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FASHIONING LEGAL AUTHORITY FROM POWER: THE CROWN–NATIVE FIDUCIARY RELATIONSHIP

Evan Fox-Decent*

The prevailing view in Canada of the Crown–Native fiduciary relationship is that it arose as a consequence of the Crown taking on the role of intermediary between First Nations and British settlers eager to acquire Aboriginal lands. First Nations are sometimes deemed to have surrendered their sovereignty in exchange for Crown protection. The author suggests that the "sovereignty-for-protection" argument does not supply a compelling account of how Aboriginal peoples lost their sovereignty to the Crown. Furthermore, Aboriginal treaties compel the courts to take seriously the fact that Aboriginal peoples had (and in at least some cases still have) sovereign authority to treat with the Crown. However, First Nations did not intend to surrender their sovereignty through the treaty process. Against this background, the author argues that the Supreme Court of Canada has imposed fiduciary obligations on the Crown in order to legitimise the Crown's assertions of sovereignty over Canada's Aboriginal peoples.

> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. … It is still recognized in the surrender provisions of the Indian Act. The surrender requirement, and the responsibility it entails are the source of a distinct fiduciary obligation owed by the Crown to the Indians. … The purpose of the surrender requirement is clearly to interpose the Crown between the

* Assistant Professor, Faculty of Law, McGill University. Some of the arguments in this paper were developed in my PhD thesis, "Sovereignty's Promise: The State as Fiduciary" (Department of Philosophy, University of Toronto, 2004). I owe special thanks to my adviser, David Dyzenhaus, and to committee members Arthur Ripstein and Lorne Sossin. I am also grateful to Anthony Guindon for invaluable research assistance and to an anonymous referee for fruitful suggestions. Finally, I would like to thank Dean Matthew Palmer and the Victoria University of Wellington's New Zealand Centre for Public Law (NZCPL) for the opportunity to present a draft of this paper at the Third Annual NZCPL Conference on the Primary Functions of Government: The Executive (Wellington, November 2005).

> Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.[1]
>
> The Crown–Native fiduciary relationship has its origins in the interaction between the groups in the immediate, post-contact period. During the formative years, which roughly covers the period from contact until the removal of France as a major colonial power in North America in 1760–1, Crown–Native relations were based on mutual need, respect and trust. Furthermore, when the fiduciary character of these relations was crystallized, the participants conducted themselves on a nation-to-nation basis. Consequently, the nature of the Crown's fiduciary obligations is founded on the mutually recognized and respected sovereign status of the Crown and aboriginal peoples.[2]
>
> Where treaties remain to be concluded, the honour of the Crown requires negotiation, leading to a just settlement of Aboriginal claims. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfill its promises". This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.[3]

I INTRODUCTION

It is now settled law in Canada that the Crown and Canada's First Nations are in an ongoing fiduciary relationship with one another. The Crown's fiduciary obligations have been found to arise in a wide range of contexts, including land surrender,[4] the creation and administration of reserves,[5] and cases involving legislation that infringes Aboriginal[6] and treaty rights entrenched in section 35(1) of the Constitution Act 1982.[7] The Crown also owes First Nations obligations that arise from

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1 *Guerin v The Queen* [1984] 2 SCR 335, 376 and 383 Dickson J (as he then was) [*Guerin*].

2 Leonard I Rotman *Parallel Paths: Fiduciary Doctrine and the Crown–Native Relationship in Canada* (University of Toronto Press, Toronto, 1996) 13 [Rotman *Parallel Paths*].

3 *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73, para 20 McLachlin CJ for the Court [*Haida*] (citations omitted).

4 *Guerin*, above n 1; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)* [1995] 4 SCR 344.

5 *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 [*Wewaykum*]; *Osoyoos Indian Band v Oliver (Town)* [2001] 3 SCR 746.

6 Aboriginal law scholars in Canada now uniformly capitalise Aboriginal, Native and Indigenous and the courts are beginning to follow, for example *Haida*, above n 3.

7 Constitution Act 1982 (Canada Act 1982 (UK) Sch B). On this point, see *R v Sparrow* [1990] 1 SCR 1075 [*Sparrow*]; *R v Van der Peet* [1996] 2 SCR 507 [*Van der Peet*]; *R v Gladstone* [1996] 2 SCR 723 [*Gladstone*]; *R v NTC Smokehouse Ltd* [1996] 2 SCR 672 [*Smokehouse*]; *R v Badger* [1996] 1 SCR 771 [*Badger*]; *R v Marshall* [1999] 3 SCR 456 [*Marshall I*]; *R v Marshall* [1999] 3 SCR 533; *R v Marshall; R v Bernard* [2005] 2 SCR 220. "Aboriginal rights" in Canadian jurisprudence refers to territorial rights

the roughly 500 treaties the Crown and First Nations have entered into over the course of the last four centuries.[8] This paper is about the basis of the Crown–Native fiduciary relationship and the connection of this relationship to Crown–Native treaties and their interpretation by the judiciary.

The dominant judicial explanation of the fiduciary relationship traces its historical origins to the system of Aboriginal land tenure that became entrenched in the Royal Proclamation of 1763 and then reaffirmed in successive versions of the Indian Act, much as Dickson J suggests in the excerpt from *Guerin v The Queen* (*Guerin*) above. Professor Leonard Rotman, the leading academic commentator on the Crown–Native fiduciary relationship, traces it back even further, to the period spanning from contact until the removal of France as a major power in North America (1760–61). He concludes that the Crown's fiduciary obligations stem from "the mutually recognized and respected sovereign status of the Crown and aboriginal peoples."[9] I take a less solicitous view of the Crown's efforts to protect Aboriginal lands from non-Aboriginal encroachment and in fact argue for something close to the opposite of Rotman's thesis: there is no compelling account of how First Nations lost de jure sovereignty over themselves and their lands to the Crown and, in the absence of such an account, the Supreme Court of Canada has recognised the Crown–Native fiduciary relationship in order to lend legitimacy to the Crown's de facto sovereignty over First Nations. To clarify: de jure sovereignty refers to the authority to govern through law, whereas de facto sovereignty refers to the incidents of sovereign power that make governance through law possible. Further, the fact that there is no compelling account of how First Nations lost de jure sovereignty to the Crown does not imply (nor do I mean to imply) that such sovereignty has been lost. Many First Nations insist that they never surrendered de jure sovereignty to the Crown and that it remains with them. While the Crown, over time, may have acquired a measure of de facto sovereignty over Aboriginal peoples, this de facto sovereignty is alleged to be an instance of sheer power rather than authority. In Part III, I offer some arguments in support of this view. The force and somewhat obvious nature of these arguments lends additional plausibility to the idea that the Supreme Court has turned to fiduciary law in order to lend legitimacy to Crown sovereignty.

Specifically, then, I argue for two related but distinct propositions with respect to the judiciary's willingness to recognise the Crown–Native fiduciary relationship. The first concerns the ultimate moral and legal justification of imposing fiduciary obligations on the Crown, one based on the Crown's exercise of irresistible and discretionary power over First Nations. As we shall see, in the

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associated with Aboriginal title and to practices, customs or traditions of central significance to the culture of the group claiming the right. Fishing and hunting, for example, are activities often found to give rise to Aboriginal rights that seek to protect Aboriginal culture.

8 Donald J Purich *Our Land: Native Rights in Canada* (James Lorimer, Toronto, 1986) 95, as cited in Patrick Macklem *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, Toronto, 2001) 133.

9 Rotman *Parallel Paths*, above n 2.

leading cases the courts deploy this justification, which underscores the legal implications of the Crown's discretionary power. The second proposition trades on the justificatory appeal of the first, but attempts to explain why judges have now recognised the Crown–Native fiduciary relationship. The best explanation of this judicial recognition is that judges are anxious to legitimise the Crown's unilateral assertions of sovereignty over Aboriginal peoples, assertions which themselves are assumed by the judiciary to have extinguished Aboriginal sovereignty. This account also helps to explain why the judiciary does not view the Crown as a fiduciary of all its subjects (the Crown–Native relationship, like Aboriginal rights generally, is said to be sui generis[10]), notwithstanding that the Crown exercises irresistible and discretionary power over non-Aboriginals as well.

