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## ANOTHER INAPPROPRIATE F WORD: FIDUCIARY DOCTRINE AND THE CROWN-INDIGENOUS RELATIONSHIP IN CANADA

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ANOTHER INAPPROPRIATE F WORD: FIDUCIARY DOCTRINE AND  
THE CROWN-INDIGENOUS RELATIONSHIP IN CANADA

*By Bryan Birtles*

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## INTRODUCTION

Settlers have inhabited what is now Canada for over 500 years, but newcomers and the original inhabitants have yet to determine a satisfactory way to live together. Despite an auspicious start based on treaty agreements between sovereign peoples to share territory, the relationship between Indigenous peoples and settlers devolved into one of domination by the latter and the attempted assimilation of the former. Though there are signs the relationship is repairable, questions remain about whether the structures through which we relate, especially legal ones, promote or hinder reconciliation.

One such structure is the fiduciary relationship between Indigenous peoples and the Crown: first determined in *Guerin v The Queen*,<sup>1</sup> the fiduciary relationship makes the Crown responsible for acting with *uberrimae fidei*—the utmost good faith—toward Indigenous peoples. However, even a casual look at Crown-Indigenous relations since the 1984 decision will show the Crown has not treated Indigenous peoples with the utmost good faith. It simply has too many competing interests to put Indigenous interests first, as demanded by fiduciary doctrine.

This paper argues that fiduciary doctrine is an inappropriate concept to impose on the Crown-Indigenous relationship: because of the Crown's competing interests and the structural inequality built into fiduciary doctrine, such a concept can never embody the sovereign-to-sovereign relationship demanded by our treaty agreements. The only way forward is a renewed nation-to-nation relationship with the Indigenous peoples of this territory.

In Part I, I examine the history and parameters of the fiduciary relationship, the two ways a fiduciary duty can arise within the Crown-Indigenous relationship, and competing interpretations of the duty's potential to bring about a relationship of equality. In Part II, I contend that the imposition of fiduciary doctrine onto the Crown-Indigenous relationship has no hope *but* to fail due to the Crown's competing duties, and explore examples of the Crown breaching its duty toward Indigenous peoples. In Part III, I suggest that—in addition to these competing duties—the overarching reason the Crown cannot help but fail to act with *uberrimae fidei* to its Indigenous beneficiaries is because the Crown does not and will not understand Indigenous worldview or law, which makes it impossible to behave with the utmost fidelity toward Indigenous interests. In Part IV, I offer two solutions that would implement a nation-to-nation relationship, while arguing that whatever solution—or variety of solutions—is arrived at, self-determination must be at the heart of the arrangement.

### I. HISTORY AND PARAMETER OF THE FIDUCIARY RELATIONSHIP

#### A. *Evolution from Land Surrender to General Duty*

The fiduciary duty first arose in *Guerin*, where the Supreme Court determined that when the Musqueam Band surrendered part of its reserve to the Crown so it could be sold, the Crown—by interjecting itself between the band and a prospective purchaser—took on the role of fiduciary,

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<sup>1</sup> *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (Can.).

giving rise to a duty to act in the Musqueam’s best interests.<sup>2</sup> Subsequent jurisprudence has found various sources of the duty, including the *Royal Proclamation of 1763*,<sup>3</sup> or simply the historic relationship between the Crown and Indigenous peoples.<sup>4</sup>

There are two types of fiduciary duties between the Crown and Indigenous peoples.<sup>5</sup> A *sui generis* or unique fiduciary relationship arises when—as in *Guerin*—there is a “specific or cognizable Aboriginal interest”<sup>6</sup> coupled with an “undertaking by the Crown of discretionary control over that interest.”<sup>7</sup> An *ad hoc* fiduciary duty arises the same as it would between the Crown and any identifiable group at common law, when three conditions have been met: first, there must be an undertaking by the Crown to act in the best interests of the group; second, the group must be vulnerable to the Crown’s control; and third, it must be possible that the legal or substantial practical interests of the group could be negatively affected by the Crown’s exercise of such control.<sup>8</sup> Although there is little agreement about the scope of the duty and its application,<sup>9</sup> there is general agreement that the duty inheres in the overall relationship and is not limited to the land-surrender context.<sup>10</sup>

*Manitoba Metis Federation*, a recent case about the fiduciary duty, is a good example of the general nature of the duty and its limits. The Métis sought a declaration that the *Manitoba Act* created a fiduciary duty by promising to provide land to Métis children<sup>11</sup>—a promise that was never fulfilled. While the court declared a fiduciary *relationship* existed between the Crown and the Métis as an Indigenous people,<sup>12</sup> it concluded the *Act* did not give rise to fiduciary *obligations* because Métis control of the land was not communal and therefore did not qualify as an Aboriginal interest.<sup>13</sup>

This paper does not delve into the differences between the *ad hoc* and *sui generis* fiduciary structures as they apply to Crown-Indigenous relations: rather, it argues there is *no* appropriate application of fiduciary doctrine to Crown-Indigenous relations. The *overall* relationship between

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<sup>2</sup> Mark L Stevenson & Albert Peeling, *Probing the Parameters of Canada’s Crown-Aboriginal Fiduciary Relationship*, in *In Whom We Trust: A Forum on Fiduciary Relationships* 7, 14 (L Comm’n of Can. & the Ass’n of Iroquois and Allied Indians eds., 2002).

<sup>3</sup> *Id.* at 12.

<sup>4</sup> *R v. Sparrow*, [1990] 1 S.C.R. 1075 (Can.).

<sup>5</sup> *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)* also offers a concise explanation of the two types of fiduciary duties possible between the Crown and Indigenous peoples in Canada. See *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 44, [2018] 1 S.C.R. 83 (Can.).

<sup>6</sup> Jim Reynolds, *Aboriginal Peoples and the Law: A Critical Introduction* 73 (Purich Books ed., 2018).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 74.

<sup>9</sup> Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* 112 (University of Toronto Press ed., 1996) [hereinafter *Rotman, Parallel Paths*].

<sup>10</sup> Andrée Lajoie, *With Friends Like These ... Two Perspectives on Fiduciary Relationships*, in *In Whom We Trust: A Forum on Fiduciary Relationships* 57, 64 (L Comm’n of Can. & the Ass’n of Iroquois and Allied Indians eds., 2002).

<sup>11</sup> *Manitoba Act*, 1870, 33 Vict, c 3 s-31 (Can.).

<sup>12</sup> *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para 48, [2013] 1 S.C.R. 623 (Can.).

<sup>13</sup> *Id.* at para 56.

the Crown and Indigenous peoples must be reimagined, and a nation-to-nation approach must replace the paternalism of the fiduciary duty. To continue to insist upon any fiduciary relationship is a roadblock to this necessary course of action.

### *B. A Different Take on Fiduciary Duty*

Professor Leonard Rotman, an expert in both fiduciary and Aboriginal law, contends that conceiving of the Crown-Indigenous relationship as a fiduciary is appropriate. In essence, Rotman's position emphasizes that fiduciary relationships can take a different form than the powerful trustee-vulnerable beneficiary model associated with Crown-Indigenous relations.

