

Fiduciary Relationship as Contemporary Colonialism

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Abstract: Aboriginal rights as inherent rights deriving from Aboriginal peoples' historical occupation of North America (i.e. sovereignty) are recognized and affirmed in Section 35(1) of the Canadian *Constitution Act, 1982*. Despite the fact that this constitutional protection recognizes the *sui generis* nature of the Crown-Aboriginal relationship, there is a recent tendency in the Supreme Court of Canada to comprehend Aboriginal rights by characterizing the Crown-Aboriginal relationship as fiduciary. This paper discusses the danger of recognizing Aboriginal rights through the lens of a Crown-Aboriginal fiduciary relationship. This type of recognition entails: (1) authorizing excessive fiduciary discretion by the Crown, as opposed to focusing on its obligations; (2) failing to reflect the Aboriginal perspective on Aboriginal rights, which are derived from Aboriginal sovereignty; (3) fundamentally distorting the nature of Aboriginal rights by creating a myth that Aboriginal rights were created by the Canadian constitution; and (4) as a result, creating vulnerability on the Aboriginal side by making Aboriginal peoples tacitly consent to the Crown's *de facto* sovereignty. If the Court's characterization of the Crown-Aboriginal fiduciary relationship remains as it is now, the gap between the Crown's understanding of Aboriginal rights and that of Aboriginal peoples may constitute a form of contemporary colonialism.

Key Terms: Fiduciary relationship; Section 35(1); Colonialism

Introduction

Aboriginal peoples are the original inhabitants of what is now known as Canada. This fact alone gives them their political as well as legal rights, exercisable at their pleasure. These so-called Aboriginal rights have been given form within the Canadian legal framework in Section 35(1) of the *Constitution Act, 1982*. This legal provision has become the cornerstone of Aboriginal peoples' claims of Aboriginal and treaty rights. However, the understanding of

the nature of Aboriginal rights is still controversial. While Aboriginal peoples understand Aboriginal rights as stemming from their prior occupation of their traditional lands (i.e. Aboriginal sovereignty), the question of how this understanding can be reconciled with the Crown's assertion of sovereignty over Canada is still unresolved. In 1984, in *Guerin v. The Queen*, the Supreme Court of Canada characterized the *sui generis* Crown-Aboriginal relationship as "fiduciary" (p. 42-43). The majority judgment stated that this characterization was based on inherent Aboriginal title, while the minority held that it was based on the surrender of land by the Band to the Crown. The recognition of the Crown-Aboriginal fiduciary relationship was affirmed in *R. v. Sparrow* in 1990. In this case, the Supreme Court held that the question of whether an Aboriginal harvesting right has been infringed must be interpreted in light of the Crown's fiduciary duty to Aboriginal peoples. While these characterizations of the Crown-Aboriginal relationship may seem to provide a legal tool to enhance Aboriginal rights, my analysis of the implications of both *Guerin* and *Sparrow* shows that the Crown-Aboriginal fiduciary relationship works so as to confine Aboriginal rights claims and ultimately subordinate Aboriginal peoples to Crown sovereignty. Focusing on the above-mentioned court cases, this article examines the nature of the Crown-Aboriginal fiduciary relationship in order to investigate whether this *sui generis*, "trust-like" relationship: (1) merely reflects the power imbalance between the Crown and Aboriginal peoples; (2) is designed to produce further vulnerability on the Aboriginal side; (3) is concealed in the morally appealing term "fiduciary relationship"; and (4) works as a means to confine Aboriginal peoples as dependent peoples in this unilaterally created framework, in order to make them tacitly consent to the fact that Crown sovereignty is unquestionable.

