model might work for cases involving land surrender, but it may be difficult to apply in other cases.[288] As well, using express or implied trusts would not recognise the "general historic obligation", described earlier. The basis for the trust would be the surrender document, or some similar instrument, with little regard given to the past relationship of the Crown and Natives.

APPLICATION OF FIDUCIARY DUTIES

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287 Apsassin, *supra* note 250 at 34.

288 An important part of Wilson J.'s reasoning, that an express trust arises on surrender, was the existence of the surrender document to define the terms of the trust. See Guerin, *supra* note 226 at 360. Without a surrender document to define the terms of the trust, Dickson J.'s point about lack of certainty of object and certainty of obligation would seem to become more crucial. See Guerin, *ibid.* at 342.

As Finn stated, the vocabulary used to describe general fiduciary relations was useless in trying to deal with specific situations:

> But the very generality of the terms used to express the fiduciary obligation has meant that they, themselves, provide no immediate yardstick against which to measure the propriety or impropriety of a fiduciary's actions in a particular case. It is one thing to oblige a fiduciary to act honestly in what he believes to be the interests of his beneficiaries. It is quite another to attempt to use that formula alone as the criterion on which to base judicial review.[289]

Another example of this reasoning is stated by Rotman[290], who divides fiduciary responsibilities into (a) general duties owed to all Aboriginals and (b) specific duties flowing from treaties, agreements, alliances, and the *Indian Act*. He described the nature of the "general duties":

> The key characteristics of this relationship are bilateral needs, respect, trust, and the mutually recognized and respected sovereignty of both European and Aboriginal nations during the formative years of the relationship.[291]

Justice La Forest stated:

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289 Finn, *supra* note 225 at 15.

290 See Rotman, *supra* note 277 at 738, but note that the subject of this article is fixing fiduciary obligations to the provinces, which is irrelevant to the present discussion.

291 *Ibid.* Note that these criteria deviate substantially from those set out by Wilson J. in Frame v. Smith, *supra* note 240 and accompanying text.

> In determining the nature of the relationship between the Crown and the Band, Justice Dickson observed that the historical purpose of the surrender requirement was to interpose the Crown between the Indians and prospective purchasers or lessees of their land so as to protect the Indians from sharp dealing. This power given the Crown by law, combined with the historical duty to act in the best interests of the native people, was held to form the basis of a fiduciary duty.[292]

We can plainly see that Justice La Forest distinguished between the general historic obligation and the specific legal power, which in this case was the Crown interposing itself between the band and prospective lessees or purchasers.

Instead of viewing the fiduciary obligations of the Crown as a question of either "general duties" or "specific duties", the better view might be to recognise the existence of the "general historic obligations" distinct from the application of fiduciary principles.

Relative Vulnerability

Instead of applying the law of trusts in Aboriginal situations, it may be more logical to venture a more usual fiduciary analysis. The law of equity, and in particular the law surrounding fiduciary obligations, was already extremely

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[292] La Forest, *supra* note 235 at 5; it should be noted that this particular obligation is not to every Native person, but only to those with interests in reserves.

flexible.[293] There seems to be no good reason why a regular application of the Frame v. Smith criteria could not be applied.[294] Of these three criteria, one stands out in importance.

The question of vulnerability could be the quintessential problem facing the fiduciary relationship in an era of self-government. The facts of the Lac Minerals case are well known.[295] The issue was whether it was possible to recognise a fiduciary relationship between two corporations. Normally, two persons of equal standing would not ordinarily attract a fiduciary characterisation. Ultimately in that case, the majority decided a fiduciary relationship did not exist *per se*, however a duty not to misuse confidential information was imposed. The minority of Justices La Forest and Wilson held that the conduct amounted to a fiduciary relationship. The issue of vulnerability

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293 See Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution*, 3rd ed., (London: Sweet & Maxwell, 1986) at 633, which gives a long list of cases where fiduciary principles have been flexibly applied to meet a host of different fact situations.

294 This is especially so, since the courts have practically applied this case anyway. See Apsassin, *supra* note 250 at 40, Note that the *sui generis* description could still be applied since there are some aspects of the Crown-Aboriginal relationship that are outside the normal scope of the law surrounding fiduciary relationships. In particular, the ability of a band to direct the Crown seems contrary to a normal fiduciary relationship, *supra* note 264. However, just because the *relationship* has a *sui generis* description does not mean that the normal rules of fiduciary obligations could not apply to a given situation.

295 LAC Minerals owned mining rights on land that it was in the process of exploring. International Corona approached LAC Minerals regarding possible partnership or joint venture on that land. During the course of negotiations Lac Minerals released the results of its drilling that indicated probable mineral deposits on adjacent property. Subsequently Lac Minerals tried to acquire the mining rights to the adjacent property, only to find that International Corona out bid them and developed a mine on its own. The issue was whether a fiduciary relationship had been created.

was at the heart of this case. Sopinka J. held that vulnerability was lacking in this case, so a fiduciary relationship could not exist. One of the main factors he considered was the accessibility of professional assistance.[296] La Forest J. on the other hand held that vulnerability consisted of:

> **Persons are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict that harm. It is clear, however, that fiduciary obligations can be breached without harm being inflicted on the beneficiary.[297]**

This idea could be applied very responsibly to Aboriginal fiduciary relations under a self-government regime. However the specific fact situation would be the ultimate determination of whether that was so. If we take a fully operational band, with wide ranging legislative powers, large capital and large resources, it could possibly have a fiduciary claim against the Crown, but in this scenario it would be unlikely. The s. 35 analysis would still remain regardless of the band's independence. However, in a situation similar to Guerin where this band enters into an agreement with the Crown, it may not be possible to found a fiduciary claim. This would depend on the court's analysis of the specific duties

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[296] Specifically, "ready access to geologists, engineers, and lawyers". See Lac Minerals, *supra* note 240 at 68. Another main reason for avoiding the fiduciary label was the disruption caused to normal commercial transactions. In arms length commercial dealings the court will be very slow to impose fiduciary relationships. See Lac Minerals, *ibid.* at 60. Disruption to Aboriginal economic interests was the point made by Salembier, *supra* note 258 at 20.

[297] See Lac Minerals, *supra* note 240 at 40, where La Forest J. cites Keech v. Sandford (1726), 25 English Reports 223, as the clearest example of this proposition.

on the Crown.[298] If the court found that the normal fiduciary requirements were not met, the general historic obligation would not be enough to carry the action. However, with facts similar to Lac Minerals it is entirely possible that a fiduciary duty could be found. In this manner, the relative vulnerability would be assessed on a situation by situation basis. One band may be relatively invulnerable in one set of facts, and totally dependent on the exercise of Crown power in another.[299]

One problem with this view was the rejection of the "public trust" characterisation of the "general historic obligation" in Guerin.[300] Both Dickson J. and Wilson J. held that the independent nature of "Indian title" rendered the political trust cases inapplicable. Moreover, the independent nature of Indian title meant that "it is not a creation of either the legislative or executive branches of government", so therefore it was not a public law duty but similar to a private law duty. In this way the *sui generis* description was invoked and fiduciary

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298 Note that one principle of the Manitoba Framework Agreement was to amend or repeal the *Indian Act* as it applied to First Nations in Manitoba (see Appendix I at 191). With the repealing of the *Indian Act*, the legislative requirement of reserve inalienability goes with it. There is some uncertainty regarding the "inherent" nature of that particular character of the "Indian interest" in land. See Salembier, *supra* note 256 at 16, and Robert Rieter, *The Fundamental Principles of Indian Law*, (Edmonton: First Nations Resource Council, 1990) at 21 of Appendix.

299 Note that this view would also come much closer to Eastmain Band v. James Bay and Northern Quebec Agreement (Admininstrator) (1992) 99 D.L.R. (4th) 16 at 25 (FCA). In this decision the Federal Court of Appeal held that a decrease in vulnerability would decrease the reliance on the favourable treaty interpretation rules (discussed in Chapter One at 47). The court held that the question of vulnerability could also impact on the fiduciary relationship (at 27).

300 Guerin, *supra* note 226 at 331 and 357.

obligations applied.[301] This reasoning has come under criticism.[302] Just because the Aboriginal interest in land is a pre-existing legal interest, independent of legislative or executive creation, does not change the fact that the powers being exercised are legislative and executive.

Another potential problem with the "general historic obligation" is that an unenforceable obligation could be ignored. The difference between the obligation discussed in Henry and a modern version of that obligation was its use as a basis for interpretive principles. One contemporary manifestation was to justify the s. 35 interpretation as set out in Sparrow.[303] In this respect the "general historic obligation" would be indirectly enforceable as an interpretive

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301 *Ibid.*

302 See Hurley, *supra* note 247 at 598. He argues that viewing "Indian title" as having an independent origin does not logically move the Crown's obligation from a public law to a private law setting. The Crown's responsibility is still to a category of "political society", as opposed to individuals.

303 See Sparrow, *supra* note 231 at 409 where Dickson J. and La Forest J. stated:

> There is no explicit language in the provision that authorizes this court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power... 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 government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick, supra*, 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 v. The Queen, supra*.

principle to s. 35.[304]

FIDUCIARY DUTIES AND TREATIES

The most recent application of *sui generis* fiduciary obligations is in the area of treaties. On this topic the recent Royal Commission on Aboriginal Peoples stated:

> **The nation-to-nation relationship embodied in the practice of treaty making implies a set of *mutual* fiduciary obligations between the nations that were parties to treaties. This relationship arises from the mutual agreement of the treaty parties to share a territory and its benefits and thereby to establish a continuing and irrevocable relationship of coexistence.**[305]

In their view, this fiduciary relationship requires:

> **... the Crown is under a fiduciary obligation to implement such measures as are required to reverse this colonial imbalance and help restore its relationship with treaty nations to a true partnership. This will require the**

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304 This interpretation does not totally agree with Dickson J.'s description, *supra* note 303, which specifically refers to incorporation of "the fiduciary relationship". This could be reconciled by viewing Justice Dickson's description as comparative instead of literal. Instead of viewing "fiduciary" as importing that area of the law, one could lean more heavily on the later description of upholding the honour of the Crown. However, to what extent is a true "fiduciary" analysis a part of the s. 35 analysis, especially in relation to treaties?

305 The Royal Commission on Aboriginal People,, *Restructuring the Relationship*, vol. II, Part One, (Ottawa: Canada Communication Group, 1996) at 42 [hereinafter Royal Commission report][emphasis in original].

Crown to take positive steps toward this end as well as to refrain from taking actions that will frustrate it.[306]

Clearly, in the above passages the term "fiduciary" was being stretched to its limits, with questionable legal application. However these quotes do illustrate the extent to which the *sui generis* fiduciary concept can be applied.[307]

Fiduciary obligations expanded into treaty law jurisprudence in a brief comment by the Supreme Court of Canada regarding the Robinson-Huron Treaty:

It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians.[308]

Although not decided on the basis of treaty rights, the most general expansion occurred in Sparrow, where the fiduciary concept was incorporated by s. 35 into the analysis of treaty rights.[309] However, beyond s. 35 it was difficult to see how

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306 *Ibid.*, at 44. The Royal Commission bases this premise on New Zealand Maori Council v. A.-G. (1987) 1 N.Z.L.R. 641 (CA).

307 Prompting Salembier, *supra* note 256 at 24, to write:

> **It is also inevitable that the lower courts will continue to echo the *sui generis* mantra in situations that call for a touch of judicial mysticism to justify a departure from established practice...**

308 Ontario (Attorney-General) v. Bear Island Foundation (1991) 83 D.L.R. (4th) 381 at 384.

309 See R. v. Cote (1996) 138 D.L.R. (4th) 385 at 398 (SCC)[emphasis in original]:

> **As a general rule, where a claimant challenges the application of a *federal* regulation under s. 35(1), the characterization of the**

a regular fiduciary relationship can apply to treaties.[310] There have been attempts to broaden the scope of Crown fiduciary obligations to treaty rights, but these attempts have been largely unsuccessful.[311] How could the application of fiduciary principles be divorced from the s. 35 analysis and still retain a *sui generis* characterisation? If, for example, the Crown has improperly withheld

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> **right alternatively as an aboriginal right or as a treaty right will not be of any consequence once the existence of the right is established, as te *Sparrow* test for infringement and justification applies with the same force and the same considerations to both species of constitutional rights.**

See also R. v. Little [1996] 2 C.N.L.R. 136 at 152 (BCCA), for a recent review of the s. 35 analysis. However the extent of the notion that a true "fiduciary analysis" is to be applied to treaty rights should be qualified. The second stage of the Sparrow test is justification of the regulation, if it was found to infringe a treaty right and had a valid legislative objective. Regarding the fiduciary connection with the justification stage of the Sparrow, *supra* note 231 at 413, stated:

> **If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-a-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.**

Note that this is not the same as an analysis for a fiduciary relationship, see *supra* note 240 and accompanying text.

310 Beyond the application to land surrenders discussed earlier. Land surrenders have less to do with treaties and more to do with the surrender provisions and the *Indian Act*. See Apsassin, *supra* note 250 at 34.

311 See R. v. McIntyre [1992] 1 C.N.L.R. 129 (Sask. QB) and R. v. Littlewolf; R. v. Potts [1992] 3 C.N.L.R. 100 (Alta. QB), where the argument was made that the Crown had a fiduciary obligation to protect treaty rights. The practical effect of this obligation was to render the asserted commercial hunting rights in these cases unchangeable without the consent of the Natives. The attempt in both cases was to distinguish R. v. Horseman [1990] 3 C.N.L.R. 95 (SCC), which held that the *Natural Resources Transfer Act* extinguished the treaty right to hunt commercially. Both McIntyre and Littlewolf/Potts rejected fiduciary arguments citing that Horseman had already decided the issue.

annuities based on a treaty promise, the fact that the debt was based on a treaty seems irrelevant to the ultimate adjudication of the case.

The bottom line was that true fiduciary duties have questionable practical applicability to treaty cases.[312] If the view of the "general historic obligation" were taken, it could provide a more realistic integration with current case law.[313]

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312 However, note R. v. Wolfe (1995) 129 D.L.R. (4th) 58 (Sask. CA) where the Court relied on a breach of the Crown's fiduciary obligations arising from Treaty Six to stay a criminal charge. Mr. Wolfe was the subject of an undercover operation carried out by wildlife officers. To win Mr. Wolfe's confidence the undercover officer brought liquor onto the Onion Lake Reserve, which maintained an alcohol ban. Onion Lake band was party to Treaty Six which stated:

> Her Majesty further agrees with her said Indians that within the boundary of Indian reserves, until otherwise determined by her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force or hereafter to be enacted to preserve her Indian subjects inhabiting the reserves or living elsewhere within her North-West Territories from the evil influence of the use of intoxicating liquors, shall be strictly enforced;

In justifying the stay of proceedings the Court held (at 79):

> In light of the conditions on this reserve relating to alcohol, the department's sanction of alcohol on a reserve cannot be justified by reference to principles of wildlife conservation. *Sparrow* and *Ontario (Attorney-General) v. Bear Island Foundation* (1991), 83 D.L.R. (4th) 381, [1991] 2 S.C.R. 570, [1991] 3 C.N.L.R. 79, require that this law enforcement be undertaken in a manner which fulfils the Crown's fiduciary obligations.

313 As the earlier Sparrow quote (*supra* note 309) illustrated, the s. 35 analysis was more concerned with upholding the honour of the Crown as an interpretive principle than in applying any substantial fiduciary analysis. Furthermore, the two leading Supreme Court of Canada cases on treaties, Simon v. The Queen (1985) 24 D.L.R. (4th) 390 and R. v. Sioui (1990) 56 C.C.C. (3d) 225, made no mention of fiduciary principles. Although R. v.Cote, *supra* note 309 at 398, makes it clear that the Sparrow analysis applies to treaty rights, it still does not explain how a traditional fiduciary analysis could take place. This seriously undermines any attempt to argue that a traditional fiduciary analysis should be applied to questions of treaty rights.

