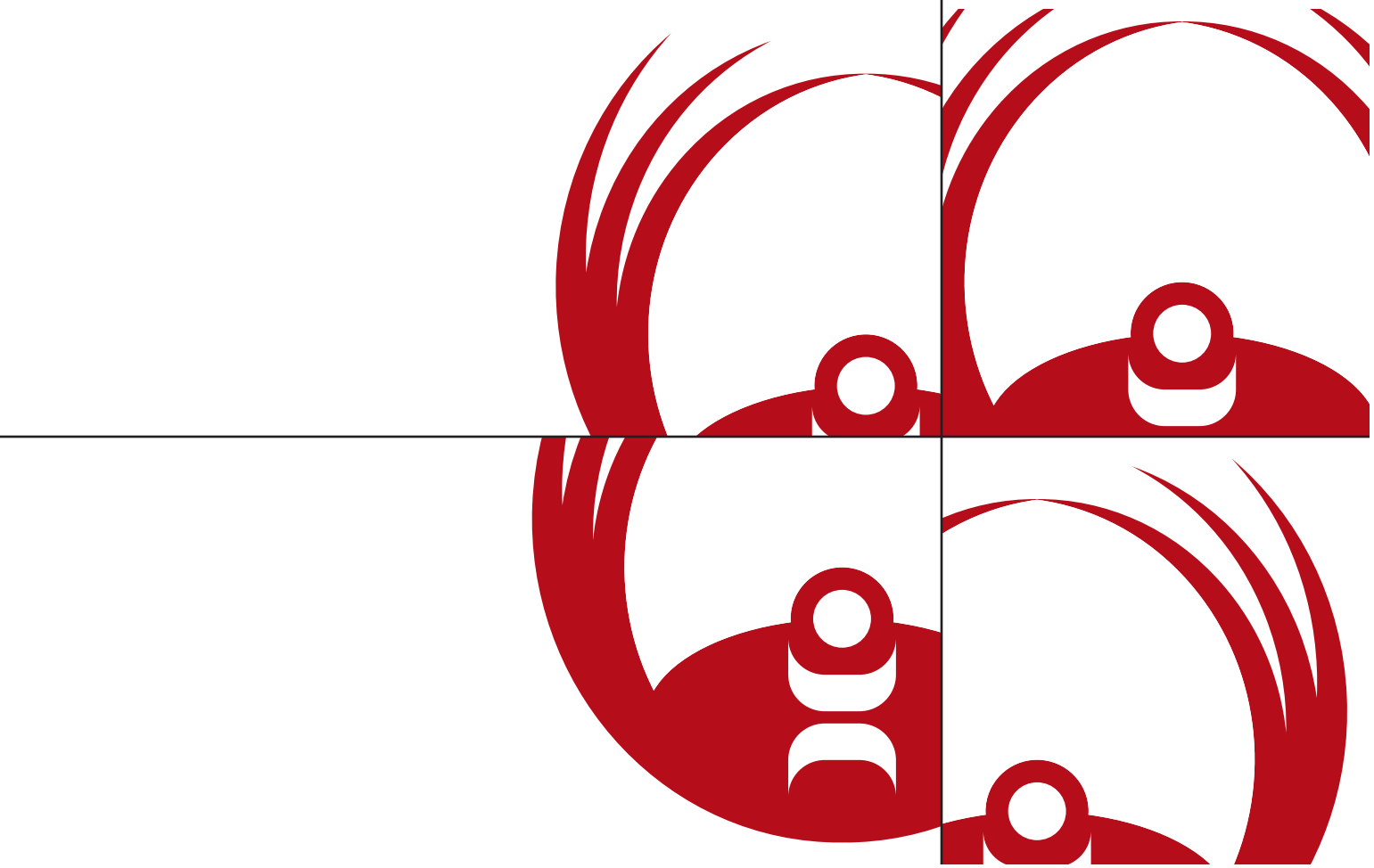

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Treaty Relationships Between the Canadian and American Governments and First Nation Peoples

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I. INTRODUCTION

This paper is intended to provide First Nations with a comparative overview of treaty relationships between the Canadian and American governments and First Nation peoples. From this historic treaty relationship, legal principles have been developed which give effect to Treaty rights. Modern day Treaty rights are framed, in part, by virtue of the historical and legal authority of governments in Canada and in the United States during the treaty-making period. One large component of modern day Treaty law is the concept of fiduciary duty; that is, where the government has a legal duty to do what is in the best interests of the First Nation. Canadian law as it relates to the Crown's fiduciary obligations toward First Nations, in some measure, rests on an understanding of American law. There are two major components to this paper. In the first part, American and Canadian approaches to treaty making, including the development of Indian policy, will be examined. The second part of this paper will examine the comparative historical governmental authority and legal justification in respect of Indian nations and their lands. This paper will conclude with a brief discussion of how fiduciary duty legal principles may affect Treaty First Nations and their rights.

