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by Alison Aho

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EQUITABLE COMPENSATION AS A TOOL FOR RECONCILIATION: REMEDYING BREACH OF FIDUCIARY DUTY FOR INDIGENOUS PEOPLES

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I ABSTRACT

The doctrine of equitable compensation is often used to remunerate First Nations in claims of breach of fiduciary duty. While this has been the practice for years, the doctrine of equitable compensation remains unclear in its application to Aboriginal law, and lacks certainty as a tool to determine quantum of damages. As such, and given the Western liberalist context of the Canadian justice system, this article asks the following question: Can equitable compensation truly serve as a vehicle for remedying breach of fiduciary duty to Indigenous peoples? By critically analyzing the relevant case law around breach of fiduciary duty owed to First Nations, and identifying gaps in applying Indigenous legal concepts to Western legal practices, this article determines that equitable compensation is an inadequate tool to remunerate First Nations for their loss. This article also offers possible solutions to supplement the current legal system to incorporate Indigenous legal principles until full Indigenous self-governance is a reality.

II INTRODUCTION

Canada's relationship with Indigenous peoples[1] is historically strained. This is a result of Canada's colonialist past, residual systemic racism, and intergenerational trauma.[2] However, since the implementation of the *Constitution Act, 1982*, Canadian law has moved toward recognizing the rights of Indigenous peoples as distinct from the rights of non-Indigenous peoples. Significantly, the *Constitution Act, 1982* includes section 35, which promises, "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[3] Over the years following its implementation, this language has been interpreted to mean that the Crown has special and unique responsibilities in its relationship with Indigenous peoples, including a fiduciary duty.[4]

In the First Nations context, a fiduciary duty will arise when the Canadian government holds discretionary control over a specific Aboriginal interest.[5] Where a court finds that the Crown has breached its fiduciary duty toward a First Nation, oftentimes the remedy is a monetary amount, decided using the doctrine of equitable compensation. The doctrine of equitable compensation is meant to put the injured party in the position they would have been in had it not been for the breach.[6] In this way, a First Nation is theoretically remunerated for what the government had deprived.

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1. Note: This article uses the terms "Aboriginal," "First Nation," and "Indigenous" in distinct ways. "Aboriginal" is used specifically in the context of Aboriginal law, the area of law determining Canada's relationship with Indigenous peoples. "Indigenous" is used generally to refer to Canada's First Nation, Métis, and Inuit peoples. "First Nation" is used to loosely describe Indigenous peoples who do not identify as Inuit or Métis, as a means of narrowing down the scope of this article.

2. *R v Ipeelee*, 2012 SCC 13 at para 60 [*Ipeelee*].

3. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1) [*Constitution Act, 1982*].

4. *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at paras 46–59 [*Manitoba Métis Federation*].

5. *Ibid* at para 49.

6. *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744 at para 48 [*Whitefish Lake Band of Indians*].

As the doctrine of equitable compensation has developed in the context of First Nations, the following question must be asked: How "equitable" is it, truly? Equitable compensation exists within a Western liberalist legal system.[7] As a result, it is subject to all the flaws of adversarial justice, including lengthy litigation or negotiation processes, where a First Nation has to fight for what they are owed. This litigation also lacks the influence of Indigenous law and legal history as a tool for reconciliation.[8] Compensation for breach of fiduciary duty and reconciliation are inalienable, yet the Canadian legal system has failed in effectively marrying compensatory tools to reconciliatory goals. Using the theoretical framework of Indigenous legal theory (to be defined below), this article asks the following question: Can equitable compensation truly serve as a vehicle for remedying breach of fiduciary duty to Indigenous peoples?

This question will be answered using a qualitative methodology; that is, "the subjective dimension of knowledge creation, dissemination, and utilization."[9] In doing so, this article engages in an exploratory study of the existing research around equitable compensation and fiduciary duty in the context of First Nations, as well as a deeper discussion and critique of the relevant jurisprudence using a "case analysis" method.[10] As part of this methodology, a critical analysis of the law as it stands through the theoretical framework of Indigenous legal theory will be conducted.

This article starts by engaging in a short literature review of the theoretical framework, Indigenous legal theory. A review of the principles of fiduciary duty in treaty cases will be followed by an examination of the development of the law of equitable compensation in the First Nations context.[11] An analysis of the foregoing evidence will assess whether equitable compensation can ever remedy a breach of fiduciary duty where the claimant is Indigenous and propose possible changes to the system emphasizing Indigenous legal practices.

III INDIGENOUS LEGAL THEORY: LITERATURE REVIEW

This article uses the theoretical lens of Indigenous legal theory (ILT) to analyze equitable compensation as a means of assessing damages to First Nations plaintiffs. There is a distinct gap in the existing research in applying the theoretical framework of ILT to the context of fiduciary duty litigation. Of course, this area of the law has deep implications on the lives of Indigenous peoples. Respect and recognition of Indigenous perspectives is essential to achieving

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7. Canada is a "liberal democracy." As a part of Canadian law, equitable compensation is inherently influenced by Western legal principles. "Concepts of rights, freedom and autonomy are so all-pervasive it can be said that the political morality of liberalism supplies the language of everyday legal discourse." Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 72.

8. The use of Indigenous laws is one of the Truth and Reconciliation Commission Calls to Action. Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 50 [*TRC: Calls to Action*].

9. William N Dunn, "Qualitative Methodology" (1983) 4 Research in Progress 590 at 591.

10. *Ibid* at 592.

11. Note: This paper is based on Canadian law as of April 2018.

meaningful justice. Using ILT facilitates an exploration of what an Indigenous imagining of "equitable compensation" might look like in comparison to the current model.[12]

Indigenous legal theory asserts that Western liberalist law is a form of "colonial law"[13] imposed on Indigenous peoples through practices of colonization. The fundamental nature of Indigenous law versus liberal law is at odds. One of the central tenets of liberalism is the concept of pursuit of the individual good, which is inherently subjective.[14] Proponents of liberalism believe that this cultivates a sense of freedom for every individual, making liberalism appealing for democratic countries.[15] However, liberalism has historically been problematic in its application to racial minorities. Many scholars view a necessary function of liberalism to be a "raceless ideal"[16] where, in order for liberalist principles to be effective, they need to rely on the assumption that all members of society start with equal privilege. Obviously, this is not the reality in the majority of countries, particularly those that thrive on the image of multiculturalism.

In comparison, Indigenous rights are more often collective or community rights.[17] In her PhD dissertation, Tracey Lindberg writes, "in the Cree context, law was not man made. Laws are natural and a reflection of the environments and territories that we as Indigenous citizens came from. These laws are not man made and are derived from an authentic and Original source."[18] If Canadian laws are meant to protect Western-European interests, then they are not designed to represent the interests of Indigenous people. There is also an array of intersectional issues with more nuanced obstacles, such as those faced by female Indigenous peoples, Indigenous peoples who are also members of the LGBTQ+ community, Indigenous peoples with disabilities, and more. Though these are pressing and fascinating areas of study, for the purpose of the limited scope of this article, issues of intersectionality will not be addressed.

In order for reconciliation to be a realistic goal, the government will be required to recognize Indigenous law as an important legal tradition.[19] According to Val Napoleon and Hadley Friedland, Indigenous law has always revolved around "oral histories, narratives and stories,"[20] which have the potential to fit into the common law framework. Unfortunately, the current asymmetrical power relationship between Canada and Indigenous peoples creates a roadblock to mutual recognition. As Napoleon and Friedland write, "for respectful and useful

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12. This article is not intended to establish an "Indigenous imagining" of equitable compensation. As a non-Indigenous scholar, I do not feel I am in a position to make this proposal. What I propose is a model that incorporates principles from both Western and Indigenous legal practices as an interim solution until self-governance can be fully realized. I would certainly be an interesting area of research to look into what a self-governed model would look like.

13. Christie, *supra* note 7 at 68.

14. *Ibid* at 74.

15. *Ibid* at 70.

16. Charles W Mills, "Rawls on Race/Race on Rawls" (2009) 47 Southern Journal of Philosophy 161 at 170.

17. Christie, *supra* note 7 at 72.

18. Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD dissertation, University of Ottawa, 2007) [unpublished] at 18.

19. Kirsten Anker, "Reconciliation and Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2016) 33:2 Windsor YB Access Just 15 at 16.

20. Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61 McGill LJ 725 at 728.

engagement to occur, the law in Indigenous legal traditions must be treated substantively as law to be debated, applied, interpreted, argued, analyzed, criticized, and changed."[21] It is impossible for Indigenous law to be realized as long as it is treated as subordinate to the dominant structure of Western liberalist law.

Indigenous legal theory views recognition as a key to reconciliation. In discussing the nature of restorative justice processes (such as the Truth and Reconciliation Commission, or TRC), Kirsten Anker writes,

> [t]he space of engagement is thus potentially an uncomfortable one, with 'our' grounds always unsettled and called into question. In this view, it is not enough for the TRC, for example, to strive simply for 'relational,' rather than 'cheap,' reconciliation, without also opening up the idea of reconciliation itself to engagement with Indigenous languages and traditions.[22]

Indigenous legal theory is understandably wary of lip service toward Indigenous traditions, given the history marked with unfulfilled promises, sparking important reconciliatory mechanisms such as the TRC. Indigenous models of self-governance cannot be successful if they are modeled on the Canadian government and therefore created in the image of colonial law. For reconciliation to be achieved, it must be an inherently restorative process. Much like the doctrine of equitable compensation, it must be deeply focused on restoring the party to the position it would have been in had it not been for the breach—in this case, the act of colonization.

IV WESTERN PRINCIPLES OF FIDUCIARY DUTY IN THE FIRST NATIONS CONTEXT

Generally speaking, "[w]here the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty."[23] More specifically, in the First Nations context, a fiduciary duty "may arise as a result of the Crown [assuming] discretionary control over specific Aboriginal interests."[24] Thus, a fiduciary duty will not arise in every circumstance involving a First Nation; it requires that a specific Indigenous interest be engaged.

Treaties are a sort of contract under s 18(1) of the *Indian Act* used to determine use and possession of land.[25] In treaty relationships, a fiduciary duty will often arise because the First Nation has surrendered land to the Crown, and the Crown has agreed to manage the land and resources for the benefit of the First Nation.[26] There are a number of circumstances where the Crown may breach its fiduciary duty, such as selling land or resources for below market value,

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21. *Ibid* at 739.

22. Anker, *supra* note 19 at 17.

23. *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 18, citing *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 79 [*Haida Nation*].

24. *Manitoba Métis Federation, supra* note 4 at para 49, citing *Haida Nation, supra* note 23 at para 18.

25. *Indian Act,* RSC 1985, c I-5, s 18(1).

26. *Ibid*.

failing to pay out royalties to the First Nation, breaching treaty land entitlement agreements, causing environmental damage, and many more.

It is also possible to argue that many of these treaties constitute a breach of fiduciary duty in and of themselves. As of the late eighteenth century, the main purpose of treaty making was "for the Crown to take possession of Indigenous land."[27] Today, there continues to be ongoing conflict, where claimants dispute the legitimacy of treaties, insisting that they involved trickery and coercion on the part of the Crown. The uncertainty surrounding many treaties has also caused disagreement regarding what land belongs to whom and how rights are to be dealt with in this modern era.[28]

Treaties have continued to be formed between Canada and First Nations. Between 1973 and 2008, Canada has entered into twenty-two treaties with First Nations, mainly as a means of addressing claims of Indigenous peoples against the Crown.[29] These treaties have not provided a solution to the inherent power imbalance between the Crown and First Nations. Without structurally based solutions, there cannot be meaningful, systemic change to the persistent problems faced by Indigenous peoples, particularly in the context of fiduciary duty.

V EQUITABLE COMPENSATION IN THE FIRST NATIONS CONTEXT: THE DEVELOPMENT OF THE LAW

The intention of the doctrine of equitable compensation is to put the injured party back in the position they would have been in had it not been for the breach.[30] The leading cases developing equitable compensation in the First Nations context are *Whitefish Lake Band of Indians, Beardy's & Okemasis, Huu-Ay-Aht First Nations*,[31] and most recently, *Southwind v Canada*, all of which are summarized below.[32] Each of these cases has demonstrated the potential equitable compensation has to influence Canadian/Indigenous relations. However, this body of jurisprudence also demonstrates the limitations of the Western liberal legal system, specifically regarding equitable compensation in representing the interests of Indigenous peoples.

A. *Whitefish lake band of indians v canada (ag)*

The facts of this case can be summarized as follows: Whitefish Lake Band of Indians ("Whitefish Lake") surrendered its timber rights to the Crown 120 years prior to this decision.

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27. Brian Egan & Jessica Place, "Minding the Gaps: Property, Geography and Indigenous Peoples in Canada" (2013) 44 Geoforum 129 at 132.

28. *Ibid* at 133.

29. Robert Maciel & Timothy EM Vine, "Redistribution and Recognition: Assessing Alternative Frameworks for Aboriginal Policy in Canada" (2002) 3:4 International Indigenous Policy Journal 1 at 1.

30. *Whitefish Lake Band of Indians, supra* note 6 at para 48.

31. *Southwind v Canada,* 2017 FC 906 at para 249 [*Southwind*] citing *Whitefish Lake Band of Indians, supra* note 6, *Re Beardy's & Okemasis Band No 96 and Canada (Minister of Indian Affairs and Northern Development),* 2016 SCTC 15 [*Beardy's & Okemasis*], *Re Huu-Ay-Aht First Nations and Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCTC 14 [*Huu-Ay-Aht First Nations*].

32. *Southwind, supra* note 31.