The Crown-Aboriginal Fiduciary Relationship

The Crown-Aboriginal relationship was first characterized as fiduciary by the Supreme Court of Canada (the "Court") in *Guerin v. the Queen*. The facts of this case were that the Indian Affairs Branch of the federal government, acting on behalf of the Musqueam Band, leased approximately 160 acres of the Band's land in Vancouver to Shaughnessy Heights Golf Club on terms that had not been negotiated with the Band, creating damage on the Band side. The legal issue was whether the Band could recover damages by reason of a breach of trust on the Crown side. The Court held that the Crown breached its fiduciary, or "trust-like", obligations to the

Band and awarded the Band \$10 million in compensation, upholding the original trial decision (*Guerin*, 1984, p. 5). *Guerin* is considered to be a landmark decision in Aboriginal rights cases for two reasons. First, despite the fact that the Crown claimed that Aboriginal interests are not legal interests, so that any Crown duty is political in nature, the Court affirmed that Aboriginal rights are pre-existing rights not derived from the *Royal Proclamation of 1763*, the *Indian Act*, or any other executive actions or legislative stipulations (*Guerin*, 1984, p. 379). Second, as a result, Aboriginal rights were considered as being independent legal interests, so that a duty to protect them would be legally enforceable. In relation to the Supreme Court of Canada decision *R. v. Calder* (1973) in which Aboriginal title was recognized as being an independent legal right, the *Guerin* decision was also significant in that it affirmed the idea that Aboriginal rights are worthy of receiving legal remedies in Canadian courts (Donohue, 1991, p. 387). Regarding this point, Kent McNeil argues that the fiduciary relationship is beneficial for Aboriginal peoples, as the concepts of the Crown's obligations to, and responsibility for, Aboriginal peoples "fortify and support the more specific duties" arising from treaties; furthermore, they give Aboriginal peoples "various grounds for pursuing claims against the federal government" (2001, p. 355). That is to say, the very fiduciary framework itself confines the Crown to act in accordance with its obligations, thereby setting some limitations on Crown sovereignty.

However, the problem with the *Guerin* decision was that both the nature and scope of the Crown-Aboriginal relationship were left undefined. Consequently, later court cases dealing with the Crown-Aboriginal fiduciary relationship simply refer to the *Guerin* case without further elaborating it, thereby creating a situation in which the fiduciary relationship is treated as both axiomatic and embryonic (Rotman, 2003, p. 366). It was in *Sparrow* that the Court rearticulated the Crown-Aboriginal relationship as fiduciary and added more substance to this relationship. McNeil (2001, pp. 319-320) argues that, as a result of the *Sparrow* case, the fiduciary obligation of the Crown was constitutionalized in Section 35(1), thereby widening the scope of the Crown obligation to the whole Crown-Aboriginal relationship. Leonard L. Rotman also observes that not only was the expansion of the Crown-Aboriginal fiduciary relationship in *Sparrow* "firmly entrenched as an integral basis of Crown-Native interaction," in the sense that the combination of *Guerin* and *Sparrow* has constituted a new

ground on which Aboriginal rights jurisprudence rests, but that there is now a potential to apply this relationship to “all elements of Crown-Native interactions” (2003, p. 365).

The Implications of the Crown-Aboriginal Fiduciary Relationship

Since the characterization of the Crown-Aboriginal relationship as fiduciary has a potential to become the foundation on which *all* aspects of Crown-Aboriginal interactions are assessed, it is worth examining possible implications of the Crown-Aboriginal fiduciary relationship. Analyzing this relationship as a conceptual framework provides a clearer comprehension of the nature of the relationship and an assessment of whether this framework is beneficial to Aboriginal rights.

A fiduciary relationship is a legal relationship generally defined as one in which a party has rights and powers that he or she must exercise for the benefit of another person, and more importantly, “a fiduciary is not allowed himself to benefit in any way from the position he holds” (Yogis, 1995, p. 92). Whether this generally understood definition can be applicable to the Crown-Aboriginal relationship needs to be investigated. The way in which the Court defined the Crown-Aboriginal fiduciary relationship can be found in *Sparrow*, since this judgment is considered as giving some substance to the relationship. In *Sparrow*, the Court stated that “The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship” (1990, p. 35). This statement needs to be carefully analyzed in order to understand (1) *why* the Crown-Aboriginal relationship can be characterized as fiduciary in nature, and (2) the *possible implications* of this characterization.