A further argument concerns the origin and juridical status of the fiduciary relationship in Canada's legal order. The Supreme Court's initial acknowledgement of a Crown–Native fiduciary relationship in *Guerin* came just a few years after the entrenchment of Aboriginal and treaty rights in the Constitution Act 1982. As I suggest below, it is very likely that the constitutionalisation of Aboriginal and treaty rights contributed to judicial willingness to recognise that the Crown owes fiduciary obligations to Aboriginal peoples. Canada's jurisprudence, however, reveals that the rise of fiduciary law in the First Nations' case has been more the result of common law innovation than constitutional reform. This innovation, I contend, could have (and should have) taken place even if Aboriginal and treaty rights did not appear in Canada's Constitution. Thus, the common law basis of the Crown–Native fiduciary relationship has important implications for common law jurisdictions with Aboriginal peoples living in them, but which have not entrenched Aboriginal and treaty rights in a written constitution.[11]

II THE CROWN–NATIVE FIDUCIARY RELATIONSHIP AND TREATY INTERPRETATION

One of the striking features of the leading First Nations fiduciary cases, *Guerin* and *R v Sparrow* (*Sparrow*),[12] is that they are both unanimous decisions. The unanimity is striking in *Guerin* because the Court broke away from past decisions that characterised Crown–Native relations in terms of legally unenforceable "political trusts",[13] as well as from others that saw the formal requirements of

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10 See for example *Guerin*, above n 1, 385.

11 The Court of Appeal in New Zealand has commented on the common law basis of the Crown's fiduciary obligations in Canada: "There are constitutional differences between Canada and New Zealand, but the *Guerin* judgments to not appear to turn on these." *Te Runanga o Muriwhenua Inc v Attorney General* [1990] 1 NZLR 641, 655 (CA) Cooke P (as he then was) for the Court.

12 *Sparrow*, above n 7.

13 The leading British cases on political trusts are *Kinloch v Secretary of State for India* (1882) 7 AC 619 (HL) and *Tito and Waddell (No 2)* [1977] 3 All ER 129 (Ch). The leading Canadian case was *St Ann's Island Shooting and Fishing Club Ltd v The King* [1950] SCR 211 [*St Ann's*].

trust law as an impenetrable barrier to the imposition of trust-like obligations on the Crown.[14] In *Sparrow*, the unanimity is surprising given the extent to which the Court broadened the scope and elevated the status of the Crown's fiduciary obligations.

In *Guerin*, the Musqueam surrendered reserve land to the Crown for the purpose of leasing it to a golf club. The Crown agent had promised to lease the land on certain specific terms and acquired the surrender based on the assurance of those terms. The Crown then proceeded to lease the land on terms that were both not disclosed to the band and less valuable to it.[15] The Court found that a fiduciary obligation had arisen as a consequence of the Musqueam's interest in the reserve land and the surrender requirements found in the Indian Act,[16] requirements that make the Crown an intermediary between the band and the golf club. In the circumstances, the Crown had a general fiduciary obligation to act exclusively on behalf of the band and a specific duty to seek fresh authorisation from the band once it became apparent that the Crown could not secure the terms on which the band had surrendered its land. The Court's reasoning was based entirely on common law fiduciary doctrine, with Dickson J finding that the Crown owed a fiduciary duty because it fell within the ambit of the following test:[17]

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

Section 35(1) of the Constitution Act 1982 did not figure in the decision. Because Dickson J tied the Crown's fiduciary duty to the surrender process, it was not clear in the wake of *Guerin* whether the courts would find that fiduciary doctrine could have wider application. Six years later, *Sparrow* established that it did.

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14 See for example *Pawis v R* [1980] 2 FC 18 (FCTD). Laskin CJ died before the Court rendered judgment in *Guerin*. Three judges – Beetz, Chouinard and Lamer JJ – concurred with Dickson J. Wilson J found an express trust present on the facts, while Estey J held that the Crown was the band's agent. In the result, all judges found that a fiduciary relationship of one kind or another existed.

15 This is a considerable oversimplification of the facts. The Crown agent hid from the band the fact that other parties were interested in the surrendered lands and that another Crown official had serious reservations about the merits of the deal the golf club was offering to the band. The Crown agent in fact urged and bullied the band into a lease he knew to be of sub-market value. Further, the Crown refused to show the lease to the band and it was not until 1970 – 13 years after the surrender – that Delbert Guerin, the band's Chief, was able to obtain a copy by going himself into the basement of a local office of the Department of Indian Affairs and searching through boxes of government documents. For a comprehensive and lucid account of the case, the history that led to it and the development of First Nations fiduciary law since, see James I Reynolds *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Purich Publishing, Saskatoon, 2005). Reynolds was one of the lawyers who represented the Musqueam in *Guerin*.

16 Indian Act RS C 1952 c 149.

17 *Guerin*, above n 1, 384 Dickson J (Beetz, Chouimard and Lamer concurring).

Sparrow was charged under section 61(1) of the federal Fisheries Act[18] with fishing with a drift-net longer than was permitted by the band's food fishing license. The issue was whether section 35(1) of the Constitution Act 1982 limited Parliament's power to regulate Aboriginal fishing. The Court had yet to interpret section 35(1), which itself is cast in terse and general terms: "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."

Dickson CJ and La Forest J, writing for the Court, looked to the common law for interpretative guidance, noting that: "There is no explicit language in [section 35(1)] that authorizes [the courts] to assess the legitimacy of any government legislation that restricts Aboriginal rights."[19] The judges cited two streams of jurisprudence on Aboriginal rights in support of an overarching Crown–Native fiduciary relationship. The first stream concerns treaty interpretation.

The Court referred to *Nowegijick v The Queen*[20] for the principle that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[21] However, the deeper principle on which the Court relied came from *R v Taylor and Williams*,[22] a pre-Constitution Act 1982 case on treaty interpretation that established a "general guiding principle" for the interpretation of section 35(1): "In approaching the terms of a treaty … the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."[23]

Dickson CJ and La Forest J went on to say that the idea of the honour of the Crown is reflected in *Guerin*, the second stream of Aboriginal jurisprudence on which their interpretation of section 35(1) relied. The honour of the Crown speaks to "the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation".[24] Putting the pieces together, the common law principle that informs the proper interpretation of section 35(1) was set out in the following terms:[25]

> [T]he Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the government and Aboriginals is trust-like, rather than adversarial,

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18 Fisheries Act RS C 1970 c F-14.

19 *Sparrow*, above n 7, 1109 Dickson CJ and La Forest J for the Court.

20 *Nowegijick v The Queen* [1983] 1 SCR 29.

21 *Sparrow*, above n 7, 1107 Dickson CJ and La Forest J for the Court.

22 *R v Taylor and Williams* (1981) 34 OR (2d) 322 (Ont CA) [*Taylor and Williams*].

23 *Sparrow*, above n 7, 1107 Dickson CJ and La Forest J for the Court, citing *Taylor and Williams*, above n 22.

24 *Sparrow*, above n 7, 1107 Dickson CJ and La Forest J for the Court.

25 *Sparrow*, above n 7, 1108 Dickson CJ and La Forest J for the Court.

> and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.

While federal legislative powers over First Nations remain intact, pursuant to section 91(24) of the Constitution Act 1867,[26] exercises of those powers are subject to a justification requirement: "federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights."[27] Infringing legislation that lacks the proper justification is, therefore, unconstitutional.

The Crown's justification must be framed in terms that are consistent with the Crown–Native fiduciary relationship. To meet its justificatory burden, the Crown must show that it has acted in accordance with "a high standard of honourable dealing."[28] The honour of the Crown plays an illuminating role in this context, for it underscores that what is at issue is the Crown's very legal authority to govern Indigenous peoples. Dickson CJ and La Forest J write:[29]

> The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's Aboriginal peoples.
>
> [T]he honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

The honour of the Crown provides a useful jurisprudential platform from which to build on the fiduciary doctrine of *Guerin*. In *Guerin*, the honour of the Crown was implicated in the manner in which the Crown performed a specific administrative function. In *Sparrow*, on the other hand, the honour of the Crown was at stake when it enacted legislation that affected the rights of Aboriginal peoples. The Court in *Sparrow* applied the same fiduciary principle to legislation that in *Guerin* it had applied to administration. Legislation and administration are both dealings with Aboriginal peoples and are therefore both subject to the constraints of an overarching fiduciary principle now imbued with constitutional authority.