The Crown proceeded to sell those rights to a third party at below market value. Prior to trial, the Crown admitted to having breached its fiduciary duty to the First Nation, rendering the issue of whether or not there was a fiduciary duty a non-issue for the court. Thus, the main question in dispute was the compensation owed to the First Nation for the breach of fiduciary duty.[33]

The court of appeal agreed with the trial judge's valuation of Whitefish Lake's timber rights at $31,600.00 based on the evidence. Justice Laskin determined that "had the Crown fulfilled its fiduciary duty, it would have invested 90 per cent of the $31,600 in the Whitefish trust account. That money would have earned investment income, which would have been available for Whitefish and its members."[34] The court further decided that the amount was also subject to compound interest under the doctrine of equitable compensation. Since the invested money would have been collecting compound interest in a trust account, the calculation of equitable compensation should also include accumulated compound interest.[35] In other words, a First Nation is entitled to compensation for its lost opportunity, which includes the opportunity to invest the money to which it is entitled at the rate it was entitled.

It is also significant that the court determined that consumption could not be considered toward the award of equitable compensation. That is to say, the Crown is not in a position to presume that because many First Nations were and are impoverished, they would have spent that money quickly on addressing immediate needs.[36] In this case, the Crown had argued that the result of higher consumption should be minimizing on the amount of compound interest accumulated on the smaller remainder that would have been invested. Justice Laskin writes, "In the absence of evidence to the contrary—and there is virtually none—equity presumes that the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary."[37] However, equitable compensation must also reflect "realistic contingencies," where the court takes into account how some of the money would have been spent.[38]

There were too many deficiencies in the evidence in this case for the court to render a quantum for the equitable compensation owed. As a result, the case had to be returned for a new hearing with more evidence.[39] However, this remains a significant case in Canadian law. The Ontario Court of Appeal made it clear that, when in doubt, the court should err on the side of a more favourable decision for the injured First Nation. In this area of law, this decision was precedential and ultimately informed the decisions in both *Beardy's & Okemasis* and *Huu-Ay-Aht First Nation*.

Nonetheless, this decision has grown out of a Western liberalist legal system and relies on well-established Western liberalist legal principles. While Justice Laskin attempts to develop equitable compensation to meet the needs of a specific group of people with nuanced interests, he fails in doing so. At no point does this decision focus on any of the aforementioned Indigenous legal principles, including the impact of the breach on collective/communal rights

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33. *Whitefish Lake Band of Indians*, *supra* note 6 at paras 1–2.

34. *Ibid* at para 40.

35. *Ibid* at para 41.

36. *Ibid* at paras 101–102.

37. *Ibid* at para 102.

38. *Ibid* at para 103.

39. *Ibid* at para 132.

or how a compensation framework should reflect those interests. Nor does the decision emphasize the significance of different legal techniques, such as oral narratives, and how they can and should be incorporated.[40] This is, and always will be, a problem in the application of the doctrine of equitable compensation where the injured party is a First Nation.

B. *Beardy's & okemasis band no 96 and no 97 v canada (minister of indian affairs and northern development)*

This case was decided at the Specific Claims Tribunal. The central issue of this case was the Crown's failure to make annuity payments to the First Nation under Treaty 6, following the North-West Rebellion.[41] The Crown claimed that band members' participation in the North-West Rebellion was contrary to the terms of Treaty 6 and that, therefore, withholding annuity payments was appropriate. The total annuities withheld amounted to $4,750.00.[42] Ultimately, the tribunal found "[t]he government seized on the Rebellion to justify measures designed to bring the Cree under its control. The purpose was to destroy their tribal system, restrain individual mobility, and strengthen the controlling hand of local officials."[43] Thus, there was a breach of fiduciary duty, and the Crown breached its legal obligation to pay the First Nation treaty annuities.[44]

The Crown and the First Nation agreed that a breach of fiduciary duty should be calculated based on the principles of equitable compensation, but disagreed on the application of those principles. Chairperson Slade, citing *Guerin v R,* described "realistic contingencies" as "contingencies that affect the potential for realization of compensation based on the full application of factors governing the assessment of equitable compensation, in particular the presumption of most advantageous use."[45]

Importantly, the quantum of equitable compensation in this case was decided in a subsequent decision.[46] The two parties disagreed significantly on the "realistic contingencies" that would have affected the amount of annuities that would be subject to equitable compensation.[47] Chairperson Slade again assessed the expert evidence of a number of witnesses relating to how equitable compensation should be calculated. Ultimately, Chairperson Slade decided that equitable compensation should be $4.5 million. This decision was based on applying compound interest to the amount of lost annuities.[48]

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40. Napoleon & Friedland, *supra* note 20 at 728.

41. *Beardy's & Okemasis*, *supra* note 31 at para 2.

42. *Ibid* at para 261.

43. *Ibid* at para 432.

44. *Ibid* at para 438.

45. *Ibid* at para 12.

46. *Ibid* at para 2.

47. *Ibid* at para 12.

48. *Ibid* at para 120.

C. *Huu-ay-aht First Nations v Canada (Minister of Indian Affairs and Northern Development)*

In 1938, Huu-Ay-Aht First Nation (HFN) conditionally surrendered its timber rights in order for the Crown to sell them in the best interests of the First Nation. Canada put the timber licence up for tender and accepted a bid in 1942. No harvesting commenced until 1948. In the meantime, HFN was petitioning Canada to cancel the licence to protect HFN interests. Canada refused, and timber harvesting continued until the 1970s.[49] The Specific Claims Tribunal found that Canada had breached its fiduciary duty by not acting in the best interests of the First Nation. The main issue here was how to calculate equitable compensation for such a breach. Specifically, "whether foregone revenues hypothesized to be spent on consumption merit compensation under the remedy of equitable compensation."[50]

After hearing the testimony from a number of experts on calculating equitable compensation, HFN felt that the methods of calculation proposed "(1) underestimated the Claimant's likely investment and savings; and, (2) hypothesized elevated levels of consumption that Canada would not likely have approved."[51] This demonstrates an evident lack of clarity regarding how equitable compensation should be applied. What is even more telling is the Crown and First Nation could not agree upon the nature of hindsight, which had supposedly been decided in previous cases:

> The Parties agreed that using hindsight to achieve restorative compensation involves consideration of evidence of what likely would have happened absent the breach of fiduciary duty, and that this can be done through the construction of a hypothetical history. *They disagreed, however, on whether hindsight and assessment at trial meant all losses should be taken into account* (the Claimant's position), *or only foregone savings and income-generating investments that were not likely to have been consumed or lost between the hypothesized time of receipt and the date of judicial assessment*.[52]

After years of litigation concentrating on the doctrine of equitable compensation, there remains much uncertainty about how the doctrine itself is actually applied in practice. The experts called by both the Crown and HFN contradicted each other in their interpretations of the case *Whitefish Lake Band of Indians,* causing greater confusion in the application of equitable compensation.[53] This is especially peculiar given the factual similarities of *Whitefish Lake Band of Indians* and *Huu-Ay-Aht First Nations* (both being based on the sale of timber rights).

Both parties attempted to interpret and closely follow the reasoning provided by Justice Laskin in *Whitefish Lake Band of Indians*.[54] This task proved particularly difficult in terms of accurately identifying "realistic contingencies" and consumption patterns. This attempt to build off existing case law contributed to a long and arduous process. In the end, Justice

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49. *Huu-Ay-Aht First Nations, supra* note 31 at para 12.

50. *Ibid* at para 306.

51. *Ibid* at para 144.

52. *Ibid* at para 157 [emphasis added].

53. *Ibid* at para 260.

54. *Ibid* at para 274.

Whalen accepted that HFN would have deposited any money they would have received into trust accounts.[55] Justice Whalen also acknowledged that he had the benefit of hindsight, where he had access to specific knowledge of HFN's spending patterns to take into account "realistic contingencies."[56] He also recognized that consumption must be factored into the overall loss of opportunity of a First Nation.[57] This is a significant clarification, as Justice Whalen identified that HFN would have spent the money on consumption had it not been for the breach as a result of the Crown causing their poverty.[58] Thus, consumption cannot be held against a First Nation, as it would be unethical. Taking into account all of these considerations, HFN was awarded nearly $14 million in damages.[59]

D. *Southwind v Canada*

In October 2017, the Federal Court of Canada decided *Southwind v Canada*. This decision is important because it has taken the principles built by the existing body of jurisprudence and pushed them to their limit. As of the time this article is being written, an application for appeal has been filed for this case. Whichever way the Federal Court of Appeal decides on this matter could fundamentally change the way that courts assess equitable compensation.

This case is lengthy and complicated. At trial, twenty-four witnesses were called. As stated by counsel for Lac Seul First Nation (LSFN), "the main issue is whether Canada was obliged as the band's fiduciary to obtain a royalty or a rental or some other form of return on the investment that Canada forced the band to make in this project by taking its land."[60] The Crown disputes that there was a breach of fiduciary duty at all.

The facts are as follows: LSFN has a reserve near Red Lake, Ontario, established by treaty.[61] In 1929, a dam was built to support gold mining in Red Lake. As part of the project, the government created a reservoir at LSFN, flooding the reserve so badly it was divided from its neighbouring communities by water.[62] This caused irreparable damage to many of the houses, crops, quality of life of members, and the reserve land itself, much of which is still under water.[63] As part of this project, the Crown was responsible for clearing timber from the foreshore. Only a small amount of timber was actually cut, causing a loss in both timber and potential earnings for the people inhabiting LSFN.[64] Had the Crown cleared the timber, LSFN would have received more money in timber dues, and the timber would have been preserved for harvesting purposes.

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55. *Ibid* at para 279.
56. *Ibid* at para 291.
57. *Ibid* at para 313.
58. *Ibid* at para 319.
59. *Ibid* at para 324.
60. *Southwind, supra* note 31 at para 9.
61. *Ibid* at paras 104–105.
62. *Ibid* at para 218.
63. *Ibid* at para 5.
64. *Ibid* at para 218.

LSFN was not consulted or kept apprised of what was happening in regards to building this dam and what the impacts would be on their land.[65] Water levels began to rise in 1929 and finally reached their maximum height in 1936. "One-quarter to one-third of the houses of the LSFN had to be moved or replaced due to the flooding, but this was not undertaken until 1935, when the water had already affected the housing."[66]

Based on the facts and the relevant case law, Justice Zinn decided that the Crown had breached its fiduciary duty to LSFN. The Crown agreed that should it be found to have breached its fiduciary duty to LSFN the damages should be determined by equitable compensation.[67] Thus, Justice Zinn faced the involved and complicated task of determining how equitable compensation should be determined. He looked at the leading cases of equitable compensation in both the non-Indigenous context (*Canson Enterprises Ltd v Boughton & Co,* [1991] 3 SCR 534, SCJ No 91, and *Hodgkinson v Simms,* [1994] 3 SCR 377, SCJ No 84),[68] as well as the Indigenous context (*Whitefish Lake Band of Indians, Beardy's & Okemasis,* and *Huu-Ay-Aht,* as summarized above).[69] Importantly, Justice Zinn identified six main principles in applying the doctrine of equitable compensation to First Nations based on this jurisprudence:

1. The goal of equitable compensation is to restore what the plaintiff has lost due to the breach;
2. What the plaintiff lost is an opportunity that was not realized because of the breach;
3. The plaintiff's loss arising from the breach is to be assessed with the advantage of hindsight and is not to be assessed based on what may have been known at the date of the breach or have been reasonably foreseeable;
4. The losses are to be determined based on a common sense view of causation, which is to say that the lost opportunity must have been caused by the breach;
5. The Court must assume that the plaintiff would have made the most favourable use of the trust property—the plaintiff's best opportunity—and the loss must be assessed accordingly; and
6. When considering what would have happened had the defendant not breached its duty to the plaintiff, the Court must assume that the defendant would have carried out its duties vis-à-vis the plaintiff, in a lawful manner.[70]

Next, Justice Zinn identified two of the most challenging aspects of this case: determining what position LSFN would have been in in 1929, but for the breach, and how to measure what

65. *Ibid* at para 136.
66. *Ibid* at para 218.
67. *Ibid* at para 228.
68. *Ibid* at para 232.
69. *Ibid* at para 249.
70. *Ibid* at para 285.

was lost in modern terms.[71] Justice Zinn summarized the calculable losses as "$14,582.16 in 1929 for the flowage easement over its Reserve lands; $34,917.33 in 1929 for timber dues; and $1,750,000.00 for community infrastructure."[72] He then proceeded to identify damages caused that were not calculable, including "loss of livelihood both on and off-Reserve; and loss of easy shore access, damage to boats, and overall damage to the aesthetic of the lake shore due to the failure to remove the timber prior to flooding."[73] Additional damages would need to amount to an assessment of all of this loss.

Although these numbers can be laid out clearly in a retrospective context, the greater challenge is to calculate what this amounts to in modern valuations. After assessing the expert evidence presented to the court on valuations, Justice Zinn determined that Canada owed $14,981,868.10 just in calculable damages.[74]

What Justice Zinn decided next was a major departure from the previous jurisprudence. He went on to determine that LSFN's equitable damages amounted to $30,000,000.00. In his 160-page decision, Justice Zinn chose to devote only one paragraph to this determination, listing his twelve reasons for more than doubling the amount owed in calculable damages. The factors he considered in arriving at that figure included the following:

1. The amount of calculable losses;
2. That many of the non-quantifiable losses created in 1929 persisted over decades, and some are still continuing;
3. The failure to remove the timber from the foreshore created an eyesore and impacted the natural beauty of the Reserve land;
4. The failure to remove timber from the foreshore also created a very long-term water hazard affecting travel and fishing for members of LSFN;
5. The flooding negatively affected hunting and trapping, requiring members to travel further to engage in these pursuits and the number of animals were reduced for some period as a result of the flooding;
6. Although Canada supplied the materials to build the replacement houses, the LSFN members supplied their own labour;
7. The LSFN docks and other outbuildings were not replaced;
8. LSFN hay land, gardens and rice fields were destroyed;
9. The hunting and trapping grounds on the Reserve were negatively impacted;
10. Two LSFN communities were separated by water and one became an island, impacting the ease of movement of the people who lived there;
11. Canada failed to keep the LSFN informed and never consulted with the band on any of the flood related matters that affected it, creating uncertainty and, doubtless, some anxiety for the band; and
12. Canada failed to act in a prompt and effective manner to deal with compensation with the LSFN prior to the flooding and did not do so for

71. *Ibid* at para 287.