According to the Court, the Crown-Aboriginal fiduciary relationship emerged out of the parties’ historic relationship. In *Guerin*, the Court relied on the *Royal Proclamation of 1763* as the first recorded expression of the fiduciary relationship by stating “Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band’s behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763” (1984, p. 43). The *Royal Proclamation* states that “...the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection,

should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as...are reserved to them” (1763, p. 12). However, what should not be forgotten is that the *Royal Proclamation of 1763* is also a legal document that is considered as the source of Crown sovereignty asserted over North America. Indeed, the *Royal Proclamation* stipulates, regarding lands not encompassed by the Proclamation, or by the Hudson’s Bay Company land grant, that “We do further declare it to be Our Royal Will and Pleasure...to reserve [these additional lands] under our Sovereignty, Protection, and Dominion, for the use of the said Indians” (1763, p. 13). Nevertheless, the Court also recognized that the idea of the Crown-Aboriginal fiduciary relationship is rooted in the concept of Aboriginal title. Referring to the 1921 Privy Council case, *Amodu Tijani v. Southern Nigeria (Secretary)*, which acknowledged the principle that “a change in sovereignty over a particular territory does not...affect the presumptive title of the inhabitants [emphasis added]” (p. 45), the Court noted that this principle (also implicitly assumed in *Calder* in that Aboriginal title is confirmed as being an independent legal right) is recognized in the *Royal Proclamation of 1763* (Guerin, 1984, p. 45).

Based on the Court’s understanding of the correlation between the concepts of Aboriginal title and of the Crown-Aboriginal fiduciary relationship, it can provisionally be concluded that in *Guerin*, the Court affirmed that the Crown’s recognition of Aboriginal title, as recognized in *Calder*, is based on the establishment of the Crown-Aboriginal fiduciary relationship. It can also be said that Aboriginal sovereignty was cancelled at the same time the Crown-Aboriginal fiduciary relationship was created.¹ This proposition can be further examined by analyzing the *Sparrow* case.

Surprisingly, with regard to the foundation of Crown sovereignty, the Court in *Sparrow* stated rather bluntly that “while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset *never any doubt* that sovereignty and legislative power, and indeed the underlying title, to such lands *vested in the Crown* [emphasis added]” (1990, p. 30). Indeed, Kenneth Coates flatly perceives the *Royal Proclamation of 1763* as the

¹ Evan Fox-Decent argues that the way in which the Court recognizes the Crown-Aboriginal fiduciary relationship provides legitimacy to the Crown’s *de facto* sovereignty (2006, p. 3).

Crown's assertion of sovereignty (2001, p. 81). Considering these statements and provisions together, it becomes appropriate to read the *Royal Proclamation* as a legal document which legitimizes *both* Crown sovereignty and the Crown-Aboriginal fiduciary relationship that is rooted in the concept of Aboriginal title. However, what is left out of this conceptual framework is the fact that Aboriginal occupation of the land is derived from *Aboriginal sovereignty*. This is the foundation on which the Crown-Aboriginal historical relationship must be established.

The Crown-Aboriginal Historical Relationship

The proposition that the *Royal Proclamation of 1763* is the basis of Crown sovereignty and the first emerged the Crown-Aboriginal fiduciary relationship may come into conflict with Aboriginal peoples' understanding of the *Royal Proclamation*, because this proposition has the potential to deny Aboriginal sovereignty. This raises the question of whether there exists a mutually acceptable understanding of the historical relationship between the Crown and Aboriginal peoples in Canada, since Crown sovereignty and Aboriginal sovereignty tend to be viewed as mutually exclusive or irreconcilable. That is, the understanding of the Crown-Aboriginal historical relationship itself still remains unresolved and contested.

Significantly, in the provisions of the *Royal Proclamation*, the term "sovereignty" is only used *once* when describing the Crown's protection of nations or tribes of Indians. As well, in *Guerin*, the Court reaffirmed the standpoint of the U.S. Supreme Court in *Johnson and Graham's Lessee v. M'Intosh* (1823) in which Chief Justice John Marshall explained that the doctrine of discovery (1) gave the discovering nation the "sole right of acquiring the soil from the natives," but (2) as a result, the "rights of the original inhabitants were...*necessarily*, to a considerable extent, impaired [emphasis added]" (*Guerin*, 1984, p. 45). Moreover, in this case, Justice Marshall held that the "natives were admitted to be the rightful occupants of the soil, with a legal as well as just claims to retain possession of it...but their rights to complete sovereignty, as independent nations, were necessarily diminished" (*Johnson v. M'Intosh*, 1823, p. 21).