II. UNITED STATES AND CANADA: AN OVERVIEW

Americans entered into many more historical treaties than did the Canadian government. For example, between 1848 and 1867, the United States government signed over 100 treaties with various Indian tribes.[1] Early in the colonial process, it was the objective of each of the developing nations to foster relationships and secure Indian lands for incoming European settlers. To do this, the governments entered into treaties with the Indian inhabitants. The Americans faced circumstances virtually unseen in the Canadian treaty making experience, including costly Indian wars and a rapidly increasing European settler population. A major problem facing American Indians, even after treaty, was the continued homesteading by settlers on treaty lands. By contrast, there were no remarkable

[1] St. Germain, Jill. *Indian Treaty-Making Policy in the United States and Canada: 1867-1877* (University of Nebraska Press, 2001), at 11.

Indian wars to speak of in Canada and settler expansion westward was less intensive than it had been in America, occurring much later as well.

A. American Land Settlement and Indian Treaties

As early as the sixteenth century, the first newcomers began arriving on the eastern shores of North America. By about the mid 1750's, as Europeans were arriving in large numbers, the French and English were at odds over Indian land westward into the Ohio and the Mississippi River basins. Land speculators had a keen interest in the purchase of Indian land.[2]

In 1754, war broke out between the French and English on the frontier as a result of conflicting European claims to the territories still in the possession of the many tribes in the area.[3] The tribes by this time were discontented and angry at the continued encroachments to their lands and at the fraudulent practices committed against them by the English. The English sought to acknowledge the colonies' unwillingness to prevent encroachments on Indian land threatening the Crown's imperial interests, and to gain alliance against France. To this end, the English prohibited the settlement of English subjects on lands and hunting grounds belonging to the Indians beyond the Appalachian Mountains. This policy successfully secured the alliance of the Iroquois and other tribes to British aspirations in defeating the French.[4]

In the early 1760s, France ceded its colonial claims in the western territories between the Mississippi River and the eastern mountain ranges, and the central areas in what became Canada, to Great Britain. If encroachments onto Indian lands continued, officials in London knew that more Indian wars were possible. In a move to prevent further encroachments, English officials formalized the war time policy of protecting Indian

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2 Geteches, David H, Wilkinson, Charles F and Williams, Robert A. *Cases and Commentary on Federal Indian Law,* 5th ed. (Thomson West: 2005), at 58.

3 *Ibid.*

4 *Ibid.*

land. The *Royal Proclamation of 1763*[5] proclaimed the area beyond the Appalachian Mountains as off limits to settlement as they were reserved to the tribes of the region.[6] One of the main features of the *Royal Proclamation* is the reservation to the Crown of the exclusive right to negotiate for land title with the Indian inhabitants.[7]

The ability to negotiate for land under the *Royal Proclamation* became the foundation of Indian treaty making in both the American and, later, the Canadian experience.[8] Although this principle became core to treaty making in both America and Canada, this common history did not result in a parallel development of Indian policy.[9] Some American government officials were immediately resistant to the purpose and intent of the *Royal Proclamation*.[10] By the late 1770s, when the thirteen colonies declared their independence from Great Britain, the effectiveness of the *Royal Proclamation* in preventing the loss of Indian lands also was greatly diminished.

Eighteenth and nineteenth century American Indian policy was expressed in the treaties made with the Indian tribes and in a series of federal laws "to regulate trade and intercourse with the Indian tribes…"[11] The first of these trade and intercourse statutes was passed in 1790.[12] This law was directed at lawless land speculators who disregarded the treaties. In 1802 a new trade and intercourse Act[13] was introduced and it remained in force as the governing law of Indian relations until it was replaced with a codification of Indian policy in 1834.

As early as 1789, American policymakers began debating the removal of Indian tribes who were seen as in the way of settlement. Among those moved was the Cherokee Nation. Due to great demand for their land, the Cherokee land base, once spread over 5

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5 Cited to the Canadian legal reference: *Royal Proclamation 1763*, George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No, 1.
6 *Supra,* note 2, at 59.
7 *Supra,* note 1, at 1.
8 *Ibid.*
9 *Ibid*.
10 *Supra,* note 2, at 59.
11 *Ibid.,* at 90.
12 1 Stat. 137.
13 2 Stat. 139-146.

states had, by 1820, been reduced to lands within the state of Georgia. Political pressure increased to remove the tribes from increasing settlement. In 1830, in response to the pressure, Congress passed the *Removal Act*[14]authorizing the removal of Indians to west of the Mississippi.

