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Trusteeship and Canada's Indians

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It has been suggested recently by some of those concerned with putting forward claims on behalf of Canada's Indians that Canada stands in the position of a trustee, and the contention has been made that this relationship is not merely one of municipal concern, but that the international trusteeship system extends to them.

In so far as the North American Indians are concerned, the idea of trusteeship may be traced back to the comment of Chief Justice Marshall in *Cherokee Nation v. Georgia*:¹

[The Indians] are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to the government for protection; rely upon its kindness and its power. . .

Other United States Supreme Court judgments were to the same effect. *Ex parte Crow Dog*² concerned the interpretation of the Treaty of 1868 with the Sioux, and its interconnection with Chapter IV of Title XXVIII of the Revised Statutes entitled 'Government for Indian Country.' Speaking for the Court, Justice Matthews stated

They were to be subjected to the laws of the United States not in the sense of citizens but, as they had always been, as wards subject to guardians; . . . as a dependent community who were in a state of pupilage . . .

The purpose of this 'wardship' may be seen in the comments of Justice Miller in *U.S. v. Kagama*³:

The Indian tribes are the wards of the nation ... Because of local ill-feeling, the people of the states where they are found are often their deadliest enemies. From their very weaknesses and helplessness, . . . there arises the duty of protection and with it the power.

Clearly, therefore, the Supreme Court looked upon the tribes, not the individuals who normally form the subject of guardian/ward relationships, as being in a special capacity. The judges did not say that the common law concept of this relationship governed the

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1. 30 U.S. 1 (1831) at 9.

2. 109 U.S. 556 (1883) at 560.

3. 118 U.S. 375 (1886) at 383.

situation, for in the words of Marshall it merely 'resembled' it. Moreover, the rights of a ward as against his guardian were, in the normal way, protected through the medium of the courts. What later commentators tend to overlook when having recourse to the comments of the Chief Justice is that he went on to say:

. . . If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

Before proceeding further, one should point out the nature of the guardian/ward relationship as understood in common law. Historically, the concept was part and parcel of the feudal relationship, with the orphaned infant treated as an adjunct of his lands,⁴ and the idea of representation of the ward in, for example, judicial proceedings came later, as did the idea that the guardian owed obligations to the ward. It has been said, in fact, that⁵

the relationship of guardian and ward, at common law, is a relation under which, typically, the guardian (a) has custody of the ward's person and can decide where the ward is to reside, (b) is required to educate and maintain the ward, out of the ward's estate, (c) is authorized to manage the ward's property for the benefit of the ward, (d) is precluded from profiting at the expense of the ward's estate, or acquiring any interest therein, (e) is responsible to the courts and to the ward, at such time as the ward may become *sui juris*, for an accounting with respect to the conduct of the guardianship.

In so far as the United States relation to the Indians was concerned, this 'wardship' really indicated complete submission of the Indian tribes to congressional jurisdiction, in return for which they enjoyed protection, and, as was made clear in *Calvin's Case*⁶, at common law the concomitant of protection is allegiance and obedience. In so far as the federal government of the United States is concerned, this protection has primarily been exercised against state authorities in accordance with constitutional law — a provision which finds

4. T. F. B. Plucknett, *A Concise History of the Common Law* (4th ed. London: Butterworth, 1948) at 515; F. Pollock and F. Maitland, *History of English Law* (2d ed. Cambridge: University Press, 1898) at 436-7.

5. U.S. Dept. of the Interior, *Federal Indian Law*, 1958, at 557, paraphrasing 1 Schouler, *Marriage, Divorce, Separation, and Domestic Relations* (6th ed. 1921) pt. IV.

6. (1608), 7 Co. Rep. 1a.; 77 E.R. 377 (K.B.).

statutory parallel in s. 91 of the British North America Act. That, as wards, the Indians have had no special rights independent of those enjoyed by or conferred upon them by their guardian, is clear from such United States decisions as *Ex parte Webb*.⁷ where it was pointed out that “although those tribes [the Five Civilized Tribes] had long been treated more liberally than other Indians, they remained none the less wards of the Government, and in all respects subject to its control.”

The extent of this subjection as it affects both United States and Canadian Indians becomes clear from the words of the arbitral award in the *Cayuga Indians* case⁸ involving the rights of Cayugas who had settled on the Canadian side of the border, in the light of treaties entered into with that Nation by the State of New York between 1789 and 1795 as well as the Treaty of Ghent between Great Britain and the United States, 1814. After pointing out that the tribe had never constituted a unit in the eyes of international law, the tribunal indicated that it had always been treated as under the protection of the power occupying its land, and that

the ‘Cayuga Nation’, with which the State of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law . . . [The 1789] treaty was made at a time when New York had authority to make it, as successor to the colony of New York and to the British Crown . . . [while the Canadian Cayugas] were and are dependent upon Great Britain, or later upon Canada, as the New York Cayugas were dependent on and wards of New York.

As if to emphasise that the terms ‘wards’ was being used in the loosest and most non-technical of senses, the tribunal held that as the treaty was in the nature of a contract between New York and the Cayugas and was within New York’s competence, there was no direct liability upon the United States. The latter was liable, not because of the Indian treaties, but because of the Treaty of Ghent, and its liability was not to the Indians, with whom the original commitment had been made, but to their sovereign which, at its discretion, could have decided to keep the \$100,000 awarded for itself and its National Debt purposes.

It is true that there are some decisions of the Supreme Court in which the concept of wardship has been extended to individual members of the tribe as well as to the tribe as a totality, as originally

7. 225 U.S. 663 (1912) at 684.

8. (1926), 6 U.N. *Reports of International Arbitral Awards* at 173, 177 and 187.

was the case. In these cases, too, however, it is clear that the concept is used in a special sense that has nothing whatever to do with the normal understanding of the legal relationship that exists between a guardian and his ward. This is clear from the decision in *Elk v. Wilkins*⁹ that

. . . the question whether any Indian tribes, *or any members thereof*, have become so far advanced in civilization, that they should be let out of a state of pupilage, . . . is a question to be decided by the nation whose wards they are.

To a somewhat similar effect are two decisions of 1916 and 1917. In *U.S. v. Nice*¹⁰ the Supreme Court said:

Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.

Basing itself upon this decision, the Court in *U.S. v. Waller*¹¹ held:

The tribal Indians are wards of the Government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens the relation of guardian and ward for some purpose may continue. On the other hand, Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit clothe them with full rights and responsibilities concerning their property or give them partial emancipation if it thinks that course better for their protection.

One of the most popular arguments in favour of the wardship concept has arisen from recognition by the courts that the 'treaties' with the Indians¹² are the product of an unbalance in bargaining power and might perhaps warrant interpretations that are somewhat

9. 112 U.S. 94 (1884) at 106 (italics added).

10. 241 U.S. 591 (1916) at 598.

11. 243 U.S. 452 (1917) at 459-60.