Neither the above-mentioned court cases nor the *Royal Proclamation of 1763* explicitly acknowledged the existence of Aboriginal sovereignty and, instead, treated Crown sovereignty as a *fait accompli*.

Indeed, as argued by Thomas Flanagan (1989, p. 602), the basis of Justice Marshall's trilogy of cases² was the assumption that United States sovereignty over the American Indians was unquestionable. Based on this understanding of *de facto* Crown sovereignty, it can be presumed that Aboriginal peoples' historic occupation of their traditional lands is not considered by the courts as constituting sovereignty. In other words, to recognize Aboriginal peoples' right to occupy their lands does not necessarily mean to recognize their sovereignty over these lands. Interestingly, in *Guerin*, referring to *Johnson v. M'Intosh*, the term "sovereignty" with respect to Aboriginal peoples was only used once in the context of the denial of Aboriginal sovereignty.³

Likewise, in *Sparrow*, the Court affirmed "the rights of the Indians to their aboriginal lands – certainly as *legal rights* [emphasis added]" (1990, p. 31). In the context of the Crown-Aboriginal relationship, legal rights are derivative of sovereignty, not *vice versa*, so that to hold legal rights requires a pre-existing legal system from which the rights can be derived. However, does this mean that Aboriginal legal rights are derived from Aboriginal sovereignty? When reading the Court's affirmation of Aboriginal legal rights in relation to its earlier statement that "there was from the outset never any doubt that sovereignty and legislative power...to such lands vested in the Crown" (*Sparrow*, 1990, p. 30), it can be concluded that Aboriginal peoples possess legal rights derived from *Crown sovereignty*. What can be assumed from this proposition is that Aboriginal peoples' occupation of their traditional lands is not considered equivalent to them having sovereignty. That is to say, there appears to be a separation between the notion of sovereignty and mere ownership of lands. This conceptual separation is best described by the concept of *terra nullius*.

Two Meanings of *Terra Nullius*: Rationale for Crown Occupation

In order to legitimize the dispossession of Aboriginal peoples, the separation between sovereignty over lands and ownership of lands was made possible by giving two meanings to the concept of *terra nullius*: (1) a country within which no sovereign recognized by European nations exists;

² The Marshall Trilogy refers to the three cases which together formed the basis of federal Indian law: *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832).

³ "Their rights to complete sovereignty, as independent nations, were necessarily diminished." *Guerin v. The Queen*, [1984] 2 S.C.R. 335, p. 45.

and (2) a territory where no lands are owned by anybody (Reynolds, 1992, p. 12). Both meanings serve as legal rationales and justifications for European occupation, and ultimately, Crown sovereignty.

An inquiry into the foundation of these two meanings of *terra nullius* is essential because, not only do they interpret the way in which Aboriginal sovereignty is degraded to mere ownership of traditional lands, but when this interpretation is applied to the Crown-Aboriginal fiduciary relationship, it shows how the Crown can use its fiduciary relationship with Aboriginal peoples as a tool to expand its power over the latter. The next section will discuss the two meanings of *terra nullius* and the relationship between them.

Terra Nullius Regarding Sovereignty

Firstly, this *terra nullius* argument directly involves the question of sovereignty, since the argument concerns Aboriginal peoples' legal status according to international law. The main question here is whether the law of nations is applicable to Aboriginal peoples or communities. The way in which the law of nations perceives Aboriginal peoples should not be overlooked since, with regard to sovereignty and ownership, *terra nullius* provides the *rationale* for the denial of Aboriginal sovereignty.

As explained in the Marshall trilogy of decisions and later referred to in *Guerin*, the principle of discovery in international law is understood as balancing the competing interests of European nations in that discovery could only vest in the discovering nation the sole right to purchase land from Aboriginal peoples. Therefore, this is a legal principle applicable only to European nations. This line of argument is consistent with that of Hugo Grotius, a Dutch jurist, who claimed that a preemptive right to land needs to be accompanied by subsequent action of possession (1916, p. 11). According to this argument, the Crown cannot claim sovereignty over territory solely based on the action of discovery. Additional actions are needed to fortify the Crown's preemptive right.