CONCLUSIONS

A judicially enforced *sui generis* fiduciary relationship between the Crown and Natives was a relatively modern development in the law, existing for only thirteen years. There are those who would advocate an expansion of fiduciary liability against the Crown.[314] But this view finds increased resistance in the courts.[315] As bands have become more economically powerful, they become less vulnerable to outside powers, including the Crown. Trying to apply the same standards to all bands ignores this point. Yet no matter how powerful a band becomes, there is still a desire to recognise the unique relationship that has developed between Natives and the Crown.[316] Furthermore, there has been a need for an equitable remedy to respond to situations that are unfair by any standards, as Guerin, Kruger, and most recently Apsassin have so clearly demonstrated. The difficulty, however, is to reconcile protective measures with the inherent dangers of business relationships in a modern economy. If any consensus can be drawn it is that the vagueness and uncertainty of the current case law does not seem to meet any of these goals satisfactorily, and is

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314 See *supra* Chapter Two, note 224.

315 See Apsassin, *supra* note 250 at 31.

316 See the Royal Commission report, *supra* note 305 at 44. This seems especially true in relation to bands with treaties.

potentially doing harm to Aboriginal economic projects.[317] This can only complicate and may well impede self-governing initiatives such as the Manitoba Framework Agreement, especially considering principle 5.8 (see Appendix I at 192):

> **The Crown's fiduciary relationship will continue in accordance with judicial decisions, aboriginal rights, constitutional provisions including Section 35 of the *Constitution Act, 1982* the Treaties and other laws and sources of law, or any of them;**

The next chapter will examine a small portion of the Manitoba Framework Agreement, and look at some of the potential problems that arise from that examination. The focus will be on original treaties as a source of "rights" on which the Framework Agreement proposes to found new relationships. Moreover, the Framework Agreement provides an example of The Royal Commission on Aboriginal Peoples' theory regarding one form self-government could take. Aspects of this theory will be scrutinised to highlight some fundamental questions that continue to remain unanswered.

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317 See Salembier, *supra* note 256 at 24:

> **While some Aboriginal plaintiffs may have thus far benefitted from the impenetrability of the *sui generis* characterization, the negative commercial impact of the uncertain legal character of Indian title and the potential injustice dealt to parties held responsible for properly managing an essentially unknown quantity outweighs any potential benefit in maintaining the status quo.**

CHAPTER FOUR
LEGAL RIGHTS AND THE MANITOBA FRAMEWORK AGREEMENT

> **Putting the matter in another way, the tendency-and the fallacy-has been to treat the specific problem as if it were far less complex than it really is; and this commendable effort to treat as simple that which is really complex has, it is believed, furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems.[318]**
>
> **-Wesley Newcomb Hohfeld**

INTRODUCTION

One can hardly inquire into a scheme that wants to implement a "right" of self-government, without having any context for what a "right" could be. Before analysing the Manitoba Framework Agreement one must pursue the question of what is a "right"? This chapter cannot promise an answer, but it can focus the debate on the fundamental law that is relevant to any context for Aboriginal self-government.

"RIGHTS"?

The term "right" appears continuously in the legal debate surrounding Native issues. Parliament used it in s. 35 of the constitution, protecting

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318 Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 Yale Law Journal 16 at 19 [hereinafter Hohfeld 1].

"aboriginal and treaty rights". The Supreme Court of Canada has used it to describe a wide variety of relationships, starting with the doctrine of "Aboriginal rights":

> **In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law:**[319]

Within this doctrine comes land "rights":

> **Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights.**[320]

Fishing "rights" are another example:

> **We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish.**[321]

Treaty "rights" are differentiated from Aboriginal "rights", with an example of the former :

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319 R. v. Van der Peet [1996] S.C.J. No. 77 at 29 [hereinafter Van der Peet, cited to S.C.J.].

320 *Ibid.* at 31.

321 R. v. Sparrow (1990) 70 Dominion Law Reports (4th) 385 at 395 [hereinafter Sparrow cited to D.L.R.].

I am in complete agreement with the finding of the trial judge that the original treaty right clearly included hunting for purposes of commerce.[322]

However, hunting and fishing "rights" can be categorised as either "Aboriginal" or "Treaty".[323] In these examples, the term "right" is used indiscriminately to describe a variety of different relationships. This was most evident in reference to the so called "right" of self-government:

> **The appellants' claim involves the assertion that s. 35(1) encompasses the right of self-government, and that this right includes the right to regulate gambling activities on the reservation.**[324]

Later on the same page:

> **In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.**

If these statements were considered together, the "right" to self-government is comparable to Aboriginal land "rights", or an Aboriginal "right" to fish and will be judged in the same manner. As these examples show, "right" can apparently be

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322 R. v. Horseman [1990] 1 S.C.R. 901, 3 C.N.L.R. 95 at 101.

323 Compare Moonias v. Ontario [1995] 3 C.N.L.R. 108 (Ont. Gen. Div.) with Sparrow, *supra* note 321. Note R. v. Cote (1996) 138 D.L.R. (4th) 385 at 398 (SCC) which held that treaty and Aboriginal rights should be treated the same when considering the Sparrow test. However the Supreme Court of Canada went on to described them as two "species of constitutional rights" (at 399).

324 R. v. Pamajewon [1996] S.C.J. No. 20 at 9.

applied by a class of people as in "Aboriginal right", or a single person as in "Joe's hunting right". Yet these two descriptors can be synonymous as in "Joe has an Aboriginal right to hunt". By adding further adjectives these "rights" can take on different characteristics. With the addition of "inherent" a right becomes somehow more valuable or has its legal characteristic changed in some manner, yet it is unclear how.[325]

The debate over the terminology and definition of rights is not a new one and has been described as "one of the most complex in legal analysis".[326] One author's contribution to this debate was described by his leading critic in 1920, shortly after his death:

> **Lastly, had he lived, he would have experienced the satisfaction of finding an interest in his ideas unequaled perhaps by any single contribution to legal science in America within the last twenty years.**[327]

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325 See Peter Hogg, & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues", (1995), 74 Canadian Bar Review 187 at 190, where they stated:

> **The Charlottetown Accord expressly recognized an "inherent" right of Aboriginal self-government. This is important from both a political and a legal perspective... ...The inherent nature of the right of self-government does not provide the answer to the questions of what the right means today, and how it can be related to the existing constitutional and political structure of Canada.**

This article is a revision of "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues", in Royal Commission on Aboriginal People, *Aboriginal Self-Government, Legal and Constitutional Issues*, (Ottawa: Canada Communication Group, 1995) at 378.

326 Carleton Allen, "Legal Duties" (1931) 40 Yale Law Journal 331 at 351.

327 Albert Kocourek, "The Hohfeld System of Fundamental Legal Concepts" (1920) 15 Illinois Law Review 24 at 24.

The author referred to was Wesley Newcomb Hohfeld. The jurisprudential scheme that he developed sparked a significant debate.[328] In two related articles Professor Hohfeld defined "jural opposites" and "jural correlatives" as the *sui generis* incarnations of legal relations.[329] The "Hohfeld Scheme" was reducible to:

JURAL	RIGHT	PRIVILEGE	POWER	IMMUNITY
OPPOSITES	NO-RIGHT	DUTY	DISABILITY	LIABILITY
JURAL	RIGHT	PRIVILEGE	POWER	IMMUNITY
CORRELATIVES	DUTY	NO-RIGHT	LIABILITY	DISABILITY

In this scheme, opposites are just that, the exact opposite of the specific term.[330]

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328 For a bibliography of articles pertaining to this debate, see Joseph Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" [1982] Wisconsin Law Review 975 at 989. Hohfeld's staunchest supporter was Professor Arthur Corbin, who had worked with him at Yale. Two other supporters of this scheme, although not as unconditional as Corbin, were Professors Walter Cook and Roscoe Pound. See Roscoe Pound, *Jurisprudence*, vol. IV, Part 7, (St. Paul: West Publishing, 1959) and Walter Cook, "Hohfeld's Contributions to the Science of Law" (1919) 28 Yale Law Review 721.

329 Hohfeld 1, *supra* note 318 at 30; "legal" relationships are distinguished from the physical and mental facts which evidence the relationships.

330 A significant criticism of this scheme was on the subject of the "jural opposites". Kocourek, *supra* note 327 at 27, argued that a better term would be "contradictories". The difference was described:

> In logic, *opposites* as distinguished from *contradictories* are the extreme terms of *quantity*. Thus +a is the opposite of -a. In the case of legal relations to have a claim to payment of $100 would be the opposite of a duty in the same person to pay $100. Yet we find in Professor Hohfeld's table that the 'opposite' of 'right' is not 'duty', but 'no-right.' Now it is clear that 'right' and 'no-right' are not 'opposites' -at least not in the sense of logic- but are

For example a "privilege" was the absence of a "duty", as in X having a privilege to enter on Y's land or equivalently X having no duty to stay off Y's land.

Correlatives are what the other person holds in relation to a specific jural relation. In other words, a correlative looks at the specific legal relationship from the opposite party.[331] For example, if X holds a power against Y, another way to describe this relation is Y has a correlating liability to X. Similarly, if Q has a right to do something, Z has the corresponding duty. In this manner, a legal relationship was fully described. No right, privilege, power, or immunity could exist without its jural correlative. The legal relationship was defined by the extent of both jural correlatives. For example, a right can only be defined by

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> rather 'contradictories' (negatives).

Arthur Corbin, "Jural Relations and Their Classification" (1921) 30 Yale Law Review 226 at 229 refuted this criticism saying that the choice of words between 'opposite' and 'contradictories' does not change the underlying meaning, which was the same with both Kocourek and Hohfeld.

See also Roscoe Pound, *supra* note 328 at 78, where he argued that a better term would be "contrasts". He also argued that there can be more than one "opposite/contrast" in a given scenario. To illustrate the point he argued *ad absurdum* that a neighbour would be under a duty to prevent servant, cow and ponded water from trespass, thereby giving a legal power to the servant, cow and water respectively. This correlated to the neighbour's liability for such actions by these three.

331 Kocourek, *supra* note 327 at 30, described 'correlative':

> Correlatives are those objects or ideas of objects which are necessarily connected with other objects or ideas of objects; thus, 'father' is a relative term and 'son' is the correlative.

Max Radin, "A Restatement of Hohfeld" (1938) 51 Harvard Law Review 1141 at 1150, quibbling with Hohfeld's word 'correlative' as indicating a separateness, went even further:

> They are not even two aspects of the same thing. They are two absolutely equivalent statements of the same thing. B's duty *is* A's right.

whoever holds the corresponding duty. If one cannot point factually to the holder of the corresponding duty, of what use is the right?[332] The physical and mental facts must support a jural correlative for a legal relationship to exist.[333] Hohfeld's scheme was preferable to more elaborate versions because it was both simple without being simplistic, and it utilised terminology that was familiar and practical for lawyers.[334]

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332 The notion of a strict definition of "right" is debatable. For example, Roscoe Pound, *supra* note 328 at 74, differentiated between a right "in the wider sense" and right "in the stricter sense". A "strict" right was the definition that Hohfeld advocated. The "wider" right might include legal advantages such as liberties, powers, and immunities. A "wider" right was also exemplified by the French term *droit*, which meant "law, right, and a right". See Carleton Allen, "Legal Duties", *supra* note 326 at 334.

333 Note that logically, the existence of one jural correlative necessarily implies the existence of its partner.

334 Several points should be made. First, the criticism from Kocourek was itself criticised by Pound, *supra* note 328 at 82, saying:

> But one cannot but feel that he carries out schematic exposition and terminology far beyond what is practically worth while.

This highlights the practical benefit of this scheme, Corbin, *supra* note 330 at 227 stated:

> It is not meant by the foregoing that this is the only possible usage of the terms in question. It is believed to be the actual usage, and that it is of advantage to abide by it.

The Hohfeld scheme is not perfect or beyond criticism. The Hohfeld definitions are *sui generis* concepts, whose words are capable of alternate definition. However when criticising this scheme, Corbin's words, *ibid.* at 232, should be kept in mind:

> Whether or not we should adopt either one as a definitional attribute is a mere question of convenience. But having made a choice, our definition is not invalidated merely because there can be found one or more cases falling within some other definition but not within ours.

Following this scheme[335], the definition of a specific jural relationship lies in the identification of its correlative. Professor Hohfeld explained:

> **The strictly fundamental legal relations are, after all, *sui generis*; and thus it is that attempts at formal definitions are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of "opposites" and "correlatives," and then proceeding to exemplify their individual scope and application in concrete cases.**[336]

Since "right" is the term that we are concerned with, it needs description.

Professor Hohfeld pointed out:

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335 Two further points should be stressed. The first being the proper use of the terms *in rem* and *in personam*. The term *in rem* does not necessarily have anything to do with "the thing", as it is commonly understood, which Professor Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1917) 31 *Yale Law Journal* 710 at 718 [hereinafter Hohfeld 2] described:

> **always *one* of a large *Class of fundamentally similar* yet separate rights, actual and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people.**

In rem relations can exist in any jural relationship. All jural relationships are held against people, and must be defined as such.

The second is any jural relationship regardless of *in personam* or *in rem*, can be affirmative or negative. An "affirmative" jural relationship would involve something a person may do. For example, a person holding a right to collect $100 would hold an "affirmative" right. There would then be an "affirmative" duty on someone else to hand over the $100. A "negative" jural relationship would involve someone not doing something. A contract in restraint of trade where X promises Y she will not carry on a certain business for five years would be an example of a "negative" right held by Y and a "negative" duty held by X. Y has a legally enforceable right against X that she will not carry on business for five years. Conversely Y has the negative duty not to carry on business for the agreed time.

336 Hohfeld 1, *supra* note 318 at 30.

> **Recognizing, as we must, the very broad and indiscriminate use of the term, "right" what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative "duty," for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative.**[337]

It was within the concept of "duty" that the definition for "right" can be found. A right can be defined by the existence and factual identification of a duty. This is not circular reasoning, since both right and duty are legally descriptive terms for actual physical and mental facts. In this manner, one jural relationship can be defined in terms of another jural relationship. This necessarily implies that all physical and mental facts constituting a legal relationship between two people can be categorised within the Hohfeldian scheme. It is within this lexicon that a more detailed examination of "rights" in the Aboriginal context can take place.[338]

An excellent example occurred in R. v. Sioui. The fight was over Mr. Sioui's "right" to practice his religion and customs in a provincial park. Mr. Sioui was charged with cutting down trees, camping, and making fires there. His defense relied on a document signed by a British Brigadier General in 1760, which (he argued) contained a treaty "right" protecting the ability to practice his

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[337] *Ibid.* at 31.

[338] Note that in the Aboriginal context the most important terms will be "right" and "duty". This is the least contentious pairing in the Hohfeldian scheme, see Corbin *supra* note 330 at 230. This is because virtually all jurisprudential analysts recognised that the "right" concept described by Hohfeld, whether called "right in the strict sense", "demand right" or any other name, should be paired with a duty. Disagreement erupted over what factual situations should fall into the "right-duty" pair, for example should a moral right be included. See Carl Wellman, *A Theory of Rights* (Totowa: Rowman & Allanheld, 1985) at 23.

rites and ceremonies in the park. The Supreme Court acquitted Mr. Sioui saying that his "right" was not absolute, but that it did not interfere with the Crown's right of ownership over the property. Correspondingly it was up to the Crown to prove that its occupancy of the territory would be upset by the reasonable exercise of the Huron's "rights".