12. For analysis of the nature of these treaties, see L. C. Green, *Legal Significance of Treaties Affecting Canada's Indian* (1972). 1 Anglo-Am L.R. 119.

liberal on behalf of the Indians. This feeling clearly underlies the comments of Matthews J. in *Choctaw Nation v. U.S.*¹³:

The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection.

The same principle of liberality has been applied when interpreting acts of Congress in their application to the Indians, and in *Choate v. Trapp*¹⁴ the Supreme Court departed from the rule of strict statutory interpretation, pointing out that

. . . in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favour of the United States, are to be resolved in favour of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases

of which this was one.

While this more liberal approach towards both statutes and treaties was confirmed, at least as regards taxation, in *Squire v. Capoeman*¹⁵, one must not overlook the comment of Justice Reed in *Northwestern Band of Shoshone Indians v. U.S.*¹⁶ in 1945:

We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.

It might be thought that undue attention has been paid to the decisions of the United States Supreme Court. It should be remembered, however, that Chief Justice Marshall in the *Cherokee* case was aware that the American title stemmed from the original

13. 119 U.S. 1 at 28. See also *Jones v. Meehan* 175 U.S. 1 (1898) at 11; and for Canada, e.g. *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 314, and L. C. Green, *Canada's Indians: Federal Policy International and Constitutional Law* (1970), 4 Ott. L.R. 101 at 11-4.

14. 224 U.S. 665 (1912) at 675.

15. 351 U.S. 1 (1956).

16. 324 U.S. 335 (1945) at 353.

British title and thus it comes from the same stem as does that in Canada, and this is true whether the word 'title' is used to describe the rights of the state or of the Indians. Moreover, those who currently discuss the claims of the Canadian Indians, particularly when putting them forward in a form that has not previously been used, do not hesitate to have recourse to the decisions of the Supreme Court and the American situation generally¹⁷ when dealing with the Indians in the United States, even though the legal regime there is in fact somewhat different, as reference to the Government publication *Federal Indian Law*^{17a} makes clear. Further, Canadian judges themselves have on occasion not hesitated to adopt the words of Marshall when construing the legal rights of Canada's Indians. An outstanding instance of this is Norris J.A. of the British Columbia Court of Appeal in *R. v. White and Bob*¹⁸.

In leaving the issue of wards and guardians, we should bear in mind the comment in *Federal Indian Law*¹⁹ that "it should be clear that the use of the terms 'guardian' and 'ward' in these cases has no necessary connection in the other senses in which the ward concept has been used." If it is necessary to look for some comparable legal concept which might be adopted by analogy it would be more correct to look to the issue of minority protection as it is found in such documents as the Constitution of India when dealing with, for example, untouchables or linguistic groups²⁰.

Closely related to the concept of wardship is that of the trust, and here too there is a proneness when talking of Indians to use technical terms somewhat loosely. There is a tendency to forget the historical origins of this relationship and its close connection with the law of real property²¹, while the current concept of trust is a much more recent development and depends on judicial interpretation and statutory definition. This, however, has not prevented commentators from using terms which would imply that a trust relationship

17. See, e.g., P. Cumming and N. Mickenberg, *Native Rights in Canada*, (2d. ed. Toronto: General Pub. Co, 1972).

17a. *Supra*, note 5.

18. (1965), 50 D.L.R. (2d) 613 at 630 (B.C.C.A.), citing *Johnson and Graham's Lessee v. M. Intosh*, 21 U.S. 543 (1823) at 589-90, 572-4.

19. *Id* at 566.

20. See, e.g., discussion of Arts. 15-18, in H. Seervai, *Constitutional Law of India*, (Bombay: N.M. Tripathic, 1068) ch. X.

21. Plucknett, *supra*, note 4, at 566: Pollick and Maitland, *supra*, note 4 at 228-39.

exists between Indians and government and that there is, to all intents and purposes, no difference between the guardian/ward relationship and trusteeship. Thus in *Seminole v. U.S.*²² the Supreme Court of the United States stated dogmatically that the United States “has charged itself with moral obligations of the highest responsibility and trust . . . [which is in part] a humane and self-imposed policy,” but it should be noted that the Court referred to it as only a moral obligation and, more usually, the attitude has been not to use the word trust quite so openly, although the Indian occupancy of tribal lands, for example, is frequently described²³ as

. . . sacred, . . . as sacred as the fee of the United States in the same lands . . . ‘But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to the right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, . . .’²⁴

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed to be a political one, not subject to be controlled by the judicial department of the government. . .

. . . When treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

These comments concerning the right of occupancy remind one of the attitude of the Privy Council in *St. Catherine’s Milling & Lumber Co. v. The Queen*²⁵ that “the tenure of the Indians was a personal and usufructuary right depending upon the goodwill of the sovereign”, and the reference to the political character of the obligation is similar to the statements made by Taschereau J. in the

22. 316 U.S. 286 (1942) at 296-7.

23. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) at 564-6, re the Treaty of Medicine Lodge, 1867.

24. Citing *Beecher v. Wetherby*, 95 U.S., 517 (1877) at 525.

25. (1889), 14 App. Cas. 46 at 55 (P.C.) (Can).

same case when before the Supreme Court of Canada²⁶, while the comments concerning good faith are reminiscent of those uttered by McGillivray J.A. in *R. v. Wesley*²⁷:

. . . In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements. . . . Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate, and it is not to be thought that the Crown has departed from those equitable principles which the Senate and the House of Commons declared in addressing Her Majesty in 1867²⁸, uniformly governed the British Crown in its dealings with the aborigines. . . . It is satisfactory to be able to come to this conclusion and not to have to decide that “the Queen’s promises” have not been fulfilled. It is satisfactory to think that the legislators have not so enacted but the Indians may still [in the words of the Royal Proclamation of 1763²⁹] be “convinced of our justice and determined resolution to remove all resonable causes of discontent”.

Despite all the talk of ‘trust’ and the like, the comment of Justice Douglas in *U.S. v. Santa Fe Pacific R. Co.*³⁰ seems to sum up the situation correctly, not only as it exists in the United States, but with only verbal alteration as it exists in Canada too:

The manner, method and time of . . . extinguishment [of Indian title] raise political, not justiciable, issues . . . As stated by Chief Justice Marshall . . . the exclusive right of the United States to extinguish Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete domination, adverse to the right of occupancy or otherwise, its justness is not open to inquiry in the courts.

While it cannot be doubted that these judicial pronouncements have been concerned with the rights of the Indians to equitable treatment, it would appear that they have used such terms as equity, fair dealing, good faith, and the like in a very general sense based on moral judgement. It can hardly be said that they have recognized

26. (1887), 13 S.C.R. 577 at 649.

27. [1932] 2 W.W.R. 337 at 351 and 353; [1932] 4 D.L.R. 774 at 788 and 790 (Alta. S.C.).