72. *Ibid* at para 443.

73. *Ibid* at para 444.

74. *Ibid* at para 508. Canada was credited $1,133,997.70 for compensation previously paid to LSFN.

> many years after the flooding, despite being aware of the negative impact on the band members.[75]

The court further determined that it was not necessary to consider punitive damages separately, as the quantum in equity was a global sum, and consideration of punitive damages had been considered therein.

Southwind is an example of the courts pushing the doctrine of equitable compensation as far as it will go to financially remunerate First Nations for the damages they have incurred. However, therein lies the problem: based on the current Western liberalist legal model, all a court can do is provide monetary compensation. The court is not required to make decisions that will contribute to holistically restoring the loss a First Nation has sustained. This is illustrative of the problems built into a Western liberalist legal system, making equitable compensation an ineffective vehicle for remedying a breach of fiduciary duty.

While *Southwind* does not engage with Indigenous legal principles and therefore does not reflect Indigenous perspectives, it is a clear departure from prior case law. By awarding damages based on a list of relatively vague considerations, including some that appear to be subjective, such as the impact on the natural beauty of the reserve,[76] Justice Zinn does demonstrate that an assessment is not always crystal clear and goes beyond strict financial loss. Instead, an assessment may enrich context—understanding "loss" as a complex tapestry, where it's hard to tell where one loss ends and another begins. The fallout of a breach cannot be compartmentalized and instead bleeds into other areas of the plaintiff's life. Justice Zinn seems to let his feeling about the inequity experienced by the First Nation influence the quantum he awarded and draw his conclusions based in part on his personal understanding of equity. This is arguably equitable compensation at its best. However, even at its best, monetary compensation is simply one piece of a larger damages package that is necessary to fully address what a First Nation has lost and been deprived of in the long term, as will be described in greater detail below.

E. The Case Law: Critical Analysis

Now that the question is no longer "how do we compensate a First Nation?" a new issue has emerged. Compensation that puts the injured First Nation back in the financial position it would have been in but for the breach is insufficient if it does not work toward the greater goal of reconciliation. Considering the law of fiduciary duty in the context of ILT, there are a number of obstacles in the way of equitable compensation adequately embodying the tenets of reconciliation. In the words of Tracey Lindberg, "reconciliation, cannot, in my understanding, be effectively and actually established without a meaningful redress of reclamation, restitution, and reparation."[77]

This body of case law highlights some clear issues with the doctrine of equitable compensation, and more importantly, the use of the Western liberalist legal system to address these issues. First, money is a temporary solution. Monetary compensation cannot replace the Indigenous connection to land or tradition and what was irreplaceably lost as a result

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75. *Ibid* at para 512.

76. *Ibid*.

77. Lindberg, *supra* note 18 at 14–15.

of the breach.[78] Courts willingly pay lip service to the concept that equitable compensation is a global assessment, meant to consider all the ways a First Nation has been injured by the breach in question. Unfortunately, those injuries are persistent and even systemic, causing intergenerational trauma as communities struggle to heal.[79] As a result, a lump sum payment will quickly be absorbed by legal fees and addressing immediate problems in the community that desperately require attention.[80]

Of course, to say that financial compensation is an inadequate remedy is not a unique or novel statement. Finding meaningful compensation for injured parties is not only a problem in fiduciary duty cases, but in other areas of law as well. However, the importance of meaningful reparation is exacerbated in the context of fiduciary duty because of the long and tumultuous history between the parties involved.[81] This is further exacerbated by the government's stated mandate of reconciliation, where Canada is allegedly working toward the reparation of its relationship with Indigenous peoples through a number of initiatives.[82] If the government is incapable of meaningfully remedying a breach of fiduciary duty, this will have repercussions in its relationship with Indigenous peoples as a whole and impede upon the goal of reconciliation.

Another obstacle to the success of equitable compensation is the inherently adversarial process required to participate in the Western liberalist legal system. Indigenous models of justice are often geared toward healing and therapeutic approaches, including restorative justice structures (outlined in greater detail below).[83] In its least adversarial form, equitable compensation is negotiated between the government and the First Nation, finding an "appropriate" quantum of damages to avoid litigation and settle the matter in advance.

Undoubtedly, the worst-case scenario is litigation. Even if the First Nation is successful in litigation, they have had to be subjected to the arduous process of collecting historical reports, expert evidence, and lengthy government applications; and if they are successful, it is only to the chagrin of the government. For reconciliation to be meaningful, it must be reparative in order to establish accountability for the wrongs committed.[84] Requiring a First Nation to fight tooth and nail to simply receive financial compensation, without even an admission of guilt or apology from the government, fails as a means of achieving this goal. In these ways, equitable

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78. Quantifying damages as a strictly monetary amount is an inherently Western concept, taking root in the liberalist concept that "the good life must be pursued *individually,* and we each strive to better ourselves according to our own sense of what is valuable." Thus, this is potentially at odds with the Indigenous concept of communal justice. Christie, *supra* note 7 at 74.

79. Lindberg, *supra* note 18 at 9.

80. *Huu-Ay-Aht First Nations, supra* note 31 at para 312.

81. One historical failure contributing to the strained relationship between the Government of Canada and Indigenous peoples is the residential school system, which has been described as follows: "cultural genocide of residential schools constitutes a harm affecting legal traditions not just because law is also part of culture and closely tied to language but also because the assumption of control was a direct travesty of Indigenous sovereignty and self-governance under traditional legal orders." Anker, *supra* note 19 at 18, citing Courtney Jung, "Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Non Transitional Society," in Paige Arthur, ed, *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge: Cambridge University Press, 2010) at 241.

82. See, for example, *TRC: Calls to Action, supra* note 8.

83. Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNBLJ 313 at 316.

84. Anker, s*upra* note 19 at 23.

compensation fails at repairing the relationship between the Crown and the First Nation. These issues paint a picture of a compensation system that is ineffective at best.

VI EQUITABLE COMPENSATION: A TRUE REMEDY FOR BREACH OF FIDUCIARY DUTY ABSENT INDIGENOUS JUSTICE MODELS?[85]

One of the central issues with equitable compensation in fiduciary duty matters is the failure to engage with alternative dispute resolution mechanisms traditionally used by some Indigenous peoples. The following section will outline the current primary mechanisms for addressing claims in fiduciary duty, potential Indigenous justice elements, and whether they are compatible.

A. Specific Claims Process

The process to file a claim in breach of fiduciary duty is extremely complex. A First Nations complainant can either pursue a claim through the Federal Court or through the Specific Claims Tribunal. The Federal Court process is similar to any claim within the federal jurisdiction, so for the purposes of this article, it will not be addressed in great depth. The appeal of filing a claim with the Specific Claims Tribunal is that there is funding available to First Nations,[86] and the adjudicators typically have a more nuanced knowledge of Aboriginal law than a Federal Court judge, who may rarely encounter these types of claims.

However, there are also a number of drawbacks to filing a claim at the Specific Claims Tribunal. In order to file a claim, a First Nation must first file their claim with the Minister of Indigenous and Northern Affairs (INAC). Once received, the minister has three years to determine whether the government will negotiate the claim.[87] Only after the minister has refused to negotiate the claim can it proceed to the tribunal. Treaty litigation is usually historical in nature and, as a result, tends to face evidentiary delays. For example, in *Huu-Ay-Aht First Nations,* the claim was initially filed with the minister in 2005.[88] Then, after receiving a response, HFN filed the claim with the Specific Claims Tribunal in 2011.[89] The case was finally concluded in 2017, taking a total of 12 years from start to finish. This timeline is not abnormal, and could take even longer.

The minister may also decide to negotiate the claim instead of proceeding to the tribunal. In Canada, the specific claim negotiation process starts with a claim being accepted for

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85. It is important to note that there is no "pan-Indigenous" law. Rather, there are distinct laws within different Indigenous groups, some of which draw similarities and others that do not. For this next section, I try to refer to "Indigenous laws" in a general sense, as opposed to "Canadian laws." Where possible, I refer to the specific First Nation or group of whose laws I am discussing.

86. "Fact Sheet—At a Glance: The *Specific Claims Tribunal Act*" (16 September 2016), online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1100100030306/1100100030307>.

87. *Specific Claims Tribunal Act,* SC 2008, c 22, s 16.

88. *Huu-Ay-Aht First Nations v Canada (Minister of Indian Affairs and Northern Development)*, 2014 SCTC 7 at para 2.

89. *Ibid* at para 5.

negotiation. This only happens after Canada has accepted that it has an "outstanding lawful obligation" to the First Nation.[90] Next, negotiators for both parties reach a joint negotiation protocol agreement, which establishes the "ground rules" for negotiation.[91]

The third step is conducting research on compensation. This is intended to assist the negotiators in determining how much compensation should be paid out at the end of negotiations once a formal settlement is reached. The fourth step involves discussions on compensation, where the studies conducted in step three are reviewed and a quantum for settlement is reached. The next step is drafting the settlement agreement, which is generally based on a template form provided by the government. Then, once confirmed, negotiators for both parties initial a number of original copies of the settlement agreement. Next, it goes to a First Nation ratification vote where members have the opportunity to vote on whether or not they approve the settlement agreement after an information session. If approved, the agreement will be ratified by Canada. Once both parties have signed, the agreement will be implemented (after being approved by the minister).[92]

Specific claims negotiations are the easiest and most reconciliatory process that INAC has to offer, and it is still incredibly cumbersome. The hoops that First Nations are forced to jump through to receive their settlement obliterate the reconciliatory quality that a settlement agreement is meant to realize. Thus, even where the research phase considers equitable compensation in its assessment, it does not effectively contribute to reconciliation in a way that transcends simple compensation.

B. Storytelling as Law

The TRC calls for recognition of Indigenous laws as equivalent alongside Canadian law.[93] Now that this principle is recognized, it is time to transition into the next phase of work—that is, to see to it that Indigenous laws are not treated as a philosophy, but are instead engaged with at a "practical, problem-solving level."[94] One aspect of reconciliation has been unambiguous since mandated by the government: Indigenous involvement is essential.[95] The issue is whether equitable compensation is compatible with Indigenous legal frameworks.

As briefly discussed, an important part of Indigenous law is oral narrative. In many Indigenous cultures, narratives are used to convey essential lessons about sharing knowledge with other groups, prophecy, obligations, respect, healing, and more.[96] While a significant part of Indigenous law, storytelling is also an important part of the Canadian common law system. Narrative has been used as a tool for legal historians, law, and literature scholars, and more recently by critical legal theorists as an instrument for communicating messages and

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90. "The Specific Claims Policy and Process Guide" (15 September 2010), online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506>.

91. *Ibid.*

92. *Ibid.*

93. *TRC: Calls to Action*, *supra* note 8 at 50.

94. Napoleon & Friedland, *supra* note 20 at 739.

95. *TRC: Calls to Action*, *supra* note 8 at 50.

96. Napoleon & Friedland, *supra* note 20 at 742–743.

experiences from the lens of a party.[97] Moreover, narrative is particularly important to the growth and adaptation of the common law system.[98] In Canada, we frequently see the most heart-wrenching or thought-provoking cases (which resemble stories) influencing legislative reform or judicial decisions, effectively changing the way the judiciary approaches specific issues.[99] It is these stories that humanize the justice system and create courts that articulate Canadian values.

However, while the common law system now accepts stories as oral evidence in court, it is rarely included in the reasoning in judicial decisions, suggesting that it is not weighted as heavily as conventional forms of evidence.[100] Specifically, the law of equitable compensation fails to use Indigenous narrative at all.[101] The decisions of the Federal Court and the Specific Claims Tribunal do not speak to Indigenous experience, and their decisions do not turn on oral evidence expressing essential principles of Indigenous law. This not only fails to meet the Calls to Action of the Truth and Reconciliation Commission,[102] but also misses an opportunity to integrate a reconciliatory mechanism into an area of law that is specifically meant to be reconciliatory. Absent cultural recognition and legitimization on behalf of the Canadian government, the common law and Indigenous law systems will not achieve parity, and Indigenous principles cannot successfully integrate into the Canadian conceptualization of "law."

C. Restorative Principles

Most of the literature informing Indigenous approaches to alternative dispute resolution takes place in the criminal law context. However, many Indigenous legal practices have a restorative aspect[103] and often engage in therapeutic approaches as a means of repairing relationships. Given the emphasis on negotiation in fiduciary duty cases, there is an opportunity to incorporate restorative principles within this forum of resolution. Although this has a more reconciliatory tone than litigation, these negotiations still fail to put into action the Indigenous legal principles that are available.

Restorative justice can look different depending on the context. One example John Borrows describes is an Anishinaabek story recorded in 1838 that illustrates some key aspects of this First Nation's legal system.[104] To paraphrase, a member of the community had become mentally ill and was hurting himself and threatening others. After trying to help him as best

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97. Kathryn Abrams, "Hearing the Call of Stories" (1991) 79 Cal L Rev 971 at 973–975.

98. Napoleon & Friedland, *supra* note 20 at 752.

99. An example of this is the death of a young Indigenous man, Colten Boushie, which has sparked conversation about reforming the laws of jury selection: "Boushie family promised 'concrete changes' in meeting with Trudeau, ministers," *CBC News* (14 February 2018), online: <https://www.cbc.ca/news/politics/boushie-verdict-ottawa-parliament-meeting-1.4533112>.