Examining this in light of the Hohfeldian scheme reveals that the Huron's "rights" cannot be truly described as such. If we focus for the moment on the Crown, it has an *in rem* right of ownership over the territory, which includes a right of occupancy as described by the Court. Therefore the corresponding duty was a general one on everybody, not to interfere with the Crown's *in rem* right. The question is how should this jural relationship be categorised? If the Huron had a right to practise their ceremonies on that land, it would be an *in personam* right against the Crown. In other words, the Crown would have a corresponding duty to allow the Huron to practise their ceremonies. The Crown's *in rem* right would then be subject to the duty they owed the Huron. However, a close reading of the case shows that this did not accurately describe the relationship. The Supreme Court clearly stated that the Huron can practise their ceremonies so long as this did not "prevent the realisation"[339] of the Crown's right of occupancy. This showed that the Crown was under no duty to the Huron in this respect. If the Huron's ceremonies did prevent the realisation of the Crown's right of occupancy in some manner, the Crown's right would prevail. The only

339 R. v. Sioui (1990) 56 C.C.C. (3d) 225 at 262.

way left to describe accurately this jural relationship was as a privilege. The jural correlative to a privilege is a no-right. In this way the Huron had the affirmative privilege of practising their ceremonies, and the Crown had no-right in respect of this. In other words the Crown had no right to stop the Huron from engaging in this activity, as long as it did not interfere with the Crown's right of occupancy, which it held against the world, including the Huron.

As alluded earlier, the inherent "right" of Aboriginal self-government offers another example of the confusion that the term "right" can create. Two recent academic articles illustrate the point. Professors Hogg and Turpel argued that Aboriginal self-government can be implemented without changing the constitution[340]. They describe the "right" of Aboriginal self-government:

> **The right of self-government was understood in the Charlottetown negotiations to be a pre-existing right rooted in Aboriginal peoples' occupation and government of this land prior to European settlement.[341]**

Furthermore:

> **Many treaties concluded between Aboriginal peoples and the Crown also demonstrate that Aboriginal peoples exercised their rights of self-government by structuring their relations with governments in Canada on the basis of consent and mutual recognition.[342]**

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340 Hogg & Turpel, *supra* note 325 at 191.

341 *Ibid.*, at 190.

342 *Ibid.*

But is it correct to describe Aboriginal self-government as a single "right"? Does this not oversimplify the issues and imply a consensus of terminology that does not exist? A second author advocated a broad interpretation of the term "right":

> **A second difference is that, while section 25 speaks of "rights or freedoms," section 35 mentions only "rights." The disparity, however, seems more verbal than real. Can the drafters have intended to draw a sharp line between, say treaty provisions conferring "rights" and those granting "freedoms," and to guarantee only the former in section 35, whole protecting both in section 25? There would appear to be no reason for doing this. The term "rights," in normal usage, is broad enough to include freedoms, powers, and immunities, and it seems natural to read section 35 in this way.**[343]

Unfortunately, Professor Slattery did not give any further reasons why his interpretation is correct. In what sense can it be "normal" for someone to include powers and immunities within the concept of "rights"?[344]

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343 Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83), 8 Queen's Law Journal 232 at 239.

344 As for the "freedoms" considered by Slattery, Hohfeld (*supra* note 318 at 36) offered a parallel example concerning the use of a synonymous term "liberty" by Lord Lindley:

> **A "liberty" considered as a legal relation (or "right" in the loose and generic sense of that term) must mean, if it have any definite content at all, precisely the same thing as *privilege*, and certainly that is the fair connotation of the term as used the first three times in the passage quoted. It is equally clear, as already indicated, that such a privilege or liberty to deal with others at will might very conceivably exist without any peculiar concomitant rights against "third parties" as regards certain kinds of interference. Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits.**

Another example of the single "right of self-government" view states:

> **The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations.**[345]

A final example comes from the Supreme Court of Canada. In R. v. Pamajewon, Chief Justice Lamer stated for the majority:

> **The appellants' claim involves the assertion that s. 35(1) encompasses the right of self-government, and that this right includes the right to regulate gambling activities on the reservation. Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet, supra*. Assuming s. 35(1) encompasses claims to aboriginal self-government, such claims must be considered in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet, supra*. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.**[346]

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345 Minister of Indian Affairs and Northern Development, "Aboriginal Self-Government", (Ottawa: Minister of Public Works and Government Services Canada , 1995) at 3 [hereinafter "Aboriginal Self-Government"].

346 Pamajewon, *supra* note 324 at 9. See also R. v. Van der Peet, *supra* note 319 where the first part of the test was stated at 41:

> **...in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed.**

The second part of the test was stated at 42:

> **To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, tradition**

The prevailing dialogue judicially, politically, and academically is that regardless of whether or not there exists a "right of self-government", it will be discussed using the term "right".

This view is held without any analysis of what the corresponding duty would be, or who would bear it.[347] Who holds this right: a collective or an individual? Who defines who holds the right? Is the legal right based in common law, international law, statutory law, or a *sui generis* concept of inherent rights? After specific physical and mental facts have been accurately characterised as a specific jural relationship, increased clarity must be the result.[348] However, increased clarity does not in itself solve the social problems that underlie the confusion.

> or custom was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture.

The time frame that this test is concerned with was the "period prior to contact between aboriginal and European societies" (at 44).

347 There are some who would argue that the *only* analysis worth undertaking is an analysis of the duty. See Allen, *supra* note 326 at 332.

348 Corbin, *supra* note 330 at 238 stated:

> Terminology and analysis are the tools that we must use in the process of applying the precedents and in stating rules and policies. They are vitally important tools. They clear the ground and lay bare the underlying legal and social problem to be solved. Without them, we may not see this underlying problem at all; and even if we see it, we may get lost in the inaccuracy and confusion of our own verbosity.

THE "RIGHT OF SELF-GOVERNMENT" AND EXECUTIVE AGREEMENTS

In Manitoba, modern treaties in the form of executive agreements are likely to be the method chosen to bring about change for Aboriginal communities. Apparently both the Natives and government agree to use the phrase "inherent right of self-government".[349] Yet how does this "inherent right" relate to treaties?[350] One view places treaties at the center of the new relationship.[351] About this relationship Hogg and Turpel states:

> **Many First nations leaders speak of "treaty government", and suggest that their treaties are an effective vehicle for the implementation of the inherent right of self-government. Confusion over the relationship between treaties and the package of self-government amendments in the Charlottetown Accord was a source of dissension during the debate over the Accord in Aboriginal communities.[352]**
>
> **... For some Aboriginal peoples, the implementation of the inherent right of self-government is inseparably linked to the fulfilment of a pre-existing**

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349 See principle 5.2 of the Framework Agreement, Appendix I at 191 and "Aboriginal Self-Government", *supra* note 345 at 3.

350 At this point the question should be seen in two lights. First in respect to the "inherent right" and the Numbered Treaties rights as two separate entities, and second in respect to the "inherent right" as a "treaty right".

351 Hogg & Turpel, *supra* note 325 at 194. Note that using the treaties as the basis for self-government was based upon "treaty" meaning the historic variety such as the Numbered Treaties of Manitoba. This theory was also impliedly based on such bands wanting the historic treaties as the basis for any new relationship. The Manitoba Framework Agreement says in principle 5.2 that the agreement is based on "Treaty rights", see Appendix I at 191.

352 *Ibid.* at 193.

> treaty relationship.[353]

They describe the relationship as:

> ...and recognizing that for Treaty First Nations the implementation of self-government will mean the articulation of rights and responsibilities flowing from existing treaties, which should be fully honoured and implemented by Canadian governments as a central part of self-government implementation.[354]

The authors also imply that any self-government scheme, like that described above, would be in the nature of a third order of government that would be "sovereign in their own spheres" of legislative powers.[355]

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353 *Ibid.* at 194. See also Royal Commission of Aboriginal Peoples, *Restructuring the Relationship*, vol. II, Part One, (Ottawa: Canada Communication Group, 1996) at 48 [hereinafter Royal Commission report]:

> In entering into nation-to-nation treaties with them the Crown has already acknowledged their self-governing nation status.

354 *Ibid.*

355 *Ibid.* at 191. Hogg & Turpel described their "sovereignty" position in relation to the Charlottetown Accord. However, in a note describing their preferred view of constitutional amendment, they imply that a similar "sovereignty" view would be taken without constitutional amendment:

> In our view, comprehensive constitutional amendments on Aboriginal self-government would be the preferred approach because they would assist in clarifying the status and nature of Aboriginal governments in light of the already defined federal and provincial jurisdictional structure of the Canadian federation. Moreover, comprehensive constitutional amendments would ensure that Aboriginal government jurisdiction not be "inferior" in status to the existing two orders of government, which already have a secure constitutional footing with established rules for the resolution of jurisdictional conflicts. This is not to say that the courts would not support exclusive Aboriginal jurisdiction over certain subject matters without constitutional reforms, but that comprehensive amendments would save resources on litigation

The federal government seems to have endorsed the concept of "inherent right" as a treaty right:

> **The Government of Canada is prepared, where the other parties agree, to constitutionally protect rights set out in negotiated self-government agreements as treaty rights within the meaning of section 35 of the *Constitution Act, 1982*. Implementation of the inherent right in this fashion would be a continuation of the historic relationship between Aboriginal peoples and the Crown.**[356]

The "inherent right" would apparently be transformed by a self-government agreement into a "treaty right", thereby attracting constitutional protection.[357] If this view is added to the earlier theory of Hogg and Turpel, it seems the "inherent right of self-government", although predating the treaties, would flow from them and then be constitutionally protected as a treaty right itself.[358] As a working theory this would allow "Aboriginal governments" to legislate in a

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> **and acrimonious jurisdictional conflicts.**

356 "Aboriginal Self-Government", *supra* note 345 at 8.

357 Royal Commission report, *supra* note 353 at 224:

> **A treaty dealing with the inherent right of self-government gives rise to treaty rights under s. 35(1) of the *Constitution Act, 1982* and thus becomes constitutionally entrenched. Even when a self-government agreement does not itself constitute a treaty, rights articulated in it may nevertheless become constitutionally entrenched**

358 It is logically and terminologically contradictory that an "inherent right" would flow from a treaty. One rebuttal to this point could be something like the following: the inherent right was not created by the treaty, but was recognised and further defined by the treaty and therefore the treaty defines part of the inherent right.

sovereign manner over certain spheres of power[359], without requiring constitutional amendment. The Manitoba Framework Agreement would be a real example of what Hogg and Turpel discuss in theory.[360]

There are two main areas of concern that this "third order of government" theory highlights, and which the Manitoba Framework Agreement exemplifies. Firstly, from a Hohfeldian standpoint, there has been undue focus on "rights" with little or no attempt to define correlative duties that should arise. By not

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359 Examples of these "spheres of power" may be taken from principle 5.11 the Manitoba Framework Agreement, see Appendix I at 192. Specifically, protection and promotion of cultures, identities, institutions, traditions, citizenship, lands, waters, economies and languages. See also Royal Commission report, *supra* note 353 at 217. Some would argue that the treaties could be used as evidence for the proposition that internal self-government of bands was contemplated. However, this internal self-government would be nothing like the sovereign powers proposed by the Royal Commission: Kenneth Tyler, "Another Opinion: A Critique of the Paper Prepared by the Royal Commission on Aboriginal Peoples Entitled: 'Partners in Confederation'", *The Inherent Right of Aboriginal Self-Government, Vol. II*, (Continuing Legal Education Program, Annual Meeting, Toronto, 1994) at 50. To base a claim of sovereignty on the treaties, however, would seem to require that sovereignty was never surrendered. This view was questionable in light of the case law. See Logan v. Styres (1959) 20 D.L.R. (2d) 416 at 422 (Ont. HC) which involved the plaintiff trying to block a surrender of 3.05 acres of reserve by arguing that the Six Nations were not subjects of the Crown and therefore the *Indian Act* did not apply to them. King J held:

> **In each of these deeds it is made clear that those of the Six Nations Indians settling on the lands therein described do so under the protection of the Crown. In my opinion, those of the Six Nations Indians so settling on such lands, together with their posterity, by accepting the protection of the Crown then owed allegiance to the Crown and thus became subjects of the Crown**

See also R. v. Sparrow, (1990) 70 D.L.R. (4th) 385 at 404 (SCC) Dickson C.J.:

> **...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.**

360 The Framework Agreement would seem to be what Hogg & Turpel had in mind when describing their theory. Treaty Natives who have an agreement based on a recognition of the "inherent right of self-government" will use historic treaty rights to found a "new relationship".

defining the duty, the content of a right is subject to uncertain interpretations that do not aid legal analysis. As we will see, the lack of attention to the correlating duties can allow for vast differences in the interpretation of the treaty provision, fiduciary responsibilities being one area of particular concern. Secondly, despite the content of right-duty relationships being uncertain, it is still proposed as the basis for a third order of government. But can and should a treaty right accomplish this monumental constitutional change? For a number of reasons the Treaty Five education right provides a good example.[381] But first some background on the Manitoba Framework Agreement and the Treaty Five education right is necessary to give the Education Framework Agreement context.

The Manitoba Framework Agreement

The Framework Agreement was signed on 7 December 1994 between sixty Manitoba bands and Her Majesty the Queen in Right of Canada. Section 1 of the Agreement defined its objectives:

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381 Treaty Five affects the largest number of people in Manitoba. See Minister of Indian Affairs and Northern Development, *First Nations Community Profiles, 1996, Manitoba Region* (Ottawa: Indian and Northern Affairs Canada, 1996 at 153) [hereinafter *Community Profiles*]. Note also that the Treaty Five education provision was identical to Treaties Three and Six, Chapter One *supra*, note 91. The education right seems to be the subject whose implementation has proceeded the most rapidly, and has been dealt with most thoroughly. See Bruce Spence, "Education Framework Agreement Nearing Community Ratification", *The Peoples' Decision*, vol 1, no. 4, March, 1996 at 1, and *Framework Agreement on Indian Education in Manitoba* [hereinafter Education Framework Agreement], Appendix II.

1.1 Dismantle the existing departmental structures of the Department of Indian Affairs and Northern Development (hereinafter sometimes referred to as "DIAND") as they affect First Nations in Manitoba;

1.2 Develop and recognize First Nations governments in Manitoba legally empowered to exercise the authorities required to meet the needs of the peoples of the First Nations; and

1.3 Restore to First Nations governments the jurisdictions (including those of the other federal departments);

consistent with the inherent right of self-government, all of which is hereinafter referred to as the "Objectives".[362]

The Agreement goes on to give a brief historical background of Aboriginal-European contact, as well as a background on the recent political process leading up to the Agreement[363]. The core of the Framework Agreement is contained in Section Five, entitled "Principles".[364] It is upon these eighteen enumerated principles that the objectives are supposed to be reached.

Education and the Framework Principles

5.1 First Nations' Treaty rights, aboriginal rights and constitutional rights will in no way be diminished or adversely affected by this

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362 *The Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdictions to First Nations Peoples in Manitoba and Recognition of First Nations Governments in Manitoba*, December 7, 1994. Copies are currently available from the Department of Indian Affairs and Northern Development. [Hereinafter Framework Agreement]. See Appendix I.

363 According to the Framework Agreement the process started in October 1993.

364 Framework Agreement, Appendix I at 191.

process;[365]

If the "inherent right" flowed from the treaties, then logically the content of original treaty rights would be important. The education right of Treaty Five was clearly stated. The concern here was the promise to "maintain" schools for instruction on reserves that requested them and that seemed advisable to the Crown. Using the Hohfeld scheme, this promise does qualify as a right and duty relationship. The right is to the maintenance of "schools for instruction", with the corresponding duty on the Crown to provide and maintain these schools.

It was logical to begin with the treaty interpretation rule which stated that the text of the treaty was of primary importance, with an inquiry into the original intent of the framers only if there was some ambiguity in the text.[366] In this case the Treaty text reads:

> **And further, Her Majesty agrees to maintain school for instructions in such reserves hereby made as to her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.[367]**

The provision seems reasonably clear on its face. However some provisions

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365 See Appendix I at 191.