The underlying assumption of this discovery argument may seem to be an acknowledgment of Aboriginal possession of the land, as the act of discovery grants the discovering nation a pre-emptive right to purchase the land *from* Aboriginal peoples. However, this was not the common Western view at the time European nations encountered Aboriginal peoples. As mentioned earlier, the common view held by Europeans was that the notion

of *terra nullius* itself embraces two different meanings: (1) a country within which no sovereign recognized by European nations exists; and (2) a territory where no lands are owned by anybody (Reynolds, 1992, p. 12). In the discussion of sovereignty concerning Aboriginal peoples, European nations adopted the former view to legitimize annexation of the land (Reynolds, 1992, p. 12). The adoption of this view in the context of sovereignty indicates that Aboriginal peoples are legally and politically excluded from the international realm. They are legally excluded because the first view denies Aboriginal peoples entitlement to statehood within the framework of the law of nations. Moreover, Aboriginal peoples are politically excluded because the underlying assumption of the legal exclusion of Aboriginal statehood from the law of nations stems from the notion that European legal systems are superior to or more civilized than those of Aboriginal peoples. This discriminatory view was openly expressed by scholars in the nineteenth century. Thomas J. Lawrence, for example, claimed that a territory is considered as technically *terra nullius* and open to occupation if it is “not in the possession of states who are members of the family of nations” (1910, p. 11). Even in the twentieth century, some scholars bluntly embrace the discourse of savagism when theorizing about Aboriginal peoples’ prior occupancy of their traditional lands. For instance, John Westlake (1904, pp. 105-107) held the view that Aboriginal peoples’ inability to provide a governance system “suited to white men” is the reason why they were not entitled to sovereignty. Legal positivism has flourished in the discussion of sovereignty by artificially confining the extent to which the law of nations is applied to non-European nations.

Terra Nullius Regarding Ownership

Terra nullius regarding ownership is perhaps best exemplified in John Locke’s labour theory – his ideas about uncultivated land – in Chapter Five of his *Second Treatise of Government*. Arguing for the existence of private property in the state of nature, Locke understands the entire earth as given to human beings and held in common until humans mix their labours with the soil or the fruits thereof to create individual property (Locke, 1988, p. 286). It is noteworthy that in this state of nature, a property can be made from the earth without acquiring consent from other human beings (Locke, 1988, p. 289). This non-consensual nature of the emergence of private

property is reflected in Locke's view that the enclosure of a certain piece of land transforms it into a private property. Needless to say, this discussion of the appropriation of the world by individuals is followed by limitations required by the law of nature: one's private property or ownership must stem from one's own labour; there should be a reasonable number and the same quality of appropriable objects left for others; and one should not appropriate (claim ownership of) more than one can use (Locke, 1988, p. 288). According to Locke, these requirements naturally result from the law of nature, which orders a better realization of mutual self-preservation.

However, as he continues to outline the origin of private property, Locke lifts these requirements by referring to the invention of money, through which the accumulation of private property was legitimized (1988, pp. 293-294). Based on this invalidation of the requirements of the law of nature, Locke proceeds to arguments regarding Aboriginal peoples in the Americas. Locke's view on this subject is clearly stated based on his theory of value and property, which he manifests in his *Second Treatise of Government*: "'Tis Labour then which puts the greatest part of Value upon Land, without which it would scarcely be worth anything" (1988, p. 298). Therefore, because land in the Americas is still in the state of nature in which no improvement (i.e. mixing with labour) has been observed, inhabitants of the Americas have wasted their lands. Furthermore, Locke observes that a king of the uncultivated Americas would be "worse than a day Labourer in England" (Locke, 1988, p. 297). Locke's labour theory does not explicitly allow for the exploitation of the Americas, but the proposition in his theory is that because the Indian lands are still in close proximity to the state of nature, the land is held in common, thereby preserving the possibility of appropriation of the land. Hence, by taking into account the developmental status of Indian land in comparison to that of England, the theory indeed helps legitimize Crown occupation of the land. Flanagan (1989) further analyzes Locke's theory of value and property in relation to (1) the "easy availability of land" argument of John Winthrop (first governor of the Massachusetts Bay Colony), and (2) Swiss philosopher Emerich de Vattel's emphasis on the sovereign's natural law duties to cultivate the land. According to Flanagan, Locke, Winthrop and de Vattel all thought that because there was no practice of agriculture among Indian communities, these communities did not own the land (Flanagan, 1989, p. 596). In holding this view, not only did European nations deny

Aboriginal nations statehood, as expressed by the concept of *terra nullius* with regard to sovereignty, they also denied Aboriginal ownership of the land by employing the second meaning of *terra nullius* regarding ownership.