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26 Constitution Act 1967 (UK), 30 & 31 Vic, c 3, s 91.

27 *Sparrow*, above n 7, 1109 Dickson CJ and La Forest J for the Court.

28 *Sparrow*, above n 7, 1109 Dickson CJ and La Forest J for the Court.

29 *Sparrow*, above n 7, 1110, 1114 Dickson CJ and La Forest J for the Court.

The Court in *Sparrow* devised a four-part test to determine whether legislation alleged to infringe section 35(1) is constitutionally valid:[30]

1. Is the individual or band acting pursuant to an Aboriginal right?
2. Was that right extinguished prior to 1982?
3. Has that right been infringed?
4. Is the infringement justified?
    4.1 Is there a valid legislative objective?
    4.2 Does the means to attain the objective conform with the Crown's fiduciary duty?

I limit my discussion here to the third and fourth parts of the test.

The third part of the test inquires into whether the legislation has the effect of interfering with an Aboriginal right. The onus is on the Aboriginal party to show that the limitation is unreasonable, that the regulation imposes undue hardship or that the regulation denies the right-holder his or her preferred means of exercising the right.

If the right-holder can show a prima facie infringement then the onus shifts to the government to justify it. The government must first show that the legislative objective behind the regulation is "valid" or "compelling and substantial".[31] Conservation and resource management, for example, are considered valid legislative objectives. If the government can show a valid objective, scrutiny then turns to the requirements of the Crown's fiduciary obligation.

In the case of fishing rights, the Crown's fiduciary duty is to give priority to Aboriginals who depend on fishing for food over non-Native fishers, but the Crown can still limit the total catch for the sake of conservation. More generally, the Crown owes a duty of minimal impairment as well as a duty to consult. The Crown cannot simply forge ahead with conservation plans without consulting affected Aboriginal parties and seeking to minimise the effect of the infringement.[32] If the infringement involves an expropriation, compensation will usually be due. In all cases, the content

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30 *Sparrow*, above n 7, 1111–1115 Dickson CJ and La Forest J for the Court.

31 Subsequent courts have adopted "compelling and substantial" as the standard. See for example *Delgamuukw v BC* [1997] 3 SCR 1010, 1108 [*Delgamuukw*].

32 The duty to consult has been the subject of considerable litigation, with the Crown alleging that First Nations must establish in a court of law a prima facie infringement of an Aboriginal right before the duty to consult is triggered. This view was recently rejected in *Haida*, above n 3, and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550. I discuss *Haida* in Part III below.

of the fiduciary duty is to be determined on a case-by-case basis that is sensitive to the underlying rights it is meant to protect.[33]

While *Sparrow* dealt with an Aboriginal right to fish for food and ceremonial purposes, *R v Badger* (*Badger*)[34] established that the same conceptual framework, one based on the Crown–Native fiduciary relationship, applies to Aboriginal treaty rights.[35] Thus, infringements of such rights must be justified in light of the Crown's fiduciary duty to preserve and protect them. Furthermore, as noted already, Canadian courts developed a "liberal and generous" approach to treaty interpretation that pre-dates the Constitution Act 1982.[36] According to this approach, one based explicitly on the honour of the Crown, literal interpretations are to be avoided, ambiguities are to be resolved in favour of the Aboriginal party, First Nations' understandings of the treaties are to be taken into consideration and extrinsic evidence may be relied upon as part of the interpretative exercise.[37] The goal of treaty interpretation is "to choose from among the various possible interpretations of common intention the one which best reconciles the interests of the parties at the time the treaty was signed."[38]

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33 For discussion of the case-sensitive approach, see *Gladstone*, above n 7, 763–764.

34 *Badger*, above n 7.

35 *Badger*, above n 7, dealt with the issue of whether Aboriginal peoples could exercise a treaty right to hunt for food on privately owned lands that lay within the territory surrendered under a treaty. The Court held that they could, but only if such lands had not been put to a visible and incompatible use (for example, a treaty would not supply a right to hunt on private land if the treaty lands became visibly occupied by non-Aboriginals for the purpose of urban development or farming).

36 The first in this line of cases is *R v White and Bob* (1964) 50 DLR (2d) 613; 52 WWR 193 (BCCA); affirmed (1965) 52 DLR (2d) 481n (SCC) [*White and Bob*], though the honour of the Crown first appears in relation to Aboriginal treaties in *Province of Ontario v Dominion of Canada and Province of Quebec; In re Indian Claims* (1895) 25 SCR 434. Prior to *White and Bob*, the courts had held that First Nations could make only limited claims on the basis of treaty rights either because the treaty obligations amounted to nothing more than a "personal obligation" undertaken by the Crown's representative rather than the Crown itself or because First Nations were not deemed to have the requisite status to enter into treaties. See *Attorney-General of ON v Attorney-General of Canada: Re Indian Claims* [1897] AC 199, 213 (PC); *R v Syliboy* [1929] 1 DLR 307 (NS Co Ct) Patterson J for the Court [*Syliboy*]. The Court in *Syliboy* held (at page 313) that: "The savages' rights of sovereignty even of ownership were never recognised." Interestingly, even the *Syliboy* Court conceded (at page 314) that:

> Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty.

37 See for example *Simon v The Queen* [1985] 2 SCR 387 [*Simon*]; *R v Sioui* [1990] 1 SCR 1025 [*Sioui*]; *Badger*, above n 7, *Marshall I*, above n 7; Leonard Rotman "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNBLJ 11.

38 *Marshall I*, above n 7, para 78 McLachlin J (as she then was) dissenting (on other grounds), citing *Sioui*, above n 37, 1068–1069.

The liberal and generous approach to First Nation treaty interpretation proceeds from the assumption that Crown agents (often local military commanders[39] or Governors[40]) were capable of binding the Crown; therefore, obligations that arose were and are enforceable against the Crown, notwithstanding a wholesale lack of statutory implementation. In other words, Canada's dualism with respect to international treaties (the doctrine that requires legislative implementation of ratified treaties for them to have direct domestic effect) does not apply to Aboriginal treaties. Indeed, the presumption concerning the legal effect of First Nation treaties runs in the opposite direction: First Nation treaty rights remain in force unless such rights were abrogated by clear and plain federal legislation prior to their entrenchment in section 35(1) of the Constitution Act 1982. Prior to the constitutionalisation of Aboriginal treaty rights in 1982, they imposed (or are now deemed to have imposed) common law duties on the Crown. As such, they could be extinguished or restricted by nothing less than an explicit Act of Parliament. Pre-1982 legislation and regulatory schemes of general application that limit access to game and fisheries do not exhibit the degree of explicitness required to extinguish Aboriginal and treaty rights to hunt and fish.[41]

I do not mean to suggest that the liberal and generous approach to Aboriginal treaties is problematic on account of the fact that it runs counter to dualism; I have argued elsewhere that

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39 See for example *Sioui*, above n 37.

40 See for example *White and Bob*, above n 36; *Simon*, above n 37; *Marshall I*, above n 7.

41 See for example *Sioui*, above n 37; *Sparrow*, above n 7. Many commentators have argued that the Supreme Court's approach to Aboriginal treaties is fundamentally flawed because Parliament, prior to 1982, is understood to have had authority to extinguish treaty rights unilaterally so long as its legislation used clear and explicit words, and post-1982 Parliament can unilaterally infringe treaty rights if such infringements conform to the test laid out in *Sparrow* and *Badger*. See for example G Christie "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's LJ 143; J Y Henderson "Empowering Treaty Federalism" (1994) Sask L Rev 241; Macklem, above n 8. Roughly, these writers say that to understand Parliament to have unilateral authority to extinguish or infringe treaty rights implies that the Aboriginal parties to such treaties must be taken to have surrendered their own sovereignty through the treaty process and thereby to have become subjects of the Crown. Because no such surrender in fact occurred, the argument goes, this underlying and critical premise is false and, therefore, treaties ought to be viewed as constitutional accords from which no derogation is possible absent mutual and informed consent. As will become clear, I agree that Aboriginal peoples did not enter into treaties with the Crown for the purposes of surrendering their sovereignty and becoming the Crown's subjects. Indeed, this claim is critical to my larger argument that the judiciary has turned to fiduciary law to compensate for the Crown's unilateral (and imperious) assertions of sovereignty over First Nations. Thus, I do not intend my remarks concerning the relative vigour of Aboriginal treaties vis-à-vis unimplemented international treaties to suggest that the Supreme Court of Canada has articulated the best possible approach to Native treaties. On the contrary, its failure to do so is further evidence that the Court has felt compelled to turn to fiduciary doctrine in an effort to legitimise Crown sovereignty.