366 See *supra*, Chapter One at 55.

367 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, (Toronto: Willing & Williamson, 1880) at 346. See *supra*, Chapter One *supra*, note 91, for a comparison to other treaty's education provisions.

could be subject to varied interpretations. *Black's Law Dictionary* defined "maintain" as:

> **The term is variously defined as acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition; bear the expense of; carry on; commence; continue; furnish means for subsistence or existence of; hold; hold or keep in an existing state or condition;...provide for; rebuild; repair; replace; supply with means of support; supply with what is needed; support; sustain; uphold.**[368]

Clearly the idea was to supply the school with the physical necessities of operation, which would logically include everything from desks and chalkboards to teachers. If one were to quibble with the wording in the Treaty, there is no mention of any undertaking to actually build the schools on the reserve. This is a relatively inconsequential point, as the federal government funded and continues to fund the building of schools on reserve. Using the Opaskwayak Cree Nation (hereinafter referred to as OCN) and Norway House First Nation as typical examples, schools were built on these reserves over 100 years ago. The school on the OCN was built in July 1880. In Norway House the school was built shortly after in 1881. All costs for staffing and construction were assumed by the Federal Department of Indian Affairs.[369] By 1920/21 there were three schools at

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368 *Black's Law Dictionary*, 5th ed. (St. Paul: West Publishing Co., 1979) at 859.

369 *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880* (Ottawa, Maclean, Roger & Co., Wellington St., 1881) at 241; *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881* (Ottawa, Maclean, Roger, 1882) at 214.

OCN and the school at Norway House had two teachers.[370]

The *Indian Act* also deals with this point. Section 114(2) states:

> **The Minister may, in accordance with this Act, establish, operate and maintain schools for Indian children.**

Furthermore, the *Indian Act* gave a definition of "school" in s. 122:

> **"School" includes a day school, technical school, high school and a residential school;**

Section 114(1) allowed the minister to enter into agreements with different parties to provide for Indian education. Specifically s. 114(1) stated:

> **The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with**
> **(a) the government of a province**
> **(d) a public or separate school board, and**
> **(e) a religious or charitable organization**

As such, this section allowed the Crown to make entirely different provisions for Indian education on reserves[371] than was stated in Treaty Five. It is important to

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[370] *Annual Report of the Department of Indian Affairs for the Year Ended 31st March, 1921* (Ottawa, F. A. Acland, 1921) at 67.

[371] Note that s. 4 states that s. 114 does not apply to Natives off reserve unless ordered by the Minister.

note that s. 114 was a permissive section only. Using the word "may" does not necessitate conflict with the treaty provisions, since the minister can still fulfill both the statutory and treaty provisions by providing a school on the reserve.

The treaty remains silent on who specifically must provide the educational services. Clearly the treaty gave the responsibility of maintaining the schools to the federal government. However, there seems to be nothing to stop the federal government from delegating the actual educational services to others. Legislatively, the minister has various options as stated in s. 114(1). Norway House reserve was a prime example of this scenario, where its first school was run by a church.[372] It currently has three schools operating under the Frontier School Division, which is a provincial school division.[373] These arrangements would not appear to have violated the treaty provisions because this all took place on reserve.

This indicates that the terms of Treaty Five could be fulfilled by the delegation of educational responsibility to bands, in exactly the same manner as educational responsibilities were delegated to religious orders, or provincial school divisions in the past. This would satisfy the provisions of both the *Indian Act* and Treaty Five as described above. However, this solution would not give any effect to an "inherent right".

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372 The *Annual Report of the Department of Indian Affairs for the Year Ended 31st March, 1912/13* (Ottawa, F. A. Acland, 1913) at 422 lists the school as Roman Catholic. The 1920/21 report, *supra* note 367 at 67 lists the school as Methodist.

373 See *Community Profiles*, *supra* note 361 at 44.

Self-government Based on Treaty Rights?

> **5.2 The inherent right of self-government, First Nations Treaty rights and Aboriginal rights will form the basis for the relationships which will be developed as a result of the process;**[374]

According to this provision treaty rights will "form the basis" for future relationships. But what does this mean? To what extent will the original treaty rights be involved in future initiatives started by this self-government process? As seen above, the Treaty Five education right was clearly stated in the treaty text. It provided a good example, because it was a subject specifically considered in the Framework Agreement.

In 1984 the Assembly of First Nations' commissioned their Education Secretariat to conduct a study of Indian Education in Canada. The study was completed in 1988. It expressed the opinion that:

> **First Nations governments have the right to exercise their authority in all areas of First Nations education. Until First Nations education institutions are recognized and controlled by First Nations governments, no real First Nations education exists**[375]

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[374] See Framework Agreement, Appendix I at 191.

[375] Assembly of First Nations, *The Circle of Knowledge*, ed. by G. Mike Charleston, (Ottawa: Assembly of First Nations, 1988) at 47 [hereinafter *The Circle of Knowledge*].

On the issue of jurisdiction the study stated:

> **First Nations people view jurisdiction as having local jurisdiction and parental responsibility over education. Although most First Nations have been able to obtain some involvement in education, they do not have full jurisdiction as was intended by the *Indian Control of Indian Education* policy paper. Most First Nations would like mechanisms to enhance local jurisdiction over programs so as to have jurisdiction over delivery, planning, budgeting, evaluation, choice of language of instruction, teaching methods and curricula.**[376]

In Manitoba this is now somewhat of a moot point because there are no longer any federally controlled schools on reserve.[377]

Despite this fact, the Assembly of Manitoba Chiefs entered into a *Framework Agreement on Indian Education in Manitoba,*[378] on 5 December 1990, almost four years before the general Framework Agreement was signed. The general Framework Agreement makes specific reference to the Education Framework Agreement in s. 8.4.3.1, regarding the allocation of $500,000.00 to further the implementation of that specific agreement. The general Framework Agreement made further reference to the Education Framework Agreement in the attached *Workplan*. Under the *Workplan*, the Education Framework Agreement programs are to be expedited, with the purpose:

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376 *Ibid.* at 53.

377 *Community Profiles*, *supra* note 361 at 154.

378 See Appendix II.

To review the tasks set out in the Education Framework Agreement signed in 1990, the work already undertaken by the First Nations Education Transition Team in Manitoba and to determine the next steps to be taken to enable First Nations in Manitoba to assume responsibility for all education functions.[379]

The tasks referred to are found in the "Objectives" section of the Education Framework Agreement:

a) To identify educational matters that require immediate or long term attention and resolution;
b) To develop an agenda for change that will accelerate Indian control, authority, management and jurisdiction in the Indian education in Manitoba
c) To conduct research and development projects or initiatives to support and enhance the development of a better educational system under Indian jurisdiction;
d) To develop models of possible educational systems under Indian control and management;
e) To identify the appropriate role of the Department of Indian Affairs and Northern Development with respect to its responsibilities and obligations for the education of Indian people;
f) To develop a plan for the devolution to Indian people in Manitoba of control over and management of their educational institutions;
g) To develop a process for the purpose of establishing funding arrangements for Indian education in Manitoba;[380]

All of this was for:

The purpose of this Framework Agreement is to recognize the intent and commitment of the parties to negotiate formal arrangements on Indian Education in Manitoba, and to establish the parameters within which such

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379 Assembly of Manitoba Chiefs & Indian and Northern Affairs Canada, *Towards First Nations Governments in Manitoba, Workplan*, See Appendix I at 197.

380 Education Framework Agreement, Appendix II at 199.

arrangements will be negotiated.[381]

On the face of these words it seems a logical and exhaustive procedure to arrive at the desired result of Aboriginal control over education. However it is of utmost significance that throughout these key statements not one mention of the original treaty right is made. The original treaty right is only referred to three times in the whole agreement, and never quoted. The first two times occur in the "whereas" section:

> **AND WHEREAS Canada, by virtue of certain Treaties with the Indian Tribes and Nations in Manitoba, has certain responsibilities and obligations with respect to the education of Indians;**
>
> **AND WHEREAS attempts by the parties to negotiate certain issues relating to treaty rights and to post secondary education have not given rise to acceptable rights, and these issues may therefore be addressed by the parties outside the scope of this Framework Agreement;**[382]

It is the second "whereas" that really indicates the complete disregard for the

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381 *Ibid.*

382 *Ibid.* For the third reference see Education Framework Agreement, Appendix II at 199:

> **1.1 In this Framework Agreement, the following principles shall guide and influence the preparations, planning, work, research, development, programs, services, and further initiatives that derive from the implementation of its provisions:**
>
> > **(a) Indians have a distinct status and identity by virtue of their indigenous origin, history, development and existing aboriginal and treaty rights, which existing aboriginal and treaty rights are recognized and affirmed by s. 35 of the <u>Constitution Act, 1982</u>;**

original treaty right. In effect this provision says that the Education Framework Agreement can proceed while they deal with the exact contents of the original treaty right in some other manner.[383] Logically, this seems backward to the process stated in the Framework Agreement principles 5.1 and 5.2. Specifically, how can anyone base a "new relationship" on treaty rights, the content of which are not agreed upon? If original treaty rights really had anything to do with the Education Framework Agreement, would they not have to be agreed before modernising, refining, redefining, or any other form of modification? This would still be the case even if principle 5.3 is taken into consideration:

> **In this process, the Treaty rights of First Nations will be given an interpretation, to be agreed upon by Canada and the First Nations, in contemporary terms while giving full recognition to their original spirit and intent.[384]**

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[383] This lack of agreement on the terms of the original treaty was evidenced in Bruce Spence, "Education Framework Agreement Nearing Community Ratification", *The Peoples' Decision*, vol. I, no. 4, March, 1996 at 1 where he attributed the following comments to Virginia Arthurson, Education Advisor to The Assembly of Manitoba Chiefs:

> **'Education is a treaty right. It drives the whole EFA process,'... ...However, she says, when it comes to fiscal responsibility on the part of the government, they attempt to narrow it down to covering kindergarten to grade 12 only.**

In contrast:

> **Mendel Schnitzer represents DIAND on the Education Framework Agreement steering committee. He is Senior Negotiator and Policy Analyst for the intergovernment affairs branch of DIAND's Manitoba regional office. He declined to discuss the Education as a treaty right.**
> **'These issues are going to be handled in the final agreement under the FAI process. They have been left to the side because they are so contentious.' Schnitzer said.**

[384] Framework Agreement, Appendix I at 191.

One way of viewing principle 5.3, although perhaps cynically, is that it would allow the government and the band to disregard the actual treaty text and agree to "contemporary terms" that do not necessarily have any resemblance to the original treaty terms. Regardless of the position one takes on this issue, it is hard to ignore the fact that the "original spirit and intent" will be determined by today's negotiators.

The original Treaty Five education provision had absolutely nothing to do with Aboriginal control over education. The treaty provision, as described earlier, did not mention jurisdiction, management or authority. The treaty provision was a promise by the Crown to the Treaty Five bands to maintain a school on their reserves. To take the Hogg and Turpel view that legislative control can somehow flow from Treaty Five requires that the actual treaty text be ignored.

Furthermore, there is the conspicuous absence of any attempt to analyse duties arising from the "rights" so liberally referred to. This has resulted, as Hohfeld warned, in "a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems"[385], by inviting drastically different interpretations. One such interpretation of the Treaty Five education right concludes:

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385 Hohfeld 1, *supra* note 318.

> **The education right as stated in Treaties 1 and 2 is unlimited and clearly should be read as including elementary, secondary and post-secondary education. While the written text of Treaty 3 and the subsequent treaties based on it include a clause that the government see the provision of schools as being "advisable," the collateral sources support the position that at the time of the signing of the Treaty there were no such conditions in place and the first Nations' understanding of the Treaty was no different from that of Treaties 1 and 2.**[386]

This statement implies that the federal government has the duty to provide schooling through to post-secondary levels. However, it framed the question in terms of the right. So even if the federal government agrees with the above statement, where will that leave the bands? Should not the substance of the inquiry be the duty that arises from the right, and the standard that duty must be held to.

As we have seen there are duties that arise from the treaties, and these duties may also have a fiduciary aspect to them. For example would simply providing funds be sufficient to fulfil the duties that arise from the treaty right? One view suggests yes:

> **...it is recognized that it may not always be feasible to provide post-secondary education in the form desired to First Nations' people on reserves. While that may amount to a *prima facie* breach of the Treaty, it is likely that in such a case some reasonable agreement could be reached to accomplish the objective of the Treaty. It should be emphasized however, that it would be the government's responsibility to come to an agreement with the First Nations with respect to a reasonable alternative, not vice versa. A suitable alternative would likely include the funding of post-secondary education off the reserve at one of the universities or other**

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386 Vic Savino, & Erica Schumacher, "Whenever the Indians of the Reserve Should Desire It': An Analysis of the First Nation Treaty Right to Education", (1992) 21 Manitoba Law Journal 476 at 496. Contrast this with note 64 above.

post-secondary education institutions already in existence (such as has occurred for over one hundred years).[387]

Does this proposed duty have a fiduciary aspect to it? This duty could be compared to a contractual duty that someone cannot fulfill. In this example would it not be the person's duty to attempt to re-negotiate the promise or come to some other agreeable solution? However, in the Aboriginal context R. v. Cote tells us that there is a fiduciary aspect to treaty rights[388]. If one takes the view of a generally pervasive fiduciary obligation on the government, this seems to provide a specific example of the Royal Commission's view:

> **In the Commission's view, the Crown is under a fiduciary obligation to implement such measures as are required to reverse this colonial imbalance and help restore its relationship with treaty nations to a true partnership. This will require the Crown to take positive steps toward this end as well as to refrain from taking actions that will frustrate it.[389]**

On the other hand, just how can this duty to "make a deal" be enforced? As suggested earlier, one of the main problems with the general fiduciary obligation view is the difficulty in applying it to specific situations.[390]

Nevertheless this does illustrate the overall point, which is: by exclusively

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387 *Ibid.* at 489.

388 Cote, *supra* note 6.

389 Royal Commission report, *supra* note 353 at 43.

390 *Supra* Chapter Three at 108.

framing questions in terms of a "right", the substantive questions tend to be obscured. In this case, the debate centers on whether the education *right* includes post-secondary education. But as we have seen, Treaty Five stated a specific duty, *i.e.,* to provide schools of instruction. To say that a band has a right to post-secondary education enforceable against the federal government obscures what actually must be done. For example, fighting for the government to admit a right to education really does not describe what action or resources must be made available. But, by saying the Crown has a duty to provide post-secondary education to the bachelor, master or doctoral level is much more clear, and tells us what must be done. In this way the correlative right can be defined in terms of the specific duties that are owed. However, as we will see it is not sufficient to stop the inquiry here, just because the content of a right-duty is under debate.

TREATY RIGHTS AND AUTHORITY FOR CHANGE

The Treaty Five right to education and its proposed transformation by the Education Framework Agreement generate further questions about using a treaty right as the basis for a new order of government. Despite the implication that the scope of treaty duties rests at the heart of band-government conflict in education, this conflict should not stop a preliminary inquiry into questions about the right-duty supporting a third order of government.[391] The right-duty of education is still proposed as the basis for a band's legislative power in this area, regardless of whatever outcome the negotiations determine the "content" of the right to be.[392] It is the reference to "jurisdiction" that provide evidence of this. One of the Education Framework Agreement's objectives is :

> **To develop an agenda for change that will accelerate Indian control, authority, management and jurisdiction in Indian education in Manitoba.**[393]

The Education Framework Agreement's term "jurisdiction" is equivalent to Hogg and Turpel's "sovereign legislative authority"[394], a notion supported by principle 5.11:

> **First Nations governments in Manitoba will be able to undertake legislative, executive, administrative and judicial functions, based on agreements which are consistent with the inherent right of self-government and, with that proviso, will include, but not be limited to, the protection and promotion of their cultures, identities, institutions, traditions, citizenship, lands, waters, economies and languages;**[395]

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391 As described earlier, it is made very clear in both the general Framework Agreement, (principle 5.3, Appendix I at 191), and the Education Framework Agreement (the "Whereas" section, Appendix II), that the actual content of the original treaty rights (which logically must include the duties), is the subject of ongoing negotiation. See *supra* note 381-383 above and accompanying text.

392 Note that this does not change the earlier stated view that this seems to have the process backwards. See *supra* note 383 and accompanying text.

393 Education Framework Agreement, s. 2.1(c), Appendix II at 200.

394 Hogg & Turpel, *supra* note 325 and accompanying text.

395 Framework Agreement, Appendix I at 192.

Education seems to be included under protection and promotion of culture, institutions and languages.[396] Furthermore, the end result of the Education Framework Agreement process will presumably become a treaty under s. 35 which would entrench this sovereign "right" to legislate in the area of education.[397]

This line of reasoning ignores the question of a treaty right's legal authority, which is at the base of the questions following in these next sections.