By the early 1830s, the American government had developed principles which became standard American Indian policy. The principles were intended to:

1. protect Indian right to land by setting boundaries of "Indian Country", restricting non-Indian entry;
2. control Indian lands by denying the right of purchase by individuals or local governments;
3. regulate trade with Indians;
4. prohibit liquor in Indian Country;
5. punish crimes committed by members of one race against the other and compensation for damages by one group to the other; and
6. promote civilization and education among the Indians to absorb them into general American society.[15]

At times, United States treaty-making could be described as flurries of activity. Between 1829 and 1851, for example, eighty-six ratified treaties were signed with twenty-six tribes in New York, the Old Northwest and the Mississippi area.[16] Between 1845 and 1848, Texas, Oregon County and Mexican Cession were added to the American territory.[17] By 1848, the United States grew by more than half its previous population.[18] Between 1853 and 1856, fifty-two treaties with various Indian tribes had been entered into.[19] When reporting on the outcome of treaty discussions, Commissioner of Indian Affairs George W. Manypenny wrote:

> "In no former equal period of our history have so many treaties been made, or such vast accessions of land been obtained."[20]

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14 4 Stat. 411-412.
15 *Supra,* note 2, at 89-90.
16 Prucha, Francis Paul. *American Indian Treaties: The History of a Political Anomaly* (University of California Press: 1994), at 184.
17 *Ibid*., at 235.
18 *Supra,* note 1, at 9.
19 *Supra*, note 16, at 236.
20 *Ibid*.

Commissioner Manypenny provided three classifications of American Indian treaties: "first, treaties of peace and friendship; second, treaties of acquisition, with a view of colonizing the Indians on reservations; and third, treaties of acquisition, and providing for the permanent settlement of the individuals of the tribes, at once or in the future, on separate tracts of land or homesteads, and for the gradual abolition of the tribal character."[21]

By an 1867 Act of Congress, the United States Indian Peace Commission was created to negotiate Indian treaties.[22] The treaties of 1867 and 1868 signed by the Peace Commission were among the most important of the hundreds of treaties signed and almost the last.[23] These treaties signaled a departure from past treaties, which by this time were proving ineffective. The growing feeling among white Americans was that it did not make sense to treat with Indian tribes as though they were independent sovereign nations when the Indians seemed in fact to be wards of the government. The Peace Commission negotiated with many tribes, including the Sioux, Crows and Cheyennes who signed the Fort Laramie Treaty in April and May 1868. The Fort Laramie Treaty was the beginning of the transformation from a tribal system to an agrarian farming model.[24] In March 1871, Congress officially ended treaty making, although it reaffirmed the validity of those already entered into.[25]

B. Canadian Land Settlement and Indian Treaties

By the late 1800s, there was a clear difference of opinion in the United States and Canada regarding treaty making. In Canada, treaties were still viewed as utilitarian exercises, whereas, in the United States, treaties were seen as obsolete.[26] Because Canada did not face treaty making problems experienced in America, settlement westward was relatively

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21 *Ibid*.
22 *Ibid*., at 280.
23 *Ibid*., at 287.
24 *Ibid.,* at 282-283.
25 *Ibid.*, at 287.
26 *Supra*, note 1, at 13.

orderly. Settlers were not rushing to Canada as early, as aggressively or in vast numbers as had occurred in America. The trickling westward of settlers in Canada allowed the Canadian government time to formulate a loose "national policy", including the call for a railroad across the new nation to bring settlers west.[27]

Aboriginal peoples and various pre-confederation and post-confederation governments concluded 68 major historical treaties in Canada,[28] covering large parts of the country. Several Peace and Friendship Treaties were concluded by the British Crown and various Maritime Indian Nations up to the end of the eighteenth century. These treaties did not involve the transfer of land title, or compensation for rights taken away. They were mainly concerned with matters such as allegiance, peace and military alliance. Twenty-two treaties were concluded in what was Upper Canada from 1781 through to the mid 1830s, with four more treaties being concluded from 1850 to 1862. In 1850, the Robinson treaties were entered into with the Indian inhabitants of the north shore of Lakes Huron and Superior.[29] The Robinson treaties were the first where land cessions were sought for lands not immediately required for settlement.[30] This practice of negotiating for vast tracts of land by treaty continued as treaty making made its way westward.

After the *Royal Proclamation*, the *Constitution Act, 1867*[31] was the next major governmental exercise of legislative authority over Indians and their lands. Section 91(24) of the *Constitution Act, 1867* gave the federal government jurisdiction over matters falling within the broad spectrum of Indian relations. In order to (i) manage the Indians, (ii) give effect to treaties; and (iii) implement policy, the federal government had to develop a mechanism to give expression to those objectives. The *Constitution Act, 1867* brought the new Dominion Government into the most ambitious treaty negotiations to date.[32] 1867 set the stage for Canada's acquisition from Hudson's Bay Company of

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27 *Ibid*., at 21.

28 See: http://atlas.nrcan.gc.ca/site/english/maps/historical/indiantreaties/historicaltreaties/8.

29 Morris, Alexander. *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, (Fifth House Publishers, 1991), at 16.

30 Miller, J.R. *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (University of Toronto Press, 1989), at 108.

31 *Constitution Act*, *1867*, 30 and 31 Vict. C. 3 (U.K.) R.S.C. 1985, App. II, No. 5.