Fiduciary relationships do not *require* inequality, he argues: they can occur between equals, such as in a business venture, a law firm, or even between spouses.<sup>14</sup> Through careful review of the jurisprudence, Rotman determined “there is no doctrinally sound basis for categorically identifying Crown-Aboriginal fiduciary relations as paternalistic.”<sup>15</sup> In his conception, fiduciary duties arise because the inherent powers Indigenous peoples possess as Canada's original inhabitants have been “loaned” to the Crown, which creates an obligation to “use these powers in the same manner” as their Indigenous owners.<sup>16</sup> In this sense, the fiduciary relationship “empowers” Indigenous peoples by ensuring their interests are promoted.<sup>17</sup> Rotman's conception of a fiduciary relationship between co-equals has been taken up by other scholars, who see it as a potential basis to transition to a relationship of equality.<sup>18</sup> However, the idea the Crown-Indigenous fiduciary relationship is based on an equality similar to a business relationship—or that it could evolve to be so—ignores the reality of the current situation and the history that got us here.

As the Supreme Court has determined on more than one occasion, fiduciary relationships generally arise in situations of unequal power, and the Crown-Aboriginal fiduciary is no exception.<sup>19</sup> In *Frame v. Smith*<sup>20</sup>—a case in a family law context—Justice Wilson identifies the vulnerability of one party to another as *definitional* of fiduciary relationships.<sup>21</sup> She even suggests that business relationships, if undertaken by competent actors, might *never* give rise to fiduciary duties because “such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised.”<sup>22</sup>

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<sup>14</sup> Rotman, *Parallel Paths*, *supra* note 9 at 167 - 68.

<sup>15</sup> Leonard Rotman, *Conceptualizing Crown-Aboriginal Fiduciary Relations*, in *In Whom We Trust: A Forum on Fiduciary Relationships* 25, 52 (L Comm'n of Can. & the Ass'n of Iroquois and Allied Indians eds., 2002) [hereinafter *Rotman, Crown-Aboriginal Fiduciary Relations*].

<sup>16</sup> Rotman, *Parallel Paths*, *supra* note 9 at 168 - 69.

<sup>17</sup> *Id.* at 289.

<sup>18</sup> Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* 147 (Native Law Centre, University of Saskatchewan ed., 2012).

<sup>19</sup> See *Blueberry River Indian Band v. Canada* (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at para 38, 130 DLR (4th) 193 (Can.); *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para 80, [2002] 4 S.C.R. 245 (Can.).

<sup>20</sup> *Frame v. Smith*, [1987] 2 S.C.R. 99 (Can.).

<sup>21</sup> *Id.* at para 63; see also *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 384 (Can.) (“The hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion”) (quoting Ernest Weinrib's article, “The Fiduciary Obligation”).

<sup>22</sup> *Frame v. Smith*, [1987] 2 S.C.R. 99, para 63 (Can.).

Rotman’s characterization further ignores the underpinnings of the fiduciary duty and the fact that its structure does not just reflect an unequal relationship, but reinforces it. As per *Guerin*, the fiduciary relationship stems from the fact that Aboriginal land can only be alienated to the Crown: this fact is predicated on the assumption the Crown holds underlying title to all Aboriginal lands, an assumption based on the doctrine of discovery.<sup>23</sup> This doctrine—which stemmed from a series of papal bulls in the 1400s—is the legal mechanism by which European sovereigns claimed title to lands occupied by Indigenous peoples worldwide, during the so-called “age of discovery”: through the explorers they employed, European monarchs took control of lands in order to exploit their resources, disregarding and even subjugating the sovereign nations already existent on the territory.<sup>24</sup> The justification for the doctrine was the supposed superiority of European culture, government, law, and the Christian religion, in combination with the perceived invalidity of their Indigenous counterparts.<sup>25</sup> Although questions about its morality and propriety mount, the doctrine of discovery continues to be the legal basis upon which Crown sovereignty is presumed in Canada.<sup>26</sup>

As Aaron Mills has argued, relying on the doctrine of discovery to ground Crown title cannot be accomplished—despite Supreme Court opinion to the contrary<sup>27</sup>—without recourse to the doctrine of *terra nullius*,<sup>28</sup> a racist belief that the territory was as good as empty because Indigenous peoples were not “people” of the same stature as European colonizers.<sup>29</sup> As he writes, Canada “claims radical title to all of Turtle Island, knowing full well that Indigenous peoples were already living on it as persons, peoples, and confederacies of distinct constitutional orders before settlers arrived.”<sup>30</sup> Can Canada justify this claim of radical title? Mills says no: in *Tsilhqot’in*, he writes, the Supreme Court “brazenly refuses to say how, in the absence of the belligerent racism of *terra nullius*, Canada *did* acquire a claim over Indigenous lands sufficiently powerful to dispossess Indigenous peoples of them”<sup>31</sup> [emphasis in original]. The only way to acquire such title, he argues, is to consider Indigenous peoples less “human” than their colonizers, and therefore less entitled to the territory.<sup>32</sup> Dehumanization provides a roadblock to any conception of equality within a long-unequal relationship.

Finally, unlike Rotman’s “loan” theory, Indigenous peoples did not agree to a fiduciary relationship: it was thrust upon them. Rotman may be correct that fiduciary relationships *can* take

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<sup>23</sup> Hoehn, *supra* note **Error! Unknown switch argument.**18 at 24.

<sup>24</sup> Assembly of First Nations, *Dismantling the Doctrine of Discovery*, AFN at 2 (January 2018), [afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Doctrine-of-Discovery-EN.pdf](https://afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Doctrine-of-Discovery-EN.pdf) [https://perma.cc/7UHM-R9TK].

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *William v. British Columbia*, 2012 BCCA 285 at para 166, 33 BCLR (5th) 260 (Can.).

<sup>27</sup> In 2014, the Supreme Court wrote, “The doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763.” See *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 at para 69, [2014] 2 S.C.R. 256 (Can.).

<sup>28</sup> Aaron Mills, *What Is a Treaty: On Contract and Mutual Aid, in The Right Relationship: Reimagining the Implementation of Historical Treaties* 208, 223 (John Borrows & Michael Coyle eds., 2017).

<sup>29</sup> *Id.* at 218.

<sup>30</sup> *Id.* at 222.

<sup>31</sup> *Id.* at 223.

<sup>32</sup> *Id.* at 223 N25.

forms that reflect equality between the parties, but it moves us no closer to a solution to the challenges we face to continue to cling to the “words of colonizers”<sup>33</sup> to define the Crown-Indigenous relationship when inferiority has been at the heart of the relationship for centuries.<sup>34</sup>

Part I has explored the history and parameters of the fiduciary relationship, and argued it is grounded in notions of Indigenous inferiority: this presumed inferiority underlies the need of a fiduciary to look out for the best interests of Indigenous peoples who cannot possibly look out for themselves. Part II considers ways in which, even if we were to entertain the notion that a fiduciary relationship *could* exist, the Crown’s myriad obligations ensure it will fail.

## II. A FIDUCIARY RELATIONSHIP CANNOT BUT FAIL

### A. *The Fiduciary Structure is Insufficient*

The imposition of *uberrimae fidei* on the fiduciary relationship means a fiduciary must put its beneficiary’s interests ahead of anyone else’s.<sup>35</sup> But such a situation is impossible to maintain between the Crown and a single segment of society: the Crown has competing interests, including its own, that structurally preclude it from putting Indigenous interests first.<sup>36</sup> This can best be illustrated via the alienability of land held under Aboriginal title.