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396 See Royal Commission of Aboriginal Peoples, *Gathering Strength*, vol. III, (Ottawa: Canada Communication Group, 1996) at 442:

> **Education is a core element of jurisdiction in Aboriginal self-government. Aboriginal people must have the opportunity to exercise self-governance in education. In so doing, they would resume control of their education in its entirety, passing their own legislation and regulating all aspects of education.**

397 Note that according to Hogg & Turpel, *supra* note 325 at 211, even if the modern treaty explicitly stated that it was not meant to create treaty rights under s. 35, protection would arise regardless. The reason was:

> **This is because section 35 protects "aboriginal" as well as "treaty" rights, and the inherent right of self-government is an Aboriginal right.**

Furthermore:

> **It follows that a self-government agreement would create treaty rights that would be protected by section 35. This would mean that an attempt by the Parliament of Canada or a provincial (or territorial) Legislature to alter the terms of a self-government agreement, without the consent of the affected First Nation, would be struck down by the courts.**

Note that the Framework Agreement was not intended to be a treaty. See Phil Fontaine, "Message from Phil Fontaine, Grand Chief, Assembly of Manitoba Chiefs", *The Peoples' Decision*, vol. 1, no. 1, June 1995 at 3 where he said:

> **At the insistence of the chiefs of Manitoba, we told the minister that we did not want the agreement to be a treaty. We wanted a political process, a process that would see two governments dealing with each other on an equal basis.**

In particular, that mystical modifier "inherent", and the terms of the treaties from which the rights exist, provide fertile grounds for analysis. However one area that Hogg and Turpel and the Royal Commission has dealt with is the "doctrine of exhaustiveness". In A.G. (Ont.) v. A.G. (Can.)[398], Earl Loreburn L.C stated:

> **Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.**

The doctrine stated: if the entire area of legislative power were distributed under the *Constitution Act, 1867*[399], then *ipso facto* Natives cannot hold a sovereign sphere of legislative authority by treaty or otherwise. Hogg and Turpel argued that this doctrine may be invalid.[400] The Royal Commission further expound on this argument[401]:

> **However, this argument confuses the question of the *scope* of federal and provincial powers with the question of the exclusiveness of those powers. As a matter of principle, the fact that a governmental body has the power to deal with a certain subject does not necessarily mean that it has exclusive powers, that it is the only body competent to deal with this subject. To the contrary, it is common for two or more governmental**

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398 A.G. (Ont.) v. A.G. (Can.) [1912] Appeal Cases 571 at 583 (PC)

399 R.S.C. 1985, App. II, No. 5.

400 See *supra* note 325 at 192.

401 See Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*, (Ottawa: Canada Communication Group, 1993) at 32 and 33 respectively.

bodies to hold overlapping or 'concurrent' powers.

So, even if the *Constitution Act, 1867* distributed comprehensive powers between the federal and provincial governments, as the standard view maintains, it did not necessarily extinguish the governmental powers of First Peoples, any more than previous colonial constitutions had done. More likely, the effect of the 1867 Act was to restructure existing levels of authority, so that the imperial Parliament, the federal government, provincial governments, and Aboriginal communities all had, in varying degrees, overlapping powers to deal with matters affecting Aboriginal peoples.

The Commission[402] elaborated on this argument in their final report:

This proposition means that under British law, once the Crown assumes authority over a certain Canadian territory, no Aboriginal institution would have the power to override a parliamentary stature applying in the territory (or a law passed by a suitably empowered local legislature). According to this doctrine, an Aboriginal body would not be able to enforce an indigenous law that was inconsistent with a British statute. However, as long as no such inconsistency existed, the indigenous law would remain in force. Furthermore, the capacity of the Aboriginal body to formulate or enforce the laws of the group would not be extinguished but would continue to exist, subject to the paramount power of Parliament.

However the support for this theory is tenuous.[403] Moreover, it fails to deal with

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402 See *supra* note 325 at 207.

403 The Royal Commission cited only the case of Connoley v. Woolrich, (1867) 11 L.C.J. 197, 17 R.J.R.Q. 75, 1 C.N.L.C. 70. to support this theory. This authority was weak in the extreme. The case, decided nine days after confederation, was between heirs of William Connoley. In his tour of duty he "married" a Cree woman producing at least six children with her. William and Suzanne lived together according to Cree customs from 1802 until 1831. In 1832 William "married" Julia Woolrich in accordance with Quebec civil law and the Catholic church. Monk J. held that the Cree customs married William and Suzanne for the purpose of Quebec law, and therefore the descendants of William and Suzanne should share proportionately in the estate. According to the Royal Commission the recognition of the Cree marriage customs exemplified the Aboriginal legislative authority over all areas that are not explicitly repealed or modified by British or Canadian legislation, *supra* note 325 at 208. See Norman Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases", [1984] 4 C.N.L.R. 1:

even more fundamental questions, which will now be considered. The "third order of government" theory becomes highly questionable because it deals so superficially with or completely ignores these following issues.

Delegation vs. Inherency: Authority for a Right?

An unclear area in this discussion is in locating the origins of the authority for sovereign legislative jurisdiction. According to the Royal Commission it flows from an "inherent right of self-government", which was recognised in the treaties. If we take the position that any form of delegation is unacceptable, it is argued that authority can only come from two possible sources, the "inherent" nature of

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> The majority of reported cases expressly recognizing and applying customary law deal with family law matters, primarily marriage and adoption. Customary law has not been expressly applied to other legal issues of particular interest to aboriginal peoples, such as land use, land claims, and the regulation of hunting and fishing rights.

A common factor among theses cases was the requirement that the marriage meet with common law criteria, which placed Aboriginal custom at the level of any "foreign marriage". Zlotkin described (at 2):

> A foreign marriage would be recognized if it was valid under the law of the place in which it was celebrated and if the marriage had certain basic characteristics: it must have been voluntary; it must have been intended by the parties to last for life; and it must not have been polygamous.

This was no recognition of an inherent legislative authority, only an acknowledgment that Aboriginal marriage customs could support the common law requirements of formal validity for a marriage. To use this as authority to support a theory describing sovereign legislative authority in all subject areas seems tenuous at best.

the right or from the constitution.[404]

The Hogg-Turpel, Royal Commission theory says that a modern day self-government treaty allegedly found its authority in an unsurrendered, inherent right of self-government, that was conceptualised as concurrent with federal legislative powers over "Indians and lands reserved for Indians".[405] According to the Royal Commission this legislative power was vulnerable to federal legislative override, but:

> **The inherent right is thus entrenched in the Canadian constitution, providing a basis for Aboriginal governments to function as one of three distinct orders of government in Canada.[406]**

One problem was, if the legislative authority were seen as delegated from Parliament, then it runs afoul of a line of constitutional cases preventing the parliament or the legislatures from delegating legislative authority to new legislative bodies.[407] Therefore the claim must be that for Natives to possess

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404 See Loretta Meade, "Manitoba First Nation Education Jurisdiction: Methods consistent with Treaty and Inherent Rights - an Interim Report" (Paper presented to the Assembly of Manitoba Chiefs, Special Chiefs Assembly on Education, 21-23 January 1997) [unpublished] at 5, where after outlining the only types of jurisdiction, namely constitutionally based, delegated, and inherent, stated:

> **The "right to assume complete jurisdiction" would refer to either the constitutionally-based or inherent based jurisdiction.**

405 Royal Commission report, *supra* note 353 at 216.

406 Royal Commission report, *ibid.* at 213.

407 See In Re: The Initiative and Referendum Act [1919] A.C. 935 at 945 (P.C.), A.G. Nova Scotia v. A.G. Canada [1951] S.C.R. 31 at 34 and 54 (*sub. nom.* Nova Scotia Inter-delegation case), where it was held that the Parliament and

legislative authority by treaty, that legislative authority must be "inherent" as opposed to "delegated":

> **If the legislative authority in the agreement is viewed as a delegation of the power to make laws, then it would seem that the delegation may be outside the commonly accepted bounds of the prerogative. If, the legislative authority is viewed as merely confirmation of an existing authority on the part of the Aboriginal community, then the agreement only serves the purpose of recognition and not delegation. The prerogative has often been used to confirm an existing situation, as for example, the Royal Proclamation of 1763, which confirmed pre-existing hunting and fishing rights.[408]**

In support of this idea the Royal Commission made it clear that "delegated" authority was not envisioned at all, and that any "right of self-government" was inherent.[409]

The proposed inherency as it related to the delegation cases highlighted a logical inconsistency. An inherent right of self-government implies that the right finds its validity in ancient custom. The Royal Commission endorses this view:

> **At the time of European contact, Aboriginal peoples were sovereign and**

Legislatures could not delegate their legislative powers under ss. 91 and 92 to each other; and In Re: Anti-Inflation Act 68 D.L.R. (3d) 452 at 504 (SCC), where it was held that an executive agreement could not support the application of federal laws to public sector employees in Ontario. Note however, that these cases did not consider an Aboriginal "third order of government".

408 See Stephen Aronson, "The Authority of the Crown to Make Treaties with Indians", [1993] 2 C.N.L.R. 1 at 10.

409 See Royal Commission report, *supra* note 353 at 202.

> **independent peoples, possessing their own territories, political systems and customary laws. Although colonial rule modified this situation, it did not deprive Aboriginal peoples of their inherent right of self-government, which formed an integral part of their cultures.**[410]

If "inherency" was where the "right" found its authority, why is it necessary to secure any agreement with the federal government when the constitution already implies recognition of this third order of government?[411]

Moreover, in In Re: Initiative and Referendum Act, Viscount Haldane referred to a province's legislative authority:

> **but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.**[412]

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410 *Ibid.*

411 The Royal Commission recognised this logical inconsistency, *supra* note 353 at 214:

> **To hold that the right of self-government cannot be exercised at all without the agreement of the Crown appears inconsistent with the fact that the right is inherent. To hold that Aboriginal peoples can implement the right to its fullest extent unilaterally reads too much into section 35(1), as seen in the broader context of the constitution as a whole.**

As a solution the Royal Commission advocates a "middle path" that divides legislative authority into core and peripheral areas. Core areas would be consistent with an "inherent" right and would not require agreements with the Crown for legislative authority. Peripheral areas the "inherent" right could only be exercised "following the conclusion of agreements with the federal and provincial governments". See *supra* note 353 at 215. Unfortunately this "middle path" does little to further our understanding of why or how legislative jurisdiction gets divided, or what use the modifier "inherent" is to the determination of that.

412 *Ibid.* at 945

This statement relied on the proposition that a legislature that owed its existence to the constitution could not endow with capacity a new legislative body. This seems to add to the question of why an Aboriginal third order of government must seek the federal government's agreement to anything? If Viscount Haldane's statement is correct, the federal government can no more sanction an Aboriginal third order of government than a province can create a new legislative body, because all three of these "orders of government" propose to derive legitimacy from the constitution. It is difficult to see why the Royal Commission suggests that "peripheral" powers require agreements to be reached with both the federal and provincial governments?[413] Presumably the "right" is either inherent or not.

Even presuming the federal government could unilaterally sanction a third order of government, would there not be limits to this power? One logical limit would see the federal government only able to sanction a third order of government which follows the Canadian constitution, which is what the Royal Commission describes:

> **So, while the section 35(1) right is inherent in point of origin, as a matter of current status it is a right held in Canadian law. The implication is that, while Aboriginal peoples have the inherent legal right to govern themselves under section 35(1), this constitutional right is exercisable only within the framework of Canada. Section 35 does not warrant a claim**

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413 See Royal Commission report, *ibid.* at 215 where the Royal Commission stated:

> **However, in the periphery, the inherent right of self-government can be exercised only following the conclusion of agreements with the federal and provincial governments.**

> to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.[414]

This statement implies that the Native claim to self-government, recognised by s. 35(1), comes only at the price of being consistent with the constitution. This seems reasonable enough, given the fact that s. 35(1) is part of the same constitution relied upon to justify the existence of the third order of government. The Royal Commission envisions core and peripheral areas of Aboriginal legislative authority.[415] Regarding legislative authority:

> In core areas of jurisdiction, an Aboriginal people is free to implement its inherent right of self-government by self-starting initiatives, without the need for agreements with the federal and provincial governments, although it would be highly advisable for Aboriginal people to negotiate such agreements in the interests of reciprocal recognition and the avoidance of litigation. However, in the periphery, the inherent right of self-government can be exercised only following the conclusion of agreements with the federal and provincial governments.[416]

These statements are premised on the notion that the self-governing "right" is

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414 See Royal Commission report, *ibid.* at 214.

415 Note that the Royal Commission cited, *ibid.* at 220, principle 5.11 of the Manitoba Framework Agreement (see Appendix I at 192) as an example of the core areas of legislative jurisdiction that can be negotiated. Note also that the Royal Commission cites education as an area falling within the core jurisdiction (at 218).

416 *Ibid.* at 215.

inherent and never surrendered. However, they also must coincide with provisions of the constitution. These statements by the Royal Commission are based on the belief that this "inherent" right is reconcilable with the constitution, and furthermore that the federal government can unilaterally recognise this by executive agreement. But is this really the case?

The constitution provides that the Queen is the head of state.[417] The head of state is critical to the operation of responsible government:

> A system of responsible government cannot work without a formal head of state who is possessed of certain reserve powers. While the occasions for the exercise of these powers arise very rarely, the powers are of supreme importance, for they insure against a hiatus in the government of the country or an illegitimate extension of power by a government which has lost its political support.[418]

However, the role a head of state will play in the Aboriginal third order of government is still extremely unclear. If the third order of government is based on pre-contact forms of Aboriginal government, as the term "inherent" implies, then surely the Queen as head of state plays no part. However, with bands who were signatories to the numbered treaties, pledges were made to be loyal subjects of Her Majesty. It is hard to say whether this would differentiate these bands from non-treaty bands? Nevertheless, if the view is taken that the

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[417] *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c.3, s. 9:

> 9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

[418] See John Keyes, *Executive Legislation*, (Toronto: Butterworths, 1992) at 253.

proposed third order of government must conform to the constitution, then will this not mean that an equivalent to the Governor General or Lieutenant Governor will have to be appointed for each band that is exercising legislative powers? It seems difficult for the federal government to sanction any type of legislative body that excludes the role of the Crown, since the head of state is an integral part of a valid legislature.[419] This point was not examined by the Royal Commission or by Hogg and Turpel. However, in light of s. 52(1) the seriousness of these questions should not be underestimated:

> **52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.**[420]

Despite these concerns, it is alternately argued that the treaty somehow captured the otherwise "inherent right of self-government".[421] Following this part

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419 *In re* The Initiative and Referendum Act, [1919] A.C. 935 at 944 (JCPC) where Viscount Haldane held:

> **Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position... ...Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.**

On this point their Lordships were "unable to assent to this contention".

420 *Constitution Act, 1982*, R.S.C. 1985, App II, No. 44.

421 Note that this line of reasoning gets very muddled. The argument goes: for a royal prerogative instrument like a treaty to *recognise* a third order of government it must be "inherent". Yet the Royal Commission also argued that a new treaty would be required to recognise certain areas of this "inherent" right. Then, either through the "inherent" aboriginal right or through the treaty (old or

of the argument would see the third order of government constitutionally entrenched as a treaty right. This leads to more questions.

Democratic Values and Constitutional Amendment[422]

It therefore seems critical to the Royal Commission's theory that the "right of self-government" be "inherent" as opposed to delegated.[423] However, this does not change the proposition that the "third order of government" became entrenched in the constitution by operation of s. 35, not by legislative intent. Whether or not one amends the constitution by treaty alone, this seems to run counter not only to the prerogative[424] but to the very reason we have legislative bodies and a constitution. Hogg himself stated:

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new?), the third order of government would gain constitutional protection from s. 35.