28. Re accession of Ruperts Land and Northwest Territories, R.S.C. 1970, App. II No. 9, Sch. A.

29. R.S.C. 1970, App. II No. 1, (promising to preserve aboriginal rights and protect Indian land interests).

30. 314 U.S. 339 (1941) at 347.

any legal relationship in any way resembling that of a trust. Nevertheless, Professor Reid Chambers in a paper submitted to a sub-committee of the United States Senate Committee of the Judiciary³¹ has not hesitated to assert that “the United States stands in a fiduciary relationship to Indians and Indian tribes.” It is submitted, however, that the evidence he adduces to support this contention hardly serves this purpose, for he goes on to say

It has been held by the Supreme Court that ‘Indian tribes are the wards of the nation’. The duty is a ‘self-imposed’ one which arises out of the Indian tribes’ status as ‘dependent domestic nations’ within the territory of the United States. The classic discussion of the Government’s fiduciary duty to Indian tribes is found in Chief Justice Marshall’s landmark decision of *Cherokee Nation v. Georgia*³². In holding that Indian tribes are not ‘foreign states’ entitled to invoke the original jurisdiction of the Supreme Court, the Chief Justice stated that ‘the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence!’

Later Supreme Court decisions have reaffirmed the special guardianship of the Federal Government for Indians. In *U.S. v. Kagama*³³ the Court analyzed the fiduciary duty as growing out of an ‘exclusive sovereignty...which must exist in the National Government’ and the fact that Indian tribes are ‘communities dependent on the United States’ . . . Most recently, in *Seminole v. U.S.*³⁴, the Supreme Court held that the United States ‘has charged itself with moral obligations of the highest responsibility and trust’. This guardianship was referred to as in part ‘a humane and self-imposed policy’.

As if realizing that his judicial authorities do not really support the case he is making, Professor Chambers has recourse to a presidential statement — hardly a source of excessive worth from the point of view of determining the legal status of a controversial situation:

The existence of this trust relationship was recently reaffirmed by President Nixon. In a message to Congress on July 8, 1970, he emphasized that:

31. “Discharge of the Federal Trust Responsibility to Enforce Legal Claims of Indian Tribes: Case Studies of Bureaucratic Conflict of Interest”, 91st Cong. 2d Sess. (Committee Print, 1970), Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources, Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary (cited in M. Price, *Law and the American Indian* (Indianapolis: Bobbs-Merrill, 1973) at 324-5.

32. 30 U.S. 1 (1831).

33. 118 U.S. 375 (1886).

34. 316 U.S. 286 (1942).

'The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute.'

The President noted that many legal disputes concerning the extent of the Indians' land and water rights are between them and agencies of the federal government, their trustee. Such instances involve conflicts of interest, as it is impossible for the government vigorously to provide legal representation to the Indians and, at the same time, effectively pursue its own designs and policies with respect to land and water also claimed by the Indians,

although in Canada we do find that the government is in fact helping to finance the legal case that the Indians are seeking to assert against the government in similar spheres.

While the American comments are of interest, care must be taken not to overlook the fact that in some instances these may be affected by the very nature of the United States Constitution, and to that extent they are of course to be referred to only with the greatest of caution by anyone interested in the problem from the point of view of Canada's Indians, although, as has been pointed out, it is by no means unknown for Canadian courts to refer to the decisions of their southern neighbour in this context. But apart from those already mentioned, there have been others in which the language of equity has been used, with implications that there exists a true guardian/ward or trust relationship. It is necessary, therefore, to examine some of these a little more closely, bearing in mind constantly the warning of Taschereau J. in the *St. Catherine* case to which reference has already been made, namely that respect for the claims of the Indians lies "not because of any legal obligation . . . but as a sacred political obligation, in the execution of which the State must be free from judicial control."³⁵

To some extent the Canadian courts have taken as their starting point the comment of Lord Shelbourne in *Kinlock v. Secretary of State for India*³⁶ in which he recognized that 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 regards higher

35. *St. Catherine's Milling & Lumber Co. v. The Queen* (1887), 13 S.C.R. 577 at 649.

36. (1882), 7 App. Cas. 649 (H.L.).

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.

Nevertheless, it is possible for the Crown to become trustee in the full sense of the word — “There is nothing...to prevent the Crown from acting as agent or trustee if it chooses deliberately to do so”³⁷. Although difficulties may arise with regard to enforcement, “it is laid down by highest authority that by a Petition of Right [— today it would be necessary to file other documents rather than to resort to this procedure —] a trust ... may be enforced against the Crown”³⁸, provided of course that a trust does in fact exist, and “I do not think that the Crown can be placed in the position of trustee by implication; the Crown can only be constituted trustee by express provisions of an Act of Parliament or a contract to which the Crown is a party”³⁹. To some extent, as in the American cases, when dealing with Indians the courts in Canada, and those using their decisions for partisan purposes, have presumed the existence of a trust from general statements, especially when these have been expressed in high-sounding moralistic terms.

One of the earliest cases that has been acclaimed as postulating a trust on behalf of the Canadian Indians is *Ontario v. Canada and Quebec, In re Indian Claims*⁴⁰. This concerned the liability of the provinces and the government of Canada in respect of certain debts and other commitments and involved consideration of treaties affecting Indians in the Lake Superior and Lake Huron districts. Before the case reached the Supreme Court of Canada it had gone before an arbitration board and the award of Mr. Chancellor Boyd referred to some of the cases decided in the United States Supreme Court and called for a liberal interpretation of the treaties with the Indians. He seems, however, to have been somewhat confused as to the nature of the Indian tribes and of the treaties in question, for he appears to have assumed that the former possessed full treaty-making capacity and that the latter were treaties in the international sense⁴¹:

37. *Civilian War Claimants, Association v. The King*, [1932] A.C. 14 at 37.

38. *Canadian Central Railway v. The Queen* (1873), 20 Gr. Ch.R. 273 at 290.

39. *Chapman v. The King*, [1934] Ex. C.R. 152 at 159.

40. (1896), 25 S.C.R. 434.

41. Green, *supra*, note 12.

The course of construction applicable both to constitutional Act and Indian Treaty is not that a literal and strict meaning be given to the words, but that they shall be construed liberally and comprehensively so as to further the reasonable scope of the provisions. This benignant construction obtains with added force in the construction of a treaty wherein the rules of international rather than of municipal law are to be regarded.

Now in these transactions with the aborigines from the earliest colonial times in North America the Government has assumed the status of the Indian tribes to be that of distinct political communities. When the dealing has been by the Crown for the cession of territory over which some legal possessory right by the tribes in actual occupation has always been recognized, then the form of the transactions has been that of a treaty. Superadded to this, it is to be taken into account that the Indians relatively to the whites are in a state of dependency or pupilage, and that the nearest legal analogy as to the relationship between their tribes and the Government is that of guardian and ward.

Hence arises the doctrine well established in American jurisprudence, and dating from the era of British colonization, that treaty stipulations are to be carried out with the utmost plenitude of good faith and with even generous interpretation in favour of these public wards of the nations. . . .