Aboriginal title offers a *sui generis* form of title similar to fee simple, with two important differences: the land cannot be put to a use that robs future generations of the benefit of the land, and it is alienable only to the Crown.<sup>37</sup> The purpose of the rule against alienability is ostensibly to protect against exploitation,<sup>38</sup> but how can this situation be categorized as a fiduciary relationship? Not only are fiduciaries typically barred from buying land from their beneficiaries to avoid exploitation,<sup>39</sup> conflict of interest is inevitable when a colonizer “can decide unilaterally, at discretion, what to do with the lands of the colonized and their derived assets.”<sup>40</sup> The next section goes into additional detail about the ways in which the Crown is able to force development of Indigenous territories—even if it cannot force its beneficiaries to sell the land—but, suffice to say, it is impossible for a fiduciary to fulfill its duties in such a structural bind.

Furthermore, the Crown has duties to others within Canada.<sup>41</sup> Supreme Court jurisprudence emphasizes the “public interest” as a balance against granting further rights to Aboriginal

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<sup>33</sup> Stevenson & Peeling, *supra* note 2 at 7.

<sup>34</sup> Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R v. Sparrow*, 29:2 *Alta. L. Rev.* 498, 510 (1991).

<sup>35</sup> Leonard Rotman, *Understanding Fiduciary Duties and Relationship Fiduciarity*, 62 *McGill LJ* 975, 986 (2017).

<sup>36</sup> Gordon Christie, *Considering the Future of the Crown-Aboriginal Fiduciary Relationship*, in *In Whom We Trust: A Forum on Fiduciary Relationships* 269, 290 (L. Comm’n of Can. & the Ass’n of Iroquois and Allied Indians eds., 2002).

<sup>37</sup> *DeIlgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras 127 – 29 (Can.).

<sup>38</sup> Mark R Gillen et al., *The Law of Trusts: A Contextual Approach* 850 (Emond Publishing ed., 3rd ed. 2015).

<sup>39</sup> Rotman, *Parallel Paths*, *supra* note 9 at 269.

<sup>40</sup> Lajoie, *supra* note 10 at 71.

<sup>41</sup> According to Larissa Behrendt, it is easy to draw the conclusion that a fiduciary relationship exists between a government and the whole of the electorate. See Larissa Behrendt, *Lacking Good Faith: Australia, Fiduciary Duties*

peoples,<sup>42</sup> but how can the Crown balance the rights of others when, as a fiduciary, it has a duty to act for the *sole* benefit of its beneficiary? The simple answer is that competing interests make the Crown structurally inadequate to act as fiduciary. Additionally, the “public interest” has long been a sword used to justify infringing Indigenous interests, not a shield to protect them,<sup>43</sup> and this justification rests on racist notions that the interests of settlers are superior to those of Indigenous peoples.<sup>44</sup>

### *B. How the Crown Breaches its Duty*

As we have seen, fiduciary doctrine requires the duty-holder to place the interests of its beneficiary above all others. However, the Crown routinely allows resource extraction from Aboriginal lands without agreement of the Indigenous groups who claim these lands—a clear violation of its duty.

Richard Lehun and Richard Janda, legal scholars with expertise in fiduciary relationships both within and outside the Indigenous context, contend that this turns a fiduciary relationship into a “sham.”<sup>45</sup> They raise the Quebec government’s mid-2000s decision to allow Domtar to log land claimed by Algonquin Anishinabeg First Nations communities to illustrate the complexities of Crown duties. At the time, Domtar’s majority shareholder was the Quebec Government,<sup>46</sup> which meant that the Crown needed to balance the interests of its Indigenous beneficiary with the interests of the public who would benefit indirectly from the economic activity, as well as its own interest in benefitting directly. When the Indigenous communities refused, Quebec endorsed a process that allowed logging despite the objections as long as sufficient consultation had been undertaken: the interests of Domtar—and the interests of the Crown—were given precedence over Indigenous interests.<sup>47</sup> This, the authors contend, is what makes the fiduciary relationship a sham: if access to a resource is refused, fiduciary duty *demand*s a moratorium on harvesting.<sup>48</sup>

The duty to consult is fundamental to the justification test for infringement of Aboriginal rights and an element of the fiduciary duty,<sup>49</sup> but consultation does not amount to utmost good

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*and the Lonely Place of Indigenous Rights*, in *In Whom We Trust: A Forum on Fiduciary Relationships* 247, 251 (L. Comm’n of Can. & the Ass’n of Iroquois and Allied Indians eds., 2002).

<sup>42</sup> Brenda L. Gunn, *Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination*, 38 Dal. L.J. 237, 249 (2015).

<sup>43</sup> Kerry Wilkins has suggested that Canadian governments, provincial and federal, only address Indigenous need when there are no political consequences and utilize the justification of the “public interest” to insist on costly litigation rather than negotiation because it appeals to some constituencies who would see “an unfavourable result in court [as] less offensive than what they perceive as unnecessary government capitulation.” See Kerry Wilkins, *Reasoning with the Elephant*, 13:1 Indigenous L.J. 27, 33 N20 (2016).

<sup>44</sup> Kent McNeil, *Aboriginal Title as a Property Right*, in *Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision* 55, 64 (Owen Lippert ed., 2000).

<sup>45</sup> Richard Lehun & Richard Janda, *Transforming Sham Fiduciary Relationships: Corporate Social Responsibility and the Enabling of Aboriginal Peoples*, in *Dimensions of Indigenous Economic Autonomy* 213, 215 (Roderick A. Macdonald & Véronique Fortin eds., 2014).

<sup>46</sup> *Id.* at 226.

<sup>47</sup> *Id.* at 242.

<sup>48</sup> *Id.*

<sup>49</sup> *R v. Sparrow*, [1990] 1 S.C.R. 1075, 1119. (Can.)



faith: the consultation process typically serves as a prelude to infringement rather than an opportunity for self-determination.<sup>50</sup> This reality comes as no surprise to observers of the Canadian Crown: as Andrée Lajoie puts it, “Canada protects Aboriginal interests in so far as they merge with its own.”<sup>51</sup> The flip side is that Canada fails to protect Aboriginal interests whenever they do not merge with its own. A fiduciary cannot serve two masters, yet the Supreme Court demands it: in *Wewaykum Indian Band*, the court declared the fiduciary duty is fulfilled when the Crown balances the rights of Indigenous peoples with non-Indigenous peoples. As the court writes, “In matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest.”<sup>52</sup> But balancing is not the duty demanded of a fiduciary, rather it is the subordination of all other interests to those of the beneficiary. So how can balancing be construed as fulfillment of the duty?

A final example may be helpful: the Comprehensive Claims Process. This modern treaty process seeks to protect Indigenous rights and grant ownership over claimed territories through negotiation. It has been lauded by the Canadian government as the “best approach to advancing reconciliation” and has, so far, concluded more than two dozen agreements.<sup>53</sup> But does it fulfill the fiduciary duty?

The process includes a conflict of interest: Aboriginals must give up their inherent rights as first occupants of the territory for the rights enumerated in the agreement.<sup>54</sup> To the extent that giving up this sovereignty is not in the best interests of Indigenous peoples who prefer to exercise their inherent sovereignty, but *is* in the best interests of the state which gains certainty and the ability to infringe treaty rights by justifying its actions, these agreements *violate* the fiduciary duty by putting the interests of the fiduciary above those of the beneficiary.