422 Note that I do not propose to examine the technical question of constitutional amendment provisions; see generally, Peter Hogg, *Constitutional Law of Canada*, (Scarborough, Ontario: Carswell, 1992) at 61 and *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, Ss. 38, 41, 43, 44, 45 . This analysis was meant to highlight the democratic principles integrated into our constitutional monarchy and to question the method by which Hogg-Turpel and the Royal Commission propose to bring about constitutional change.

423 Not only was delegation fatal to the Royal Commission theory, it seems also unacceptable to the Aboriginal position. See *supra* note 404.

424 *Supra* Chapter Two at 65.

> **The constitution must be "supreme", meaning that it must be binding on, and unalterable by, each of the central and regional authorities. If either could unilaterally change the distribution of powers, then the authorities would not be coordinate: supreme power would lie with the authority having the power to change the constitution.[425]**

To amend this "supreme" law requires something more than ordinary legislation:

> **The same idea is sometimes expressed by saying that a federal constitution must be "rigid". The term "rigid" does not imply that it cannot be amended - for all federal constitutions contain provision for amendment - but it does imply that the power-distributing parts of the constitution cannot be amended by ordinary legislative action: a special, and more difficult process is required for amendment.[426]**

Here the possibility that the Canadian constitution can be amended by executive action is not even considered. Flowing from the ancient royal prerogative rules,[427] there is a strong presumption that executive orders should not even "create" laws:

> **There is no principle in this country, as there is not in Great Britain, that the Crown may legislate by proclamation or order in council to bind citizens where it so acts without the support of a statute of the Legislature...[428]**

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425 Hogg, Peter, *The Constitution of Canada*, *supra* note 422 at 115.

426 *Ibid.*

427 *Supra* Chapter Two note 160 and accompanying text.

428 In Re: Anti-Inflation Act [1976] 2 S.C.R. 373 at 433.

Note however, the above quote may not be as clear as it seems:

> **We have since come to recognize that the making of legislation by the Executive is not only unavoidable, but indeed that it is both necessary and proper. The development of the Executive's legislative function did not result from a sinister bureaucratic plot to usurp the authority of Parliament, but was the outcome of new economic and social demands and expectations. The fact of the matter is that, for a variety of reasons, Parliament could not meet the growing demand for authoritative rules occasioned by the rise of the welfare state.[429]**

The authority for the executive to legislate was described as:

> **The principles of democracy and the rule of law provide the basis for linking legal effect to authority. They are translated into the requirement that executive legislation be made by a person authorized to make it at the time it is made. In most cases, authority is conferred by laws enacted by parliamentary bodies. These laws extend the legitimating effect of the democratic process to the executive legislation that they authorize. The rule of law sustains this legitimacy by permitting limits on the authority and ensuring respect for these limits.[430]**

This is not describing the prerogative powers of the Crown, but a more democratically valid exercise of executive power. Nevertheless, even this more

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429 See Keyes, *supra* note 418 at vii. Keyes noted that the term "executive legislation" could be viewed as an oxymoron. He stated (at 31):

> **The legislative branch increasingly expresses itself in terms of the purposes it wishes to achieve. Their realization is left to the executive using a variety of legal tools, including the authority to make law. Legislation and execution mingle in a transformed legal order that recognizes many forms of legislation.**

Note that Keyes was not referring to the royal prerogative powers of the Crown, but executive power under statutory authorisation. However in the Royal Commission's proposed self-government theory, there is no expression by the legislative branch to ground the executive actions.

430 *Ibid.* at 8.

legitimised exercise of executive power must conform to the constitution, not the other way around.[431] The Royal Commission's proposal seems to ignore these fundamental principles. No matter how noble the intention or proposed result, a fundamental question remains about the underlying authority of these legal arguments. Does it not seem that the legal concept "right-duty" is being assigned a role dramatically out of proportion to accepted practice, and perhaps even common sense? What future implications would this have on other areas of the law if the view is accepted that the executive recognition of a right-duty relationship can unilaterally alter fundamental principles of the constitution?

CONCLUSION

So where does all of this leave us? The answer is undoubtedly with more questions than answers. The Manitoba Framework Agreement is a good example of the Royal Commission's theories regarding self-government.[432] But most bands in Manitoba are already under treaties.[433] Although the Framework Agreement and the Education Framework Agreement propose to base the "new

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431 *Ibid.* at 159. Nowhere did Keyes even discuss the possibility that executive legislation could amend the constitution. As noted, the exact opposite situation was described, namely executive legislation must conform to the constitution.

432 *Supra* note 360.

433 *Community Profiles*, *supra* note 361.

relationship" on the treaties, there is little evidence that their texts or histories are being used at all. Despite what the Framework Agreement says, it is difficult to see how the original treaty rights can be maintained in the face of the fundamental change proposed by the Royal Commission. Will the original treaty relationships still exist after implementing new agreements? If they do exist, how will they be changed? Can the original treaties be rescinded? If so, what proportion of the band must agree to do this? These are questions not easily answered.

The fiduciary duties imposed on the Crown are proposed to continue regardless of the form self-government will take.[434] It can be argued that this view does not acknowledge either the law surrounding fiduciary obligations, nor the implicit contradiction between these principles and any band's economic aspirations.[435] Should fiduciary principles be applied the same to Natives and non-Natives alike?

Finally, what role will democratic values and the rule of law play in all of this? There have already been disturbing suggestions regarding this

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[434] See Royal Commission report, *supra* note 353 at 43, where the Royal Commission took the view that:

> ...the Crown is under a fiduciary obligation to implement such measures as are required to reverse this colonial imbalance and help restore its relationship with treaty nations to a true partnership.

[435] See Chapter Three, *supra* note 281.

question.[436] Serious concerns about the wisdom of "back door" constitutional amendments have been raised.[437] As the constitution is the "supreme law" in Canada, everyone has an interest when changes are being proposed.[438] This is especially true when the "amendments" propose adding a third order of government, a major restructuring by any standards. Further questions will be raised if traditional forms of government such as heredity are advocated in place of the current Canadian electoral system. Who decides these questions and upon what principles? As with any question of law, the courts will be placed in the unenviable position of deciding cases with such questions at the core of disputes. This will be inevitable, given either the vague ways these issues tend to be discussed or the silence of avoidance.

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436 Hogg & Turpel, *supra* note 325 at 211 where they argued:

> **A self-government agreement that has, by express agreement, been denied the status of a treaty may nevertheless be constitutionally protected. This is because section 35 protects "aboriginal" as well as "treaty" rights, and the inherent right of self-government is an Aboriginal right.**

This in itself raises new questions. What effect would s. 35 protection have in a transitional agreement like the Manitoba Framework Agreement? Would a court really uphold this against the express wishes of the parties?

437 See *supra* note 426 and accompanying text.

438 As Chief Justice Rinfret stated:

> **The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled.**

See A.G. Nova Scotia v. A.G. Canada, *supra* note 407 at 34.

CONCLUSION

The Aboriginal "treaty" is the form most likely to be chosen for implementing self-government in Manitoba, yet its legal basis remains unclear. The proponents' theory blends the concept of an "inherent right of self-government" with undefined references to original treaty rights, to produce a justification for asserting legislative jurisdiction on the part of Aboriginal communities.[439] If the plan succeeds, one consequence will be the fundamental restructuring of our present Canadian constitution. Fiduciary duties are said to justify the making of these agreements.[440] The goal is described as the restoration of Aboriginal jurisdiction, but it might be better described as the transfer of local legislative authority over a variety of different subject areas that affect Aboriginal peoples.[441] This approach is not easy to reconcile with accepted principles of law.

There is still a lack of analysis, discussion, and agreement as to what

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439 See *supra*, Chapter Four at 140.

440 See *supra*, Chapter Four note 389 and accompanying text.

441 See *supra*, Chapter Four at 159. For example, note the use of term "jurisdiction" by the Royal Commission, *supra* Chapter Four note 396:

> Education is a core element of jurisdiction in Aboriginal self-government. Aboriginal people must have the opportunity to exercise self-governance in education. In so doing, they would resume control of their education in its entirety, passing their own legislation and regulating all aspects of education.

those treaty rights are.[442] One approach is to have negotiators anachronistically render a modern interpretation of 'ancient' rights.[443] There also is often a general disregard for what the original treaties actually say, instead favouring a "spirit and intent" approach.[444] This raises suspicions about original treaty rights being used, not for their historical content, but for modern political purposes in the hopes that this will add credibility to modern self-government initiatives.

Another pillar on which modern self-government agreements are proposed to rest is an "inherent right of self-government". Did this "inherent right" exist as part of the original treaties, or does it stand alone in its own right? On the one hand, the argument is that an inherent right was never surrendered and still exists so that it can be recognised by a modern executive agreement.[445]

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442 See *supra*, Chapter Four note 383 and accompanying text.

443 See *supra*, Chapter Four at 155, and see Education Framework Agreement, Appendix II at 199:

> AND WHEREAS attempts by the parties to negotiate certain issues relating to treaty rights and to post secondary education have not given rise to acceptable rights, and these issues may therefore be addressed by the parties outside the scope of this Framework Agreement.

444 See *supra*, Chapter Four at 153. Compare objective (b) of the Education Framework Agreement, see Appendix II at 200:

> To develop an agenda for change that will accelerate Indian control, authority, management and jurisdiction in the Indian education in Manitoba.

And the Treaty Five provision, *supra*, Chapter One at 38:

> ...Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.

445 *Supra*, Chapter Four, note 351 and note 397 and accompanying text.

However it can also be argued that no executive agreement is required and that legislative jurisdiction can be accomplished by "self-starting" initiatives.[446] On the other hand, the original treaties and treaty rights are themselves said to be recognitions of the "inherent right", somehow acting as a conduit between ancient forms of tribal governance and a modern legislative regime.[447]

Locating fiduciary duties within this argumentative framework also raises many unanswered questions. The parties have scrupulously avoided discussion of duties that correspond to the rights that they claim, yet maintain that fiduciary duties will be unchanged by these modern self-government agreements.[448] It has even been proposed that there is a fiduciary duty on the federal government to restore Aboriginal communities to a self-governing state.[449] Yet the evidence indicates that ordinary fiduciary principles are not being consistently applied in the Aboriginal context.[450] Moreover, there is no certainty as to what extent

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446 *Supra*, Chapter Four note 411.

447 *Supra*, Chapter Four note 351 and accompanying text and Chapter Four at 141.

448 See Framework Agreement principle 5.8, Appendix I at 192:

> The Crown's fiduciary relationship will continue in accordance with judicial decisions, aboriginal rights, constitutional provisions including Section 35 of the *Constitution Act, 1982*, the Treaties and other laws and sources of law, or any of them;

449 *Supra*, Chapter Three note 306.

450 *Supra*, Chapter Three at 97. In particular the ability of the Crown to balance competing interests with those of the fiduciary band, *supra* Chapter Three at 98, and the "intention-based approach" of Justice Gonthier, *supra* Chapter Three at 102.

fiduciary principles are applicable to treaties.[451]

Similar uncertainty is raised by the choice of executive agreements as instruments of self-government. If self-government is a constitutionally recognised inherent right, then why negotiate modern treaties?[452] Does the federal government have the authority to engage in such fundamental constitutional restructuring without a formal constitutional amendment?[453] Furthermore, even if the federal government has such authority, can and should it be exercised through prerogative powers that are the antithesis of democratic accountability?[454]

All of this begs the question of what role the courts should play in this scheme? Courts have authority to review the actions of bodies created under prerogative and to apply both the *Charter* and administrative law principles.[455] To what extent would this apply to Aboriginal institutions created by executive agreement? Would Aboriginal communities accept judicial review of their future institutions of government in this manner?

With all of these questions avoided or unanswered, why are executive agreements the chosen method of proceeding? Is there not a more legally

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451 *Supra* Chapter Three note 309.

452 *Supra* Chapter Four at 166.

453 *Supra* Chapter Four at 167 for the proposition that a legislature cannot give its own powers to a new legislative power not created by the act to which it owes its own existence.

454 *Supra* Chapter Four at 171.

455 See Operation Dismantle v. R., *supra* Chapter Two at 77.

sound and permanent manner of achieving the desired objective of Aboriginal self-government within Canadian society? Formal constitutional amendment is the method preferred by some.[456] Unfortunately this means a political process, subject to a sometimes excruciatingly slow time frame. Without the political will for change there is little chance that a constitutional amendment will be forthcoming anytime soon.[457] These proposals are the product, therefore, of creative legal initiatives that try to find alternate ways of meeting the objective of

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[456] Royal Commission on Aboriginal Peoples, *Renewal A Twenty - Year Commitment*, vol. V (Ottawa: Canada Communication Group, 1996) at 120:

> Based on the findings of extensive research conducted for the Commission and our own assessment of the constitution, Commissioners have reached a number of legal conclusions that clearly push the boundaries of the constitution to new limits. Critics of these conclusions may well disagree and offer alternative interpretations. Rather than risk conflict over what the constitution does or does not mean, some would prefer to resolve issues through formal constitutional amendment.

Peter Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues", (1995) 74 Canadian Bar Review 187 at 191:

> In our view, comprehensive constitutional amendments on Aboriginal self-government would be the preferred approach because they would assist in clarifying the status and nature of Aboriginal governments in light of the already defined federal and provincial jurisdictional structure of Canadian federation.

[457] Hogg & Turpel, *ibid.* at 189:

> Since the failure of the Charlottetown Accord in October 1992, there has been uncertainty about the future of Aboriginal self-government and particularly the implementation of the Aboriginal part of the proposed constitutional amendments. It appears that constitutional reform is not on the national agenda in the wake of the 'No' vote... Aboriginal peoples have repeatedly expressed their frustration with the premises, scope, and the pace of present negotiations and the limited progress suggests that a fundamental rethinking of government policy and practice is in order.

Aboriginal self-government without having to wait for formal constitutional change.[458] The underlying problem with this method of proceeding is its failure to acknowledge the fundamental value of democratic participation in changing the fabric of our legal system: namely, the constitution.[459] Executive agreements are clearly a shorter, swifter road than that of constitutional amendment. It remains to be seen if they can provide a sound basis for the fundamental

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458 Hogg & Turpel, *ibid.* at 189:

> The purpose of this article is to explore the extent to which progress can be made immediately, within the existing Constitution of Canada, on the implementation of the inherent right of self-government... In particular, we want to analyze the legal and constitutional issues involved in the implementation of the inherent right without the express constitutional amendments proposed by the Charlottetown Accord.

Royal Commission, *supra* note 456 at 119:

> In this report, therefore, our recommendations are presented in such a way as to ensure that they can be implemented without constitutional change.

459 Note that the Commission seems to recognise the reverse, namely Aboriginal people should have a say in all changes to the constitution regardless of the direct applicability of the change to them. See Royal Commission, *supra* note 456 at 125:

> We believe, however, that a strong argument can be made that the participation of Aboriginal peoples and territorial governments in the Charlottetown negotiations established a constitutional convention requiring their participation in future constitutional conferences. Moreover, it should be understood that their participation covers all subjects on the agenda, not just those of immediate consequence to Aboriginal peoples. The reality is that the entire *Constitution Act, 1982* is of concern to them. The moral legitimacy of any future constitutional amendment would be brought into question if Aboriginal people did not have a say in its content.

change that the Royal Commission tells us is necessary.[460]

[460] Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol. I (Ottawa: Canada Communication Group, 1996) at xxiii:

> The approach proposed in this report offers the prospect of change in both the short and the long term. Broad support can be expected in Canada for policy changes that better the life conditions of Aboriginal people, that lead to the enhancement of educational and economic opportunities, and that help to establish healthier and happier neighbourhoods.

APPENDIX I

THE DISMANTLING OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE RESTORATION OF JURISDICTIONS TO FIRST NATIONS PEOPLES IN MANITOBA AND RECOGNITION OF FIRST NATIONS GOVERNMENTS IN MANITOBA

December 7, 1994

FRAMEWORK AGREEMENT

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FRAMEWORK AGREEMENT ON THE DISMANTLING OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE RESTORATION OF JURISDICTIONS TO FIRST NATIONS PEOPLES IN MANITOBA AND RECOGNITION OF FIRST NATIONS GOVERNMENTS IN MANITOBA

THIS FRAMEWORK AGREEMENT is entered into this 7th day of December, 1994.