32 *Supra,* note 1, at 13.

Rupert's Land and the North-Western Territory. The *Rupert's Land and North-Western Territory Order (1870)*, under which the Hudson's Bay Company Charter territories were transferred to Canada, provided that Canada deal with compensation to Indians for lands required for the purposes of settlement and that it was the "duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."[33] Canada's acquisition of Rupert's Land and the North-Western Territory created the need for a new Indian policy.

In order to open up the North-West for settlement in the late 1800s, the government had to deal with the Indian inhabitants between the Great Lakes and the western mountain regions. Traditional means of reaching this end in British North America had been through treaties providing compensation in return for land surrenders. For the most part, the western Indians themselves were anxious to have treaties.[34] By 1870, the Indians were facing the starvation due to the loss of staples such as the buffalo. They were encountering sickness not seen before. In short, their lives were changing before them, and they knew that the old way of living was soon coming to an end and they could do little about it. Government viewed Indian treaties as agreements for land surrenders and for the maintenance of peace and order. In return, the government provided First Nations with a small cash annuity, reserves of land, schools, agricultural assistance, and hunting and fishing supplies.[35] This was the basic pattern for the eleven Numbered Treaties, entered into from 1871 to 1921. There were also adhesions to various Numbered Treaties well into the 1900s.

The first seven Numbered Treaties were the basis for the Indian policy in the North-West.[36] Earlier treaties provided for hunting and fishing rights, for reserves and annuities. In some cases, First Nations were responsible for introducing important treaty terms. For instance, during Treaty Six negotiations in 1876, the Cree negotiated commitments from the Crown for medicine and relief should a calamity or general famine befall them. With

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33 *Rupert's Land and North-West Territory Order (1870)*, R.S.C. 1985, App. No. 9.

34 Price, Richard. Ed. *The Spirit of the Alberta Indian Treaties*. 3rd ed. (University of Alberta Press, 1999), at 3.

35 *Ibid.*

36 *Ibid*., at 4.

the Numbered Treaties came standard objectives: (i) settle Indians on reserves; (ii) provide them with farm implements, and (iii) educate them in preparation for an agrarian lifestyle.[37]

According to the late Dr. Harold Cardinal, the *Indian Act* was passed with the intention of implementing the terms of the treaties and of establishing the status of Indians.[38] The first consolidated *Indian Act* was enacted in 1876.[39] Since 1876, there have been numerous amendments to the *Indian Act*.[40] From a government perspective, the *Indian Act* has proven its sustainability in the implementation of colonial Indian policy, particularly given that it continues to regulate the lives of First Nation peoples.

III. LEGAL AUTHORITY AND JURISDICTION

A. The Legal Time Difference

In the United States, the law that relates to Indian tribes is referred to as "Federal Indian Law'. In Canada, law relating to First Nations is referred to as "Aboriginal or Treaty Law". Federal Indian Law was developed earlier in America than Aboriginal or Treaty Law was in Canada. Among the first American Federal Indian Law decisions were those delivered in the early 1800s by the United States Supreme Court involving the Cherokee Nation. In Canada, the only historic decision regarding Indian land rights came in 1888 in *St. Catherine's Milling and Lumber Company v. The Queen*.[41] In *St. Catherine's*, the Judicial Committee of the Privy Council (on appeal from the Supreme Court of Canada), held that Indian occupation of land was a 'personal and usufructuary'[42] right dependent on the goodwill of the Crown. The first modern Supreme Court of Canada decision

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37 For a comparison of the terms of Numbered Treaties, see: St. Germain, *supra*, note 1, at App. 2.

38 Cardinal, Harold. *The Unjust Society* (Vancouver: Douglas & McIntyre, 1999), at 37.

39 *An Act to amend and consolidate the laws respecting Indians,* S.C. 1876, c. 18 (39 Vict.).

40 *An Act respecting Indians,* R.S.C. 1985, c. I-5, as am. See also: Venne, Sharon Helen. *Indian Acts and Amendments, 1876-1975: An Indexed Collection* (Saskatoon: Native Law Centre, University of Saskatchewan, 1981). Isaac, Thomas. *The Indian Act and Amendments: 1970-1993: An Indexed Collection* (Saskatoon: Native Law Centre, University of Saskatchewan, 1993).

41 *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 A.C. 46.