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<sup>50</sup> Gurston Dacks, Commentary, IN WHOM WE TRUST: A FORUM ON FIDUCIARY RELATIONSHIPS 113, 115-16 (L. Comm’n of Can. & The Ass’n of Iroquois & Allied Indians, eds., 2002). Gordon Christie makes a similar point and takes it further, noting that the duty to consult as prelude to infringement is not only the Crown operating in bad faith but pressure—via both the Crown itself and the judiciary which justifies it—to assimilate. As he writes, “the duty to consult does not operate to merge or reconcile self-understood Aboriginal visions of land use with Crown visions. Rather, the Crown is imagined as working within and through nothing but its vision, with the duty to consult operating to potentially modify the activities that fall under this vision.” In this way, Crown interests are seen as “correct” interests, to which Aboriginal interests can be resigned via the duty to consult, or simply be replaced by Crown interests after a period of consultation deemed appropriate by the Crown and its court. Gordon Christie, *A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation*, Windsor Y.B. Access Just, 23:1, 2005, at 17, 44-45.

<sup>51</sup> Lajoie, *supra* note 10, at 77.

<sup>52</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, para. 96 (Can.).

<sup>53</sup> GOVERNMENT OF CANADA, COMPREHENSIVE CLAIMS (13 July 2015), aadnc-aandc.gc.ca/eng/1100100030577/1100100030578 [https://perma.cc/SAX8-WVFS].

<sup>54</sup> Rotman, *Parallel Paths*, *supra* note 9, at 271. It should be noted that, as of 2014, the Crown no longer insists on an extinguishment clause in comprehensive claims agreements, but the extinguishment clause has been replaced by the “certainty clause” which has the same practical effect: any rights that do remain after the comprehensive claims process are useless and may as well not exist. For additional criticism of the Canadian Government’s insistence on certainty in comprehensive claims agreements, see Bruce McIvor, *Canada’s Misguided Land Claims Policy*, in FIRST PEOPLES L.: ESSAYS ON CAN. L. AND DECOLONIZATION 141 (2014).

The fiduciary duty, especially via the duty to consult, is seen by the Supreme Court as central to the process of reconciliation.<sup>55</sup> But it bears asking how the duty can serve as a vehicle for reconciliation when it is clear the Crown cannot possibly act as fiduciary.

As imagined by the Supreme Court, the fiduciary duty is meant to protect Indigenous peoples but, far from achieving its goal, the fiduciary duty is a paternalistic construction that allows for the “unjustified usurpation of power by one party”<sup>56</sup> at the expense of another. An existing power imbalance is reinforced through the fiduciary relationship, legitimating through law the power of the Crown to exercise complete discretion over the people it has colonized.<sup>57</sup>

Part II has explored ways in which fiduciary duty is an inappropriate concept within the Crown-Indigenous relationship because the Crown cannot help but breach its duty. Part III argues that the Crown cannot protect Indigenous interests for an additional reason: it cannot *understand* Indigenous interests.

### III. A LACK OF UNDERSTANDING

It is crucial at this point to set out some parameters to avoid speaking on behalf of those I have no right to speak on behalf of and avoid pan-Indigenism: I am not an Indigenous person, so my understanding of Indigenous worldview is consequently limited. Further, because I live in shared Anishinaabe/Haudenosaunee territory—within the area covered by the Dish with One Spoon treaty—in discussing Indigenous worldview this paper is, for the most part, limited to expressions of Anishinaabe and Haudenosaunee worldviews.<sup>58</sup>

#### *A. Indigenous Worldview and its Relationship to Indigenous Law*

The Anishinaabe worldview conceives every part of the natural world as a living being with agency:<sup>59</sup> Even rocks have decisions to make about how they are to be used by those with whom

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<sup>55</sup> Rachel Ariss et al, *Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?*, McGill Int'l J. Sustainable Dev. L. & Pol'y, 13:1, 2017, at 1, 12.

<sup>56</sup> Christie, *supra* note 36, at 291.

<sup>57</sup> *Id.*

<sup>58</sup> Anishinaabe legal scholar Jeffery Hewitt has argued that a pan-Indigenous approach to Indigenous law is inappropriate and that, when learning Indigenous law, students and law schools should focus on the laws of the nations upon whose territories they reside. See Jeffery G Hewitt, *Decolonizing and Indigenizing: Some Considerations for Law Schools*, Windsor Y.B. Access Just, 33, 2016, at 65, 81.

<sup>59</sup> Although this section focuses on Anishinaabe legal traditions and worldviews, the Haudenosaunee see the natural world in a similar way: as interconnected reciprocal obligations amongst living beings with agency. See, Brenda E. LaFrance & James E. Costello, *The Haudenosaunee Environmental Protection Process (HEPP): Reinforcing the Three Principles of Goodmindedness, Peacefulness, and Strength to Protect the Natural World* in Christine Sternberg Patrick, ed, PRESERVING TRADITION AND UNDERSTANDING THE PAST: PAPERS FROM THE CONFERENCE ON IROQUOIS RESEARCH, 2001–2005 61, 62-63 (Christine Sternberg Patrick ed., 2010), available at [nysm.nysed.gov/common/nysm/files/nysmrecord-vol1\\_0.pdf](https://nysm.nysed.gov/common/nysm/files/nysmrecord-vol1_0.pdf) [<https://perma.cc/HPP2-8HAS>]. In addition, other Indigenous nations regard the world along similar lines, including the Cree, See HADLEY FRIELAND, CREE LEGAL TRADITIONS REPORT (Jessica Asch et al. eds., 2012), available at [indigenousbar.ca/indigenouslaw/wp-content/uploads/2017/10/cree\\_legal\\_summary.pdf](https://indigenousbar.ca/indigenouslaw/wp-content/uploads/2017/10/cree_legal_summary.pdf) [<https://perma.cc/58BJ-QYCT>]; the Tsilhqot'in, see Val Napoleon, *Tsilhqot'in Law of Consent*, U. BRITISH COLUMBIA L. Rev., 48:3, 2015, at 873, 883 n. 36; the Métis, see Jennifer Adese, *Spirit gifting: Ecological knowing in Métis life narratives*, DECOLONIZATION: INDIGENEITY, EDUCATION & SOCIETY, 3:3, 2014, at 48, 53-53; and others.

they share the planet.<sup>60</sup> Furthermore, it is an important aspect of Anishinaabe constitutionalism that humans and the other natural aspects of Earth—the animals, plants, even the rocks—have reciprocal obligations to serve, sustain, and protect each other.<sup>61</sup> This raises a real question as to whether a fiduciary duty—between anyone, not simply between the Crown and Aboriginal peoples—is even possible within such a constitutionalism. If even rocks have the responsibility to make decisions about how they are utilized, how could anyone have the ability—let alone the right—to make decisions on their behalf? Such agency of the Earth and the “things” within it is impossible to reconcile with the Western ideal of ownership.<sup>62</sup> As the Canadian Crown exists within a Western, liberal framework, the inability to reconcile these competing values makes the Crown a poor fiduciary indeed, because it cannot possibly determine the interests it is meant to be giving the utmost fidelity to.