100. Napoleon & Friedland, *supra* note 20 at 735.

101. In my review of the leading cases of breach of fiduciary duty and equitable compensation, there were no instances where Indigenous narrative was relied upon.

102. *TRC: Calls to Action*, *supra* note 8 at 50.

103. John Borrows, "Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada" (2006) at 47, online (pdf): Government of Canada <http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf>.

104. *Ibid* at 45–47.

they could, as a community and with the permission of the band council, the Anishinabek people decided he must die. His closest friend was tasked with the duty to shoot him. Afterwards, they examined the body of the man and found that he was indeed very ill. They also gave the father of the man gifts and carried out tasks his son would have done for him had he been alive and healthy.[105]

This story demonstrates the restorative principles present at least within historic Anishinabek law. Here, the restorative aspect comes from the emphasis on community restoration after the loss of a member. By helping the man's father to heal, the community was able to reconcile and deal with the loss.[106] "Restorative justice" is an inherently vague term, which can be represented in a number of ways. This story is meant to illustrate one historical example of how this principle was applied.

There is often a fine line between "reconciliation" and "restoration." One example of a traditional reconciliatory tool is the Haudenosaunee condolence ceremony.[107] These ceremonies have been held for hundreds of years and continue to this day, and they are frequently used for restorative purposes. Kirsten Anker writes,

> Recently, a condolence was held for a whole community of Kahnawake to help "clear their minds" of fear, anger, and sadness accumulated over the 285 years of the settlement. Thus, the ceremony appears to be both polyvalent—appearing in different forms and social contexts—and ecumenical, used also in relations with non-Haudenosaunee and non-Indigenous allies.[108]

In order for compensation to move toward reconciliation, there must be an aspect of restoration. This piece, among others, can contribute to the healing that will truly help put the injured party in the position it would have been in but for the breach. In reality, equitable compensation does not accomplish this goal because Canada defines "restoration" in colonialist terms. A re-envisioning of equitable compensation with an eye toward restoration is essential to effectively remedy a breach of fiduciary duty.

D. The Significance of "Recognition"

While understanding different principles of Indigenous law is important, recognition of the mutuality of those laws is one of the most significant things Canada can do in support of reconciliation. By shifting the focus from trying to redistribute rights to substantively recognizing Indigenous rights and law, Canada could take a major step toward healing a tenuous relationship with Indigenous peoples.[109] Recognition of Indigenous laws is one of the central Calls to Action by the Truth and Reconciliation Commission.[110]

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105. *Ibid.*

106. *Ibid* at 47.

107. Anker, *supra* note 19 at 33.

108. *Ibid* at 34, citing Teyowisonte (Thomas Deer), "Releasing the Burden: Haudenosaunee Concept of Condolence," *The Eastern Door* (28 September 2001) at 14.

109. Maciel & Vine, *supra* note 29 at 1.

110. *TRC: Calls to Action*, *supra* note 8 at 50.

One of the main obstacles to recognition is creating a legal space that is neither Western-dominant nor Indigenous-dominant. Rather, a neutral ground is necessary for both sides to meet and engage with each other's laws. Neutrality would most likely be accomplished by creating an entirely new legal system.[111] Reconciliation must involve engagement with Indigenous laws and traditions to be successful.[112] In this way, recognition is not only powerful, but also essential to meaningful nation-to-nation relationship building.

In its full form, recognition of Indigenous peoples requires self-determination.[113] This is the ultimate expression of parity. This would also be a means of creating a neutral space for both sides to hear each other, since they would be recognized as equals rather than a dominant and subordinate power. In the context of treaty land claims, this is difficult. Since the concept of fiduciary duty inherently involves a power imbalance, recognition needs to be more substantial to view First Nations as equal contractual partners. Equitable compensation fails in meeting these ends because it is not supporting the recognition of Indigenous laws, but again is based on a set of considerations to determine the quantum adopted in the Canadian common law system. Since equitable compensation cannot respond to the holistic loss experienced by the First Nation through recognition of Indigenous laws and legal mechanisms, it cannot function as a reconciliatory tool.

While full self-governance is not yet a reality for Canada's Indigenous peoples, there are evidently interim steps that can be adopted into the common law. Val Napoleon and Hadley Friedland suggest using legal analysis to interpret Indigenous laws and apply them to the common law system as one method of engaging with Indigenous laws.[114] By merging two legal worlds, it is possible to at least incorporate Indigenous legal principles into a justice system otherwise barren of relevance to First Nations.

E. Comprehensive Damages Packages in the First Nations Context: Interim Solutions to Replacing Equitable Compensation

This article has established that equitable compensation cannot remedy a breach of fiduciary duty where a First Nation is the injured party. There must be a more comprehensive damages package in place.[115] What is proposed is a completely different forum to deal with compensation after a breach of fiduciary duty is found. The following recommendations are not meant to offer a complete model with which to replace equitable compensation; rather, it is meant to outline some principles that must be encompassed in the interim until self-governance can be realized.

The starting point of a new doctrine involves changing the question the court is determining. Instead of asking "What does the community need to restore it to the position it would have been in but for the breach?" the court should be determining "What does

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111. Anker, *supra n*ote 19 at 17.

112. *Ibid.*

113. Christie, *supra* note 7 at 112.

114. Napoleon & Friedland, s*upra* note 20 at 746.

115. This analysis relies on the assumption that a breach of fiduciary duty has already been accepted. As this article is critiquing the use of the doctrine of equitable compensation exclusively, this is a necessary assumption. Identifying alternative ways to assess whether a breach of fiduciary duty exists would be an interesting area for research, but it is outside the limited scope of this article.

your community need in order to heal?" This would reflect the communal interests of the First Nation. The former question stems from Western concepts of justice and is a product of existing case law. Furthermore, this question compartmentalizes the damages experienced by the First Nation as limited to what is directly related to the breach and fails to reflect the reality that a breach of fiduciary duty bleeds into all areas of life and has an intergenerational impact. A simpler question, such as "What does your community need in order to heal?" is a better starting point because it is more open and leaves room for discussion among the parties as opposed to engaging in an adversarial process.

Importantly, the answer to this question will differ depending on the needs of the community. These needs should be expressed through oral narrative and discussion instead of experts. This is not to say that the use of experts will be rendered irrelevant; however, their role may be minimized depending on what the community feels is necessary.[116] The discussion would likely involve historical impacts related to the breach, firsthand accounts of suffering or loss that are connected to the breach (i.e., if the community was forced to relocate), financial losses, and the residual effects on the community today.

In doing so, this narrative should not be presented in the forum of a Western court or tribunal. Important changes must be made to reflect the purpose of the court. First, the judiciary should include Indigenous peoples to help assess the loss incurred. In this way, Indigenous voices are being represented in a decision-making capacity. An Indigenous adjudicator is also more likely to have a greater familiarity with the lived experience of the community and may be in a better position to help assess ways to facilitate healing.[117] Second, the physical forum in which fiduciary duty matters are dealt with should reflect a more reconciliatory model. In some Indigenous traditions, the circle is deeply associated with reconciliation.[118] Sentencing circles have been adopted into criminal law as a means to determine an appropriate sentence for an offender, considering the position of a number of stakeholders, including the offender, family, the victim(s), police, counsel, elders, the judge, and more.[119] Adopting this model into the fiduciary duty context fosters a sense of equality, where the judge is no longer on a pedestal, and Indigenous rights are represented at parity with those of the Crown. After hearing what the community needs, the judge, with the assistance of the elders, will be in a better position to determine what a comprehensive compensation package will look like.

This suggested model borrows from Indigenous legal tools as well as existing Western practices. Instead of envisioning equitable compensation as a financial assessment of where the injured party would have been but for the breach, the analysis takes on a restorative focus, seeking to not only heal the community but also heal the relationship between the parties. In this way, this proposed forum supports the mandate of reconciliation. This proposed model

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116. In *Southwind,* 24 witnesses were called, all but two of which were experts. *Southwind, supra* note 31 at para 12.

117. The academic research related to the importance of Indigenous adjudicators is relatively limited. However, in one study specifically related to using sentencing circles in domestic violence matters, which is an area largely affecting Indigenous peoples, only one of the twenty-seven judges interviewed was Indigenous. It is clear that Canada needs Indigenous peoples to provide input on issues that affect them at disproportionate rates. Joanne Belknap & Courtney McDonald, "Judges' Attitudes about and Experience with Sentencing Circles in Intimate-Partner Abuse Cases" (2010) 52:4 Can J Corr 369 at 376.

118. Anker, *supra* note 19 at 29.

119. *Ibid.*

also addresses some of the concerns identified in the current Western liberalist model. This model will likely reduce the time and cost of litigation since it is not solely focused on financial compensation and will therefore require fewer experts to testify on quantum. It eliminates the adversarial quality in establishing compensation. Finally, it ultimately works toward reconciliation by respecting some Indigenous legal principles and finding meaningful resolution to historic problems.

VII CONCLUSION

This article began by asking the question, Can equitable compensation serve as a vehicle for remedying breach of fiduciary duty to Indigenous peoples? Based on the foregoing critical analysis and arguments, it is clear that equitable compensation has a series of inherent flaws preventing it from ever contributing to meaningful and ongoing remedy for the injured party.

It is not possible for equitable compensation to fully restore an injured First Nation to the position it would have been in but for the breach because it does not use any Indigenous legal principles. Reconciliation requires recognition-based models of governance, where Canada recognizes Indigenous-governing models at parity.[120] Without this fundamental shift in power dynamics, equitable compensation cannot fulfil the ends of reconciliation because it will only assess compensation in a purely monetary sense. While the courts recognize that compensation must be an "assessment" rather than a "calculation," they still fail to address the actual loss and help to repair broken communities. Unless Western liberalist mechanisms of compensation are either replaced with Indigenous mechanisms or are re-envisioned to embody Indigenous teachings, values, and law, they will always lack holistic rehabilitation. Although recent case law has illustrated a shift toward emphasizing the best interest of the injured party, equitable compensation is still an inherently Western concept. This starting point undermines the interests of First Nations.

Ultimately, this article concludes that equitable compensation is inadequate in the context of First Nations. Going forward, it is incumbent upon the Government of Canada to take greater, more meaningful, strides in supporting self-governance. Supporting rather than leading will be absolutely essential to success. In the interim, a new model encompassing Indigenous legal principles must be adopted to support comprehensive compensation and work toward an underlying objective of reconciliation.

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120. Maciel & Vine, s*upra* note 29 at 6.

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DOES THE DUTY TO CONSULT CREATE ECONOMIC UNCERTAINTY? HOW GREATER RECOGNITION OF SELF-DETERMINATION CAN BENEFIT BOTH INDUSTRY AND INDIGENOUS PEOPLES

Alexander Buchan[*]

CONTENTS

I INTRODUCTION

The duty to consult has greatly changed the relationship between Canada's Indigenous peoples and Canada's natural resource sector. By slowly expanding the scope and importance of the duty to consult, the Supreme Court of Canada has done away with twentieth-century norms and processes for resource development, leaving extractive industries rethinking their planning processes and business strategies. Simultaneously, many First Nations[1] have experienced stronger recognition of land rights, economic opportunity, and political leverage.

Commentators at the Fraser Institute have said that this expansion of the duty to consult creates an economic uncertainty that is harmful for both First Nations and industry alike, as the outcome of the duty is left in the hands of the government and therefore beyond the

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1. Terms such as First Nations, Indigenous peoples, Indigenous communities, Aboriginal groups, and other descriptors are used throughout this paper. The reason such a variety of terms are used is that they are intended to reflect the intention of each source being cited.

control of the groups involved. These concerns are not without merit, as approval processes for National Energy Board projects and mines in northern Ontario stretch longer and longer, leading many to wonder if they will ever come to fruition. Similarly, First Nations that participate and negotiate in the consultation process often feel sidelined, seeing their efforts and requests treated as optional by regulatory bodies and other agents of the Crown.

This paper argues that there are three common themes frustrating Indigenous economic efforts: land rights, lengthy timelines needed to approve economic endeavours, and the indirect nature of the duty to consult. Accordingly, to reduce uncertainty and strengthen the relationships between industry and Indigenous peoples, the three themes can be addressed through a greater recognition of Indigenous sovereignty.[2]

A. A Brief Note on Economic Uncertainty[3]

Friedrich Hayek, the influential liberal economist, saw the complex processes of economic activity as a series of variables to be reduced to foster coordination between economic actors. The more that public institutions could control these variables and create stability, the more efficient the economy would be and the more scope it would have for growth.[4] Processes that have unknown outcomes therefore suppress economic growth by preventing meaningful investment.[5] In real terms, if a company cannot put a price on an investment or know when it will come to fruition, it will not commit to a project, and investors will not commit to lending.

Frank H. Knight, another classical liberal economist, distinguished risk from uncertainty. Knight conceptualized risk (such as determining the chance that an event will occur) as measurable and uncertainty as immeasurable. In this sense, uncertainty is still risk, but risk that is immeasurable.[6] This is troubling for businesses that want to make good on their investments, as it creates a situation that is increasingly difficult to plan for. When undertaking a cost–benefit analysis, if a business cannot ascribe values to risks, it becomes difficult for the business to make confident investments and begin new projects.[7] It follows that stable and predictable policy landscapes are more attractive for businesses, and this is a common principle among economic theories of investment.[8]

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2. "Sovereignty" is a weighty term and carries European notions of nationhood and political autonomy that are not necessarily in line with Indigenous concepts of political and cultural self-determination. This is recognized by a number of Indigenous scholars, who debate its use (see John Borrows, *Recovering Canada*, *infra* note 68; Brian Slattery, "The Metamorphosis of Aboriginal Title," *infra* note 78; and Felix Hoehn, *Reconciling Sovereignties*, *infra* note 79). The term "sovereignty" will often be used in this paper to reflect the terms used by the sources cited. A fuller discussion of these scholars and their perspectives is found in the text below.