However, Flanagan observes that while the agricultural theory may offer a strong impetus for European settlers attempting to acquire land in the Americas, this argument can legitimize the acquisition of only a small portion of the continent because this is a private ownership argument, and this argument alone cannot legitimate Crown sovereignty (1989, pp. 601-602). Therefore, it can be said that the relationship between *terra nullius* with regard to sovereignty and *terra nullius* with regard to ownership is that the latter provides a moral justification of the former, meaning that the non-recognition of Aboriginal peoples' right to statehood is legitimized by the perceived superiority of colonial agriculture over a supposedly nomadic indigenous lifestyle (i.e. Indians have wasted the lands given by God). Thus, when the two meanings of *terra nullius* are put together in the context of Aboriginal peoples' prior occupancy of their traditional lands, it legitimizes the denial of Aboriginal sovereignty, thereby also legitimizing the Crown's occupation of Aboriginal peoples' traditional lands. The result of the application of *terra nullius* is the creation of the Crown's *de facto* sovereignty.

The Impact of *Mabo*

Terra nullius with regard to ownership is, however, later denied its legitimacy. The High Court of Australia brought down a significant decision in 1992 which fundamentally changed the European view of Aboriginal peoples and their lands. *Mabo v. Queensland (No.2)* is considered a landmark case due to its recognition of Aboriginal title and has had a great impact on the legal systems of Commonwealth countries, including Canada (*Mabo (No. 2)*, 1992). In this case, the issue was whether the Meriam people have legal rights to lands on the Murray Islands, which had been annexed to Queensland. The High Court of Australia affirmed the existence of Aboriginal title based on the plaintiffs' occupation of and connection to their traditional lands, thereby abolishing the concept of *terra nullius* (*Mabo (No. 2)*, 1992, p. 34).

Strictly speaking, the High Court of Australia's rejection of *terra nullius* is limited to the second definition of *terra nullius* (i.e. a territory

where no lands are owned by anybody). However, the first definition of *terra nullius* (i.e. a country within which no sovereign recognized by European nations exists) is not explicitly denied in this case because the Crown's *de facto* sovereignty in Australia was still taken for granted, and its legitimacy was unquestioned in the *Mabo* case (Gray, 1997, pp. 3, 18). Hence, the *Mabo* decision should be considered as the invalidation of *terra nullius* with regard to property ownership of Aboriginal peoples. Otherwise put, in the *Mabo* case, the Crown's ultimate sovereignty over the land was unquestioned, resulting in the continuity of the Crown's *de facto* sovereignty.

The failure to question *terra nullius* with regard to the Crown's sovereignty may be seen as the High Court of Australia's upholding of the Crown's *de facto* sovereignty over Aboriginal land. However, at the same time, it also indicates how fragile the Crown's *de facto* sovereignty is, at least in theory. *De facto* sovereignty can be characterized as acquired sovereignty through the use of sheer power or control without having a rationale in itself (except for reasons relating to e.g. Christian "civilizing" missions). In light of the *Mabo* decision invalidating the legitimacy of *terra nullius* regarding ownership, the Crown's *de facto* sovereignty in Australia and in Canada now needs to have a different, yet morally acceptable, framework to fortify its legitimacy. This is where the concept of fiduciary relationship plays a significant role in providing the Crown with the legitimacy it seeks.