Similarly, the Crown and Indigenous peoples have differing conceptions of the importance of land and its place within a cultural worldview. Whereas from the perspective of the Crown, the Earth is an exploitable economic resource, to Indigenous peoples—or, at least the Anishinaabe—the Earth is sacred, “a sentient being that helps to generate life.”<sup>63</sup> Further, land cannot be ‘owned’ in the same sense under Anishinabek law as it can under settlers’ common law. While the idea of holding land in trust for future generations exists in Anishinabek law, this trusteeship is not to be considered the equivalent of a common law trust as it is bound up in the web of reciprocal obligations described above: humans have obligations to the land and the agency-exercising beings upon it, in turn, these beings hold reciprocal obligations to humans and to each other, and fulfilling these obligations ensures the survival of all.<sup>64</sup>

Finally, treaty agreements prove difficult for reconciling Indigenous worldviews with a Western one. Whereas the Supreme Court interprets treaties through a contract lens,<sup>65</sup> the Anishinaabe see treaties not as unalterable legal instruments but as “frameworks for right relationships,” subject to renewal in the same way relationships are.<sup>66</sup> As Mills explains, Anishinaabe worldview holds that “[Y]ou can’t sell what you belong to, you can only share it.”<sup>67</sup> Anishinaabe legal values don’t strive for justice, he says, but harmony in the way people relate to each other and the world around them.<sup>68</sup>

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<sup>60</sup> John Borrows, *Canada’s Indigenous Constitution*, 245 (University of Toronto Press, 2010).

<sup>61</sup> *Ibid* at 246.

<sup>62</sup> See MARY JANE MOSSMAN & PHILIP GIRARD, *PROPERTY LAW: CASES AND COMMENTARY* 1-4 (2014), for a brief discussion of the history and parameters of Western notions of ownership and a comparison to other culture’s conceptions of property.

<sup>63</sup> Borrows, *supra* note 60 at 242.

<sup>64</sup> *Id.* at 246.

<sup>65</sup> For an in-depth history of the judicial tensions between contractual interpretation and *sui generis* interpretations of historical treaties in Canadian jurisprudence, see Janna Promislow, *Treaties in History and Law*, U. BRITISH COLUMBIA L. Rev. 47:3, 2014, at 1085.

<sup>66</sup> Mills, *supra* note 28, at 225.

<sup>67</sup> Here, Mills is quoting Anishinaabe Elder Fred Kelly, *Id.* at 209.

<sup>68</sup> *Id.* at 236.

When the Crown forces liberal values onto Indigenous peoples through fiduciary doctrine or through forcing them to make their claims cognizable to the justice system,<sup>69</sup> it substitutes its own values for those of its supposed beneficiaries.<sup>70</sup>

Borrows uses a hypothetical mining project to explain how these values can be at odds. Imagine a proposed mine on Indigenous land, which offers half the profits to the First Nation and fully employs the entire community at incredible earnings but leaves environmental degradation in its wake. While a Western worldview weighs these interests and comes down on the side of economic benefit as if by rote, an Anishinaabe worldview sees the environmental degradation as too great a loss and would not see the economic benefit as a “pressing and substantial objective” as dictated by the test for infringement.<sup>71</sup> In this way, the Crown worldview is irreconcilable with the Indigenous worldview, and the Crown is an ineffective fiduciary for Indigenous peoples.

However, it was not always this way: the next section explores examples of the Crown—especially the Imperial Crown—adopting and adapting to Indigenous worldviews and laws to reach mutually-beneficial agreements to share the land in ways that reflect the sovereignty of each group.

### *B. Canada Can Understand Indigenous Perspectives*

The *Treaty of Niagara 1764* has been held up as an agreement predicated on an Indigenous worldview and legal system.<sup>72</sup> The agreement between the Crown and 2000 chiefs was undertaken via Indigenous methods of diplomacy<sup>73</sup> and ultimately solemnized via wampum belts,<sup>74</sup> an Indigenous medium of international communication well-understood by the Imperial Crown.<sup>75</sup>

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<sup>69</sup> *R v. Van der Peet*, [1996] 2 SCR 507 at para 49, 137 DLR (4th) 289. In *Van der Peet*, Chief Justice Lamer wrote for the court that “The definition of an [A]boriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by [A]boriginal peoples with the assertion of Crown sovereignty over that territory, take into account the [A]boriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.”

<sup>70</sup> Mills, *supra* note 28, at 221.

<sup>71</sup> John Borrows, *Canada’s Colonial Constitution*, in *THE RIGHT RELATIONSHIP: REIMAGINING THE IMPLEMENTATION OF HISTORICAL TREATIES* 17, 34-35 (John Borrows & Michael Coyle, eds., 2017). The test for infringement to which Borrows refers is the *Oakes* test, the test for infringement of any *Charter* right (*R v Oakes*, [1986] 1 S.C.R. 103: although this test is arguably a higher standard than the test for infringement of an *Aboriginal* right in *Sparrow*, the *Sparrow* test still demands a “valid legislative objective” that is in accord with the “honour of the Crown.” *R v. Sparrow*, [1990] 1 S.C.R. 1075 at 1079 (Can.).

<sup>72</sup> Mills, *supra* note 28, at 238.

<sup>73</sup> Leonard Rotman, *Conceptualizing Crown-Aboriginal Fiduciary Relations*, in *IN WHOM WE TRUST: A FORUM ON FIDUCIARY RELATIONSHIPS* 25, 32 (L Comm’n of Can. & the Ass’n of Iroquois and Allied Indians eds., 2002) [hereinafter Rotman, *Crown-Aboriginal Fiduciary Relations*].

<sup>74</sup> Wampum are tubular white and purple beads made from shells, used for currency, ornamentation, ceremonial, and diplomatic purposes. When strung into a belt, the design of the differently colored shells often symbolize the content of a diplomatic agreement between nations. Wampum belts were used to make treaty between Indigenous nations prior to European arrival and adopted by the newcomers as a means of communication and assent to treaty. See René R Gadacz, *Wampum*, *THE CANADIAN ENCYCLOPEDIA* (7 Feb, 2006), [thecanadianencyclopedia.ca/en/article/wampum](https://perma.cc/V3F2-STJP) [https://perma.cc/V3F2-STJP].

<sup>75</sup> Darlene M Johnston, *The Quest of the Six Nations Confederacy for Self-Determination*, 44 U. TORONTO FAC. L. REV. 1, 9 (1986).

The two wampum belts that emerged from the agreement define both sides' understanding of the treaty: the *Covenant Chain* belt and the *Twenty-Four Nations* belt. The *Covenant Chain* depicts two human figures holding hands, each with a differently-beaded heart to depict the alliance between two peoples who come together yet remain distinct.<sup>76</sup> The *Twenty-Four Nations Belt* represents a commitment by each group, Indigenous and European, to provide gifts that meet the needs of the other<sup>77</sup>—a worldview unknown to the British prior to contact. However, by the time the treaty was concluded, the British were well-versed in the language of wampum and the worldview of the Indigenous peoples with which it sought treaty.<sup>78</sup> The reason the Imperial Crown had a thorough understanding of wampum belts in 1764 is that it had utilized them for over a century. Darlene Johnston raises the *Two-Row Wampum* treaty between the British and the Haudenosaunee, which predates the *Treaty at Niagara 1764*. The wampum consists of two parallel violet lines on a white field, and represents the Haudenosaunee understanding of the relationship between themselves and the incoming Europeans: while they will coexist in the same place and share gifts, the relationship involves respecting the autonomy of the other and not interfering.<sup>79</sup> The Haudenosaunee have abided by the agreement for over 300 years, even as the Crown has not.<sup>80</sup>

### C. Canada Chooses to Dismiss Indigenous Perspectives

The process of Confederation is a major turning point in Crown-Indigenous relations. The Province of Canada—created in 1841 through the merger of Upper and Lower Canada—took responsibility for Indigenous affairs in 1860.<sup>81</sup> The approach of the colony was more interventionist than the Imperial Crown's and, by Confederation in 1867, "a pattern of colonial government intrusions into the internal affairs of the Indian nations, followed by indignant protests, began to emerge."<sup>82</sup>

The newly minted federal government understood what it was doing. Canada's first prime minister, John A. Macdonald, denied Indigenous sovereignty—despite its affirmation being the practice of his Crown forebears for 200 years—for the sake of expediency rather than justice.<sup>83</sup> Sovereign nations within the territory Johnston desired might get in the way of his plans for nation-building, so he simply ignored their sovereignty as he welcomed new provinces into confederation, relegated Indigenous nations to paltry reserves, and built a transcontinental railroad across Indigenous land.