42 A usufruct right is one which allows a person or persons to enjoy use of something that belongs to another. Usufructuary pertains in this context to one that holds property by usufruct.

regarding Indian rights was released in the early 1970s. The comparative lateness of Indian rights cases being brought may have had much to do with the fact that from 1927 to 1951 the *Indian Act* made it illegal for any person to solicit or receive payment from Indians for the purpose of bringing any claim by Indians (including matters related to land), without the consent of the Superintendent General. Although there is a significant time gap between the development of law as it relates to Indian rights in Canada and America, similarities in the historical treaty relationship are sufficiently close for the Canadian courts to have drawn principles from United States Federal Indian Law. The United States Supreme Court noted that the Indian and government relationship was "perhaps unlike that of any other two people in existence."[43] In Canada, the courts describe the relationship between First Nations and government as unique, or *sui generis*.[44]

B. The American Legal Experience: Treaty and Fiduciary Duty Law

Most important to the development of Federal Indian Law were three decisions delivered by Chief Justice Marshall of the United States Supreme Court in the early 1800s, *Johnson v. McIntosh*,[45] *Cherokee Nation v. Georgia*,[46] and *Worcester v. Georgia*.[47] Chief Justice Marshall was the first to articulate and define the contours of the legal relationship between Indian Nations and the government. *Johnson* was the first of the three cases, decided in 1823, at a time when Indian lands were still under pressure from incoming settlers. By virtue of the *Royal Proclamation*, the British authorities claimed exclusive jurisdiction over newly acquired territories and the exclusive right to control land grants in these territories. As stated above, soon after the passage of the *Royal Proclamation*, it was disregarded by government officials and settlers alike in America.

Johnson involved the purchase of lands by a trader named Murray in 1773 from the Illinois people. The land was within the boundaries of "Indian Country", land that had

43 *U.S. v. Kagama* (1886) 118 U.S. 375.
44 Of its own kind or class; unique or particular, Black's Law Dictionary, 2nd Ed. West Group, 2001.
45 *Johnson v. McIntosh*, 21 U.S. (8 Wheat), 543 (1823).
46 *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
47 *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832).

been reserved under the *Royal Proclamation* to the Indians. The United States had granted another individual, McIntosh, land rights in the area where Murray claimed to have purchased the land from the Illinois. In his ruling, Chief Justice Marshall supported the imperial view of relations with Indian peoples, denying that they had any right to carry out land transactions without the permission or control of government authorities. Chief Justice Marshall also confirmed that, in these transactions, Indian Nations were obliged to deal exclusively with the sovereign under whose influence they now fell. For Chief Justice Marshall, this conclusion did not disenfranchise the Indian inhabitants of their land rights; rather, such rights could not be disposed of freely by them. In summary, Justice Marshall found that:

(a) discovery of the lands by Europeans gave title to those lands to the discovering sovereign against adverse claims from other European powers;
(b) this title by discovery gave the discovering European power the exclusive right of acquiring the lands from the Indian inhabitants;
(c) notwithstanding title by discovery, the Indian inhabitants remained entitled to the possession of the lands until such time as they were ceded to the discovering European power; and
(d) the sovereign power of the Indian inhabitants were impaired by the title through discovery so that they could not transact in regard to their rights with any authority or person other than the sovereign of the discovering European power.[48]

Ultimately, Chief Justice Marshall took a pragmatic approach, reasoning that "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which he has successfully asserted."[49]

By the early 1830s, the Cherokee had towns and a government resembling that of the United States. At this time, the state of Georgia passed legislation aimed at taking control of Cherokee lands, which the Cherokee challenged in court, in part, by arguing that they were a nation with status as a foreign state. In *Cherokee Nation v. Georgia,* Chief Justice

[48] Mainville, Robert. *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach*, (Purich Publishing, Saskatoon, 2001), at 11-12.
[49] *Ibid*., at 12.

Marshall found that the Cherokee could not petition the court as a foreign state because they were a "domestic, dependent nation" whose status as independent peoples had been impaired. In the last of the Cherokee cases, *Worcester v. Georgia*, Chief Justice Marshall expanded on his findings in *Johnson* confirming that discovery gave title in the lands to the European power who made the discovery. Although this discovery impaired the rights of the Indian inhabitants – because it forbade them from negotiating with other European powers – it did not cancel their rights.

The three Cherokee cases laid the foundation for future legal principles arising from the historic treaty relationship between the Indian Nations and Europeans. From this historic relationship comes a level of protection by government toward the Indians; namely, fiduciary duty. American case law has developed with the recognition of a general trust obligation of the government toward recognized Indian tribes, though that obligation does not necessarily invoke fiduciary duties. This principle was affirmed in the 1942 United States Supreme Court decision in *Seminole Nation v. United States*:

> The general trust relationship in itself does not impose such duties as are erected in a complete trust with fully accountable fiduciary obligations. When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations are not imposed on the United States. [50]

In some circumstances, the United Supreme Court has held that the trust relationship creates legally enforceable fiduciary duties for federal officials in their dealings with Indians. *United States v. Mitchell* ("*Mitchell II*")[51] is the primary American case on trust responsibility. The plaintiffs alleged violations of the *General Allotment Act* of 1887 ("GAA") in respect of the management of timber by the government on reservation lands held in trust. The GAA provided that the United States hold lands in trust for the sole use and benefit of the Indians. While the United States Supreme Court did not agree that the language of the GAA reached a fiduciary duty, they did find that, on the basis of various other timber management statutes and regulations, the government was obligated to manage timber resources on the reserve lands. The plaintiffs had established that a

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50 *Seminole Nation v. United States*, 16 U.S. 286 (1942).