BETWEEN:

Sixty First Nations in Manitoba, namely:

Barren Lands
Berens River
Birdtail Sioux
Bloodvein
Brokenhead Ojibway Nation
Buffalo Point
Chemawawin
Crane River
Cross Lake
Dakota Plains
Dakota Tipi
Dauphin River
Ebb and Flow
Fairford
Fisher River
Sagkeeng/Fort Alexander
Fox Lake
Gamblers
Garden Hill
God's Lake
God's River
Grand Rapids
Hollow Water
Indian Birch
Jackhead
Keeseekoowenin
Lake Manitoba
Lake St. Martin
Little Black River
Little Grand Rapids
Little Saskatchewan
Long Plain
Mathias Colomb
Mosakahiken Cree Nation
Nelson House
Northlands
Norway House
Oak Lake
Opaskwayak Cree Nation
Oxford House
Pauingassi
Peguis
Pine Creek
Poplar River
Red Sucker Lake
Rolling River
Roseau River
Sandy Bay
Sapotaweyak Cree Nation
Sayisi Dene
Shamattawa
Sioux Valley
Split Lake Cree
St. Theresa Point
Swan Lake
War Lake
Wasagamack
Waterhen
Waywayseecappo
York Factory

as represented by the Assembly of Manitoba Chiefs, (hereinafter referred to as the "Assembly"),

AND:

Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development, (hereinafter referred to as the "Minister").

The Assembly and the Minister, on behalf of their respective constituencies and peoples, and fully recognizing the historic nature of the Project and mutual covenants herein contained, hereby agree as follows:

1. OBJECTIVES

To establish a formal, binding process (herein sometimes referred to as "the Project") between the Minister and the Assembly in order to:

1.1 Dismantle the existing departmental structures of the Department of Indian Affairs and Northern Development (hereinafter sometimes referred to as "DIAND") as they affect First Nations in Manitoba;

1.2 Develop and recognize First Nations governments in Manitoba legally empowered to exercise the authorities required to meet the needs of the peoples of the First Nations; and

1.3 Restore to First Nations governments the jurisdictions (including those of the other federal departments);

consistent with the inherent right of self-government, all of which is hereinafter referred to as the "Objectives".

Notwithstanding anything else contained in this Framework Agreement:

(a) The Objectives of the Project will be realized on the basis of the core Principles and Mutual Commitments contained in paragraphs 5 and 6 hereof, the Memorandum of Understanding confirmed and ratified in paragraph 7.1, and such other matters as may be mutually agreed to in the course of the Project; and

(b) The Objectives of the Project will be implemented only on the basis of mutual decisions and agreements.

2. HISTORICAL BACKGROUND

2.1 Rich Diversity Pre-Contact

From time immemorial, the Cree, Dakota, Dene, Ojibway and other First Nations peoples governed themselves effectively. The relationships and structures used were as diverse as the peoples and reflective of the lives they led. Some were highly complex, with great formalities of ritual and process. Others were simple, practical and family based. All related to the needs, lifestyles and cultures of the people.

2.2 Early Relationship - Mutual Trust

Early relationships were based on mutual trust, sharing and mutual interests. The generosity extended by First Nations to early explorers was essential for the development of Canada, as were the technologies that had been developed by the First Nations peoples. This generosity and sharing exemplified itself in many nation to nation alliances, which also played a major role in the development and survival of Canada as a distinct nation.

.../3

2.3 Period of Decline

It is the position of the First Nations that relationships between First Nations and settler Canadians entered a long period of decline. The First Nations peoples lived on the margins of society in their own land. The erosion of First Nations peoples' pride, self-respect and independence was set in motion.

2.4 Treaties and the Special Relationship

In recognition of the special relationship between the Crown and First Nations, Treaties 1, 2, 3, 4, 5, 6 and 10 were signed respectively on August 3, 1871, August 21, 1871, August 4, 1873, September 15, 1874, September 20, 1875, August 10, 1876 and August 28, 1906 by the Crown and First Nations peoples, with adhesions thereafter. It is the position of the First Nations that their forefathers, when they signed the Treaties, believed that their lands would provide home bases, which would provide sustenance, as they always had done, as long as the sun shines, the rivers flow and the grasses grow.

2.5 The *Indian Act*, 1876 and Thereafter

The newly created Parliament of Canada passed the first consolidated *Indian Act* in 1876. The *Indian Act* affected every aspect of First Nations' lives, including lands, money, personal assets, law making, services, and citizenship.

After almost one hundred and twenty years, the Minister and the Assembly recognize that it is time to put in place a process that will lead both First Nations and Canada into a new relationship which is based on mutual respect and the recognition of First Nations' rights of government, management and control of their own lives, as recognized in the inherent right of First Nations to self-government.

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3. CONSULTATION

It is recognized that the first and foremost requirement of this Project and its outcomes is for the people of the First Nations of Manitoba to be fully informed, and to give informed consent, to the Project and its outcomes at every stage of its development. Outcomes must grow out of a consensus of the people of the First Nations and out of their history, culture and institutions. Outcomes cannot be imposed. Moreover, consultation and communications throughout the Project must be focused on, and delivered primarily by, individual First Nations communities and tribal councils in order to ensure the widest possible support and maximum absorption of information and decision making.

4. THE PROCESS LEADING UP TO THIS AGREEMENT

It is important to remember the recent history of the process leading up to the formulation of, and signatures to, this Agreement. The key moments in time were as follows:

4.1 AMC Chiefs' Resolution of October 1, 1993 directed the establishment of a joint working group to examine the dismantling of the Manitoba regional office of DIAND;

4.2 Broad political understanding emerged from the "Red Book", which promised:

> "The Liberal government will be committed to gradually winding down the Department of Indian Affairs at a pace agreed upon by First Nations, while maintaining the federal fiduciary responsibility."

4.3 In December of 1993, Minister Irwin met with the Chiefs of Manitoba and, collectively, they reached agreement to initiate a process;

4.4 Further meetings were held between Minister Irwin, Grand Chief Fontaine and some members of the Executive of the Assembly of Manitoba Chiefs (January, 1994, February, 1994 and March, 1994);

4.5 The Executive of the Assembly of Manitoba Chiefs approved and presented to Minister Irwin a tentative "Proposal Regarding the Recognition of Manitoba First Nations Governments" (February, 1994);

4.6 Minister Irwin, on March 9, 1994, committed to the initiative in Manitoba in the House of Commons;

4.7 The Assembly of Manitoba Chiefs tabled to the AMC/DIAND Joint Co-ordinating Group a discussion paper entitled "Towards Manitoba First Nations Governments" (March 14, 1994);

4.8 Technical meetings and tribal council consultations then were initiated;

4.9 Further meetings were held between Minister Irwin and Grand Chief Fontaine and some members of the Executive of the Assembly of Manitoba Chiefs, resulting in the exchange of correspondence between Grand Chief Phil Fontaine and Minister Irwin dated April 14, 1994, April 18, 1994 and April 19, 1994, intended to put the process into context;

.../5

4.10 The Chiefs of Manitoba met in assembly at Opaskwayak First Nation, The Pas, Manitoba, on April 19 - 21, 1994 to discuss the project;

4.11 On April 20, 1994, at Opaskwayak, Grand Chief Fontaine and Minister Irwin signed an historic Memorandum of Understanding, attached hereto;

4.12 By Resolution of the Special Chiefs' Assembly at Opaskwayak First Nation, passed on April 21, 1994, the Chiefs in General Assembly resolved to continue negotiations in a Resolution entitled "Self-Government Process" and, concurrently, passed a Resolution entitled "Guiding Principles for Dismantling of INAC", which will also, in part, guide the Chiefs of Manitoba in the negotiating process;

4.13 A further Special Assembly of Manitoba Chiefs was held in Winnipeg on June 14, 15 and 16, 1994 to further consider and approve the Project. Approval was given, subject to further changes to the Framework Agreement directed by the Chiefs to be brought back for consideration and ratification at a further Special Assembly.

4.14 A further Special Assembly was held in Dakota Tipi on September 1, 1994, to further consider and approve the Project. Authorization for execution of the Framework Agreement was given by Resolution of the Assembly.

4.15 The Framework Agreement was approved for Canada by Cabinet on November 22, 1994.

5. PRINCIPLES

The following principles, together with the terms of the Memorandum of Understanding entered into between Grand Chief Fontaine and Minister Irwin on April 20, 1994 (attached hereto), will guide the process to achieve the Objectives. Such principles include the following, among others which may also be agreed to by the parties:

5.1 First Nations' Treaty rights, aboriginal rights and constitutional rights will in no way be diminished or adversely affected by this process;

5.2 The inherent right of self-government, First Nations' Treaty rights and Aboriginal rights will form the basis for the relationships which will be developed as a result of the process;

5.3 In this process, the Treaty rights of First Nations will be given an interpretation, to be agreed upon by Canada and First Nations, in contemporary terms while giving full recognition to their original spirit and intent;

5.4 First Nations governments in Manitoba and their powers will be consistent with Section 35 of the *Constitution Act, 1982*;

5.5 The *Indian Act* will be amended, or repealed, as it applies to First Nations in Manitoba, to the extent required in order to give effect to the new relationships of those First Nations which ratify the new relationships;

5.6 The relationships between the governments of Canada and First Nations in Manitoba will be mutual, stable and secure;

5.7 The primary locus of First Nation Government will be the individual First Nation; in addition, there may be functions of First Nation government carried out at appropriate aggregated levels as determined by First Nations;

5.8 The Crown's fiduciary relationship will continue in accordance with judicial decisions, aboriginal rights, constitutional provisions including Section 35 of the *Constitution Act, 1982*, the Treaties and other laws and sources of law, or any of them;

5.9 Any and all liabilities for past actions and inactions by Canada will remain with Canada. Liabilities arising out of the exercise of decision-making powers and authorities by First Nations governments in Manitoba, unfettered by involvement of the Minister, will rest thereafter with the First Nations governments in Manitoba;

5.10 Canada recognizes First Nations governments in Manitoba have the power to enter into arrangements with other First Nations governments, provinces, municipalities and the federal government, to deal with issues and relationships deemed to be appropriate;

5.11 First Nations governments in Manitoba will be able to undertake legislative, executive, administrative and judicial functions, based on agreements which are consistent with the inherent right of self-government and, with that proviso, will include, but not be limited to, the protection and promotion of their cultures, identities, institutions, traditions, citizenship, lands, waters, economies and languages;

5.12 This project in Manitoba will not affect other First Nations in Canada or the relationship between such First Nations and DIAND;

5.13 Ratification by the people of each First Nation will be required for any First Nation which moves into the new relationship envisaged by the First Nations governments in Manitoba. However, any First Nation will have the option to remain under the administration of the federal government;

5.14 The implementation of the new relationships will be subject to ratification by a reasonable number of First Nations.

5.15 Provision must be made for the financing of those services that DIAND receives and/or benefits from directly as part of the federal government;

5.16 This Project will have no adverse impacts on other initiatives between Canada and the First Nations of Manitoba;

5.17 Fiscal and/or financial arrangements for operational and administrative costs of First Nations governments and those of program and service delivery will be determined by balancing the needs of the First Nations communities and peoples, the obligations of the federal government to First Nations, federal government resources, federal fiscal and budgetary management requirements, historical levels of funding provided to First Nations in Manitoba, and the scope of the new institutions, structures and responsibilities to be effected;

.../7

5.18 This Project is separate from, and will not be affected, circumscribed or impacted by the Community-Based Self-Government Process.

6. MUTUAL COMMITMENTS

Without restricting any other term hereof, it is mutually agreed that:

6.1 The joint Assembly/Ministerial political overview process has been established with the understanding that First Nations leadership will have reasonable access to the Minister throughout the Project and that officials of the Assembly will have reasonable access to the Minister's political designates and officials;

6.2 The work will proceed in a timely manner and at a pace that conforms to the needs of First Nations for consultation and deliberation and on the understanding that the Assembly desires to move expeditiously but it will do so only with the full understanding and agreement of the Chiefs of First Nations in Manitoba;

6.3 Adequate funding will be provided by the Minister throughout the term of this Agreement (as defined in paragraph 9) to enable First Nations of Manitoba to be fully capable of becoming informed, planning and implementing the process required to effect the Project and implementing agreed functions and structures of First Nations governments in Manitoba. Such funding will be predicated on agreed upon workplans and budgets submitted in advance;

6.4 Adequate personnel from DIAND, particularly at a sufficiently senior level and with authority to direct the Project, will be assigned to work on the Project in cooperation with the Assembly, and consistent with the Framework Agreement and costed workplan, as developed jointly by the Assembly and the Minister;

6.5 A record of all meetings, sessions and decisions taken at all levels of these joint relationships will be maintained;

6.6 The Secretariat of the Assembly will provide quarterly financial reports with respect to expenditures against approved budgets both to the Minister and to the Assembly;

6.7 This Agreement will not preclude or prevent the First Nations of Manitoba from accepting, participating in or benefitting from any other or future legislative or constitutional reform, or other measures, favouring First Nations or First Nations governments in Canada.

7. STRUCTURES AND APPROACH

7.1 The Memorandum of Understanding between Grand Chief Fontaine and Minister Irwin signed at Opaskwayak First Nation, The Pas, Manitoba, on April 20, 1994 (attached hereto) is hereby formally incorporated in this Agreement by reference, and its terms confirmed and ratified.

.../8

7.2 The Objectives of the parties herein, as identified in Paragraph 1 hereof, and elaborated in the terms of this Agreement, will be processed and accomplished in accordance with the Workplan, dated November 22, 1994, entitled "Towards First Nations Governments in Manitoba", (herein referred to as the "Workplan"), which is attached hereto and hereby incorporated by reference, fully and completely, as the operational guide, as though it were reproduced in full herein.

7.3 Subject to Section 8 hereof, the Parties agree that amendments to, extensions of or changes in the Workplan will be made only on a mutually agreeable basis.

7.4 At mutually agreed upon times and terms and on mutually agreed upon issues, such as those dealing with provincial jurisdictions, the Province of Manitoba will be invited to participate in the Project.

7.5 Notwithstanding paragraph 1(b), during the continuation of the process:

(i) a relationship of "business as usual" shall continue to exist between DIAND and First Nations, with no reductions, disruption or delay in funding, programs, initiatives or services resulting from the process and funding for this process will not impair, dilute nor prejudice the levels of funding for all other matters that impact on First Nations in Manitoba; and

(ii) nothing in this Framework Agreement will preclude any federal department from undertaking "business as usual" organizational, policy or legislative initiatives. However, where it is reasonable and lawful to do so, the federal government will give reasonable notice of any such initiatives to the Assembly.

8. FUNDING

8.1 All funding will be provided by the Minister in accordance with this Framework Agreement, the Memorandum of Understanding and the Workplan and on the basis of annual, flexible transfer payment agreements.

8.2 The Assembly is accountable, in the manner prescribed in this Framework Agreement and in the Workplan or in subsequent mutual agreements, for all funding received from the Minister.

8.3 Both parties agree, in the process of determining funding, to good faith bargaining, on a reasonable basis, in order to accomplish the Objectives of the Project. Except with regard to funding for the first phase of the Project, the parties intend to agree by September 1 of each year of the Project, throughout its entire course of years, on funding to be provided by the Minister in the next subsequent period.