One reason for the change stems from the decreased importance of Indigenous groups to the imperial goals of England, and later, Canada. As it became possible to defend Canada without

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<sup>76</sup> Mills, *supra* note 28, at 238.

<sup>77</sup> *Id.* at 239.

<sup>78</sup> Johnston, *supra* note 75, at 9.

<sup>79</sup> *Id.* at 11.

<sup>80</sup> *Id.*

<sup>81</sup> Act of Union 1840, 3 & 4 Victoria c. 35 (UK).

<sup>82</sup> Johnston, *supra* note 75, at 15.

<sup>83</sup> *Id.* at 17-18.

Indigenous military allies, respect for Indigenous perspectives, protocols, and laws were relegated to memory.<sup>84</sup>

Ignoring Indigenous perspectives is not a problem that exists solely in memory, however: our contemporary courts consistently acknowledge a different perspective exists, pay it lip service, then dismiss it as inapplicable to the instant case.<sup>85</sup> Lajoie writes about cases like *Horseman* where the court confirms a fiduciary duty then denies it has been violated. She also writes about the court determining that Aboriginal title is a legal right but reducing its content to the point of uselessness in *Delgamuukw*; she writes that freezing rights in time under the *Sparrow* test is the Crown “taking back with the left hand what it had not yet finished giving with the right.”<sup>86</sup>

None of this treatment could be construed as fulfilling the fiduciary duty as none of it puts the interests of Indigenous peoples above those of the Crown. Part IV explores potential solutions to the quagmire of the fiduciary relationship.

#### IV. SOLUTIONS

In Part IV, I focus on two potential solutions to the problems inherent in a fiduciary approach to the Crown-Indigenous relationship: the separate sovereignty approach of the Haudenosaunee Confederacy and the concept of shared sovereignty as posited by a variety of Indigenous legal scholars. I will also consider whether the lack of respect for Indigenous sovereignty has progressed so far that it is no longer a viable option. Prior to this, however, I argue self-determination must be at the heart of any solution.

##### A. *Self-Determination is Paramount*

Reconciliation is the goal of Indigenous jurisprudence, from section 35 rights to Aboriginal title to the fiduciary duty.<sup>87</sup> But, as Professor Brenda Gunn explains, reconciliation is impossible without a “new approach that allows Indigenous peoples to determine their own futures.”<sup>88</sup> It should be clear by this point in the paper that self-determination is impossible so long as a fiduciary has the power to make decisions on behalf of Indigenous peoples.

Indigenous leaders have long insisted on making their own decisions. Following the English conquest of New France in 1760, France’s Indigenous allies insisted the French capitulation did not extend to them: “Although you have conquered the French you have not yet conquered us,” Ojibway Chief Minavavana explained in 1761.<sup>89</sup> This protest is part of a common thread stretching from Chief Minavavana’s time, through to the Haudenosaunee’s centuries-long protest against Canadian rule,<sup>90</sup> to modern protest movements such as Idle No More. Indigenous peoples

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<sup>84</sup> *Id.* at 14.

<sup>85</sup> Lajoie, *supra* note 10, at 73.

<sup>86</sup> *Id.*

<sup>87</sup> Constitution Act, 1982, s 35, *being* Schedule B to the Canada Act, 1982, c 11 (UK). *See also R v. Sparrow*, (1990) 1 S.C.R. 1075 at 1107 (Can.).

<sup>88</sup> Gunn, *supra* note 42, at 251.

<sup>89</sup> ROTMAN, *Parallel Paths*, *supra* note 9, at 37.

<sup>90</sup> *See* Johnston, *supra* note 75 (explaining the complete history of this struggle).

have been clear: they want self-determination. Further, Indigenous peoples around the world struggle to achieve self-determination—the principle is so important it is enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), in Article Three.<sup>91</sup> The next section goes into greater detail about the declaration.

What does self-determination mean? Darlene Johnston calls it freedom from alien rule.<sup>92</sup> Gunn explains it as the choice of a way of life and notes that the question of self-determination is about more than a particular end result but about process and political legitimacy, choice and participation.<sup>93</sup> The assessment of potential solutions in this paper is offered in this spirit.

### *B. UNDRIP Provides Support for the Notion of Self-Determination*

First adopted by the General Assembly in 2007, Canada acceded to the UNDRIP in 2016 under a Liberal government, after nearly a decade of opposition by the former Conservative government.<sup>94</sup> Initially, there was cautious optimism amongst Indigenous academics and organizers,<sup>95</sup> but years after signaling a commitment to ratify UNDRIP and implement it into domestic law, the government has failed to do so.

Nevertheless, the existence of the declaration, and the government’s professed willingness to implement it, means UNDRIP is worth considering in any discussion regarding self-determination and the Crown-Indigenous relationship in Canada. This section focuses on three related articles from the declaration: Article Three, which reads, “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development,”<sup>96</sup>; Article Nineteen, which states, “States shall consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them,”<sup>97</sup> and; Article Thirty-Two, which states that not only do Indigenous peoples have the right to determine their own priorities for their lands and resources, but directs states to “consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands

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<sup>91</sup> GA Res 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter Declaration].

<sup>92</sup> Johnston, *supra* note 75, at 2.

<sup>93</sup> Gunn, *supra* note 42, at 251–52.

<sup>94</sup> Joshua Nichols, *UNDRIP and the Move to the Nation-to-Nation Relationship*, in BRAIDING LEGAL ORDERS: IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 145, 145 (John Borrows et al. eds., 2019).

<sup>95</sup> Jeffery Hewitt has pointed to the dissonance between the government’s May 2016 endorsement of UNDRIP and its November 2016 approval of the Trans-Mountain Pipeline expansion project, which will expand the capacity of an oil pipeline that runs through Indigenous territory—despite Indigenous protest, asking, “[i]s this a sea change in the relationship between Canada and Indigenous peoples or simply a dressing up of Conservative aspirations in a Liberal constitutional robe?” Jeffery G Hewitt, *Options for Implementing UNDRIP without Creating Another Empty Box*, in BRAIDING LEGAL ORDERS: IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 153, 153-154 (John Borrows et al. eds., 2019).

<sup>96</sup> Declaration, *supra* note 91, art. 3.