51 *United States v. Mitchell,* 463 U.S. 206 (1983) ("*Mitchell II*").

fiduciary duty existed. The court found that where the federal government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship usually exists with respect those monies or property.

The court found that all of the necessary elements of a common law trust were present: a trustee (the United States), a beneficiary (the Indians), and the trust corpus (Indian timber lands and funds). *Mitchell II* indicates that the courts will not automatically infer a traditional fiduciary duty on the federal government whenever government actions affect Indian rights or property. A fiduciary obligation applicable to private trustees between the United States and tribes does not exist when the source of the law recognizes a "general" or "bare" trust.[52] Relevant statutes and regulations define the contours of the United States government's fiduciary responsibilities.[53]

A more recent American trust case, *Cobell v. Norton*[54] alleged mismanagement by the federal government of hundreds of thousands of trust accounts of individual Indian beneficiaries. The beneficiaries sought to have the government render an accounting of the funds, in the hundreds of millions of dollars, held for them. The main question before the court was whether the government was in breach of trust duties related to an accounting of the funds. The court found the government in breach of certain trust duties due to its inability to render an accurate accounting of the monies. When the government, as an administrator, is faced with more than one policy choice, that administrator will generally be allowed to select any reasonable option. However, this is not the case when the government is acting as a fiduciary for Indian beneficiaries because stricter standards apply to federal agencies when administering Indian programs. In *Cobell*, the court reasoned that the federal government charged itself with moral

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[52] See *E. Band of Cherokee Indians v. United States*, 16 Cl. Ct. 75, 78 (1988), holding that a breach of a general trust relationship in Indian education does not establish a "claim for money".

[53] See also: *White Mountain Apache v. United States*, 249 F. 3d 1364; 2001 U.S. App., where the United States Supreme Court awarded damages to the White Mountain Apache for the government's breach of its fiduciary duty to maintain certain building held in trust for the tribe. To the extent that the government has exclusive use of the property, they owe a fiduciary duty. Absent exclusive use and control, the government owes no fiduciary duty.

[54] *Cobell v. Norton*, 240 F. 3d 1081 (Fed. Cir. 2001).

obligations of the highest responsibility and trust in its relationship with Indians, and its conduct should therefore be judged by the most exacting fiduciary standards.

C. The Canadian Legal Experience: Treaty and Fiduciary Duty Law

In Canada, the *Royal Proclamation* continues to inform our understanding of the historical and legal relationship between First Nations and the Crown. The *Royal Proclamation* referred to the "nations or tribes of Indians with whom we are connected and who live under our protection…", suggesting a relationship with some obligations of protection by the government while at the same time, leaving some measure of independence with the Indians. The relationship between First Nations and the Crown was also given effect by section 91(24) of the *Constitution Act, 1867* which gave exclusive authority to the federal government over Indians and their lands:

> VI. DISTRIBUTION OF LEGISLATIVE POWERS
>
> *Powers of the Parliament*
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> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-
>
> ….
>
> 24. Indians, and Lands reserved for the Indians.

As noted above, the relationship between the Crown and First Nation people in Canada is unique, or *sui generis*. Aboriginal and Treaty rights are now protected under section 35 of the *Constitution Act, 1982*.[55] One of the first Supreme Court of Canada decisions to deal with the issue of Aboriginal rights was the 1973 decision in *Calder v. Attorney General*

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[55] Schedule B to the *Canada Act*, 1982, (U.K.) 1982, c.11 which came into force April 17, 1982.

of British Columbia.[56] The first Supreme Court of Canada decision which affirmed the Crown has fiduciary obligations toward Aboriginal peoples was the 1984 decision in *Guerin v. The Queen*.[57] The issue in *Guerin* was whether the federal government's action in entering into a lease of surrendered land on less favourable terms than what the Musqueam Band agreed to at a surrender meeting was in breach of the Crown's fiduciary duties to the Band. The Supreme Court affirmed that fiduciary obligations existed in relation to the exercise of Crown authority and discretion over the surrender, reasoning that Parliament had "conferred upon the Crown a discretion to decide for itself where the Indians' best interests lie."[58]

In examining the nature of the fiduciary obligation of the Crown toward Indians, Justice Dickson referred to that obligation as "trust-like in character", which "carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct."[59] The obligation was therefore subject to principles very similar to those that govern the law of trusts.[60] In *Lac Minerals,*[61] the Supreme Court of Canada described the fiduciary's duty:

> The obligation imposed may vary in its specific substance depending on the relationship, … it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary.[62]

Given that the Crown's fiduciary duty, section 35 of the *Constitution Act, 1982* embraces duty a constitutional aspect that limits the Crown's legislative capacity. It places upon the Crown the burden of justifying any infringement of rights of Aboriginal people.