The Role of the Crown-Aboriginal Fiduciary Relationship

Based on the understanding of the conceptual foundation of the Crown's *de facto* sovereignty discussed above, as well as on the Crown's compelling need to acquire a means to ethically legitimize its existence on Aboriginal land (i.e. a means which justifies the use of sheer power), an interpretation of the Crown-Aboriginal fiduciary relationship is necessary. In *Sparrow*, the Court stated that "the relationship between the Government and aboriginals is trust-like, rather than adversarial" (1990, p. 35). The Court's term "trust-like" needs to be clarified because it implies that there may be some *sui generis* characteristic(s) embedded in the Crown-Aboriginal fiduciary relationship that differ from those of an ordinary trust relationship. Since the Court did not specify possible *sui generis* characteristics of the Crown-Aboriginal relationship, these are subject to

interpretation. The interpretation of the nature of these added *sui generis* characteristics embedded in the special Crown-Aboriginal fiduciary relationship is the key to comprehending how the Crown's *de facto* sovereignty is dealt with by the Court. This interpretation is made possible through an analysis of the infringement test that emerged in *Sparrow*.

In *Sparrow*, the Court invented a two-step method that would allow the state to infringe upon Aboriginal and treaty rights.⁴ This means that the Court acknowledged that Aboriginal rights are not absolute, and are subject to some restrictions. This denial of the absolute character of Aboriginal rights should not be overlooked, since the infringement test itself reflects the characteristics of the fiduciary relationship between Aboriginal peoples and the Crown. The infringement of Aboriginal rights is assessed and justified in relation to the other rights claims of non-Aboriginal citizens in Canada. The Court explicitly articulates its view regarding possible justifiable causes of legislative action in relation to care or use of the land. That is, on the one hand, the Court questions the appropriateness of the use of the concept of "the public interest" (used by the Court of Appeal in *Sparrow* to infringe upon a constitutionally protected Aboriginal right) on the basis that the concept is too vague (*Sparrow*, 1990, pp. 40-41). However, on the other hand, conservation and resource management were regarded by the Court as legitimate reasons for intruding upon Aboriginal rights (*Sparrow*, 1990, p. 40). Interestingly, the Court, referring to its decision in *Kruger v. The Queen* (1978), states that this conservation and management justification is legitimate because the "conservation and management of *our resources* is consistent with aboriginal beliefs and practices, and...with the enhancement of aboriginal rights [emphasis added]" (*Sparrow*, 1990, p. 41).⁵

However, if the Court assesses Aboriginal rights on the basis of balancing them with the rights of non-Aboriginal citizens of Canada, this may suggest the abrogation of the Crown's fiduciary duty to Aboriginal

⁴ The first step of the infringement test requires a government involved in a case to show its valid legislative objective, and also to question if there is a *prima facie* infringement of Section 35(1). If this infringement is recognized, then the second step considers whether the infringement is justifiable. The test also requires the government to accommodate Aboriginal rights through the fiduciary Crown obligation and, if infringement is unavoidable, remedies are provided accordingly.

⁵ In this statement, the Court implies that the land's resources are the Crown's. It is interesting to note that this explicit statement from the Court was made in the same case in which the Court characterized the Crown-Aboriginal relationship as fiduciary.

peoples. This is the principal characteristic of the *sui generis* Crown-Aboriginal fiduciary relationship. What can be produced from this principal characteristic embedded in the relationship is the proposition that in this fiduciary relationship, the Crown's power and duty stem from different frameworks. Concerning this point, analyzing the Marshall trilogy and subsequent development of the plenary power in the U.S., Maureen Ann Donohue observes that Congress' power over Indians existed *prior to* the government's duties towards the Indians; moreover, it was in the government's interests to have the Indian land ceded to them, and also to ensure a peaceful relationship (i.e. guardianship) that authorized the federal government's unrestrained power over Indians (1991, p. 375). This indicates that, in the U.S., the concept of guardianship was *utilized* in order to expand the government's power over Indians. During the plenary power era, the U.S. Supreme Court always sided with the U.S. government due to the Indians' "condition of dependency" (Donohue, 1991, p.375). The fact that the government's fiduciary power existed prior to its obligation is key. In the Canadian context, not only does this imply that the government's power existed prior to its fiduciary obligations; it suggests that the origin of this power rests outside the Crown-Aboriginal fiduciary framework. This means that the Crown's fiduciary power is derived from Crown sovereignty, not from the Crown-Aboriginal fiduciary framework, because the contemporary Crown-Aboriginal fiduciary relationship itself was created by the Crown's power, derived from Crown sovereignty. If the fiduciary relationship is contractual in nature, the fiduciary's power and obligation must stem from the same contractual framework. However, because the fiduciary relationship was created *at the same time* as the British Crown asserted sovereignty over Aboriginal peoples and the land, the very fiduciary framework itself is the Crown's creation. This is why Crown sovereignty is regarded as a *fait accompli* in the Crown-Aboriginal fiduciary relationship. Therefore, any claim that a duty exists beyond this framework (i.e. any claim that challenges the foundation of this framework) will be held to be invalid.