dualism itself is problematic.[42] However, while the Court insists that Aboriginal treaties are sui generis accords rather than international agreements,[43] the separation of powers rationale that underwrites dualism with respect to international agreements applies with equal force to Aboriginal treaties. In both cases, the executive may be alleged to usurp the legislature's law-making power if the treaties it has ratified (Aboriginal and international alike) are given legal effect in the absence of implementing legislation. Put another way, the characterisation of Aboriginal treaties as sui generis is irrelevant to the application of dualism because dualism is a constitutional doctrine that responds to merely the alleged spectre of illegitimate executive law-making. Generally speaking, Aboriginal treaties were concluded by the executive but were not implemented through legislation. Below, I argue that the Crown–Native fiduciary relationship justifies the Court's refusal to let dualism subvert the idea that Aboriginal treaties gave rise to legal rights and obligations prior to their entrenchment in section 35(1) of the Constitution Act 1982. At the same time, seeing judicial recognition of the fiduciary relationship as a response to Crown assertions of sovereignty brings into focus the nature of the deficit in legitimacy that the Court attempts to mend through the imposition of fiduciary obligations.

In summary, while judicial recognition of fiduciary and treaty obligations owed to First Nations has coincided with the wider development of rights-protective jurisprudence that followed promulgation of the Constitution Act 1982, this recognition is based on common law understandings of fiduciary doctrine and Aboriginal treaty interpretation, matters on which section 35(1) is entirely silent. Section 35(1) merely elevates the status of existing Aboriginal and treaty rights from the common law to the constitutional level. I return to the implications of the common law basis of the Crown's fiduciary and treaty obligations in Part IV.

III THE BASIS OF THE CROWN–FIRST NATION FIDUCIARY RELATIONSHIP

As we have seen, the Court in *Sparrow* says that the Crown–Native fiduciary relationship has arisen as a consequence of "the special trust relationship created by history, treaties and legislation".[44] This relationship is presumed to be "trust-like, rather than adversarial",[45] and draws on the Crown's historic willingness and desire to prevent exploitative bargains by letting itself stand

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42 A de Mestral and E Fox-Decent "Implementation and Reception: The Congeniality of Canada's Legal Order to International Law" in Oonagh Fitzgerald and others (eds) *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law, Toronto, 2006) (forthcoming); D Dyzenhaus and E Fox-Decent "Rethinking the Process/Substance Distinction: *Baker v Canada*" (2001) 51 U Toronto LJ 193.

43 See for example *Simon*, above n 37, 404 Dickson CJ: "An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."

44 *Sparrow*, above n 7, 1107 Dickson CJ and La Forest J for the Court.

45 *Sparrow*, above n 7, 1108 Dickson CJ and La Forest J for the Court.

as an intermediary between First Nations and non-Aboriginals eager to acquire Aboriginal lands.[46] I do not question that the Crown assumed the position of a fiduciary in this context by assuming the powers and responsibility that it did. However, the courts were well aware of these facts long before *Guerin* and consistently held that the Crown took surrendered lands on the basis of a political trust between the Crown and First Nations,[47] a kind of trust that gives rise to no legal obligations and which reflects early jurisprudence that conceived of an Aboriginal interest in land as "a personal and usufructuary right, dependent upon the good will of the Sovereign."[48]

Arguably, what made the difference in *Guerin* was the political and legal context in which the decision was rendered. The political context was marked by a global trend toward decolonisation and a rise in Aboriginal resistance to the Crown's unilateral assertions of sovereignty, assertions that led to patently assimilationist policy recommendations as late as 1969.[49] The legal context was marked by *Calder v A-G of British Columbia* (*Calder*),[50] the first case on Aboriginal title in Canada in which a majority of the Supreme Court held that such title was to be determined on the basis of a factual inquiry into Native occupation of land, rather than on the basis of whether some emanation of the Crown had recognised an Aboriginal interest in such lands. It is also likely that the presence of section 35(1) in the Constitution Act 1982, although not relied on in *Guerin*, gave judges a measure of positivistic comfort when they turned to the issue of whether the Crown's authority to deal with surrendered lands was subject to fiduciary obligations: if Canada's supreme law can limit

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46 The relevant part of the Royal Proclamation of 1763 reads:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians.

Extract from The Royal Proclamation of 1763, as reproduced in John J Borrows and Leonard I Rotman *Aboriginal Legal Issues: Cases, Materials & Commentary* (2 ed, LexisNexis Canada, Markham, Ontario, 2003) 27.

47 *St Ann's*, above n 13.

48 *St Catherine's Milling & Lbr Co v The Queen* (1888) 14 AC 46, 46 (headnote).

49 In 1969, the federal government issued a now infamous white paper. It proposed assimilating Indigenous peoples into the non-Indigenous mainstream of Canadian society by phasing out rights and benefits associated with Aboriginal status, including the denial of land claims. The White Paper, available online at <http://www.turtleisland.org/discussion/viewtopic.php?t=535> (last accessed 10 April 2006), sparked outrage among First Nations and was eventually withdrawn.

50 *Calder v A-G of British Columbia* [1973] SCR 313 [*Calder*].

the Crown's legislative power, then it is easier to imagine the common law placing constraints on Crown administrative authority. Ultimately, the best moral justification for deploying fiduciary law in *Guerin* and *Sparrow* rests on the nature of the Crown's assertions of sovereignty over First Nations and principles found in the common law. However, at this juncture I am merely trying to explain recent judicial use of fiduciary doctrine and it is plausible to think that constitutional entrenchment of Aboriginal and treaty rights played some role in the political and legal context that made resort to fiduciary doctrine possible.

Be that as it may, once the Court in *Sparrow* extended the Crown–Native fiduciary relationship to comprehend Aboriginal and treaty rights, the Crown's position as intermediary in land surrenders could no longer serve as an adequate explanation of the Crown's fiduciary obligations and the judiciary's recognition of them, since many of the contemporary obligations apply to contexts where land surrenders are not in issue, such as cases involving treaty rights to fish and trade.[51] A more general explanation is needed, one that takes account of the political and legal context outlined above, but that also pays close attention to the constitutional framework within which judges take themselves to be working.

A central feature of this framework is that the Crown has exclusive and plenary sovereign authority over First Nations and their ancestral lands. In *Sparrow*, Dickson CJ and La Forest J affirmed that:[52]

> It is worth recalling 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.

From *Sparrow* onwards, the Supreme Court has held that the purpose of section 35(1) is to reconcile Aboriginal rights that pre-date contact with Crown assertions of sovereignty.[53] Aboriginal rights are said to arise from Aboriginal occupation and use of land prior to contact with Europeans. As Lamer CJ put it in *Van der Peet*:[54]

> [T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(12), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.

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51 See for example *Marshall I,* above n 7.

52 *Sparrow*, above n 7, 1103 Dickson CJ and La Forest J for the Court.

53 See the *Van der Peet* trilogy: *Van der Peet*, above n 7; *Gladstone*, above n 7; *Smokehouse*, above n 7.

54 *Van der Peet*, above n 7, para 30 Lamer CJ.

Along with Aboriginal prior occupation, the Court often recognises that First Nations lived with "their own practices, traditions and cultures".[55] Until the 2004 decision in *Haida Nation v British Columbia (Minister of Forests)* (*Haida*),[56] however, conspicuously absent from the Court's reconciliation thesis was recognition of the fact that prior to and well after contact, Aboriginal peoples also lived with their own sovereign powers, in both the de jure and de facto senses.[57] While the Court has developed elaborate tests to determine the existence and nature of Aboriginal rights, Crown sovereignty is taken as a given, as an immutable fact against which the remainder of Canadian law – including law relating to Aboriginal peoples – must fashion itself.