The rules to be applied are those which govern public treaties, which even in the case of controversies between nations equally independent are not to be read as rigidly as documents between persons governed by a system of technical law, but in the light of that larger sense which constitutes the spirit of the Law of Nations.

In the Supreme Court,⁴² only Gwynne J. was prepared to recognize the existence of a trust, but his judgment was by way of dissent and even he was not prepared to assert that the Crown was legally bound⁴³:

The terms and conditions expressed in those instruments [treaties] as to be performed by or on behalf of the Crown have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.

Among the majority, Strong C.J. was emphatic in holding that there was "no ground for saying that there was any express charge, lien

42. *Supra*, note 40.

43. *Id.* at 511-2.

or trust’’⁴⁴. In fact, the case was decided almost as an interprovincial dispute, so that most of the remarks concerning Indian rights and the significance of the treaties were in fact *obiter*. Nevertheless, Sedgewick J.’s comments are significant⁴⁵:

Do these treaties as they are called in law create a burden upon or give to the Indians an interest in the land they purport to cede? . . .

The wards of the nation must have the fullest benefit of every doubt. But I do not see that where the question is solely between the two provinces these high ethical doctrines should have a weight. It is one thing from motives of grace or from a sense of moral obligation to do more than justice to the Indian races. It is quite another thing in the construction of a legal instrument to give weight to these motives in favour of one province at the expense of another, especially when these races in no way benefit thereby. . . .

The only security in the treaty [for annuities] was the personal covenant of the Sovereign. . . . I cannot bring myself to think that it was ever within the contemplation of the parties that as security for payment the Indians were to have a charge upon the ceded lands.

Other cases which have used somewhat loose language from the law of trusts have been invoked to support the trusteeship concept on behalf of Canada’s Indians. There can be little doubt as to the correctness of the comment of Macdonald J.A. in his dissenting judgment in *R. v. Morley*⁴⁶ that the ‘‘reservation of federal jurisdiction in respect to Indians and Indian lands reserved for Indians [in s.91 of the British North America Act], has a definite object in view, viz., safeguarding the rights and privileges of the wards of the Dominion at all times’’, and this was confirmed in wider terms by McArthur Co. Ct.J., Nova Scotia, in *Re Kane*⁴⁷:

For reasons which are quite apparent, the Indian has been placed under the guardianship of the Dominion Government. He is its ward, so long as he remains unenfranchised⁴⁸, and the Minister . . . is given the control and management of all lands and property of Indians in Canada. They are looked upon and treated as requiring the friendly care and directing hand of the

44. *Id.* at 503.

45. *Id.* at 533, 535 and 537-8.

46. [1932]4 D.L.R. 483 at 513; [1932]2 W.W.R. 193 at 218 (B.C.C.A.).

47. [1940]1 D.L.R. 390 at 397. (N.S. Cty. Ct.).

48. Enfranchisement is regulated by ss. 109 - 13 of the *Indian Act*, R.S.C. 1970, c.I-6.

Government in the management of their affairs. They and their property are, so to speak, under the protecting hand of the Dominion Government. . .

A fairly recent case in the Supreme Court indicates that the facts may be such that a trust is created, although on the major issues the matter was referred back to the lower court because of insufficient evidence. In *Miller v. The King*⁴⁹, Kellock J. having referred to the comment by Lord Atkin in the *Civilian War Claimants* case⁵⁰ that the Crown could deliberately choose to be a trustee, drew attention to the rival contentions which make clear what the Crown's views generally are:

[I]t is also alleged by the petition that the Department of Indian Affairs from its formation in 1784 to the present time is an express trustee of the lands and property of the Indians, including all Indian money paid to it. . . . On behalf of the respondent it is . . . said that reference to the Crown (presumably in documents or statutes) as trustee for the Indians and to the Indians as wards of His Majesty is not a technical use of such terms but such references are merely descriptive of the general political relationship between His Majesty and the Indians. It is also contended that only fact relied upon to show a trust or agreement is the acceptance . . . of the surrender of the Indian lands . . .

[However,] I see no more difficulty in the present instance, should the facts warrant, in making a declaration that the monies in the hands of the Crown are trust monies and that the appellant and those upon whose behalf he sues are cestuis que trust, even although the court could not direct the Crown to pay. In this latter event it is inconceivable that . . . the Crown, as the fountain of justice, would not do justice. I think, however, no such difficulty lies in the way of an order for payment

and one claim was conceded. Lest it be considered that the Supreme Court is here asserting that the relationship between the Indians and the Crown always constitutes that of trusteeship, it is as well to refer to the Supreme Court's decision in *St. Ann's Shooting and Fishing Club v. The King*⁵¹ in the same year, in which Rand J. stated

The language of the statute [in question] embodies the accepted view that these aborigines are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation.

It would help if one knew what is meant by " a political trust of

49. [1950] S.C.R. 168 at 174 and 177-8; [1950] 1 D.L.R. 513 at 518 and 521.

50. [1932] A.C. 14. at 37.

51. [1950] S.C.R. 211 at 219; [1950] 2 D.L.R. 225 at 232.

the highest obligation'', especially as Prime Minister Trudeau in explaining his Government's White Paper on Indian Policy⁵² said of Canadian policy towards the Indian⁵³:

We have set the Indians apart as a race. We've set them apart in our laws. We've set them apart in the ways the governments will deal with them. They're not citizens of the provinces as the rest of us are. They are wards of the federal government. They get their services from the federal government rather than from the provincial or municipal governments. They have been set apart in law. They have been set apart in the relations with government and they've been set apart socially too.

The White Paper too is no help in explaining this 'political trust of the highest obligation.' It informs us that

The treatment resulting from their different status has been often worse, sometimes equal and occasionally better than accorded to their fellow citizens. . . . Many Indians . . . suffer from poverty. The discrimination which affects the poor, Indian and non-Indian alike, when compounded with a legal status that sets the Indian apart, provides dangerously fertile ground for social and cultural discrimination. . . . The legal and administrative discrimination in the treatment of Indian people has not given them an equal chance of success. It has exposed them to discrimination in the broadest and worst sense of the term — a discrimination that has profoundly affected their confidence that success can be theirs. Discrimination breeds discrimination by example, and the separateness of Indian people has affected the attitudes of other Canadians towards them.

There are few Canadians, Indian or non-Indian, who would be prepared to disagree with this summation of past Canadian policy and attitudes. That being so, it is hardly possible to regard the relation between the Government and the Indians as one based on trusteeship, whether it be legal or political in character — unless of course the words ward and guardian and trust are to lack all meaning — legal, equitable, or moral.