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56 *Calder v. Attorney General of British Columbia* [1973] S.C.R. 313. In this case, the Supreme Court of Canada divided on the issue of whether the Nisga'a people retained Aboriginal title to their unceded lands after European settlement, or whether it had been extinguished by the British Crown or legislation.

57 *Guerin v. The Queen,* [1984] 2 S.C.R. 335.

58 *Ibid,,* at 340.

59 *Ibid.*, at 341.

60 Reynolds, James I., *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Purich Publishing: Saskatoon, 2005), at 137.

61 *Lac Minerals Ltd. v International Corona Resources Ltd*., [1989] 2 S.C.R. 574.

62 *Ibid.*, at 77.

Regarding the language found in section 35(1), the Supreme Court of Canada in *Sparrow*[63] had this to say:

> …we find that the words "recognition and affirmation" (in section 35) incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.[64]

The Crown's fiduciary obligations toward Aboriginal people apply to government officials administering Aboriginal lands and resources. As well, the *sui generis* nature of the relationship requires the Crown be held to a high standard of honourable dealing with Aboriginal people. *Sparrow* involved a claim to an Aboriginal right to fish by the Musqueam Band. The government had imposed a fish net limit, which Musqueam fishers exceeded. The Supreme Court of Canada found that the net limit imposed by the government infringed the Musqueam's Aboriginal right to fish. In order to ensure government did not unduly infringe Aboriginal rights, the Supreme Court established a test requiring government officials to justify an infringement of an Aboriginal right.

In *Blueberry River Indian Band v. Canada*,[65] a case dealing with the Crown's management of treaty reserve lands, the Supreme Court found that the Crown's fiduciary duty expressly applied when the government managed those lands. In 1940, the Band transferred the mineral interests in its reserve to the Crown in trust. The Crown was required to hold those minerals in trust for the benefit of the Band. In 1945, the Band agreed to surrender the whole of their reserve to the Crown "to sell or lease" on terms deemed most beneficial for the welfare of the Band. When the lands were sold the Crown failed to hold back the minerals. Oil was later found under the surrendered lands. The Supreme Court of Canada described the fiduciary obligation of the federal government as one which "required [it] to act in the best interest of the Band in dealing with the mineral rights….the DIA (Department of Indian Affairs) was under a fiduciary obligation to put the Band's interests first".[66]

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63 *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
64 *Ibid,* at 1109.
65 *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.
66 *Ibid*., at para. 14.

In *R. v. Van Der Peet,*[67] the Supreme Court of Canada confirmed that the legal relationship between the Crown and Aboriginal peoples is a fiduciary one that requires statutory and constitutional provisions protecting the interests of Aboriginal peoples must be given a generous and liberal interpretation. This is because the "honour of the Crown is at stake" in the Crown's dealings with Aboriginal peoples. To identify whether an applicant has established an aboriginal right protected by 3.35(1), the court laid down the following test: in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

Factors to be considered in applying this 'integral to a distinctive culture' test include the perspective of the aboriginal peoples, the identification of the nature of the right being claimed, whether the activities in question are of a central significance to the particular aboriginal group, and whether there is continuity between the activities and the claimed right. The court reasoned that these claimed rights ought to be adjudicated on a specific rather than a general basis.

Prior to 2002, there was no real distinction between the types of fiduciary duty owed by the Crown to First Nations, before and after reserve creation. The law was clear to this point, including that: (i) the Crown was in a fiduciary relationship with Aboriginal people, (ii) the honour of the Crown is always at stake in its dealings with Aboriginal people; and (iii) ambiguity should be resolved in favour of the Aboriginal people. With *Roberts*[68] the Supreme Court of Canada affirmed that the fiduciary duty owed by the Crown is different before and after reserve creation. *Roberts* involved a claim by two Bands, the Weywakum (Campbell River Indian Band) and the Wewaikai (Cape Mudge Indian Band), over the other's reserve. Historic notations on government documents indicated that the reserves belonged to one Band, then to the other Band. In the 1970s, the Bands commenced legal action, in part, claiming a breach of fiduciary duty against the federal government.

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67 *R. v. Van Der Peet*, [1996] 2 S.C.R. 507.

68 *Roberts v. R.* (2002), (sub nom. *Wewaykum Indian Band v Canada*) 2002 SCC 79.