Is Reconciliation between the Two Sovereigns Possible?

Since *Sparrow*, the Crown-Aboriginal fiduciary relationship has been constitutionalized as a guide to the interpretation of s. 35(1) of the *Constitution Act, 1982*. This entrenchment makes it difficult for Aboriginal

claims to be recognized in Canadian courts for three reasons. First, in *Sparrow*, the Court uses the infringement test as an analogy to s. 1 of the *Canadian Charter of Rights and Freedoms*, which places limitations on the rights guaranteed in the Charter (*Sparrow*, 1990, p. 30). However, s. 1 deals with rights and freedoms in Canada that are applicable to both Aboriginal and non-Aboriginal peoples. The Court's connection of the infringement test to s. 1 of the Charter also indicates that Aboriginal rights are evaluated as being similar to the rights of non-Aboriginal citizens. Second, as mentioned above, the Crown-Aboriginal fiduciary relationship does not allow Aboriginal peoples to question the legitimacy of Crown sovereignty in court. By constitutionalizing this relationship through s. 35(1), the Crown is now legally authorized to use its power over Aboriginal peoples—the power which stems directly from Crown sovereignty. Moreover, the more Aboriginal peoples appeal to s. 35(1) to realize their claims, regardless of whether these claims are recognized in courts, the more this could be regarded as Aboriginal *tacit consent* to Crown sovereignty, having the potential effects of transforming the Crown's *de facto* sovereignty into *de jure* sovereignty and reinforcing the subordination of Aboriginal peoples to the Crown. Finally, Cole Harris (2004) offers an interesting argument. He explains that management methods, such as maps, numbers and law, were used by the colonizer to dispossess the colonized from their lands. Harris' argument that the state often relies on a number of disciplinary technologies to simplify multi-faceted realities within narrow contexts can be applied to the creation of the Crown-Aboriginal fiduciary relationship, for the relationship simplifies and confines Aboriginal rights claims within the framework of the Canadian constitution. Thus, the relationship makes it easy for the Crown to *manage* Aboriginal rights claims. Furthermore, as a result of this management of Aboriginal rights claims, there will be no reconciliation between the two sovereigns, for the management itself, to use Franz Fanon's term (2004, p. 15), would "compartmentalize" Aboriginal peoples into a narrow frame of the so-called Crown-Aboriginal fiduciary relationship. Hence, it may be said that the fiduciary relationship is yet another form of contemporary colonialism that attempts to distort or even eradicate the nature of Aboriginal rights claims.

Conclusion

In order to realize Aboriginal rights in this fiduciary framework on the basis of the Crown's duties, the following challenges await Aboriginal peoples. First, Aboriginal rights claims within this framework are essentialized according to Canadian domestic courts' conception of justice (i.e. national sovereignty being a tenet of fundamental justice to domestic courts) in order to make them fit into the discourse of the Canadian constitution. As a result, Aboriginal claims will be distorted from their original form. Second, because the Crown-Aboriginal fiduciary relationship, now constitutionalized in s. 35(1), cannot substantively challenge the legitimacy of Crown sovereignty, any claim that infringes upon the legitimacy of the Crown is denied automatically through the infringement test introduced in *Sparrow*. That is to say, Aboriginal peoples can make rights claims on the basis of the Crown's fiduciary duty as long as they do not challenge the Crown's fiduciary power which is derived from Crown sovereignty. What has been introduced and constitutionalized by *Guerin* and *Sparrow*, respectively, is limited Crown duties within the Crown-Aboriginal fiduciary framework, with the Crown's sheer power lying outside of this framework. Hence, the Crown-Aboriginal fiduciary relationship may not contribute to the reconciliation of Crown and Aboriginal sovereignties because the relationship exists *for* the benefit of the Crown, not for that of Aboriginal peoples.

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