<sup>97</sup> *Id.* at art 19.

or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”<sup>98</sup>

There is an obvious tension between Canada’s jurisprudential insistence on the duty to consult and the free, prior, and informed consent demanded by UNDRIP. Whereas free, prior, and informed consent recognizes a right to self-determination—in fact, Sarah Morales has suggested that self-determination is the “central guiding principle of UNDRIP”<sup>99</sup>—the duty to consult does not. Instead, the duty reinforces the existing power imbalance between the Crown and Indigenous peoples because the Supreme Court has determined that the duty to consult is not a duty to agree.<sup>100</sup> Thus, “the Crown could proceed [with development of Indigenous lands], even in the absence of an agreement, if it so chose.”<sup>101</sup> Further, because it insists on self-determination, UNDRIP precludes the imposition of a fiduciary duty: how can the Crown act on behalf of Indigenous peoples—even with *uberrimae fidei*—if the Crown must seek consent through UNDRIP prior to proceeding? Not only is a duty to consult impossible within the context of an implemented UNDRIP, the fiduciary duty is as well.

The next section considers an argument that the Canadian-Indigenous relationship is already too far gone to implement a nation-to-nation approach.

### *C. Are We Too Far Gone?*

In *Citizens Plus*, scholar Alan Cairns rejects a nation-to-nation paradigm for one of shared citizenship between Indigenous peoples and Canadians that respects the differences between them. Primarily, Cairns is concerned about the effect of Indigenous nationhood on national unity and claims a nation-to-nation relationship would have a distancing effect,<sup>102</sup> which must be reduced for each group to thrive.<sup>103</sup>

There are two deficiencies in this approach: the first is that this approach ignores the specter of assimilation; the second is that it does not respect the wishes of Indigenous peoples, nor the agreements made between the Crown and Indigenous peoples.

Assimilation was the ultimate goal of Canada’s Indigenous policies since at least the time of Confederation,<sup>104</sup> and it is difficult to imagine how Cairns’s conception of shared citizenship could be achieved without a significant measure of assimilation: settlers vastly outnumber Indigenous peoples within Canada, settler culture is dominant, and any shared citizenship is likely to manifest much closer to citizenship as imagined by the Crown than by Indigenous nations. As such, shared

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<sup>98</sup> *Id.* at art 32.

<sup>99</sup> Sarah Morales, *Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult*, in BRAIDING LEGAL ORDERS: IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 65, 71 (John Borrows et al. eds., 2019).

<sup>100</sup> *Haida Nation v. British Columbia* (Minister of Forests), (2004) 3 S.C.R. 511, para. 49 (Can.).

<sup>101</sup> Morales, *supra* note 99, at 69.

<sup>102</sup> ALAN C. CAIRNS, *CITIZENS PLUS: ABORIGINAL PEOPLES AND THE CANADIAN STATE* 93 (2000).

<sup>103</sup> *Id.* at 96 – 97.

<sup>104</sup> TRUTH & RECONCILIATION COMM’N OF CANADA, *CANADA’S RESIDENTIAL SCHOOLS: THE HISTORY, PART 1 ORIGINS TO 1939* 58 (2015).



citizenship is hardly different from the idea of cultural genocide, as the concept is defined by the Truth and Reconciliation Commission of Canada.<sup>105</sup>

Further, Cairns's argument disregards the contentious history of citizenship amongst Indigenous peoples within Canada. Until 1960, registered Indians could not even become full-fledged citizens of Canada without giving up their Indigenous identities, in a process known as "enfranchisement."<sup>106</sup> The process, which delivered the right to vote in federal elections, came at a cost: newly-enfranchised persons were required to give up their registered Indian status and the rights that came with it, such as living on reserve and sharing in community resources. Enfranchisement was used by the government to encourage assimilation of Indigenous persons,<sup>107</sup> even if most individuals were against the idea of renouncing their "personal and group identity by assimilating into non-Aboriginal society."<sup>108</sup> Enfranchisement was morally wrong, and policies that ignore a similar specter of assimilation should be regarded with extreme suspicion.

Finally, treaties such as the *Two-Row Wampum*, the *Covenant Chain*, the peace and friendship treaties, and even—according to Indigenous perspective—the numbered treaties of the West, amount to agreements to *share* sovereignty without giving control to the other party.<sup>109</sup> In other words, citizenship was to remain distinct even as the territory was shared. These agreements were solemn promises and no solution that disregards their intent can be countenanced.

But Cairns continues: Indigenous societies have been too "penetrated by external forces" for sovereignty to re-emerge.<sup>110</sup> They are too interdependent with settler society to regain a measure of independence.<sup>111</sup> This argument is unpersuasive because it ignores the reality that identity is multi-faceted: a person can be both Indigenous and Canadian,<sup>112</sup> and Indigenous groups should be given the opportunity to determine to what extent their sovereignty extends—that is the heart of self-determination. Furthermore, Canada and the USA are interdependent nations with a trading relationship and shared history, yet Cairns does not argue Canada ought to be governed by Washington. As Part IV has argued, a solution that disregards self-determination is no solution at all.

In the next sections, this article assesses two modes of self-determination: separate sovereignty and shared sovereignty.

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<sup>105</sup> *Id.* at 4.

<sup>106</sup> Kiera L Ladner & Michael McCrossan, *The Electoral Participation of Aboriginal People* 11 (Elections Can., Working Paper Series on Electoral Participation and Outreach Practices, 2007), available at [epe.lac-bac.gc.ca/100/200/301/elections\\_can/electoral\\_participation\\_aboriginal\\_people-e/SE3-69-2007E.pdf](https://epe.lac-bac.gc.ca/100/200/301/elections_can/electoral_participation_aboriginal_people-e/SE3-69-2007E.pdf) [<https://perma.cc/4VCJ-XF39>].

<sup>107</sup> ROYAL COMMISSION ON ABORIGINAL PEOPLES, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES VOLUME 1 - LOOKING FORWARD, LOOKING BACK 271 (1996).

<sup>108</sup> *Id.* at 287.

<sup>109</sup> *Id.* at 159 – 60; See also Karen Drake, *The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law*, 11 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 183, 207-09 (2015) (discussing promises made by treaty commissioners and the expectations those promises engendered in Indigenous signatories during the negotiation of Treaty Nine).

<sup>110</sup> CAIRNS, *supra* note 102, at 100.

<sup>111</sup> *Id.* at 101.

<sup>112</sup> See Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1359 (1993).

#### D. Separate Sovereignty: Haudenosaunee-Style Independence

The Haudenosaunee Confederacy has insisted, for over 300 years, that its members are not Canadian citizens, but sovereign peoples who have agreed to share territory with Canada.<sup>113</sup> They are not a nation-within-a-nation as Indigenous peoples are sometimes characterized, but a separate nation in an international community.<sup>114</sup> This view is reflected in the *Two-Row Wampum*.<sup>115</sup>

Haudenosaunee demands include at a minimum, the ability to set up their own political institutions; the absence of external domination; and the freedom to pursue economic, social, and cultural development.<sup>116</sup> These demands, rather than the imposition of a fundamentally flawed fiduciary duty, mark the level of self-determination acceptable to the confederacy.