Mr. Justice Binnie, writing for the Supreme Court of Canada, found that there had not been a breach of the fiduciary duty by the government. Justice Binnie acknowledged that the Crown's fiduciary duty to Indians has been raised in a number of contexts, but found that "not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature."[69] He reasoned that "[t]he content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity."[70] In the context of reserves, Justice Binnie held that the fiduciary duty is different before and after reserve creation:

> Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage its fiduciary duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with a view to the best interest of the beneficiaries.
>
> Once a reserve is created, the content of the fiduciary duty expands to include the protection and preservation of the band's interest from exploitation.[71]

Fiduciary obligations of the government have become an important feature of Aboriginal and Treaty Law in Canada. More recently, the Aboriginal Law has been expanded to affirm that the Crown owes a duty to consult and accommodate an Aboriginal or Treaty right which may be adversely affected by Crown conduct. The Supreme Court of Canada in *Haida Nation v. British Columbia*[72] held that where the Crown has knowledge that its conduct may infringe on an Aboriginal right, the duty to consult, and accommodate, if appropriate, is triggered. The duty to consult and accommodate will be consistent with the strength of the right claimed and the severity of the potential infringement.

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69 *Ibid.,* at 83.

70 *Ibid.,* at 87.

71 See: Imai, Shin. *Indian Act and Aboriginal Constitutional Provisions*, (Thomson: Carswell, 2005), at 697.

72 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511. See also: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

For Treaty First Nations, an important case involving consultation and accommodation is *Mikisew Cree Nation v. Canada (Minister of Heritage)*.[73] *Mikisew* is one of the first Supreme Court of Canada cases decided after *Haida, supra* involving treaty reserve lands. In this case, the Mikisew Band protested the construction of a winter road through their reserve located in northern Alberta because it would negatively impact their traditional culture. In response, the government re-located the boundary of the road alongside the reserve. The government did not specifically consult with the Band about either planned roadway.

The Supreme Court of Canada found that in the case of a treaty, the Crown will always have notice of its contents and should know the degree to which its actions may adversely affect Treaty rights. The Supreme Court of Canada declined to move directly into a *Sparrow* justification analysis, instead invoking the honour of the Crown, reasoning that that was enough to trigger a *Haida* type of consultation and accommodation analysis. The honour of the Crown, the court reasoned, "…is itself a fundamental concept governing treaty interpretation and application."[74]

Prior to *Mikisew*, the law of the duty to consult and accommodate was developed out of claims for Aboriginal rights in areas where historic treaties had not been entered into. That is, the Aboriginal title to the lands and territory had not been extinguished by treaty. In non-Treaty cases, the "honour of the Crown" was applied as a central principle in the resolution of Aboriginal claims despite the absence of a treaty. In *Mikisew*, the Supreme Court of Canada found that where a treaty is in place, the honour of the Crown infuses it and the performance of treaty obligations by the Crown under it. This is a very important element for Treaty First Nations; where Treaty rights may be adversely affected by Crown action, they should act reasonably quickly to ensure that the Crown is consulting them, and if required, accommodating their interests. Treaty rights are protected by treaty and the *Constitution Act, 1982*. Where it appears that government action may result in no meaningful ability to exercise a Treaty right, and the action of a treaty infringement

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[73] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

[74] *Ibid*., at para. 51.

exists, First Nations may demand a *Sparrow* type analysis to require the government to justify the infringement.[75] In any case, the courts are prepared to monitor the Crown activities to ensure that the honour of the Crown is upheld in its dealing with Treaty First Nations.

V. CONCLUSION

The historic treaty making relationship between the Indian Nations in the United States and in Canada were similar in objective and purpose. The primary concern of the European governments was to secure the land and manage the Indian inhabitants. Even though the approach taken by American and Canadian authorities to reach these ends was separated by time and circumstance, their efforts were unified by significant historical events. Case law relating to the historic treaty relationship was first developed by Chief Justice Marshall of the United States Supreme Court. Early American law provides a foundation for modern day Federal Indian Law in America and to Aboriginal or Treaty Rights Law in Canada.

At the core of the legal relationship is the unique relationship between government, on behalf of the Crown, and Indian nations. The shared basis that Canadian Aboriginal Law has in common with United States Federal Indian Law is the *Royal Proclamation*. In *McIntosh*, *supra*, the *Royal Proclamation* was found to be one of the original sources of the discovering nation's authority to deal exclusively with the Indian inhabitants in respect of their lands. For Justice Marshall, the discovering nation of Indian lands gained exclusivity to those lands. As explained above, the *Royal Proclamation* is still recognized in Canada as a legal basis for the recognition of rights of First Nations, but this is no longer the case in America. Even so, we have seen that, in the Marshall decisions and subsequent cases in the United States and Canada, legal principles have been developed which are rooted in the historical treaty making relationship. Canadian courts have drawn on American precedent to develop a distinct area of the law that, in part, places fiduciary obligations on the government. In Canada, the honour of the Crown is always at stake in

[75] Ibid., at para. 48.

its dealings with First Nation people. Importantly for Treaty First Nations in Canada, current law confirms that the Crown must act in the best interest of the Indian people, where required. The Crown will always know the content of historical treaties and cannot claim that it was unaware of the nature of its obligations toward Treaty First Nations. Where the Crown seeks to undertake activities which may infringe a Treaty right, it is to consult with the First Nation, and if warranted, accommodate reasonable concerns. Where this is not done, the courts may intervene.