It is not surprising that Canadian courts take Crown sovereignty as a given. Commonwealth judges understand themselves to be charged with interpreting and applying the law of the land. They do not see their mission as one involving an inquiry into the justice of historical and contemporary assertions of Crown sovereignty. Indeed, Canadian courts have declined to use even the act of state doctrine to justify their unwillingness to review the Crown's claims to sovereignty over Aboriginal peoples. According to this doctrine, municipal courts have no jurisdiction to review the manner in which a state acquires new territory. Hall J (dissenting, but on other grounds) discusses the doctrine in *Calder*, but not for the purposes of immunising Crown sovereignty from judicial scrutiny. Interestingly, he finds that it cannot block claims to Aboriginal title:[58]

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55 *Van der Peet*, above n 7, para 31 Lamer CJ.

56 *Haida*, above n 3.

57 John Borrows argues convincingly that the Court's characterisation of Aboriginal rights as sui generis implies that the Court recognises, at least implicitly, that Aboriginal rights are in part defined by Aboriginal legal traditions: J Borrows *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, Toronto, 2002) 5–12. At numerous junctures in *Van der Peet*, Lamer CJ cites US and Australian cases as well as academic commentators that affirm the presence and vitality of Aboriginal law pre-contact: *Van der Peet*, above n 7, paras 36, 37, 40 and 42. However, the Chief Justice cites these authorities merely as support for the view that First Nations occupied Canada as distinctive societies pre-contact and that the point of section 35(1) is to reconcile this prior occupation (not prior Aboriginal law or sovereignty) with the assertion of Crown sovereignty. See for example *Van der Peet*, above n 7, para 43. While he refers to "the rules of property found in aboriginal legal systems" in *Delgamuukw*, above n 31, 1081, in *Van der Peet* he declines to affirm in his own words that the test for defining Aboriginal rights relies on recognition of Aboriginal law. McLachlin J (as she then was) dissented in *Van der Peet*. In contrast to the majority, she based her judgment explicitly on the doctrine of continuity: "the Crown, upon discovering and occupying a 'new' territory, recognized the law and custom of the aboriginal societies it found and the rights in the lands they traditionally occupied that these supported." *Van der Peet*, above n 7, para 268. In *Mitchell v MNR* [2001] 1 SCR 911 [*Mitchell*] para 9, McLachlin CJ, this time writing for the majority, reaffirmed the doctrine of continuity. As we shall see, *Mitchell* arguably laid the groundwork for the Chief Justice's reformulation in *Haida* of the reconciliation thesis, a reformulation that explicitly recognises pre-existing Aboriginal sovereignty.

58 *Calder*, above n 50, 405 Judson J (Martland and Ritchie JJ concurring).

> When the Sovereign, in dealings with another Sovereign (by treaty of cession or conquest) acquires land, then a municipal Court is without jurisdiction to the extent that any claimant asserts a proprietary right inconsistent with acquisition of property by the Sovereign – *ie* acquisition by Act of State. … In the present case the appellants are not claiming that the origin of their title was a grant from any previous Sovereign, nor are they asking this Court to enforce a treaty of cession between any previous Sovereign and the British Crown. The appellants are not challenging an Act of State – they are asking this Court to recognize that settlement of the north Pacific coast did not extinguish the aboriginal title of the Nishga people – a title which has its origin in antiquity – not in a grant from a previous Sovereign.

While Canadian courts have not explicitly relied on act of state doctrine, the idea that underwrites the reconciliation thesis (that "there was from the outset never any doubt that sovereignty … vested in the Crown"[59]) suggests that the reason for the absence of the doctrine in Canadian jurisprudence is that its deployment in defence of Crown sovereignty would imply that some defence of Crown sovereignty was needed. Because Crown sovereignty is taken as a given, no defence of it is required, not even an act of state justification that lets judges wash their hands of the matter.

The mere fact of Crown sovereignty does not necessarily imply an absence of Aboriginal sovereignty. The two are not mutually exclusive and several writers suggest that the way ahead lies in recognising and promoting legal pluralism so that Canada distributes sovereign powers across three jurisdictions: federal, provincial and Aboriginal.[60] Nonetheless, the courts have taken Crown sovereignty to imply an extinguishment of Aboriginal sovereignty. This is why, until *Haida*, the reconciliation thesis had been cast in terms of reconciling Crown sovereignty with prior Aboriginal rights, meaning rights that reflected prior occupation of land as well as pre-contact practices, traditions and customs, rather than in terms of reconciling prior Aboriginal sovereignty with assumed Crown sovereignty.

In treaty cases, however, the courts are compelled to grapple with the fact of pre-existing Aboriginal sovereignty. States do not enter into treaties with people over whom they are sovereign; they simply legislate. It is far from clear that Native peoples ever intended to surrender their sovereignty or underlying title in the lands they occupied. The better view is that First Nations were open to sharing their lands with the French and British (and later Canada) on mutually agreeable terms, but that they intended their relations with non-Aboriginals to proceed on the parallel paths vividly depicted by the Two-Row Wampum used to consecrate many treaties. The Two-Row Wampum consists of two parallel rows of purple shells against a background of white shells. Three rows of white beads – symbolising peace, friendship and respect – separate and connect the two

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59 *Sparrow*, above n 7, 1103 Dickson CJ and La Forest J for the Court.

60 See for example Macklem, above n 8; James Tully "A Just Relationship between Aboriginal Peoples and Canadians" in Curtis Cook and Juan Lindau (eds) *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience* (McGill Queens University Press, Montreal, 2000) 39–71.

purple rows. Rotman observes: "The three rows [of white beads] were the link between the nations, but just as their paths never cross on the wampum belt, neither was to attempt to steer the other's vessel."[61] While land surrender treaties became part of British colonial policy in the 19th century, there is no reason to suppose that, from the Aboriginal perspective, these treaties were, as a rule, intended to permit colonisers to put land to a use that was inconsistent with Aboriginal uses.[62] If the liberal and generous approach to treaty interpretation is taken seriously so that doubts and ambiguities are resolved in favour of First Nations, there is scant basis to suppose that First Nations intended to give up sovereignty by treating with the Crown.

Some commentators and courts have taken a very different view of Canada's history and see the Crown's general fiduciary obligation arising from an agreed trade-off of Aboriginal sovereignty for Crown protection. The Supreme Court recently quoted with approval the italicised portion of the following instructive passage from Professor Slattery:[63]

> The Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands. This general fiduciary duty has its origins in the Crown's historical commitment to protect native peoples from the inroads of British settlers, in return for a native undertaking to renounce the use of force to defend themselves and to accept instead the protection of the Crown as its subjects … *The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.*

Putting aside for one moment the issue of whether or not Aboriginal peoples generally understood themselves to be giving up sovereignty for protection, it is worth noting that acceptance of British protection did not require the surrender of Aboriginal sovereignty. Nations commonly enter into treaties with one another for the sake of protection; there is no presumption that the

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61 Rotman *Parallel Paths*, above n 2, 32.

62 Note that this is exactly the opposite of the assumption made in *Sioui*, above n 37, 1071–1072:

> The Hurons were only asking to be permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their [British] occupier.

63 Brian Slattery "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727, 753 quoted in *Wewaykum*, above n 5, para 79 Binnie J for the Court. This is also the argument of King J in *Logan v Styres* (1959) 20 DLR (2d) 416; [1959] OWN 361 (Ont HC) [*Logan*]. In *Logan*, the Six Nations Iroquois Confederacy protested Crown assertions of sovereignty over them, claiming that they were allies and not subjects of the Crown and that they never agreed to become the Crown's subjects in exchange for its protection. They had protested the imposition of the Indian Act over them when it was first passed in 1876, and in the 1920s they travelled to London and Geneva to seek recognition of their sovereignty from the League of Nations. They were unsuccessful before the League of Nations and King J rejected their submissions in *Logan*.

weaker party loses its sovereignty to the stronger. In the circumstances, Britain could have provided the protection it promised in the Royal Proclamation of 1763 and elsewhere by exercising its jurisdiction over British subjects, whether or not those subjects were on British soil. Jurisdiction can attach to persons as well as to territories. It was not necessary for the British to have sovereignty over Aboriginal lands in order to retain jurisdiction over British subjects who chose to invade those lands. In other words, it was not necessary to persuade Aboriginal peoples to give up their sovereignty and the best available research suggests that no such attempt was made during negotiations of the important Treaty of Niagara (1764), the treaty in which some 24 Aboriginal nations from across North America agreed to accept the promise of British protection contained in the Royal Proclamation of 1763.[64]