Recent events concerning the dissolution of empire and emphasis upon the right of self-determination⁵⁴ for what are described as

52. Dept. of Indian Aff., *Statement of the Government of Canada on Indian Policy*, 1969.

53. Speech at Vancouver, 8 Aug. 1969. See Cumming & Mickenberg, *supra*, note 17, App VI.

54. See *e.g.*, debate at 1971 Conference of American Society of International Law on "Self-Determination and Settlement of the Arab-Israeli Conflict", 65 *Proceedings* at 31 *ff.*

non-self-governing peoples, culminating in the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples⁵⁵ and the affirmation that "all peoples have the right of self-determination" in Article 1 of the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights, 1966⁵⁶, have led various movements among minority groups and indigenous peoples to claim for themselves a right to independence or autonomy. In fact, on occasion, as with the occupation of Alcatraz in San Francisco Bay and Wounded Knee by the American Indian Movement, attempts have been made to declare parts of the United States independent Indian territories. Before considering the significance for such aboriginal peoples as the Indians of these international instruments, it may be useful to look at the extent to which the Crown became a trustee for its people as a result of bilateral international agreements or by virtue of treaties made with such peoples.

It is only possible to deal with a representative selection of the cases which have arisen out of claims that the Crown has become a trustee for its citizens as a result of such treaty arrangements, but they serve to illustrate what the municipal decisions have already shown, namely, that the Crown does not become a trustee by implication. Moreover, in these cases there is the further factor to be borne in mind that in so far as international law is concerned the Crown acts for the state and not for the inhabitants and any burden or benefit flowing from the treaty is borne by the Crown. From the point of view of the citizens such an agreement is *res inter alios acta* and since they are not parties to it they are incapable of being directly affected thereby, unless special arrangements are made involving, for example, a unilateral undertaking by the Crown to confer any benefits upon citizens, which may be done by way of the establishment of a special claims tribunal. Any such arrangement, however, is purely a matter of municipal law.

One of the earliest cases that raised this problem was that of *Baron de Bode*⁵⁷ arising from the provisions in the Treaties of Paris, 1814 and 1815⁵⁸, whereby British subjects whose property had been 'unduly' confiscated by the French authorities were to receive

55. G. A. Res 1514 (XV) 1960.

56. Annexed to G. A. Res. 2200 (XXI).

57. (1845), 8 Q.B. 208; 15 E.R. 854 and (1847), 13 Q.B. 364; 16 E.R. 1302.

58. 63 Parry, *Consolidated Treaty Series* (Dobbs Ferry: Oceana Publications, 1969) at 172; 65 *id.* at 251.

compensation. The court took the line that any money received by the Crown under the treaty described as for the purpose of compensating British subjects was in fact available for any purpose that Parliament might decide. It was held, further, that if any obligation had been imposed upon the Crown, breach of such an obligation would amount to a tort, and, since at that time the Crown could not be sued in tort, the position of the claimant would, from a practical point of view, be more or less the same. This decision is similar to those Canadian decisions which pointed out that there was no means of enforcing an equitable obligation against the Crown even if such did subsist; or to those United States decisions which emphasized that rights under the treaties with the Indians were for political rather than judicial protection.

Of major significance in this connection are the comments of Cockburn C. J. in *Rustonjee v. The Queen*⁵⁹ concerning monies paid by China in respect of debts owed to British subjects. It was received

for Her Majesty at her discretion to cause such distribution of it to be made as shall make good the claims which her subjects have against the foreigner from whose government the money is received. In such a case a petition of right will not lie. The notion that the Queen of this country, in receiving a sum of money in order to do justice to some of her subjects, to whom injustice would otherwise be done, becomes the agent of those subjects, seems to me really too wild a notion to require a single word of observation beyond that of emphatically condemning it. In like manner, to say that the sovereign becomes the trustee for subjects on whose behalf money has been received by the Crown, appears to be equally untenable.

Lush J. was equally horrified at the suggestion⁶⁰:

The relation which is pressed upon us here never existed in this case between the Crown and the subject, and it is one which cannot exist in any state like ours⁶¹ between the sovereign and the subject.

As has already been indicated, the Crown can in certain circumstances be a trustee for some of its subjects, and this was pointed out in the Court of Appeal by Lord Coleridge C.J.⁶²:

59. (1876), 1 Q.B.D. 487 at 492-3.

60. *Id.* at 497.

61. See, e.g., *In re Schiff*, [1921] 1 Ch. 149 at 156-7 and *Administrator of German Property v. Knoop*, [1933] Ch. 439.

62. (1876), 2 Q.B.D. 69 at 74 (C.A.).

We do not say that under no circumstances can the Crown be a trustee; we do not even say that under no circumstances can the Crown be an agent; but it seems clear to us that in all that relates to the making and performance of a treaty with another sovereign the Crown is not, and cannot be, either a trustee or an agent for any subject whatever. We do not, indeed, doubt that, on the payment of the money by the Emperor of China, there was a duty on the part of the English Sovereign to administer the money so received according to the stipulations of the treaty. But it was a duty to her subjects according to the advice of her responsible ministers; not the duty of an agent to a principal, or of a trustee to a cestui que trust.

This tendency to look to the greater good of the entire nation rather than to concede a trust relationship between the Crown and some of its subjects was the basis of the decision of the Privy Council in *Canada v. Ontario*⁶³ in which it was held that though the treaty of 1873 with the Salteaux of the Ojibwas⁶⁴ was of direct advantage to the province, the Dominion in making the treaty was not acting as agent or trustee of the province, but with a view to great national interests:

The Dominion Government was indeed, on behalf of the Crown, guardian of the Indian interest, and empowered to make a surrender of it and give equivalents in return, but in so doing they were not under any special duty to the province. And in regard to the proprietary rights in the land (apart from the Indian interest) which through the Crown enured to the benefit of the province, the Dominion Government had no share in it at all. The only thing in which the Dominion could conceivably be thought trustees for the province, namely, the dealing with the Indian interest, was a thing concerning the whole Canadian nation. In truth, the duty of the Dominion Government was not that of trustees, but that of ministers exercising their powers and their discretion for the public welfare.

One of the most important of these cases, and one which was cited with approval by the Supreme Court of Canada in *Miller v. The King*⁶⁵ is *Civilian War Claimants, Association v. The King*⁶⁶ in which it was alleged that the Crown had received reparations from Germany in accordance with the Treaty of Versailles as trustee for

63. [1910] A.C. 637 at 646. (P.C.) (Can).

64. Treaty No.3 in 1 *Canada: Indian Treaties and Surrenders* (Coles: Toronto, 1971) at 303. (This is a reprint of the three volumes published by the Queen's Printer in 1891).

65. [1950] S.C.R. 168; [1950] 1 D. L.R. 513.

66. [1932] A.C. 14 at 24.

those nationals who had suffered injury during the war. Lord Buckmaster said:

I can see no evidence whatever of an acceptance of trusteeship on the part of the Government, or assertion of trusteeship on the part of the people who suffered damage, nor anything up to the time when the money was received to show that the conception of trusteeship was in the minds of anyone in any form whatever. Indeed, the original statements that were made were made of the readiness to compensate out of the national funds at home, and nobody suggests that the Government were the trustees of those funds for this purpose.