3. This paper does not focus on economics. This section is included to provide context for some of the language used later.

4. Todd Zywicki, "Economic Uncertainty, the Courts, and the Rule of Law" (2011) 35:1 Harv JL & Pub Pol'y 195 at 197.

5. *Ibid* at 198.

6. Frank H Knight, *Risk, Uncertainty, and Profit* (Boston: Houghton Mifflin Company, 1921).

7. Stephanie Riegg Cellini & James Edwin Kee, "Cost-Effectiveness and Cost-Benefit Analysis" in Joseph S Wholey, Harry P Hatry & Kathryn E Newcomer, eds, *Handbook of Practical Program Evaluation*, 3rd ed (San Francisco: Jossey-Bass, 2010) 493 at 499.

8. Quintin H Beazer, "Bureaucratic Discretion, Business Investment and Uncertainty" (2012) 74:3 J of Politics 637 at 638.

II THE DUTY TO CONSULT

The duty to consult is a common law principle derived from section 35 of Canada's *Constitution Act, 1982*.[9] The principles of the duty to consult were given form in a series of cases in the early 2000s, starting with *Haida Nation v British Columbia (Minister of Forests)*, which found its way to the Supreme Court in 2004.[10] In *Haida*, the Supreme Court determined that the Crown (the governments of Canada and the provinces, as representing the Queen)[11] has an obligation to consult with Indigenous groups before beginning an undertaking that may alter their rights or impact land within their traditional territories.[12] This is premised upon the honour of the Crown, which finds its foundation in "the solemn promises between the Crown and various Indian nations"[13] and requires the Crown to avoid sharp dealings and conduct itself honourably with reconciliation in mind.[14]

The duty to consult demands that the Crown take reasonable steps to consult and accommodate Indigenous peoples when the Crown "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[15] This includes not only situations where the Crown knows a right will be infringed, but also scenarios where the Crown could infer that a right *may* be infringed.[16]

Though the preconditions for the duty to consult are fairly well established, the surrounding details initially were not, and outcomes often remain highly fact specific. In *Haida,* the Supreme Court reinforced its opinion in *Delgamuukw* that consultation "will vary with the circumstances,"[17] suggesting that it is therefore proportionate to the circumstances. The court described categories of "occasional, rare, or mere consultation," scaling all the way up to "requiring consent."[18] While these descriptions imply varying depths of consultation, they do not always assist government, Indigenous communities, or industry in determining when each category can or should be used, and, predictably, each group has very different interpretations.[19]

Despite the clear need for leadership on this issue, the federal and provincial governments have been slow to take the initiative and develop a framework for what constitutes "consultation." It should not be surprising, then, that the duty to consult repeatedly returns to the courts. Over the decade since *Haida* and *Delgamuukw* were released, subsequent cases have

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9. *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35 [*Constitution Act, 1982*].

10. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]; see also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

11. *Halfway River First Nation v British Columbia (Ministry of Forests),* 1999 BCCA 470 at para 35.

12. *Haida*, *supra* note 10 at para 35.

13. *R v Badger*, [1996] 1 SCR 771 at para 41, SCJ No 39.

14. *Haida*, *supra* note 10 at paras 17 and 32.

15. *Ibid* at para 35.

16. *Ibid* at para 38.

17. *Ibid* at para 40; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168, SCJ No 108.

18. *Ibid* at para 168.

19. Lee Ahenakew & Clint Davis, "Corporate Partnerships Build Aboriginal Economies" (1 January 2009) *Windspeaker*.

introduced parameters to solidify the constraints of the duty to consult. While many initially saw the doctrine as nebulous and difficult to identify or predict,[20] there is a growing consensus that while each case is highly fact dependent, there is now a weight of case law that guides all parties in the doctrine's application. For example, it is now well established that government is capable of delegating the duty to administrative boards and regulators, and that the duty to consult requires written reasons,[21] but where "deep consultation" or accommodations should take place is still highly fact driven[22] and frequently a matter of debate.[23]

Ultimately, what the duty to consult poses is a commitment to process, but not to power, and leaves both industry and Indigenous peoples alike with uncertain outcomes and a predilection toward litigation.

A. The Duty to Consult Creates Economic Uncertainty

Recent studies by the Fraser Institute indicate that there has been ebbing confidence among investors, stemming from changes to the legal landscape.[24] The Fraser Institute asserts that this is directly linked to land-claims agreements and the duty to consult, stating that industry is concerned about rapid changes to a long-standing regulation framework.[25] Prior to 1982, when Aboriginal rights were enshrined in section 35 of Canada's *Constitution Act, 1982*,[26] mineral companies were largely unconcerned with Aboriginal rights. Issues such as Aboriginal title and the Crown's duty to consult did not yet have jurisprudential recognition,[27] and industry dealt only with government permits, which were predictable and often relatively easy to obtain.

In Ontario, commentators from the Fraser Institute claim that investment has become tepid due to a lack of "policy attractiveness."[28] This assessment comes from information and commentary found in the Ontario Auditor General's 2015 report, which stated that a "lack of clarity on duty to consult with Aboriginal communities slows investment."[29] Components in this lack of clarity included delegating the duty to consult to private companies,[30] a lack of

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20. Thomas Isaac & Anthony Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2005) 23:4 J of Energy & Nat Resource Law 427 at 438.

21. *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 62, citing *Haida, supra* note 10 at para 44.

22. *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153 at para 489 [*Tsleil-Waututh*]

23. *William v British Columbia*, 2018 BCSC 1271 at para 62.

24. Malcolm Lavoie & Dwight Newman, "Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence" (24 September 2015) at 13, online (pdf): Fraser Institute <https://www.fraserinstitute.org/sites/default/files/mining-and-aboriginal-rights-in-yukon-how-certainty-affects-investor-confidence.pdf>.

25. *Ibid* at 14.

26. *Constitution Act, 1982*, *supra* note 9, s 35.

27. Dimitrios Panagos & J Andrew Grant, "Constitutional Change, Aboriginal Rights, and Mining Policy in Canada" (2013) 51:4 *Commonwealth and Comp Pol* 405 at 414.

28. Kenneth P Green & Taylor Jackson, "Uncertainty Deterring Mining Investment in Ontario" (12 January 2016), online (blog): FraserForum < https://www.fraserinstitute.org/blogs/uncertainty-deterring-mining-investment-in-ontario>.

29. Office of the Auditor General of Ontario, "2015 Annual Report" (2015) s 3.11 at 443, online (pdf): Office of the Auditor General of Ontario <http://www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf>.

30. *Ibid* at 446.

knowledge among investors about what consultation entails,[31] the complexity of consultation,[32] and the lengthy processes involved.[33]

Highlighted was investment in the "Ring of Fire," an area of northern Ontario where numerous valuable mineral deposits have been recently discovered. Despite being heralded as one of the "most promising development opportunities of a century,"[34] the lack of an adequate plan to consult more than ten different First Nations has been cited as delaying significant investment, as the province has been unable to make commitments regarding infrastructure and land-use planning.[35] In the Ontario Auditor General's report on mining, the province of Ontario has a stated goal to create a "provincial minerals sector that is healthy, competitive and sustainable."[36] This will not happen without recognizing and cooperating with First Nations.

Academics have noted that there is a considerable lack of consistent policies across Canada to support consultation.[37] This trend was noticed even before *Haida* and still has not been resolved. Instead there have been attempts to delegate the duty to administrative bodies such as the National Energy Board, who have subsequently attempted to delegate the duty to corporations.[38]

Failures to adequately consult Indigenous communities have repeatedly made national headlines in recent years. Until 2018, the most notorious example was Enbridge's Northern Gateway pipeline. The multibillion dollar project, designed to move a maximum of half a million barrels of oil a day from the Alberta oil sands to the coast of British Columbia for sale in Asian markets,[39] was approved in June 2014 with 209 conditions,[40] despite facing vigorous opposition from numerous environmental and civil society groups.[41] Planning for the project started in 1998,[42] and it is estimated that, to date, Enbridge has spent more than half a billion dollars attempting to get the project approved.[43] It is well established that Enbridge's consultation with First Nations was inadequate for the project, and repeated litigation eventually culminated in the deathblow for project approval in June 2016, when

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31. *Ibid* at 448.

32. *Ibid* at 447.

33. *Ibid* at 448.

34. *Ibid* at 449.

35. *Ibid* at 450.

36. *Ibid* at 467.

37. Isaac & Knox, *supra* note 20 at 443.

38. *Ibid, supra* note 20 at 444.

39. Enbridge, "Project Overview," online: Northern Gateway <http://www.gatewayfacts.ca/About-The-Project/Project-Overview.aspx> [Northern Gateway].

40. *Ibid.*

41. David A Rossiter & Patricia Burke Wood, "Neoliberalism as Shape-Shifter: The Case of Aboriginal Title and the Northern Gateway Pipeline" (2016) 29:8 Soc and Nat Resources 900 at 902.

42. Northern Gateway, *supra* note 39.

43. Justine Hunter & Carrie Tait, "Why Northern Gateway Is Probably Dead," *The Globe and Mail* (4 December 2015), online: <http://www.theglobeandmail.com/news/british-columbia/why-the-northern-gateway-project-is-probablydead/article27620342/>.

a Federal Court overturned the approval granted by the governor in council.[44] Enbridge has since stated that it will not seek to appeal the decision, noting in their press release that "in order to encourage investment and economic development, Canadians need certainty that the government will fully and properly consult with our nation's Indigenous communities."[45]

Since Northern Gateway, the expansion of the Trans Mountain Pipeline, formerly owned by Kinder Morgan, has dominated headlines. First announced in 2012, approval for the line was granted in 2017, but construction was immediately delayed because of litigation and civic action. In August 2018, the Federal Court of Appeal quashed the project's approval, both for failing to adequately consider or plan for "downstream" environmental risks and for failing to reach a standard of meaningful consultation with Indigenous communities along the pipeline's path.[46]

Site C is a further example of a highly controversial project in British Columbia where the duty to consult has played a pivotal role. Site C is a hydroelectric dam planned for the Peace River in northeast British Columbia, with an estimated cost of $9 billion.[47] This is the third such dam along the Peace River, and it is expected that the reservoir will be 83 kilometres long and flood more than 5,500 hectares of land in Treaty 8.[48] The Government of British Columbia drafted a five-stage process to move the project from initial planning to approval and has made assurances that the project will not go ahead without "ensuring that the Crown's constitutional duties to First Nations are met."[49] Stage 2 was intended for consultations with First Nations and stakeholders such as property owners, but once the Government of British Columbia received environmental approval, construction began, with many Indigenous groups, such as the Treaty 8 Tribal Association, still opposed to the project and concerned about the depth and quality of consultation.[50]

Despite confirming with Treaty 8 First Nations that consultation would take place at Stage 2, public pre-consultation was already complete before the Treaty 8 consultation plans had been negotiated, leaving Stage 2 only halfway complete when the scope of the project was decided.[51] Furthermore, it is argued that for adequate consultation to have taken place, the Treaty 8 First Nations should have been involved in the initial planning stages, and that

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44. *Gitxaala Nation v Canada*, 2016 FCA 187 at para 344.

45. Enbridge, "Northern Gateway Announces It Will Not Appeal Recent Federal Court of Appeal Decision that Reversed Project Approval" (20 September, 2016), online: Northern Gateway <http://www.gatewayfacts.ca/Newsroom/In-the-Media/Northern-Gateway-announces-it-will-not-appeal.aspx>.

46. *Tsleil-Waututh*, *supra* note 22.

47. Mark Hume, "Crown Land Quietly Offered to First Nations in Return for Site C Dam Site," *The Globe and Mail* (18 February 2016), online: <http://www.theglobeandmail.com/news/british-columbia/crown-land-offered-to-first-nations-in-return-for-site-c-dam-site/article28807209/>.

48. BC Hydro, "Project Overview" (2017), online: Site C: Clean Energy Project <https://www.sitecproject.com/about-site-c/project-overview>.

49. West Coast Environmental Law Association, "Legal Backgrounder: Site C Dam—The Crown's Approach to Treaty 8 First Nations Consultation" (28 May 2010), online (pdf): West Coast Environmental Law at 2 <https://www.wcel.org/sites/default/files/publications/Site%20C%20Dam%20%E2%80%93%20The%20Crown%E2%80%99s%20Approach%20to%20Treaty%208%20First%20Nations%20Consultation%20-%20Legal%20Backgrounder.pdf>.

50. Treaty 8 Tribal Association, "About Site C," online: Treaty 8 <http://treaty8.bc.ca/about-site-c/>.

51. West Coast Environmental Law Association, *supra* note 49 at 3–4.

the decision to build Site C should have required the consent of each First Nation involved.[52] Prophet River First Nation and West Moberly First Nation, two of the nations whose traditional territories will be impacted by the dam, have moved to litigate the decision. Despite lengthy court proceedings, neither First Nation was successful in challenging the consultation or obtaining an injunction to stop the construction.[53]

Where litigation has failed or is ongoing, Indigenous communities have also moved toward protest and other direct action. All of the major projects mentioned above faced significant public protest. In particular, this has delayed construction of Site C, worsened public relations regarding the Trans Mountain Pipeline, and threatened continued litigation for both.[54]

That such massive, multimillion dollar pipeline investments could be shut down or significantly delayed by the duty to consult creates uncertainty for industry. Despite the considerable effort and expense by Kinder Morgan to consult with First Nations on the Trans Mountain Pipeline and meet the requirements set out by the National Energy Board and the Government of Canada, the court still quashed the approval. This was not the fault of Kinder Morgan, who believed they had met their requirements.[55] This was the failure of the federal government and National Energy Board to create a process that ensures adequate consultation.