Moreover, even if Aboriginal peoples did agree, in some sense, to surrender sovereignty and become British subjects for the sake of protection, arguably the deal was unconscionable and void from the beginning because it rested on an interaction analogous to hostage-taking. Imagine that a Mafia Don discovers that some of his foot soldiers have kidnapped a child without his authorisation and they are now demanding a ransom from the parents. The Don advises the parents that if they pay the ransom he can assure them that their child will be returned safely. The parents ask if he will simply exercise his authority and order his men to return their child, but he declines to do so. The parents pay the ransom, the child is returned safely and the Don shares in the spoils. While the parents and the child are better off paying the ransom than letting the child perish, the mafia boss has no entitlement to the proceeds of the kidnapping. The only reason the parents pay is to nullify the kidnappers' illegitimate threat, a threat the Don could have nullified of his own accord. There is no reason to think that, by relying on the Don for protection rather than self-help, the parents forfeit their right to make a claim against him for the money he takes from the ransom. By the same token, there is no reason to think that First Nations irrevocably gave up their sovereignty to Britain on the basis of the Crown's promise to police its own settlers, because the only basis of the surrender was the illegitimate threat of a settler invasion in which the Crown was complicit. What the sovereignty-for-protection argument misses is the manner in which the Crown profited from a threat of wrongdoing made by its own subjects, a threat the Crown could have quashed without demanding the surrender of Aboriginal sovereignty in return. If the honour of the Crown is to mean anything, it must mean that the Crown cannot profit from illegitimate threats of violence that it had jurisdiction to control.

Looking to treaties and treaty relationships to find a basis for the Crown's fiduciary obligations is also problematic for conceptual reasons having to do with the nature of fiduciary duties. These

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64 For discussion of the events leading up to the Treaty of Niagara (1764) and Native peoples' understanding of it at the time, see John Borrows "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in Michael Asch (ed) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (UBC Press, Vancouver, 1997) 155.

reasons are in addition to those already given with respect to the problem of deriving the Crown's broad fiduciary duties of today from its more limited obligations to protect Aboriginal land. The hallmark fiduciary duty is the duty of loyalty. As with contracts, there is nothing inherent in treaties to suggest that the parties owe one another the selfless duty of loyalty required of fiduciaries; all that is required is performance of the treaty's obligations. The underlying assumption is that self-interested parties have come to mutually agreeable terms that further the interests of each. So, no one thinks, for example, that Canada, the USA and Mexico owe one another fiduciary duties by virtue of entering into the North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States.[65] The mere fact that the Crown assumed treaty obligations to protect Aboriginal peoples and their land does not show, without more, that those obligations are fiduciary in nature. Historically, a much closer analogue to a trust arises from the Treaty of Paris (1763), in which France (the putative settlor) and Britain (the putative trustee) negotiated religious and cultural guarantees for French Canadians (the putative beneficiaries). However, the courts have never said that Britain's treaty obligations to France, in favour of French Canadians, gave rise to fiduciary duties. An important difference between the Treaty of Paris (1763) and the Treaty of Niagara (1764) is that only the former clearly extinguished a prior sovereignty and established British sovereignty in its place.

Jurisprudence from New Zealand may appear to cast doubt on this argument, since New Zealand's Court of Appeal has said that the Treaty of Waitangi (1840) – the treaty from which New Zealand's Crown sovereignty is derived – established a partnership between Māori and the Pākehā settlers, and partners owe one another (or at least the partnership) fiduciary duties.[66] However, while the Court said that Māori owed loyalty to the Queen as well as duties of reasonable cooperation and good faith, it is far from clear that these are fiduciary duties akin to the *Guerin* and *Sparrow*-like duties the Crown owes to Māori. The reason is straightforward: Māori have not possessed the kind of irresistible power and discretionary authority over Pākehā interests that could give rise to such duties. Of course, the Court uses the partnership analogy somewhat loosely, so it is perhaps unfair to expect it to exhibit the tidy symmetrical features of a partnership at common law. For the purposes of my argument concerning judicial recognition of the Crown–Native fiduciary relationship in Canada, the most interesting aspect of the partnership analogy from New Zealand lies in its probable basis.

In the Māori language version of the Treaty of Waitangi, Māori are guaranteed "rangatiratanga" (the authority of the chiefs over their own people) and "taonga" (treasured things). These guarantees have led to the development of principles relevant to the Treaty's interpretation, principles that

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65 North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States (17 December 1992) 32 ILM; [1994] Can TS no 2 (entered into force 1 January 1994).

66 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 664, 667 (CA) Cooke P.

operate in New Zealand much as the liberal and generous approach operates in Canada. Development of these principles by the courts and the Waitangi Tribunal (a tribunal established in 1975 to inquire into allegations of past, present and potential future breaches of the Treaty) reflects an understanding of the Treaty in which there is acknowledgment that Māori did not understand themselves to be surrendering sovereignty. Thus, although the Crown alone exercises sovereign powers today, the idea of a partnership is apposite because it reflects the ongoing significance of unextinguished Māori sovereignty. In other words, whereas First Nation treaties are largely understood to have extinguished Aboriginal sovereignty in Canada (the sovereignty-for-protection argument), it appears that New Zealand judges now see the Treaty of Waitangi as a source of partnership and fiduciary obligation because they appreciate that Māori did not agree to surrender their sovereignty and, therefore, the legitimacy of Crown sovereignty depends on the Crown being held to a fiduciary standard.

Notwithstanding the Supreme Court of Canada's recital of Slattery's sovereignty-for-protection argument, in Canada too the better explanation of judicial recognition of the fiduciary relationship lies in the Court's aspiration to legitimise Crown sovereignty in the absence of a compelling narrative of how First Nations lost theirs. This explanation accounts for the Court taking Crown sovereignty to be an uncontestable given, as well as for the Court's systematic failure to apply the liberal and generous approach to the single most important issue of Aboriginal treaty interpretation: whether or not First Nations knowingly and willingly surrendered their sovereignty to the Crown through the treaty process. Furthermore, on this understanding of the fiduciary relationship we can explain how the Crown's broad fiduciary duties today arise as justifiable complements to its more limited duties to protect Aboriginal lands: all such fiduciary duties arise as a consequence of the sovereign powers and authority the Crown has assumed over Aboriginal peoples and their lands, with or without their consent.

Mitchell v MNR (*Mitchell*)[67] supports this reading. In that case, as noted already, McLachlin CJ affirms the doctrine of continuity according to which the common law recognises the validity of Aboriginal law in the absence of extinguishment by cession, conquest, or clear and plain legislation. She speaks to the doctrine of continuity within the context of a revealing gloss on the history of Crown–Native relations:[68]

> Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal

67 *Mitchell*, above n 57.

68 *Mitchell*, above n 57, para 9 McLachlin CJ.

> peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow*, *supra*. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

In short, it was the Crown's assertion of sovereignty over First Nations that gave rise to the ongoing Crown–Native fiduciary relationship. The Chief Justice does not try to justify the Crown's historical assertion of sovereignty and in the passage it goes without saying (literally) that the Crown's assertion extinguished Aboriginal de jure sovereignty.[69] However, she connects this assertion with the rise of an overarching fiduciary obligation and her use of the fiduciary principle in this context is clearly motivated by a desire to take some of the sting and imperiousness out of the Crown's assertion of sovereignty. Whereas Aboriginal peoples once had "their own social and political structures",[70] they now can rely on fiduciary law to ensure that the Crown treats them fairly and honourably and protects them from exploitation.

This view of the basis of the Crown's fiduciary duties also has the advantage of better respecting the normative structure of the fiduciary principle. Whereas parties to a contract or a treaty agree amongst themselves to the terms of their interaction, the beneficiary in a fiduciary relationship is vulnerable to the fiduciary's discretionary power and in many cases the beneficiary has no ability to negotiate the terms of the relationship. However, the law does not permit one party to unilaterally set the terms of its interaction with another. So, in cases in which one party unilaterally assumes discretionary power of an administrative nature over another, the fiduciary principle intercedes to ensure that the fiduciary's exercise of power conforms with the fiduciary's duty to have due regard for the best interests of the beneficiary.[71] The fiduciary's authority to exercise discretionary power over the beneficiary's interests is justified and legitimate in the eyes of the law because all such exercises of power are to serve the interests of the beneficiary. In this sense, the fiduciary may be said to act with authority and on the basis of the beneficiary's trust, regardless of whether or not the beneficiary has actually done anything in particular to entrust her interests to the fiduciary's care.