Although the Canadian government has imposed various band councils on the Haudenosaunee in line with the *Indian Act*,<sup>117</sup> the confederacy has maintained its own political institutions, which function as a bicameral legislature.<sup>118</sup> This puts the Haudenosaunee in a unique position amongst Indigenous groups: the assimilative policies of the Canadian government have robbed some Indigenous nations of the capacity to govern, but not the Haudenosaunee. The Confederacy is the “oldest, participatory democracy on Earth,”<sup>119</sup> and fit to govern itself—in fact, it has never stopped doing so. Scholars have pointed to the renewal of the sovereignty-respecting, nation-to-nation treaty agreements of the past as a way forward,<sup>120</sup> and the Haudenosaunee are no different: what they seek is separate sovereignty, as characterized by the *Two-Row Wampum*.

#### E. Shared Sovereignty: Cooperation and Interdependence

As discussed previously, Aaron Mills’s interpretation of the *Covenant Chain* outlines an Anishinaabe vision of *shared* sovereignty, but an anecdote may help illuminate his idea further. Mills quotes Gary Potts, former chief of the Teme-Augama Anishnabai who, upon coming across a fallen tree, was surprised to see birch and black spruce growing out of the decayed roots of a fallen tree.<sup>121</sup> The trees shared the same ground and nutrients: they were affected by the same winds, rains, snow, and sunshine. As time went on their roots might comingle, strengthening the

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<sup>113</sup> See Johnston, *supra* note 75, at 2.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 11.

<sup>116</sup> *Id.* at 29 – 30.

<sup>117</sup> The creation and existence of band councils is dictated by the Indian Act. Band councils function akin to a city council level of government, not at the level of national government demanded by the Haudenosaunee. Indian Act, R.S.C. 1985, c I-5, s 74 (Can.).

<sup>118</sup> Johnston, *supra* note 75, at 8.

<sup>119</sup> *Who We Are*, HAUDENOSAUNEE CONFEDERACY (Nov. 14, 2018), <https://www.haudenosauneeconfederacy.com/who-we-are/> [<https://perma.cc/F7HX-88L2/>].

<sup>120</sup> See Gunn, *supra* note 42, at 253; see also Patricia Monture-Angus, *The Experience of Fiduciary Relationships: Canada’s First Nations and the Crown*, in IN WHOM WE TRUST: A FORUM ON FIDUCIARY RELATIONSHIPS 151, 178-82 (2002).

<sup>121</sup> Mills, *supra* note 28, at 231.

hold each tree has on the ground. But throughout all this, the trees remain separate. That relationship between the trees, to Mills, is analogous to the theory of shared sovereignty.

Gordon Christie, a law professor of Inupiat/Inuvialuit ancestry and a specialist in Indigenous law, uses the metaphor of a braid to describe a shared sovereignty approach within the context of implementing UNDRIP. The declaration could be used to bring together Canadian law, local Indigenous laws, and international law to create shared jurisdiction over a territory; a jurisdiction that contains three separate strands that are braided together as a whole.<sup>122</sup> This suggestion means that to meaningfully implement UNDRIP—and to meaningfully share sovereignty—space must be made for Indigenous legal traditions.<sup>123</sup> As this paper argues, Indigenous legal traditions and worldview *further* preclude the imposition of a fiduciary relationship between the state and Indigenous peoples: the Crown must adopt a nation-to-nation, power-sharing approach to implement the declaration, otherwise true implementation remains impossible.<sup>124</sup>

An important aspect of shared sovereignty is the renunciation of unilateral Crown sovereignty: the imposition of power by one group over another is not compatible with the idea of co-existence.<sup>125</sup> Thus, the fiduciary relationship is not compatible with shared sovereignty because, despite Rotman’s protestations, the fiduciary relationship has always been the imposition of power by the Crown over Indigenous peoples. Furthermore, fiduciary language does not reflect a relationship of sharing.

Early interactions between settlers and Indigenous peoples were characterized by mutuality and reciprocity.<sup>126</sup> A renewal of that relationship, Mills writes, will necessitate a return by the Crown to participating in Indigenous protocols and Indigenous understandings of prior agreements: we are creating shared sovereignty, a shared community, but we must respect the “ways of being, knowing and conceptions of the value of the peoples who were already here, already constituted as political communities.”<sup>127</sup>

This is not a process that can be negotiated, implemented, and never considered again. Indigenous legal traditions dictate that treaties—which is what sovereignty-sharing agreements would be—are not contracts: they are frameworks for right relationships that necessitate that “we orient ourselves and reorient ourselves through time, to live well together.”<sup>128</sup> As the *Report of the Royal Commission on Aboriginal Peoples* observed, shared sovereignty is already a reality in Canada: it is the mechanism by which provinces retain inherent powers while joined together in a federal union.<sup>129</sup> A third order of government would complicate Canada’s governance but, unlike John A. Macdonald, we need not trade justice for expediency: it is not too late to do the right thing.

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<sup>122</sup> Gordon Christie, *Indigenous Legal Orders, Canadian Law and UNDRIP*, in BRAIDING LEGAL ORDERS: IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 47, 47-48 (2019).

<sup>123</sup> Morales, *supra* note 99, at 78; *see also* Declaration, *supra* note 91, art. 18-19.

<sup>124</sup> *Id.* at 53.

<sup>125</sup> HOEHN, *supra* note 18, at 148.

<sup>126</sup> Rotman, *supra* note 15, at 30.

<sup>127</sup> Mills, *supra* note 28, at 225.

<sup>128</sup> *Id.*

<sup>129</sup> ROYAL COMMISSION ON ABORIGINAL PEOPLES, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES VOLUME 2 - RESTRUCTURING THE RELATIONSHIP 240 – 41 (1996).

Part IV of this article has argued that Indigenous self-determination must be paramount in any Crown-Indigenous relationship going forward. It considered and dismissed the notion that an agreement to share or separate sovereignty is a practical impossibility and explored two potential paradigms for moving the Crown-Indigenous relationship beyond the fiduciary duty. One thing it has not done is to determine the best course of action: as a non-Indigenous person, it would be inappropriate for me to dictate how Indigenous peoples should feel about their relationship to the Crown. However, while I have refrained from determining *which* nation-to-nation approach is appropriate, I have argued that *only* such an approach can embody the paramountcy of self-determination, and the obligations the Crown owes to the Indigenous peoples of this territory as reflected in treaty agreements. The Crown must honor the agreements it has made and behave as if it is bound by them.

## V. CONCLUSION

This article has argued that the concept of a fiduciary is an inappropriate way to conceive of the Crown-Indigenous relationship because it is incompatible with the Crown's myriad other obligations, with Crown-Indigenous treaty agreements, and with Indigenous worldview. It further argued that the best way to progress beyond this inappropriate relationship is through the renewal of a nation-to-nation approach. It has not taken a position on which nation-to-nation approach is better: such a determination would be inappropriate for a non-Indigenous person, and the most likely outcome is a variety of sovereignty-respecting arrangements negotiated with individual Indigenous nations. Further, as Aaron Mills argued, these arrangements ought not be thought of as permanent in the sense they cannot change—they are permanent in the sense they do not cease to exist, but renewable and subject to evolution based on changing realities.

The relationship between Indigenous peoples and settlers has long been contentious, but perhaps now is the best time to strive toward deeper respect. Movements like Idle No More, the final report of the Truth and Reconciliation Commission, the federal government's recent endorsement of UNDRIP, and a long and continuing history of scholarship have put the question of the Crown-Indigenous relationship into the zeitgeist. Canadians, Indigenous or not, and Indigenous peoples, whether or not they consider themselves Canadian, have been talking about the importance of reconciliation for a long time—it is time to take the next step in repairing our relationship.