While large companies can pour huge amounts of money into the consultation process in the hopes of gaining some control over the outcome, smaller companies have even less control over the outcome of the approval process. At the same time, results are not guaranteed for either side of these conflicts. First Nations looking to exert control over their traditional territories and to be involved in the economic future of their land must resort to litigation and are forced into relationships more akin to concerned stakeholders than nations.

B. Indigenous Frustrations with the Duty to Consult

While economic certainty is of immediate and obvious benefit to corporations seeking predictability and efficiency, the framework that existed before the duty to consult was largely indifferent to Indigenous rights and sovereignty.[56] While pundits at institutions like the Fraser Institute may claim that the developments from the Supreme Court create economic uncertainty for First Nations, uncertainty may be a welcome change from being shut out of the

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52. *Ibid* at 4.

53. See *West Moberly First Nations v British Columbia*, 2018 BCSC 1835; *Prophet River First Nation v British Columbia (Minister of the Environment)*, 2017 BCCA 58.

54. Andrew Kurjata, "Site C Dam Could Still Be Cancelled at '11th Hour' if First Nations Successful in Court," *CBC* (3 March 2019), online: <https://www.cbc.ca/news/canada/british-columbia/site-c-dam-could-still-be-cancelled-at-11th-hour-if-first-nations-successful-in-court-1.5040244>; Jason Markusoff, "The Trans Mountain Expansion Will Struggle for Years—Even if It Gets the Green Light in 2019," *Maclean's* (17 December 2018), online: <https://www.macleans.ca/politics/trans-mountain-expansion-challenges-2019>.

55. The author of this paper worked as an environmental consultant and was part of the consultation process as a subcontractor.

56. Anna Fung, Anne Giardini, & Rob Miller, "A Decade since *Delgamuukw*: Update from an Industry Perspective," in Maria Morellato, ed, *Aboriginal Law since Delgamuukw* (Aurora: Canada Law Book Ltd, 2009), 205 at 208.

process and largely ignored.[57] For many Indigenous communities, the Supreme Court rulings present political tools that have the potential to pave the way toward economic and political autonomy. However, for many First Nations, these tools seem hollow and do not overcome many of the obstacles to economic development or self-governance.

Indigenous communities are often dissatisfied with how government and industry fail to recognize assertions of nationhood and sovereignty. A study in British Columbia found that many Indigenous peoples involved in the consultation process were frustrated by being considered "stakeholders," viewing it as a misrepresentation of history and their desired role in creating and managing proposed projects on the land.[58] Being described as a "stakeholder" was seen as a flattening of Indigenous views on governance and in many ways an outright denial of nationhood.

The description of "stakeholder" puts Indigenous peoples in the same box as concerned community groups, industry, and landowners.[59] This misunderstanding of Indigenous concerns and perspectives is not necessarily an ill-intentioned rhetoric, as evidenced by discussions with community members, but one that needs to change in the interest of advancing a new paradigm on Indigenous governance.[60] Instead of being viewed as members of a self-governing nation or political force, Indigenous peoples are stereotyped in the role of environmental stewards and lumped in with environmental advocacy groups. This is not only at odds with sovereignty,[61] but also obstructs conceptualizing First Nations as economic actors in their own right and perpetuates myths surrounding the attitude of Indigenous persons toward industry.[62]

Another frustration is the tendency of consultation to be incorporated into environmental impact assessments, community consultations, and other project preliminaries.[63] While this perpetuates the stakeholder status mentioned above, it also deprives Indigenous communities of opportunities to centre the discussion on their concerns and forces them to confine their issues to whatever forum is at hand.[64] This causes important issues to go unheard and can prevent Indigenous communities from engaging in higher-level discussions with project decision makers.

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57. "Fraser Institute: Supreme Court Decisions Creating Economic Uncertainty for First Nations, for Canada," *GlobeNewsWire* (9 April 2015), online: <https://www.globenewswire.com/news-release/2015/04/09/1275931/0/en/Fraser-Institute-Supreme-Court-Decisions-Creating-Economic-Uncertainty-for-First-Nations-for-Canada.html>.

58. Suzanne von der Porten & Robert C de Loë, "Collaborative Approaches to Governance for Water and Indigenous Peoples: A Case Study from British Columbia, Canada" (2013) 50 Geoforum 149 at 154.

59. *Ibid*.

60. *Ibid* at 155.

61. *Ibid* at 152.

62. Warren I Weir, "First Nations Small Businesses and Entrepreneurship in Canada" (December 2007) at 8, online (pdf): National Centre for First Nations Governance, <http://fngovernance.org/resources_docs/First_Nation_Small_Business.pdf>.

63. Martin Papillon & Thierry Rodon, "Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada" (2017) 62 Envtl Impact Assessment Rev 216 at 219.

64. *Ibid*.

For many First Nations, the simple fact that the duty to consult does not contain language or relationships founded upon consent frustrate the recognition of self-governance.[65] Despite an emerging international consensus that Indigenous peoples are entitled to free, prior, and informed consent before embarking on projects that risk infringing their rights or the integrity of their traditional territories, the current duty to consult does not allow Indigenous peoples to make autonomous choices.[66] For Indigenous peoples, a consultation process that does not include the ability to make a final decision or a process for forming recognizable boundaries leaves the duty to consult seeming less like a purposive process and more like a rubber stamp. This problem compounds others, such as funding meaningful consultation, the balance of power in negotiations, the likelihood of litigation, and more.[67]

III PERSPECTIVES ON SOVEREIGNTY

Whether overt or subliminal, the Government of Canada's policies regarding Indigenous peoples and the Crown's assumed control over natural resources are not new. Harold Cardinal's book, *The Unjust Society*, written in the 1960s, labelled the history of Canadian policies toward Aboriginal peoples as "cultural genocide" and proposed a number of solutions that centred on Indigenous self-governance and political identity.[68] These ideas were later affirmed by the Government of Canada itself in the Report of the Royal Commission on Aboriginal Peoples in 1996, with far-reaching suggestions based on a premise of Aboriginal control over Aboriginal affairs.[69]

The report acknowledged that "many Aboriginal people see sovereignty as much as a human right as a political and legal one. Seen in this way, sovereignty is an inherent human attribute that cannot be surrendered or taken away."[70] In this sense, sovereignty can be a problematic word to use, as it infers European concepts and power structures.[71] Various Indigenous groups have other terms they feel are more appropriate, such as the Mohawk word *tewatatowie,* which can be translated as "we help ourselves."[72] Understanding how each Indigenous political unit self-defines their political identity is critical, as concepts of self-

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65. While *Haida* does state that the duty to consult could give rise to a requirement of consent, that standard is not employed by the court.

66. Papillon & Rodon, *supra* note 63 at 3.

67. Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46:2 UBC L Rev 397.

68. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 139, citing Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1969) at 139.

69. Canada, *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Volume 2: Restructuring the Relationship* (Ottawa: Canada Communication Group—Publishing, 1996) [*RCAP*].

70. *Ibid* at 105.

71. *Ibid* at 108

72. Gerald R Alfred, *The Meaning of Self-Government in Kahnawake* (Ottawa: Royal Commission on Aboriginal Peoples, 1994). See *RCAP, supra* note 69.

governance, nationhood, and identity may vary with each nation's unique history, culture, and circumstance. What joins these varying concepts is a fundamental right to self-determination.[73]

John Borrows stresses that the concept of Aboriginal control of Aboriginal affairs must, by necessity, include the "special bond between Aboriginal peoples and the land they traditionally occupy."[74] This was again underlined by the Royal Commission on Aboriginal Peoples:

> Governance is inseparable from lands and resources. If self-government is to be a reality, then Aboriginal people need substantially more lands and resources than they have now. While these alone cannot guarantee self-reliance, Aboriginal peoples will be unable to build their societies and economies without an adequate land base.[75]

The report goes on to mention that self-government cannot "be practiced without a land base and resources to support the society and the administration of that society."[76] Many of the testimonials to the Commission were adamant on this point, repeatedly linking land not just to the future of economic and administrative success but to the very identity of the community.[77] Brian Slattery follows in this same mould, with a call for a broad recognition of Aboriginal title, carried by "Principles of Recognition" that encapsulate the rights of a sovereign people with a historical right to lands and self-defined ways of life.[78]

Felix Hoehn sees concepts of sovereignty and the duty to consult as inextricably linked, with the duty to consult stemming directly from the "Crown's unilateral assertion of sovereignty over Aboriginal nations."[79] This provides a conflict between Indigenous notions of sovereignty and Crown sovereignty, though one that can be reconciled through careful arrangement, such as through the Nisga'a treaty.[80] With the issue of competing jurisdictions and lawmaking settled on a constitutional level in *Campbell v British Columbia (AG)*,[81] Hoehn asserts that there is no constitutional limit to simultaneous sovereignties cooperating at different political levels. There is space for Indigenous sovereignty without threatening the unity of Canada,[82] but it must be created through negotiation and cannot be imposed by a court.[83]

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73. *RCAP, supra* note 69 at 111.

74. *Borrows*, *supra* note 68 at 157.

75. *RCAP*, *supra* note 69 at 416.

76. *Ibid* at 138

77. *Ibid* at 138–140.

78. Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85:2 Can Bar Rev 255 at 282.

79. Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre University of Saskatchewan, 2012) at 51.

80. *Ibid* at 53; *Nisga'a Final Agreement Act*, SBC 1999, c 2 [*NFAA*].

81. *Campbell v British Columbia (AG)*, 2000 BCSC 1123.

82. *Hoehn*, *supra* note 79 at 55.

83. *Ibid* at 79.

On an international level, there is a firm framework for recognizing and accepting Indigenous sovereignty. The United Nations Declaration on the Rights of Indigenous Peoples,[84] fully supported by Canada as of 2016,[85] asserts broad rights to self-determination that include political status and economic development.[86] While the current government has expressed its intention to begin a new age of communication and cooperation with Indigenous peoples on a nation-to-nation basis,[87] how the government plans to follow through on its support for the resolution has yet to be seen.

A. Sovereignty as A Vehicle for Economic Certainty

A report by the National Aboriginal Economic Development Board in 2013 noted that for consultation to be meaningful, it needed to begin at the outset of any project,[88] a sentiment echoed by scholars and Indigenous politicians alike.[89] Recognizing Indigenous sovereignty and requiring consent from Indigenous political bodies would put Indigenous communities at the forefront of any economic activity and permit industry to deal with nations directly instead of through consultation and the Crown.

It is widely recognized that there are numerous hurdles for Indigenous communities when accessing, creating, and building economic opportunities. From the *Indian Act*[90] to the duty to consult to the myriad consultation policies of Canada's various levels of government,[91] there are three common themes frustrating Indigenous economic efforts. The first is land rights, the second is the lengthy timescales needed to approve economic endeavours, and the third is the indirect nature of the duty to consult. While various plans have attempted to deal with each of these issues in their own right, such as the *First Nation Land Management Act*[92] or pursuing land claims or Aboriginal title, many of these plans do not account for concepts of Indigenous sovereignty or nationhood.

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84. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, 2007, Supp No 49, UN Doc A/61/49 (2007) 1 [*UNDRIP*].

85. Indigenous and Northern Affairs Canada, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: Government of Canada <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

86. See art 3 of *UNDRIP*, *supra* note 84 at 4.

87. Canada, Governor General, *Making Real Change Happen: Speech from the Throne to Open the First Session of the Forty-Second Parliament of Canada*, 42-1 (4 December 2015) (Hon David Johnston).

88. National Aboriginal Economic Development Board, "2012–2013 Annual Report" (2013) at 6, online (pdf): National Aboriginal Economic Development Board <http://www.naedb-cndea.com/reports/naedb-2012-2013-annual-report.pdf>.

89. Kyle Bakx, "First Nations Hold Bargaining Power in Pipeline Decisions," *CBC* (5 March 2016), online: <http://www.cbc.ca/news/business/blaine-favel-first-nations-pipelines-veto-1.3476221>.

90. *Indian Act*, RSC 1985, c I-5.

91. Ravina Bains & Kayla Ishkanian, "The Duty to Consult with Aboriginal Peoples: A Patchwork of Canadian Policies" (May 2016) at 7, online (pdf): Fraser Institute <https://www.fraserinstitute.org/sites/default/files/duty-to-consult-with-aboriginal-peoples-a-patchwork-of-canadian-policies.pdf>.

92. *First Nations Land Management Act*, SC 1999, c 24.

If the duty to consult creates economic uncertainty for businesses concerned about the outcome of the consultation process, certainty may be obtained through models of shared decision making. Models that take into account Indigenous culture, legal systems, knowledge systems, and goals have been greatly successful in the past. A prominent and often-cited example is the Gwaii Haanas, seen as a success by the Haida and the Crown alike.[93] This economic and governance agreement between Canada and the Haida Nation implements a shared decision-making model that does not question who has the final authority, as decisions are made through consensus.[94] This agreement presents a vision of how future arrangements could operate on a nation-to-nation basis, integrating decision-making ability on all levels.