Finally, when the moneys were received, it was said that from and after that moment the Crown became a trustee. . . . If that were the case, unless you are going to limit the rights which the beneficiaries enjoy, those rights might include among other things, a claim for an account of the moneys that were received, of the expenses incurred, and the way in which the moneys have been distributed. Such a claim presented against the Crown . . . would certainly have no precedent, and would . . . invade an area which is properly that belonging to the House of Commons.

That money was received by the Crown as agent seems to me can no more be established than that the money was received by it as trustee. In fact, the trusteeship is the agency stated in other words. If the Crown was not a trustee, neither was it an agent; nor can I see that in any sense the Crown received these moneys as money had and received to the use of the people whose claims were made. The people whose claims were made were not considered by Germany on making the payment at all. The terms of the treaty were that Germany should pay the sum necessary to satisfy the claims of various people who had suffered, and it was left to the Governments themselves, as between them and their nationals to determine how the money was to be distributed.

It might be suggested that since these cases refer to treaties between the Crown and a foreign sovereign they are not strictly in point when looking at the situation of the Indians. On the other hand, if, as the Indians have been inclined to contend particularly with increasing emphasis in recent years, their 'treaties' are in fact treaties in the full international sense of that term, then they would clearly be relevant, although it must be accepted that they concern claims on behalf of nationals of the Crown and not on behalf of nationals of the other party. In the case of the Indians the situation is complicated by virtue of the fact that the alleged *cestuis que trust* are simultaneously nationals of the Crown and are the other treaty-making party. From this point of view the case of *Hoani Te*

*Heuheu v. Aotea District Maori Land Board*⁶⁷ may be more significant, especially as there is a growing tendency for North American Indians to insist that their treaties were in fact 'peace' treaties. The case in issue turned on the allegation that s.14 of the New Zealand Native Purposes Act, 1935, was *ultra vires* the legislature of New Zealand inasmuch as it derogated from the rights conferred upon the Native owners by the Treaty of Waitangi, 1840⁶⁸, ending the Maori War and under which the Maori people surrendered their sovereignty to the British crown. In its terms, the Treaty was very similar to the phraseology of the Royal Proclamation of 1763, which has been described as the Indians' Bill of Rights⁶⁹:

Her Majesty the Queen of England confirms and guarantees to the chiefs and tribes of New Zealand, and to the respective families and individuals thereof, the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the chiefs of the United Tribes and the individual chiefs yield to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the prospective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Speaking on behalf of the Judicial Committee of the Privy Council, Viscount Simon L. C. said:

Under Article 1 there had been a complete cession of all rights and powers of sovereignty of the chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law. The principle laid down in a series of decisions was summarized . . . in *Vajesingji Joravarsingji v. Secretary of State for India*⁷⁰ . . . : 'When a territory is acquired by a sovereign for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the courts established by the new sovereign only such rights as the sovereign has,

67. [1941] A.C. 308 at 324-7 (P.C.) (N.Z.).

68. B.S.F.P. 1840-41, at 111.

69. *St. Catherine's Case* (1887), 13 S.C.R. 577 at 652 (*per* Gwynne J.).

70. (1924), L.R. 51 Ind. App. 357 at 360 (P.C.).

through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts . . .’

So far as the appellant invokes the assistance of the court it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him. He, therefore, refers to the New Zealand Constitution Act, 1852, under which representative government was conferred upon New Zealand. . . . [By s. 73] ‘It shall not be lawful for any person other than Her Majesty, her heirs or successors, to purchase or in anywise acquire or accept from the aboriginal natives land of or belonging to or used or occupied by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal natives in any such land as aforesaid; and no conveyance or transfer, or agreement for the conveyance or transfer of any such land, either in perpetuity or any term or period, either absolutely or conditionally, and either in property or by way of lease or occupancy, and no such release or extinguishment as aforesaid, shall be of any validity or effect unless the same be made to, or entered into with, and accepted by Her Majesty, her heirs or successors. . . .’

The appellant’s contention was that the right conferred by the Waitangi Treaty was made a substantive part of the municipal law by s. 73 of this Act, but he had to concede that the Imperial Parliament, by virtue of its sovereign power of legislation, might have altered any right recognized or conferred by s. 73 . . . In view of this admission . . . the only ground left on which the appellant can challenge the validity of s. 14 is that the Imperial Parliament has not conferred on the New Zealand Legislature the power to alter s. 73 . . . But this ground also fails [since later Imperial legislation has expressly conferred that power] . . .

If then . . . the Imperial Parliament has conferred on the New Zealand legislature power to legislate with regard to native lands, it necessarily follows that the New Zealand legislature has the same power as the Imperial Parliament had to alter and amend its legislation at any time. . . . As regards the appellant’s argument that the New Zealand legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native lands, and, in any event, even the statutory incorporation of . . . the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments . . .

There is much in this extract which clearly applies to the treaties of the Indians in North America, and especially is it relevant to the position and rights of those in Canada. As Viscount Simon pointed out, legislation can give effect to treaty provisions and to the extent that it does so the beneficiaries of the treaty clauses in question will have their rights protected. But this protection flows not from the treaty, but from the legislation. Moreover, such legislation may well create a legally enforceable trust relationship, as has the *Indian Act* itself in certain fields for Canada's treaty and registered Indians⁷¹. Nevertheless, this Act enjoys no greater status than any other act and may be repealed at any time parliament may so decide, and with the repeal of the Act any trusts created under it would equally terminate, for the statutory basis of their existence would have disappeared.

It is clear from what has been said that, save in so far as express statutory action has resulted in the creation of a trust relationship, there is no such relation between the Crown or the government and the Indians, no matter what terms indicating such a relationship, or that of guardian and ward or some other form of pupillage, may have been employed by courts or government leaders. It becomes necessary, therefore, to see whether any such commitment of a trusteeship character has been created on the international level. The first thing that must be pointed out is that the position of the Indians in North America, whether in the United States or in Canada, has nothing in common with that of the aboriginal population of colonial territories. Unlike British settlement in Africa, Malaya and the like, the North American colonies developed into the independent states of the United States and of Canada and the government of those countries are regarded as governing the entire geographic limits of their territorial empires, and the inhabitants, regardless of their colour or racial origin, are today regarded as citizens. Similar conditions prevail in Australia and New Zealand. In Africa, on the other hand, the settlers, except in South Africa and Rhodesia, never regarded themselves as permanent inhabitants and looked upon their stay as a temporary interlude until such time, perhaps somewhat remote, as the native inhabitants would be able to govern themselves. As a result, Lord Lugard's concept⁷² that "Europe is in

71. To benefit from the Act, registration in accordance with ss. 5-12 is necessary.

72. *The Dual Mandate in British Tropical Africa* (5th ed. London: Frank Cass, 1965) (Original publication: 1922).