8.4 For the first phase of the Project, approximately twelve months, beginning with the putting into place of the required infrastructure, funding will be provided by the Minister in a flexible transfer payment agreement as follows:

.../9

8.4.1 The Minister will provide $3.814 million for concurrent pursuit of Activities A, B, C, Consultation, Communications and Project Management, as detailed in the Workplan. This level of funding will be provided over two fiscal years, i.e. 1994/1995 and 1995/1996;

8.4.2 In addition, the Minister will make ten positions available in DIAND (ten-month cost estimated at $500,000.00) to representatives of, and designated by, the Assembly, so that they may work alongside departmental staff, at senior levels, in order to gain a better understanding of federal practices and policies;

8.4.3 Three projects will be expedited, as specifically cited in the Workplan, with funding, in addition to the overall funding of $3.814 million referred to above, as follows:

8.4.3.1 Education Framework Agreement: $500,000.00 in 1994/1995 (this funding is being provided through the Education Framework Agreement);

8.4.3.2 Fire Safety Program: $434,468.00 in 1994/1995. Of this amount, $225,000.00 has already been committed; and

8.4.3.3 Capital Program: $250,000.00 in 1995/1996.

8.4.4 If progress on the Workplan is faster than anticipated, related funding originally scheduled for 1995/1996 will be provided in 1994/1995. Conversely, if progress is delayed, funding originally scheduled for 1994/1995 will be made available in 1995/1996, without lapse;

8.4.5 The funding is global and flexible as demonstrable needs arise. The Assembly will have flexibility in managing the funds within the context of the detailed Workplan that focuses on results.

9. DURATION

The Parties agree that the achievement of the Objectives is not finite as to term and will endure until they have been achieved on a mutually agreeable basis. However, the other terms of this Framework Agreement, including the provisions relating to funding (including, but not limited to, paragraphs 6 and 8) will be in force until the achievement of the Objectives on a mutually agreeable basis or ten years, whichever comes earlier, or such longer period as may subsequently be agreed to by the parties. Progress under this Agreement will be evaluated and reviewed on a mutually agreeable basis at the end of its third, sixth and tenth years. If the Objectives have not been fully achieved at the end of ten years, the parties will review to determine, on a mutually agreeable basis, how this Project should be continued, and on what terms, both of which shall require approval by the Assembly and the Minister.

.../10

THIS FRAMEWORK AGREEMENT is executed on the day and year first above written on behalf of the Assembly of Manitoba Chiefs by:

In the presence of:

THIS FRAMEWORK AGREEMENT is executed on the day and year first above written on behalf of Her Majesty the Queen in Right of Canada by:

In the presence of:

Timeframe/Costing

- This work will be carried out over 34 weeks.
- Total projected cost $250,000 in 1995/1996.

B. Transfer of DIAND Education Programs to First Nations Governments in Manitoba

Purpose

To review the tasks set out in the Education Framework Agreement signed in 1990, the work already undertaken by the First Nations Education Transition Team in Manitoba and to determine the next steps to be taken to enable First Nations in Manitoba to assume responsibility for all education functions.

Approach

The majority of the work related to the generic tasks proposed in the March 14, 1994 dismantling paper have been or are being addressed in regard to information and data research, and analysis of findings and development of options for change. Similarly, some of the government powers and framework considerations for FNM to assume control of education have been dealt with. Others remain to be addressed such as legislation and other jurisdictional matters.

Outputs

There is currently a draft recommendations report from the Transition Team which is to be reviewed by the Chiefs' Committee on Education and the General Assembly of Manitoba Chiefs. This report proposes:

- operationalizing an infrastructure six months before take-over;
- dealing with legal issues related to jurisdiction and powers;
- holding a fourth round of workshops in all First Nation communities;
- negotiating the final wording of a Memorandum of Understanding with the Minister of DIAND and the Grand Chief;
- drafting FNM legislation related to education; and
- holding a General Assembly for ratification.

These recommendations envisage a complete take-over by April of 1996.

Timeframe/Costing

- The final portion of the work will be completed under the EFA and integrated smoothly into the dismantling initiative.

..../18

APPENDIX II

FRAMEWORK AGREEMENT ON INDIAN EDUCATION IN MANITOBA

This Framework Agreement entered into this 5th day of December 1990.

BETWEEN: **HER MAJESTY THE QUEEN IN RIGHT OF CANADA** herein represented by the Minister of Indian Affairs and Northern Development (hereinafter referred to as the "Minister")

OF THE FIRST PART

- and -

THE ASSEMBLY OF MANITOBA CHIEFS of Manitoba being a representative organization of the First Nations in Manitoba, herein represented by the Executive Council (hereinafter referred to as "The Assembly")

OF THE SECOND PART

WHEREAS Canada, by virtue of section 91(24) of Constitution Act, 1867 has legislative authority with respect to Indians;

AND WHEREAS Canada, by virtue of certain Treaties with the Indian Tribes and Nations in Manitoba, has certain responsibilities and obligations with respect to the education of Indians;

AND WHEREAS the Assembly has the mandate and authority to preserve and promote the distinct status and identity of First Nations in Manitoba, and, in particular to facilitate and encourage the full transition toward Indian control and jurisdiction of education consistent with and within the context of Indian self-government;

AND WHEREAS the parties to this Framework Agreement recognize that the future development of education for the First Nations in Manitoba requires the promotion and development of Indian education consistent with the needs and requirements both of contemporary life, societal trends and future developments, and Indian traditions, laws, customs, culture and philosophy;

AND WHEREAS attempts by the parties to negotiate certain issues relating to treaty rights and to post secondary education have not given rise to acceptable rights, and these issues may therefore be addressed by the parties outside the scope of this Framework Agreement;

AND WHEREAS the parties desire to undertake and implement the provisions of this Framework Agreement in the spirit of cooperation, mutual respect and harmony;

NOW THEREFORE, THE MINISTER AND THE ASSEMBLY HEREBY AGREE:

1.0 PRINCIPLES

1.1 In this Framework Agreement, the following principles shall guide and influence the preparations, planning, work, research, development, programs, services, and further initiatives that derive from the implementation of its provisions:

a) Indians have a distinct status and identity by virtue of their indigenous origin, history, development and existing aboriginal and treaty rights, which existing aboriginal and treaty rights are recognized and affirmed by s. 35 of the Constitution Act, 1982;

b) Education programs and services which address the distinctive rights and freedoms and needs of Indian people and which incorporate their history, knowledged, technologies, value systems and their social environment, cultural and spiritual development are an integral part of Indian education;

c) Access to education in Indian languages, the acquisition of the knowledge and education necessary for full and equal participation in their society and Canada, and education in one of the official languages are affirmed;

d) Education opportunities shall promote advancement of Indian people and include measures to foster understanding and reduce social prejudices in Canada.

e) To implement this agreement measures shall be designed for the development, preservation and promotion; with the participation and consent of the Indian people of Manitoba; the rights to education enjoyed by Indian people;

2.0 <u>THE OBJECTIVES</u>

2.1 The parties shall jointly pursue the following objectives in implementing the agreement:

a) To identify educational matters that require immediate or long term attention and resolution;

b) To develop an agenda for change that will accelerate Indian control, authority, management and jurisdiction in Indian education in Manitoba.

c) To conduct research and development projects or initiatives to support and enhance the development of a better educational system under Indian jurisdiction;

d) To develop models of possible educational systems under Indian control and management;

e) To identify the appropriate role of the Department of Indian Affairs and Northern Development with respect to its responsibilities and obligations for the education of Indian people;

f) To develop a plan for the devolution to Indian people in Manitoba of control over and management of their educational institutions;

g) To develop a process for the purpose of establishing funding arrangements for Indian education in Manitoba;

3.0 <u>THE PURPOSE</u>

3.1 The purpose of this Framework Agreement is to recognize the intent and commitment of the parties to negotiate formal arrangements on Indian Education in Manitoba, and to establish the parameters within which such arrangements will be negotiated.

4.0 AGENDA MATTERS

4.1 The scope of the issues to be examined by the parties under the Framework Agreement may be for either immediate or long term resolution. The parties will establish specified work plans and schedules for addressing issues drawn from the topics listed in Appendix "A" to this Framework Agreement.

5.0 RESEARCH AND DEVELOPMENT

5.1 In support of negotiations towards formal arrangements on Indian education in Manitoba, the Assembly shall conduct research and development projects or initiatives in some or all of the following areas:

a) The Indian philosophy of education and incorporation of that philosophy into the education of Indian people in Manitoba;

b) The identification and development of alternative models of management and jurisdiction of Indian education;

c) The development of a process to implement Indian control of their education consistent with the rights of Indian people;

d) The literacy needs of Indian people in Manitoba and the development of specific proposals and programs for addressing those needs;

e) The development of a data base system to collect and analyze educational information to assist the parties in their planning, budget forecasting and educational program development;

f) The development of programs to assist in the retention of Indian languages, and for the use of these languages in the education and training of Indians;

g) To research current jurisdictional structures. policies and programs existing in Manitoba for primary, elementary, secondary, post-secondary, adult and vocational education programs including special education and counselling arrangements;

h) The development of alternatives to current funding arrangements;

i) The development and identification of innovative approaches to Indian education;

j) Such other projects as may be agreed upon by the parties.

5.2 Nothing in this Agreement shall prevent the implementation, prior to the conclusion of the formal arrangements of Indian Education in Manitoba, of such changes to Indian education as may be agreed upon by the parties.

6.0 INVOLVEMENT OF FIRST NATIONS

6.1 The Assembly shall undertake an extensive consultation process in Manitoba, based on the provisions of this Framework Agreement, to ascertain the aspirations of Indian people with respect to educational changes or reforms, control of education, alternative Indian institutions and the role of the Department of Indian Affairs and Northern Development in the delivery of education for Indians. The consultation and research activities should make maximum use of existing Indian education expertise.

6.2 As an interim measure, until decisions are made on the future education structure, a small representative group of Indian education advisors will assist in implementing this Framework Agreement.

7.0 RESOURCES

7.1 The Minister undertakes to provide resources, as may be negotiated, from time to time, to assist the parties to fulfil the provisions of this Framework Agreement.

8.0 NEGOTIATIONS

8.1 The Minister and the Assembly agree to designate officials, as necessary, to fulfil the provisions of this Framework Agreement.

8.2 The Minister and the Assembly agree that political negotiations involving the Minister and the Provincial Indian Leader and designated Chiefs of the Assembly shall be held at least twice a year to ensure progress is made respecting negotiations for formal arrangements on Indian education in Manitoba.

9.0 FORMAL ARRANGEMENTS

9.1 The parties hereby agree to begin discussions and preparations for the negotiation of appropriate formal arrangements with respect to Indian education in Manitoba consistent with the principles, objectives and purpose of this Framework Agreement.

9.2 The Minister and the Assembly agree to work towards conclusion, within 5 years from the signing of this Framework Agreement, of appropriate formal arrangements with respect to education in Manitoba. Dec. 1995.

9.3 The Minister undertakes to provide resources as may be negotiated from time to time to support the negotiations undertaken by the Assembly for appropriate formal arrangements with respect to Indian education in Manitoba.

For greater certainty, nothing in this Agreement shall be construed so as to abrogate or derogate from any aboriginal or Treaty rights of the members of any Indian band or any other aboriginal people of Canada that are recognized and affirmed in section 35 of the Constitution Act 1982.

IN WITNESS where of the parties have executed this Framework Agreement as of the date first above written.

SIGNED, SEALED AND DELIVERED ON behalf of the Government of Canada)

Government of Canada

WITNESS

Signature

SIGNED, SEALED AND DELIVERED on behalf of the Assembly of Manitoba Chiefs)

~~Chief Charlie Audy~~
Chief Ron Cook

~~Chief Raymond Swan~~
Chief Louis Stevenson

Chief Rod Bushie

Chief Dennis Whitebird

~~Chief Philip Michel~~
Chief Jerome Denechezhe

~~Chief Ken Hood~~
Chief Jack Flett

~~Chief Vincent Pierre~~
Chief Peter Yellowquill

Phil Fontaine
~~Provincial Leader~~
Grand Chief

WITNESS

Signature

WP/PSAD/FRAMEWOR.3

May 17, 1990

APPENDIX "A"

Agenda Matters:

1) Indian philosophy of education
   - traditional sources and tenants
   - contemporary theory and practice

2) Indian jurisdiction of Indian education
   - day care/preschool
   - primary
   - elementary
   - secondary
   - adult/vocational

3) Curriculum development
   - native Studies
   - cultural programs
   - enrichment programs
   - Indian languages
   - music
   - English a Second Language
   - cultural input into core curriculum
   - extra curricular programs
   - sports and recreation

4) Support services
   - health/dental
   - counselling/social work services
   - specialized needs
   - diagnostic technicians

5) Training
   - vocational and adult education
   - trades and technical skills
   - professional development for education and management staff
   - literacy
   - cultural relevant training programs at post-secondary and other institution
   - professional training of:
     - teachers
     - administrators
     - counsellors
     - school social workers
     - school trustees

6) School drop-out and prevention
   - attrition and retention programs
   - private home placement programs
   - special education and incentives

7) Indian management and administration of Indian schools
   - staffing
   - teachers salaries/qualifications
   - funding formulas
   - flexible funding arrangements
   - transfer or devolution of education program
   - nominal roles
   - operating and maintenance
   - pension plans
   - labour laws
   - parental and community involvement
   - scholarships and special incentive/grants

8) Alternative models of education for Indians under present school system
   - First Nations education institutions
   - educational needs of Urban and off-reserve Indians
   - provincial public school system

9) Role of DIA in education

10) Schools and facilities
   - national/provincial building codes and standards
   - standards/evaluations
   - student-teacher ratio
   - furnishing and equipment
   - extensions/school replacement
   - emergency measures
   - maintenance and management
   - seasonal/daily transportation
   - libraries and resource materials

11) Accreditation of programs for funding

12) Impact of Bill C-31
   - funding
   - facilities
   - programs
   - staffing

13) Fiscal arrangements for Indian education
   - federal/provincial agreement
   - existing DIA education budget and allocations
   - future alternative fiscal arrangement and mechanisms

14) Other agenda items the parties may agree to.

APPENDIX III

A STATEMENT OF THE TREATY POSITION

The people of Sagkeeng are party to Treaty #1. Treaty #1 is an agreement between nations. We are a nation, we entered into Treaty #1 as a nation, we have never given up our inherent right to live under our own laws. Treaty #1 clearly states the position of the people of Sagkeeng.

The Crown is obligated to uphold the retained recognized rights of the people of Sagkeeng as outlined in Treaty #1 and the "Outside Promises" Memorandum.

- As stated in the "Outside Promises" Memorandum, "(the) treaty is binding alike upon the Government and upon the Indians".
- The "Outside Promises" Memorandum is **CANADIAN** Law having force of law in that the memorandum was signed by His Excellency, the Governor General in Council, on the 30th of April, 1875, certified by W.A. Himsworth, Clerk, Privy Council, 1875.

- Treaty #1 and 2 are the only treaties which contain the clause "sole and exclusive use".

  "Her Majesty the Queen hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians the following tracts of land,"

  "for the use of the Indians of which Ka-Ke Ka Penais is the chief, so much land on the Winnipeg River above Fort Alexander, as well furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, beginning at a distance of a mile or thereabouts above the Fort."

- Clearly, our people never gave up the right to live under our own laws. The treaty clearly refers to the application of **CANADIAN** Laws as being subject to the approval of the Indians.

  "to become responsible to Her Majesty for the faithful performance by their respective bands <u>of such obligations as should be assumed by them</u>".

  Treaty #1 is the only mutually agreed upon law. All other laws enacted by the **CANADIAN** government are unilateral, having no force upon the other party to Treaty #1.

Respect for treaties must be the founding principle for co-existence between our peoples.

Treaties are solemn pledges between nations, they establish a working relationship between different peoples. In a declaration of war, King George of England had this to say about treaties:

LONDON September 3rd 1939

Great Britain is fighting the "primitive principle that might makes right" King George said in a war message broadcast throughout the empire.

"It is the principle which permits a state in the selfish pursuit of power to disregard its treaties and solemn pledges; which sanctions the use of force or the threats of force against the sovereignty and independence of other states" the King declared.

Stripped of all its disguises, it is simply the principle that might makes right.

TAKEN FROM THE WINNIPEG FREE PRESS

The Canadian position is **MIGHT MAKES RIGHT**, the treaty conditions, and entitlement has been consistently ignored. There is no system by which indigenous people may adequately seek justice within Canada.

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