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69 The doctrine of continuity is evidence for rather than against this proposition, since the doctrine only applies to peoples subjugated to Crown rule. Recall that the Crown, at its sole discretion, could extinguish through legislation any rights arising from the indigenous law of such peoples.

70 *Mitchell*, above n 57, para 9 McLachlin CJ.

71 I defend this characterisation in E Fox-Decent "The Fiduciary Nature of State Legal Authority" (2005) 31 Queen's LJ 259.

By saying that the Crown's relationship with First Nations is "trust-like, rather than adversarial",[72] the Court is able to side-step altogether the issue of whether the relationship is based on treaties and consent, while imposing fiduciary obligations on the Crown that arise from the trust-like nature of the relationship. The relationship need not be viewed as trust-like in the sense that First Nations are presumed to have actually entrusted the Crown with their governance. Rather, the relationship is trust-like in the sense that the Crown must act under the obligations of trust – under fiduciary obligations – as if in fact Aboriginal peoples had entrusted their governance to the Crown.

By positing the Crown as fiduciary, the Court precludes the Crown from unilaterally setting the terms of its interaction with First Nations and supplies to Crown–Native relations a measure of legitimacy that would be lacking were the Crown able to set the terms of those relations at its sole discretion. How much legitimacy the fiduciary principle can afford to Crown–Native relations is, of course, highly debatable. While First Nations are beneficiaries who the Crown must consult and attempt to accommodate, they cannot command the Crown to legislate in accordance with their wishes, nor can they veto legislation that infringes their rights but passes the justificatory test laid out in *Sparrow*. Furthermore, non-Aboriginal judges of the Supreme Court of Canada are the ultimate arbiters of whether the *Sparrow* test has been satisfied in any given case. In short, it is far from clear that the fiduciary principle, as understood and applied today, can legitimise the Crown's political authority to legislate and adjudicate over Aboriginal peoples who reject Crown sovereignty and insist upon their own.

However, the Australian experience, where courts have not recognised a Crown–Native fiduciary relationship, suggests that Aboriginal peoples are better off with its recognition than without it. Australian Professor Larissa Behrendt writes:[73]

> In Australia, the lack of a clear court finding that the fiduciary relationship arises has meant that Indigenous peoples are left with little to ensure that the government will consult on policies and actions that may infringe on or extinguish their rights. It has meant that Indigenous peoples, particularly Aboriginal title holders, are captive to the whim of the legislature. If the government is not benevolent and acting in good faith in its dealings with Indigenous peoples, it leaves Aborigines and Torres Strait Island peoples vulnerable to the infringement of fundamental rights. This is not very secure tenure for the recognition and protection of those rights. Despite the many flaws and the impotence of the fiduciary doctrine in Canada, Australia offers sober reflection on what can happen if there is no recognition of the doctrine.

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72 *Sparrow*, above n 7, 1108 Dickson CJ and La Forest J for the Court.

73 Larissa Behrendt "Lacking Good Faith: Australia, Fiduciary Duties and the Lonely Place of Indigenous Rights" in *In Whom We Trust* (Irwin Law for the Law Commission of Canada and Association of Iroquois and Allied Indians, Toronto, 2002) 264–265, as cited in Reynolds, above n 15, 226.

This "sober reflection" reveals that while the fiduciary principle may not save the Crown's claim to *political* authority, compliance with fiduciary standards confers a kind of legitimacy that is intrinsic to and constitutive of the Crown's *legal* authority. Whereas political authority comprehends matters of political representation as well as the Crown's capacity to determine the substantive content of legislation, legal authority reflects the extent to which exercises of Crown power conform to the demands of legality or the rule of law, such as the demands imposed by fiduciary law. To the extent that exercises of Crown power respect the relevant fiduciary constraints, such exercises of power attain a measure of legal authority. This modest achievement of legal authority is what marks the difference noted above between Australia and Canada.

As indicated already, several commentators argue that the courts ought to go much further than this and accept that Aboriginal peoples, for the most part, never surrendered their de jure sovereignty, notwithstanding the Crown's present de facto sovereignty over them.[74] One possible result of such an admission would be that the Crown could not infringe Aboriginal and treaty rights without the consent of the relevant First Nation. Requiring the Crown to secure Aboriginal consent in such cases, however, would be to recognise that Aboriginal sovereignty, in some form, remains intact. A further direct consequence of requiring Aboriginal consent would be that First Nations would then have the power to veto legislation that infringes their rights. Despite a few obiter dicta that appear to support the idea that Aboriginal consent must be secured in some cases,[75] the Supreme Court of Canada has yet to require the Crown to obtain First Nation consent in any particular case involving the infringement of Aboriginal or treaty rights. All that has been required is consultation, accommodation and justification.

Arguably, the Court supposes that to require the Crown to obtain Aboriginal consent in all but exceptional circumstances would, in effect, grant Aboriginal peoples a measure of legislative authority and that section 91(24) of the Constitution Act 1867 exhaustively grants such authority to the federal Crown.[76] Consider *R v Pamajewon*,[77] the leading Canadian case on Aboriginal self-government. Carr J held at trial, and the Supreme Court later accepted, that the Royal Proclamation of 1763, the Robinson Huron Treaty of 1850 and section 91(24) established that "any right of self-

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74 See for example Macklem, above n 8; Christie, above n 41; Borrows, above n 57.

75 See for example *Delgamuukw*, above n 31, para 168 Lamer CJ: "Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

76 Section 91(24) grants jurisdiction to the federal Crown over "Indians, and Lands reserved for the Indians." This jurisdiction is granted to the exclusion of provincial Crowns, but, as the subsequent text suggests, courts have interpreted it to mean that the federal Crown has exclusive jurisdiction in this domain.

77 *R v Pamajewon* [1996] 2 SCR 821 [*Pamajewon*].

government which was once held by the Shawanaga First Nation had been extinguished by the clear and plain intention of the Crown."[78]

Fiduciary doctrine, then, permits the Court to take a middle position between uncontrolled Crown discretion on the one hand and requiring the Crown to obtain Aboriginal consent on the other. The middle position lets the Court hold the Crown to certain legal obligations that lend a measure of legitimacy to Crown sovereignty, but always within the present constitutional arrangement in which Aboriginal sovereignty is assumed to have been extinguished and the Crown's sovereignty is taken to be both axiomatic and exclusive.

Prior to *Haida*, *Mitchell* offered the best jurisprudential support for the explanation I am urging of judicial recognition of the Crown–Native fiduciary relationship because, until *Haida*, the reconciliation thesis was put in terms of reconciling Crown sovereignty with Aboriginal rights rather than with Aboriginal sovereignty. The Court in *Haida* had to consider the legality of the Crown's issuance of a Tree Farm License to a forestry firm over objections of the Haida people. The Haida alleged that the Crown had not consulted them in the manner required by *Sparrow* and subsequent case law. They have claimed Aboriginal title to the relevant lands for the past 100 years, but their claim is still in the claims process and so their title has yet to be legally recognised. The Crown argued that the duty to consult flows exclusively from its fiduciary duty to protect established Aboriginal rights and that until such rights are established, there is no duty to consult, much less a duty to gain consent. The Court held that the Crown did have a duty to consult and accommodate (though not a duty to gain consent), even in the absence of a legally recognised Aboriginal right. The duty was based on the now familiar principle that the honour of the Crown is always at stake in dealings with First Nations. While the degree of consultation and accommodation will depend on the strength of the prima facie case in favour of the right and the potential for irreparable harm posed by the Crown's intended action, where a prima facie case is made out, the honour of the Crown is triggered and, therefore, some consultation is due.