Africa for the mutual benefit for her own industrial classes and of the native races in their progress to a higher plane, that the benefit can be made reciprocal, and that it is the aim and desire of civil administration to fulfill this dual mandate” never applied to those British possessions wherein the white settlers eventually achieved the right of independent government, even though there have been constant references by politicians and judges alike to the civilizing mission of the white man and his desire to improve the lot of the aboriginal inhabitants. A typical statement to this effect is to be found in the Canadian Government’s Policy Statement on the Indians issued in 1969⁷³.

The concept of agency or ward and guardian became fairly significant on the international level after the First World War with the introduction of the mandate system under Article 22 of the League of Nations Covenant, wherein we find the clear assertion of there being ‘a sacred trust of civilisation’ in so far as the well-being and development of the local inhabitants are concerned. Although not expressed in quite the same terms, the provisions in the Article concerning limitations upon the military uses of the area and the commitment to the ‘open door’ were reminiscent of the second portion of Lugard’s concept. He had cited with approval Joseph Chamberlain’s view that the colonial powers were in Africa as “trustees of civilisation for the commerce of the world” and summed up the role of the colonial power to be a “trustee, on the one hand, for the advancement of the subject races, and on the other hand, for the development of its natural resources for the benefit of mankind.”⁷⁴

Despite the glowing references to trusteeship and the need to assist non-self-governing peoples towards independence, the historic background to the adoption of Article 22 of the Covenant indicates that there was no intention to apply this system on a universal scale or in a unilateral fashion solely on behalf of the local inhabitants.⁷⁵ To a great extent, the system was a result of an unwillingness on the part of Great Britain to enlarge its empire, of a desire to bring the United States into the administration sphere, a fear on the part of some self-governing dominions of having

73. *Supra*, note 62.

74. *Supra*, note 72 at 60 and 606.

75. See, e.g., D. Lloyd George, *The Truth About the Peace Treaties*, (London: V. Gollanez Ltd. 1938) at 114ff and 514ff.

German rule return to neighbouring territories, and rejection of the possibility of a revival of the grab for Africa, together with recognition of the truth of the warning delivered by Sir Robert Borden, the Canadian Premier, that⁷⁶

it would create a very bad impression if the British Empire came out of this war with a great acquisition of territory, and if the United States undertook no new responsibilities. If America were to go away from the Conference with her share of guardianship, it would have a great effect on the world. . . . If the chief result of this war was a scramble for territory by the Allied nations, it would be merely a prelude to further wars.

The most significant feature of the mandate system, perhaps even more important than the substantive content of the system with its belief in 'tutelage' and the like, is the fact that it was only limited in its scope. It was not intended to have any effect in the colonial territories of the existing empires, however much it might be hoped that its broad outlines might serve as an example. As the opening paragraph of Article 22 made clear, it would only apply to colonial territories which formerly belonged to the Central Powers:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

To give effect to this 'sacred trust' the mandates treaties were drawn up, but the principles that they embodied were only applicable to each territory to which the particular treaty applied, although the practice of the Permanent Mandates Commission served to create certain broad principles of general application for the interpretation of those treaties.

What is quite clear and cannot be doubted is that at no time was the mandate system intended to apply to the colonial territories of the members of the League of Nations. Even less was it relevant in so far as the interests and rights of indigenous communities within self-governing states or dominions were concerned. For some of these communities the minorities system was introduced⁷⁷, and

76. *Id.* at 116 and 121.

77. See, e.g., L. C. Green, "The Protection of Minorities in the League of Nations

although there developed a tendency to talk of minority protection and rights this was only true in respect of any group that was protected by a specific treaty or, as in the case of the Greek community in Albania⁷⁸, some other undertaking which created legal obligations. The minorities in question were national groups whose racial, cultural and other characteristics differed from those of the surrounding majority because they lived in multiracial states. As regards other states, which might have been described as multiracial, such as the United Kingdom, France, Canada, the United States or India, the system was as irrelevant as was the mandate system.

With the end of the Second World War a new dimension appeared with regard to independence. The Charter of the United Nations proclaimed as one of its Purposes the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples", although it nowhere defined what it meant by either 'self-determination' or the 'peoples' who were to enjoy such a right. However, the Charter does contain in Chapter XI a Declaration regarding Non-Self-Governing Territories, and in Chapter XII it introduces an international trusteeship system the aims of which are, broadly speaking, similar to those of the mandate system. In so far as the trusteeship system is concerned, while its basic objectives are

- (a) to further international peace and security;
- (b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its people and the freely expressed wishes of the people concerned, and as may be provided by the terms of each trusteeship agreement;
- (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
- (d) to ensure equal treatment in social, economic and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice [— shades of Chamberlain and

and the United Nations", in A. Gotlieb, *Human Rights, Federalism and Minorities* (Toronto: Canadian Inst. of International Affairs, 1970) at 180, and literature cited therein.

78. *E.g.*, *Minority Schools in Albania* (1935), P.C.I.J. Ser. AB/64.

Lugard —]78a, without prejudice to the attainment of the foregoing objectives. . .

the system is only to apply to those territories which are expressly placed under it. By Article 77 of the Charter the territories which may be placed under trusteeship are

- (a) territories now held under mandate;
- (b) territories which may be detached from enemy states as a result of the Second World War; and
- (c) territories placed under the system by States responsible for their administration.

It is obvious that the trusteeship system had no automatic application to any territory and that it was not intended or expected that it would be extended to any part of an existing state, although there was some hope, which never materialised, that it might make a contribution to the end of colonialism, with administrators placing their own colonial territories within the purview of the system.

Any attempt to extend the concept of the trusteeship system beyond the limits envisaged for it — and the system is in practice virtually dead due to the independence now achieved by most of the territories under its supervision — or to claim that it establishes a compulsory trust relationship between a sovereign and its aboriginal peoples is to abuse the entire philosophy on which it is based. The trusteeship system only operated to introduce a particular method of administration under the supervision of the United Nations, with a view to ultimate independence, only for those 'territories' — and this means areas not part of the metropolitan land-mass — expressly placed thereunder and only for the period that the trust agreement subsists. Thus, no attempt has been made to claim that the people of West Irian, transferred from Netherlands sovereignty to the Republic of Indonesia, are in any way to be treated as wards or *cestuis que trust*.

Moreover, Chapter XII expressly includes in Article 80 a reservation to the whole concept 'of trusteeship, ensuring that, unless specific trusteeship agreements provide otherwise, and pending the conclusion of such agreements, "nothing in the present Charter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties"'. If any confirmation were needed of the point made above that the principles underlying the

78a. *Supra*, note 72.

trusteeship system, as well as the whole concept of trusteeship as envisaged by the Charter, have no application to indigenous peoples, whether minorities or otherwise, this reservation provides it.

The framers of the Charter were very aware of the fact that the trusteeship system would be of limited application, and they introduced in Chapter XI of the Charter a Declaration regarding Non-Self-Governing Territories — not, it should be noted, non-self-governing peoples. Article 73 emphasises that there is a limited territorial scope for this Declaration, which to some extent affirms that the Members of the United Nations recognize principles broadly similar to those underlying the trusteeship system for the future administration of the territories to which the Declaration refers. The Declaration proclaims that the

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government to recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter [— which is paramount —], the well-being of these territories, and to this end:

(a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses; (b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and their peoples and their varying stages of advancement. . .