Another example is the modern treaty of the Nisga'a in the northwest of British Columbia. Land rights were central to the negotiation of the Nisga'a treaty, which spanned decades. The final agreement created what some have referred to as a "hybrid" system of land ownership and sovereignty, conferring fee simple rights to the Nisga'a, held communally and with a provision that sidesteps the underlying interest of the Crown.[95] Alongside these land rights, the Nisga'a treaty also provides the Nisga'a exclusive power over mineral wealth and other resources.[96]

There have been a range of criticisms over the appropriateness of this hybrid system, how it reflects on sovereignty and nationhood, and what it will ultimately mean for the Nisga'a and other Indigenous peoples.[97] However, with the Nisga'a now recognized as having exclusive power over mineral wealth and other resources, any industry actor wishing to access these resources must negotiate directly with the Nisga'a. Consultation cannot be sidestepped and is instead integrated, as any corporation wishing to begin a project on Nisga'a lands must do so on the terms of the Nisga'a. This power has been upheld as constitutionally valid.[98]

A similar result may be found where Aboriginal title is established. In *Tsilhqot'in Nation v British Columbia*,[99] Aboriginal title was established and the Crown could no longer make decisions for the land, as the decision-making powers under the *Forest Act* no longer applied (as it was no longer Crown land). The Tsilhqot'in gained control over their traditional territories, and their consent is now required for forest management, outside province-wide regulations of general application.[100]

While in many ways a troubled and imperfect example in the history of sovereignty and partnership, there are a lot of lessons to learn from the experiences of the Eeyou, known as the James Bay Cree who hail from the Eeyou Istchee, or "people's land" in northern Quebec.[101]

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93. Louise Mandell, "The Ghost," in Maria Morellato, ed, *Aboriginal Law since Delgamuukw* (Aurora: Canada Law Book Ltd, 2009) 55.

94. *Moresby Explorers Ltd v Canada (AG)*, 2001 FCT 780.

95. Tracie Lea Scott, *Postcolonial Sovereignty? The Nisga'a Final Agreement* (Saskatoon: Purich Publishing Ltd, 2012) at 61.

96. *NFAA*, *supra* note 80 at c 3, s 19.

97. Scott, *supra* note 95 at 86–89.

98. *Sga'nism Sim'augit (Chief Mountain) v Canada (AG)*, 2013 BCCA 49.

99. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

100. *Ibid* at para 101.

101. Caroline Desbiens, "Nation to Nation: Defining New Structures of Development in Northern Quebec" (2004) 80:4 Econ Geography 351 at 352.

What began as a story of frustration and conflict between concepts of nationhood and incompatible views eventually turned to partnership that created space for recognition of nationhood both within and outside the Eeyou Istchee, and, while not perfect, it is instructive for other Indigenous groups facing similar pressures.

The agreement signed between the government of Quebec and the Eeyou in 2002 specifically stated that this was to be an agreement between nations, as much a recognition of the national identity of the Québécois as it was a recognition of the Eeyou.[102] This agreement came in response to years of conflict between the Quebec government's hydroelectric aspirations and the Eeyou's desire for independent control over their land and resources. It is important to recognize that the struggles between the Eeyou and Quebec were often painful for the Eeyou, and that they were some of the first Indigenous groups to negotiate a resource-sharing partnership. There is still significant controversy, even within the Eeyou communities, about the success of the partnership and what it means to the future of the Eeyou people.[103]

The variance in how Indigenous groups approach sovereignty, exert control over their lands, negotiate with other actors, and pursue economic activities show that there is no silver bullet or ready-made process.

Beyond those efforts of Indigenous communities themselves, further proposals exist that attempt to mesh Indigenous desires for self-governance with European conceptions of property ownership and legal systems. One such example is Thomas Flanagan's "First Nations Property Ownership Act," which advocates a transfer of reserve land to First Nations in fee simple title.[104] Criticisms of Flanagan's proposal note that, among other glaring issues, it fails to take into account the vital aspect of self-determination that inherently accompanies concepts of sovereignty. While Flanagan understands that the current economic conundrums facing Indigenous communities often revolve around unequal control over land and resources, critics point out that his proposal flattens self-determination of Indigenous peoples and only reinforces their position in existing colonial structures.[105]

Many actors in industry do not resist these new paradigms of governance, sovereignty, and economic development. Recent statements from Stockwell Day, former energy minister and current Senior Advisor of Pacific Future Energy's advisory board, show that there is willingness among industry proponents to recognize First Nations sovereignty—at least in an economic capacity:

> We need to recognize B.C. First Nations as landowners and governments. We must recognize the true value of First Nations lands, their traditions and

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102. *Ibid* at 359.

103. Martin Papillon, "Aboriginal Quality of Life under a Modern Treaty," IRPP Choices 14:9 (August 2008) 1 at 15, online (pdf): <https://irpp.org/wp-content/uploads/assets/research/aboriginal-quality-of-life/aboriginal-quality-of-life-under-a-modern-treaty/vol14no9.pdf>.

104. Thomas Flanagan, Christopher Alcantara, & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's Press, 2010) at 180.

105. Hoehn, *supra* note 79 at 105.

> their people. We must work with First Nations every step of the way—from concept to implementation—to build any resource projects on their territory.[106]

While from an industry perspective recognizing Indigenous sovereignty stems from a desire to speed up project approvals, negotiate directly with Indigenous peoples, and reduce overall uncertainty,[107] it does show a willingness to adapt to new norms in resource management and move to new models of governance and policy. Many in industry have responded proactively, attempting to engage Indigenous peoples and bring them on board with projects as early as possible to ease the consultation process.[108] Cameco, a uranium mining company that operates in northern Saskatchewan, now includes impact benefit agreements for each of its projects, negotiating with communities before any other assessment even begins.[109]

An example of these negotiations is the four-party agreement between Cameco, Areva (another uranium company), the Kineepik Métis, and the Aboriginal Community of Pinehouse. Signed in 2012, the agreement covers a range of topics, from workforce initiatives to dispute resolution, and serves as a platform for the uranium industries to address local concerns on an equal basis.[110] While such negotiations are a step in the right direction, they still do not reflect a full recognition of Indigenous governance and do not replace the negotiations and cooperative efforts that would need to take place if the communities had a recognized jurisdiction over the land.

B. Free, Prior, and Informed Consent

Beyond the examples given above of the different ways that Indigenous peoples have moved to have their sovereignty recognized by both private and state actors in Canada, there is a strong framework to be found in Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):

> States shall consult and cooperate in good faith with the Indigenous 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.[111]

Free, prior, and informed consent has been raised by numerous Indigenous organizations and political bodies as a framework for creating dialogue not only with the Crown, but

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106. Sebastian Gault, "How First Nations Resurgence Could Help or Hinder Pipeline Projects," *Business Vancouver* (8 September 2015), online: <https://www.biv.com/article/2015/9/how-first-nations-resurgence-could-help-or-hinder-/>.

107. Dwight Newman, "Emerging Challenges on Consultation with Indigenous Communities in the Canadian Provincial North" (2015) 39 N Rev 22 at 23.

108. Papillon, *supra* note 103 at 104.

109. Cameco Corporation, "Aboriginal Peoples Engagement" (2014), online: *Cameco Sustainable Development Report* <https://www.cameco.com/sustainable_development/2014/supportive-communities/aboriginal-peoples-engagement/>.

110. *Collaboration Agreement Between the Northern Village of Pinehouse and Kineepik Metis Local Inc and Cameco Corporation and Areva Resources Canada Inc*, 12 December 2012, online (pdf): Pinehouse.info <http://pinehouse.info/wp-content/uploads/2016/06/Collaboration-Agreement-final.pdf>.

111. *UNDRIP, supra* note 84 at 8 [emphasis added].

also with industry. It is wrapped in concepts of sovereignty, and has been widely debated by Indigenous leadership in Canada, with many proponents who see it as a way of building a platform for self-governance, insofar as self-governance requires dialogue with outside actors.[112]

Free, prior, and informed consent (FPIC) has also been offered as a way of remedying the lack of language surrounding consent in the duty to consult.[113] Sarah Morales proposes that FPIC can be implemented alongside the duty to consult, with the duty to consult creating a framework for when FPIC can be implemented, and FPIC outlining a normative process informed by respect and consensus building. Morales notes that successfully achieving the implementation of FPIC requires a careful braiding of international, Indigenous, and Canadian law with the overall goals of reconciliation and Indigenous self-determination.[114]

Whether FPIC needs to be braided with Canadian and Indigenous law to achieve a version of self-determination that can engage industry is another question. The implementation of FPIC through a consensus with the Canadian state would appear to create another layer of complexity to the application of Indigenous sovereignty insofar as it applies to private corporations. It is intuitive that Indigenous sovereignty would go hand in hand with Indigenous laws and that private corporations would be obligated to follow Indigenous laws if they were a precondition to doing business. FPIC in that sense could become an obstacle to Indigenous sovereignty, as it presents yet another involvement of the Crown in what could otherwise be direct dialogue between industry and nation.

FPIC has been seen by others as an important step toward reducing litigation by fostering dialogue between industry and Indigenous peoples and encouraging agreements through negotiation. Underpinning these dialogues is the mutual acknowledgement that the industry actors, be they pipeline proponents or mining corporations, acknowledge that consent is needed to proceed with development. This is the solution advocated by Robert Hamilton in his comments on *Tsleil-Waututh Nation v Canada (AG)*, the case that shut down the Trans Mountain Pipeline.

Hamilton notes that the duty to consult, as seen by the Federal Court of Appeal, is a high standard, highly fact dependent, and prone to encouraging "endless litigation." In this way, Hamilton argues that the duty to consult breeds uncertainty for all parties, and that no matter how clear the process is, there appears to always be another court battle to be fought over the result. In Hamilton's eyes, the solution is likely negotiation and consent—industry and Indigenous peoples working together to build relationships and reach agreement—a much sought-after certainty instead of perpetual frustrations.[115]

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112. Joshua Gladstone & Rachel Singleton-Polster, "Moving Forward with the Right to Free, Prior & Informed Consent," N Pub Aff 4:2 (3 May 2016), online: <http://www.northernpublicaffairs.ca/index/letter-from-the-editor-moving-forward-with-the-right-to-free-prior-and-informed-consent/>.

113. Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Centre for International Governance Innovation, "UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws—Special Report" (Waterloo: CIGI, 2017) 63 at 65.

114. *Ibid* at 77.

115. Robert Hamilton, "Uncertainty and Indigenous Consent: What the Trans-Mountain Decision Tells Us about the Current State of the Duty to Consult" (10 September 2018), online: ABlawg.ca <https://ablawg.ca/2018/09/10/uncertainty-and-indigenous-consent-what-the-trans-mountain-decision-tells-us-about-the-current-state-of-the-duty-to-consult/>.

IV CONCLUSION

A greater recognition of Indigenous land rights and governance structures has the potential to reduce economic uncertainty for industry and Indigenous groups alike. Currently, the duty to consult does not provide an adequate means of providing confidence to industry actors or self-determination to Indigenous groups. Recognizing Indigenous sovereignty will allow Indigenous groups to capitalize on the resources within their territories while providing industry with a clear process for planning and negotiating new developments. By necessity, this involves complete Indigenous control over developments within their territories, which the current paradigm does not provide.

Many in industry are already prepared to put Indigenous communities at the forefront of new developments. However, for these changes to bring full and meaningful change, they must stem from the federal and provincial governments, and by necessity will require courage from our elected representatives to step beyond the current norm.

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JOHN BORROWS' *FREEDOM AND INDIGENOUS CONSTITUTIONALISM*: CRITICAL ENGAGEMENTS

Freya Kodar, editor[*]

CONTENTS

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I INTRODUCTION AND OVERVIEW

Jeremy Webber[1]

It is my pleasure to introduce three critical engagements with John Borrows' latest book, *Freedom and Indigenous Constitutionalism,*[2] and provide an overview of the book's argument.

The three reflections emerged out of an Author-Meets-Reader session held at the University of Victoria in February 2017. Each of the readers had engaged extensively with Borrows' previous work. Here they delved into Borrows' latest foray, reflected upon how *Freedom and Indigenous Constitutionalism* added to their understanding of Borrows' central concerns, and considered the book's implications for their own areas of expertise. This collective commentary represents, then, an extension of long-standing conversations. Indeed, Borrows' response, which concludes this set of engagements, continues the exchange, restating a central theme of his book in condensed and arresting terms.

The authors' commentaries are striking in the diversity of standpoints from which they engage Borrows' arguments. Patricia Cochran is a talented legal theorist whose work explores how judges ought to reflect on society and interpret the law in the face of the profoundly different ways in which people experience society and law, differences that are tied to wealth and social position.[3] She explores the methodological implications of Borrows' argument, specifically focusing on Borrows' close attention to the embodiment of our legal relations, including their sheer physicality. The second commentator, Avigail Eisenberg, is a leading political theorist concerned with equality, identity, diversity, inclusion, and democratic citizenship.[4] She focuses on Borrows' discussion of civil disobedience, specifically his emphasis on the ways in which various forms of contestation foster better—or worse—relationships. Our third commentator, the remarkable scholar of Indigenous comparative politics Heidi Kiiwetinepinesiik Stark, in her own work brings Indigenous and non-Indigenous concepts of law and governance into conversation.[5] She is Turtle Mountain Ojibwa and shares with Borrows a deep knowledge of Anishinaabe understandings of the world. Her commentary places Borrows' contributions within that framework of thought.

John Borrows' book consists of six chapters that had previously appeared as articles and policy papers, coupled with an important introduction and conclusion. But it is not merely a collection of previously published papers: First, the papers have been substantially reworked to form a coherent whole. Second, Borrows has long pursued his writing with two things in mind—the immediate purpose to which a particular paper is directed and a vision of how

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1. Faculty of Law, University of Victoria.

2. John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

3. See especially Patricia Cochran, *Common Sense and Legal Judgment: Community Knowledge, Political Power and Rhetorical Practice* (Montreal: McGill-Queen's University Press, 2017).