The extract from *Haida* in this paper's epigraph demonstrates that the Court now explicitly acknowledges pre-existing Aboriginal sovereignty and, of equal interest, the Court characterises Crown sovereignty as merely assumed. The point of treaties, or at least those yet to be concluded with First Nations in British Columbia, is to reconcile these sovereignties and to define the content of the treaty rights protected in section 35(1) of the Constitution Act 1982, rights the Crown would have a fiduciary obligation to protect. Pre-existing Aboriginal sovereignty gives First Nations the authority to negotiate treaties and the honour of the Crown "requires negotiation, leading to a just

78 Paraphrased in *Pamajewon*, above n 77, 829. The Supreme Court had drawn the same conclusion in *Calder*, above n 50, relying on the authority of section 91(24).

settlement of aboriginal claims".[79] The requirement of negotiation is part and parcel of consultation and accommodation and fits within a now clearer idea of reconciliation, one which:[80]

> [F]lows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.

In short, the Court now appears to recognise that both the honour of the Crown and the Crown's fiduciary obligations arise from Crown assertions of sovereignty over a people who once were sovereign over themselves, but who are no longer deemed to be so.

Once we see that the legitimacy of Crown sovereignty over Aboriginal peoples manifests itself in the honour of the Crown and the fiduciary relationship, and that these conduits of legitimacy, for the Court, rest on the reconciliation of pre-existing (and extinguished) Aboriginal sovereignty with assumed Crown sovereignty, we can see why dualism does not prevent Aboriginal treaty rights from giving rise to legal obligations enforceable against the Crown, obligations that existed as a matter of common law prior to the entrenchment of their correlative treaty rights in the Constitution Act 1982. For the Crown to have any de jure sovereignty over First Nations at all, it must respect the treaty terms on which such authority has been assumed and asserted, regardless of whether those terms were ever subsequently incorporated into domestic legislation. Dualism is merely a shield invoked to insulate Parliament's law-making power from alleged executive incursion. However, dualism must retreat when adherence to it would subvert the honour of the Crown, which is to say, the very basis of Parliament's authority to legislate over First Nations. This is why dualism is wholly absent from modern Canadian jurisprudence on Aboriginal treaty interpretation, despite the fact that its absence implies that executive treaty-making has given rise to enforceable rights and obligations that (at least prior to 1982) were never expressly subject to the will of Parliament.

Moreover, once we see the fiduciary relationship as an effort to sustain the legitimacy of Crown sovereignty, we can see that the ousting of Aboriginal sovereignty implicit in the Court's conception of Crown sovereignty is the source of the legitimacy deficit that the fiduciary relationship attempts to correct. Hence, as Aboriginal peoples negotiate modern treaties through which they gain gradual recognition of their de jure sovereign powers and the de facto ability to exercise them (for example, the 1998 Nisga'a Agreement), the Crown's fiduciary obligations will begin to recede because the basis for them – legitimisation of Crown power in the absence of recognised and effective Aboriginal sovereignty – will itself begin to disappear.

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79 *Haida*, above n 3, para 20 McLachlin CJ for the Court.

80 *Haida*, above n 3, para 32 McLachlin CJ for the Court. McLachlin CJ at this point cited her previous holding in *Mitchell*, above n 57, that: "*[w]ith this assertion [sovereignty]* arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation."

IV FIDUCIARY AND COMMON LAW CONSTITUTIONALISM

I conclude now with a few tentative remarks on the common law basis of the Crown–Native fiduciary relationship and its relationship to section 35(1) of the Constitution Act 1982. One reading of the difference that section 35(1) makes is that Aboriginal and treaty rights may now be infringed by legislation only if the infringement is justifiable in accordance with the test laid out in *Sparrow*, whereas prior to 1982, clear and plain legislative language was sufficient to extinguish such rights. Admittedly, this is the most natural reading of the jurisprudence and it sits well with the doctrine of Parliamentary supremacy.

However, if the Crown is a fiduciary of Canada's First Nations such that obligations are owed by the legislative as well as the executive branch on the basis of the Crown's historical assertions of sovereignty (as *Sparrow*, *Mitchell* and *Haida* suggest), then arguably the legislature as well as the executive is constrained with respect to the manner in which it may govern Aboriginal peoples. That is, the Crown–Native fiduciary relationship has constitutional significance independent of the recognition and affirmation of Aboriginal and treaty rights in section 35(1). Common law judges already display sensitivity to the unwritten constitutional constraints of the fiduciary relationship when they read down pre-1982 general legislation that on its face would infringe Aboriginal and treaty rights. The demand for clear and plain language is of a piece with common law constitutionalism that demands explicit words if legislation is to be interpreted to the detriment of fundamental rights and values. What the fiduciary idea may contribute to the common law constitution is a fresh juridical basis for what David Dyzenhaus describes as a "culture of justification",[81] the culture that *Sparrow* recommends in which every legitimate exercise of sovereign power (including clear and plain legislative commands) must be capable of public justification. Exercises of public authority that are not capable of justification are not really exercises of legal authority or instances of law at all: they are exercises of mere power. As such, they deserve no judicial deference.

At its most ambitious, the fiduciary and common law constitution of Crown–Native relations suggests that judges seized with interpreting a clear and plain statute that infringes Aboriginal and treaty rights not entrenched in a written constitution may uphold the plain reading of such a statute only if the infringement can be justified. For judges to do anything else would make them complicit in an abusive exercise of naked power and would thereby undermine their claim to be committed to the rule of law. Judges need not declare the infringing legislation to be invalid to refuse complicity. In this kind of extreme case, they can sustain their commitment to the rule of law by merely

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81 David Dyzenhaus "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 SAJHR 11. Dyzenhaus credits Mureinik with the idea of legal culture as a culture of justification. Dyzenhaus' forthcoming book, *The Constitution of Law*, provides a rich and detailed account of law as justification and the resources available to judges, legislators and administrators alike who are sensitive to the demands made of them by the rule of law project to which they are all, at least implicitly, committed.

declining to give effect to the rights-depriving provision.[82] By adopting such a stance, judges can underscore that their job is to interpret law and that statutory provisions incapable of justification lack legal authority and, therefore, are not law. Judges are under no duty to give effect to a statute that amounts to an exercise of arbitrary power. In other words, judges who see the authority/power distinction that the fiduciary and common law constitution makes visible ought to take their lead from US Supreme Court Chief Justice Marshall who upheld the sovereignty of the Cherokee against the state of Georgia. His decision allegedly led President Jackson to quip, "Justice Marshall has made his decision, let him enforce it."[83]

A less ambitious and very serviceable reading of fiduciary and common law constitutionalism would require consultation and accommodation where Aboriginal and treaty rights are at stake. Such measures stop short of requiring the Crown to obtain Aboriginal consent to rights-infringing legislation, but nonetheless submit Crown power to judicial and public scrutiny. Consultation guarantees Aboriginal participation, while accommodation helps to ensure that such participation is meaningful and that Aboriginal interests are taken seriously. If judges confront express and draconian legislation that attempts to oust such measures, they may have to reconsider the very basis of their authority to adjudicate such matters. If they take the conventional view that legal sovereignty rests in the Crown, they may feel constrained to give effect to the impeached statute. If, however, they take up the fruitful suggestion of Paul McHugh and understand legal sovereignty to reside in the people,[84] rather than in the Crown, they may say that while it is beyond their authority to invalidate a statute on the basis of common law precepts, they nonetheless cannot give effect to unjustifiable and rights-depriving legislation that virtually asks them to become the executioners of an Act of Attainder. In either case, it is well within their authority to denounce the statute as a subversion of the legal order for which they stand.

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82 The Supreme Court recognised the distinction between not giving effect to a particular statutory provision and declaring such a provision invalid in *Cuddy Chicks Ltd v Ontario (Labour Relations Board)* [1991] 2 SCR 5, 17. The Court held that a provincial labour board had authority to interpret its enabling statute in light of the Constitution Act 1982, and that while the board did not have authority to declare the offending provision invalid, it nonetheless had both the authority and the duty not to give it effect. My suggestion in the text above is that judges might follow this path if confronted with clear legislation that patently infringes Aboriginal and treaty rights.

83 *Worcester v Georgia*, (1832) 331 US (6 Pet) 515. For a discussion of President Jackson's reaction to this decision, see Francis Paul Prucha *The Great Father* (University of Nebraska Press, Lincoln, 1984) 212.

84 P McHugh "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) 52 U Toronto LJ 69, 98, drawing on the work of Justice E W Thomas.