This provision is clearly concerned with people in their relation to a particular territory and envisages a territory which lacks self-government. It does not refer nor purport to refer to a people within an independent state but which, as a group, lacks any of the things which the Declaration seeks to promote for the inhabitants of non-metropolitan non-self-governing territories. As if to endorse the interpretation just given, the Declaration's sole reference to metropolitan territories has no concern with the inhabitants. It seems rather to be a paraphrase of Joseph Chamberlain's remark concerning a commercial trusteeship for the world⁷⁹:

79. *Id.* at 60.

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

Since the Charter as such has no relevance to the rights of indigenous peoples, other than the commitment upon members to promote and encourage respect for fundamental freedoms and human rights for all, it becomes necessary to see whether the United Nations has in its practice done anything in the way of conferring rights or creating a trust relationship in respect of such peoples. In considering the impact of the Universal Declaration of Human Rights, there is no need to become involved in the complex debate concerning the legal character of General Assembly resolutions⁸⁰, for this Declaration has no more significance for such aboriginal groups as the North American Indians, neither by way of the conferment of rights, nor by creation of a trust, than it has for any other person be he a member of a minority or a majority group in any state. The same comment applies to all the resolutions and other documents which have been produced by or under the auspices of the United Nations, save to the extent that any single one or part thereof may confer specific rights on such people separately and distinct from their general application to the world at large. Among the documents which might be of interest from this point of view the most significant are those on racial discrimination and self-determination.

The work of the United Nations in the field of discrimination was originally undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities established in 1947,

80. See, e.g., Judge Lauterpacht's Separate Opinion on *South West Africa Voting Procedure*, [1955] 1. C.J. Rep 90 at 115. See, also F. B. Sloan, *The Binding Force of a Recommendation of the General Assembly of the United Nations* (1948). 25 B.Y. I.I. 1; II Kelsen. *The Law of the United Nations* (New York: E. A. Praeger, 1951) at 40, 63, 99, 195 — 6, 459, 953 ff., M. Virally, *La valeur juridique des recommandations des organisations internationales*, [1956] *Annuaire Français de Droit International* 66; D. H. N. Johnson, *The Effect of Resolutions of the General Assembly of the United Nations* (1955-6), 32 B.Y.I.I. 97 at 111; Sir Gerald Fitzmaurice, *The Law and Procedure of the I.C.J. 1951-4: Questions of Jurisdiction, Competence and Procedure* (1958), 34 B.Y.I.I., 1 at 3; O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (Hague: Nijhoff, 1966).

only to be abolished in 1951 “presumably because it was reviving the unwelcome issue of minorities”⁸¹. Before its demise, however, the Sub-Commission had said ⁸²:

Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. The protection belongs equally to individuals belonging to such groups and wishing the same protection. It follows the differential treatment of such groups or individuals belonging to such groups is justified when it is exercised in the interest of their contentment and the welfare of the community as a whole. . .

If a minority wishes for assimilation and is disbarred, the question is one of discrimination and should be treated as such.

When eventually in 1963 the General Assembly passed its resolution on the elimination of all forms of racial discrimination⁸³ it made no reference to trusteeship, self-determination or any such lofty ideal. Its sole concern was with banning discrimination on the grounds of race, colour or ethnic origin, and Article 1 of the International Convention on the Elimination of all Forms of Racial Discrimination of 1965 which entered into force in 1969⁸⁴ merely widens the scope of the document and reiterates that its operation is purely on an internal level:

... The term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

From the point of view of the aboriginal populations of North America, therefore, and certainly for Canada’s Indians, for Canada has ratified the Convention, the Convention merely aims at securing for them as well as for all other citizens a right to be treated equally with every other Canadian. As for the United States, the Convention

81. J. Humphrey, “The World Revolution and Human Rights”, in *Gotlieb, supra.* note 77 at 147 and 165.

82. UN Doc. E/CN. 4/52 s.V. 1947.

83. Res. 1904 (XVIII).

84. 660 UNTS 195.

merely spells out at length what recent trends have suggested is the significance of the Bill of Rights and particularly the Fourteenth Amendment as understood by the Supreme Court.

Since it is impossible to find any special protection for the North American aborigine in the work of the United Nations with regard to minorities or racial discrimination, it is necessary to look at the position from the standpoint of self-determination. A study of the history of the United Nations in this field emphasises that this concept only relates to the inhabitants of a colonial territory, that is to say a non-metropolitan area not governed by the majority of the inhabitants. This enables the claim to be made that in addition to foreign-owned territories, there is no self-determination enjoyed in such territories as South Africa, even though that country ranks as an independent state and a member of the United Nations. The true purpose of the Declaration on self-determination is seen from its correct title — Declaration on the Granting of Independence to Colonial Countries and Territories⁸⁵. That this has nothing to do with the rights of a minority in the metropolitan territory — and all the areas, be they reserves or not, in which the Indians of the United States or Canada are to be found are part of that territory — is clear from the following extracts from the Declaration, which nowhere attempts to define what it means by 'peoples':

. . . Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence, . . .

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace, . . .

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations; . . . Declares that

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human

85. Res. 1514 (XV) 1960.

rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right of self-determination. . . .

However

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

This last paragraph makes it clear that the Declaration does not purport to extend to any group within an existing national state which might feel that it is denied its right to self-determination. The fact that the right of self-determination appears as Article 1 of the two International Covenants on human rights⁸⁶ does not alter the position one iota. It is impossible to see, in the light of the above, and of the history of United Nations efforts on behalf of non-self-governing peoples, recognition of a trust, a ward/guardian relationship, or any commitment towards aboriginal peoples, in the statement that "all peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development."

Despite the political and ideological brouhaha that has been attached to the concept of self-determination, one should not overlook the truth that

. . . the struggle to end colonialism . . . swallowed up the original purpose of co-operation for promotion of human rights. . . . The anticolonial atmosphere in the Assembly . . . led to the injection of anticolonial issues into the human rights covenants. Self-determination was added to the roster of human rights as an additional weapon against colonialism although there was no suggestion that this was a right of the individual, that the individual could claim against an unrepresentative government, or that minorities could invoke it to support secession⁸⁷

Even had the various documents to which reference has been made given rise to a conception of trusteeship, and even had the claims for self-determination extended to aboriginal populations, there might have been good ground for arguing that, looking at the situation which existed when the relations between the Crown and the Indians were first established and the concepts of law that then

86. *Supra*, note 56.

87. L. Henkin, *The United Nations and Human Rights* (1965), 19 International Organization 504 at 512-3.

prevailed, together with the understanding of the legal consequences of that relationship, the present concepts could not be applied retroactively. In so far as these concepts are modern innovations of an ideological character, they are clearly no more than propaganda moves in a political game, completely devoid of legal significance.