4. See, for example, Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims* (Oxford: Oxford University Press, 2009).

5. Heidi Kiiwetinepinesiik Stark is co-editor (with Jill Doerfler and Niigaanwewidam Sinclair) of *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing, MI: Michigan State University Press, 2013) and author of *Unsettled: Anishinaabe Treaty-Relations and US/Canada State-Formation* (Minneapolis: University of Minnesota Press, under contract).

that project forms part of a larger extended argument. In a short preface entitled "Miigwech" ("Thank you" in Anishinaabemowin),[6] Borrows describes the process by which he reworked the papers into chapters at a cabin in his home community of Neyaashiinigmiing on the Cape Croker Reserve in Ontario, inspired by the coming of the spring, with his computer powered by the cabin's solar panels. It is a poetic start to a beautiful book—a book that adds substantially to the themes Borrows has addressed in previous work.[7] Indeed, the book's beauty and power have been evident to others: *Freedom and Indigenous Constitutionalism* won the 2017 Donald Smiley Prize for the best book relating to the study of government and politics in Canada—the second time Borrows has won the Donald Smiley Prize.

A. Structure

The book starts with an introduction that sets out the three linked themes that run through the volume as a whole: freedom, relationality, and tradition. I will return to those themes and their interaction in the second section of this overview. The themes are picked up in the individual chapters, each of which is devoted to a particular challenge of freedom and constitutionalism. The chapters themselves do double-duty: They address the particular topic to which they are devoted, and they provide texture to and elaboration on the themes that flow, like the interlocking channels of a braided river, throughout the book. One has the clear sense that Borrows has been reflecting long and hard on the principles that have underlain his thought across a multitude of questions. The book deals with several of those questions. It does so in a manner that is quite lawyerly at times, demonstrating Borrows' interest and skill in engaging with legal interpretation and legal mechanisms. But above all, this book expresses, with crystalline clarity, the cross-currents of principle that underlie and animate the whole of his work.

The first substantive chapter is devoted to mobility as an expression of freedom. One of the book's enchantments is that it anchors its arguments in Borrows' own life and the lives of his extended family. In this case, mobility is introduced by a story, told with self-deprecation, of Borrows being teased by his students about the frequency with which he has moved among universities.[8] Characteristically, this chapter speaks of mobility in two senses. One is geographical, in which Borrows captures how Indigenous peoples typically travelled widely, all the time retaining a privileged connection to place: to their homelands, which constitute a "pivotal axis around which most Indigenous peoples' lives revolve."[9] This is a portrait of an extended world of Indigenous action, one that was forcibly restricted by the establishment of reserves. The second type of mobility, equally if not more important, is mental mobility, in which one exercises the freedom to range across a world of ideas. Borrows sees these two kinds of mobility as being closely related, appropriately so given the grounded vision of freedom that he articulates. Throughout the volume Borrows emphasizes the contextual

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6. Borrows, *supra* note 1 at ix–x.

7. Borrows is an immensely productive scholar. Here is a list of just his solely authored books: *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).

8. Borrows, *supra* note 1 at 5–6.

9. *Ibid* at 21.

conditioning, the sheer physicality, of the conceptual analysis.[10] Indeed, the chapter on mobility is entitled "Physical Philosophy."

The second substantive chapter is on civil disobedience. This chapter is marked by Borrows distinguishing between three possible assessments of individual instances of civil disobedience—(1) productive, (2) questionably productive, and (3) not productive—which then shape his discussion of several cases of Indigenous civil disobedience that are discussed at length in the chapter.[11] The distinction between these three classes depends on the quality of relationship to others that is enacted when one is engaging in civil disobedience. He expressly rejects the "cult of self-sufficiency."[12] He says that civil disobedience can "pry open new spaces of engagement"; for example: "In some small measure, civil disobedience allows a subjugated group . . . to reflect back to the domineering party the experience of being oppressed."[13] He has a strong disposition to non-violence, although he declines to condemn all recourse to violence by others.[14] Moreover, in the striving for a better relationship—the quality, Borrows argues, that characterizes productive, democratic, and cooperative civil disobedience—assertions of law, whether of an alternative Indigenous legality or contrasting interpretations of the same non-Indigenous law, play a central role.[15]

The third chapter addresses Indigenous participation in Canada's various constitutional conversations, especially regarding constitutional reform. Borrows is highly critical of the manner in which Indigenous peoples have been acted upon or ignored by Canadian governments, but he does not reject engagement with the Canadian constitution. On the contrary, he remains faithful to his emphasis on the inescapability of relationship. He does not reject the importance of institutions, including the institutions of the state.[16] This chapter is therefore oriented, simultaneously, toward both resistance and engagement. He emphasizes the capacity, indeed the great value, of Indigenous peoples acting autonomously, "pressing against [the Canadian constitution's] potentially perpetual Eurocentric form," but always with the hope (as his use of "potentially" suggests) that Indigenous action will one day open up a greater intercultural dialogue that will transform the Canadian constitution into a genuinely intercultural body of law.[17]

His fourth substantive chapter is on originalism in the Canadian constitution—that is, on Canadian variants of the idea that the meaning of the constitution is set at its date of origin, not subject to continued evolution. His essential argument in this chapter is that, although Canadian constitutional actors have generally rejected originalism when dealing with the non-Indigenous dimensions of the constitution, they have embraced it emphatically and damagingly when dealing with Indigenous peoples. Indigenous peoples have been confined by conceptions of Indigeneity that are frozen in the past and that serve, when transposed into constitutional

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10. See, for example, *ibid.* at 8–9, where he discusses his own learning of Anishinaabemowin as a metaphor for contextually conditioned and relational freedom, in which the physical dimension of language acquisition is foregrounded.

11. *Ibid* at 53 and 55ff.

12. *Ibid* at 54.

13. *Ibid* at 51.

14. *Ibid* at 100–101.

15. See, for example, *ibid* at 53.

16. See, for example, *ibid* at 103.

17. *Ibid* at 126–127.

interpretation, to hamstring Indigenous peoples and their institutions. Instead, he argues, one should treat the Canadian constitution as a "living tree" in all its dimensions, including those that concern Indigenous peoples. He gives the metaphor of the living tree an extended interpretation founded upon the ability to learn from the natural world.[18] He also opposes originalist approaches within Indigenous discourse.[19] They too are confining and misconceived and should be rejected, although not at the expense of rejecting traditions themselves: "We need to be intellectually mobile and we also need to know when to appropriately 'dig in.' . . . We need to be constantly open to alternative approaches that challenge false horizons, even as we embrace life-giving traditions."[20]

In the fifth substantive chapter, Borrows argues for the value of legislative initiatives to Indigenous legality and Indigenous/non-Indigenous reconciliation. Indigenous peoples' experience of legislative impositions has not been good. Borrows frames the arguments in this chapter with multiple caveats, emphasizing that Indigenous peoples are fully justified in being skeptical about legislation. But he nevertheless accepts the possibility of legislation as a useful expedient, an expression of the interdependency of peoples,[21] and he draws on the experience of the United States to show ways in which legislation can play a constructive role. For this to work, however, legislation has to embrace Indigenous self-determination, something he suggests has not commonly occurred in Canada.[22]

Borrows' sixth and final substantive chapter focuses on "Aboriginal and Treaty Rights and Violence against Women." This chapter brings into conjuncture many of the arguments made throughout the book: the need to engage critically with tradition; the adoption of a living tree approach to constitutional interpretation; the value of relationship; and the past tendency of Canadian courts to interpret Indigenous rights in an ungenerous manner, especially when it comes to questions of governance. Borrows' arguments proceed along two tracks: (1) They emphasize the need for Indigenous peoples to embrace and promote women's equality, and especially the crucial role that Indigenous peoples' own legal principles and institutions can play in doing so; and (2) his arguments stress that the underdevelopment of Indigenous self-government in Canadian constitutional law has impeded the ability of Indigenous governments to fulfil this role, in part because Indigenous governments have internalized these limitations. In short, Borrows seeks to reinvigorate Indigenous peoples' own mechanisms for addressing the crucial challenge of violence against women by transforming both the internal and external constraints that undermine those mechanisms.

The sixth chapter brings to an end Borrows' thought-provoking examination of tradition, relationality, and freedom within a wide range of contexts. In his seventh and concluding chapter, the three themes are recapitulated, their interrelationships re-emphasized, and the nature of physical philosophy given greater definition. I now turn to these themes, summarizing each in turn.

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18. *Ibid* at 151–152.

19. *Ibid* at 153–156.

20. *Ibid* at 129.

21. *Ibid* at 162.

22. *Ibid* at 164–166.

B. Themes

1. Tradition

The opening words of Borrows' book are an emphatic rejection of essentialized and fundamentalist conceptions of tradition, especially in the Indigenous context:

> In my view, there is no timeless trait, characteristic, custom, or idea that is categorically fundamental to being Indigenous. The categories of Mi'kmaq, Abenaki, Cree, Haudenosaunee, Anishinaabe, Assiniboine, Dakota, Secwepmec, Salish, Nuu-Chah-Nuulth, Gitksan, Tlingit, Haida, Dene, Metis, Inuit, etc., are all context-dependent classifications. They are political, social, legal, linguistic, and/or cultural facts that are fluid and subject to change through time.[23]

Nevertheless, although Borrows adopts a dynamic and even "invented" understanding of traditions, traditions are, for him, the essential starting point for all legal analysis (both Indigenous and non-Indigenous)—indeed for all thought and action:

> There is no social or political space which is tradition-free. Traditions explicitly or implicitly colour our every thought and action in our political, social, scientific, religious, cultural, linguistic, and economic lives. . . . They arise as real limits in Indigenous peoples' relationships because they are embedded within everyday practices; within their context, a tradition's limits are treated as necessary to live well within a community in any given moment of time.[24]

In Borrows' view, then, it is necessary to approach traditions respectfully but critically. Everything depends on realizing their dynamic character and working to assess and refine them, drawing upon their strength but reforming their defects:

> It all depends on how we envision and apply them.[25]
> . . . [T]raditions can be a valuable source of inspiration, guidance, and encouragement if they are seen as resources for thought and action. They can make life worth living. However, problems arise when traditions are treated as timeless models of unchanging truths that require unwavering deference and unquestioning obedience.[26]

As with so much else in the book, these arguments are, importantly, not directed solely toward Indigenous legal traditions. Borrows turns them immediately to a critique of Canadian traditions of constitutional thought.[27] Indeed, throughout the book, Borrows holds Canadian constitutionalism to the same standards as Indigenous constitutionalism. He addresses criticisms levelled against Indigenous traditions, he gives those criticisms their due, but he

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23. *Ibid* at 3.

24. *Ibid* at 11 and 20. See also at 11 and 20n3 where Borrows invokes Eric Hobsbawm's notion of "invented traditions." See Eric Hobsbawm, "Introduction: Inventing Traditions" in Eric Hobsbawm & Terence Ranger, eds, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983) at 1.

25. Borrows, *supra* note 1 at 5. See also Borrows, *supra* note 1 at 205, although the need for critical engagement is emphasized throughout the book.

26. *Ibid* at 4.

27. *Ibid* at 4.

then turns them around, showing, with the quality of a trickster, how those criticisms are a compelling critique of Canadian law's own treatment of Indigenous peoples.[28]

The conception of tradition that emerges from this book therefore emphasizes that knowledge and action are contextual, always occurring within a historically and physically located process. Indeed, it is not too much to say that the contextual character of thought and action is what we mean by tradition: Traditions are the body of resources, terminology, stories, and experience that we use to orientate ourselves in thought and action. Tradition indispensably shapes our lives, but we then need to make it our own, criticizing it, deliberating, acting, and thereby adding to our own, our tradition's, and our nation's stock of resources. Tradition is, in Borrows' view, the crucial and indispensable starting point, providing us with sources of "inspiration, guidance, and encouragement" for lifetimes of thought and action, from which we then exercise our intellectual mobility. Traditions are always about thinking and acting, not about stasis.

2. Plurality And Relationality

Borrows also emphasizes that we always live among a plurality of traditions. That plurality is manifest at multiple levels. It is present within each individual, with traditions combining differently in each person and group.[29] The legal traditions that affect us are also multiple. When discussing responses to violence against women, he emphasizes that, within Indigenous communities (and indeed outside of them), both Indigenous and non-Indigenous forms of legality have a role to play: "Indigenous governance would be regarded as functioning analogously to the checks and balances of federalism—that is, working in a cooperative, coordinated and competitive way with the other levels of government."[30] He is also clear that this cooperation and competition among legal orders is normatively valuable and not just an empirical fact: The legal orders' combined presence means that violence against women can be dealt with "in ways that draw upon the strengths of all jurisdictions across the land."[31]

Indeed, he sees this pluralism as one of the features that promotes freedom. He emphasizes, again and again, that true freedom resides in the quality of our relationships. We gain a broader sphere of thought and action if we draw, in constructive ways, on our relations with others. Indeed, our very identities are defined in relationship with others.[32] One of his greatest criticisms of Canadian constitutionalism is that it has deprived itself of the benefits that come from constructive dialogue with Indigenous traditions.[33]

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28. Borrows introduces the Anishinaabe trickster, Nanabozho, *ibid* at 7, but of course the trickster is a key character in Anishinaabe and other Indigenous traditions, whom Borrows has invoked in other writings. See, for example, *Recovering Canada, supra* note 6 at chapters 3 and 4.

29. Borrows, *supra* note 1 at 20.

30. *Ibid* at 190–191.

31. *Ibid* at 190–191.

32. *Ibid* at 6–7 and 10.

33. *Ibid* at 12.

3. Freedom

The vision of freedom in this book is therefore relational, mobile, critical, contextualized, plural, and pragmatic. Borrows is cautious in his abstractions and generalizations, much more comfortable with tentative, nuanced, and context-bound analyses.[34] He sees the capacity for responsiveness and mobility of mind as being itself an important dimension of freedom. Indeed, I suspect that some readers will find his insistence on nuance, multiplicity, qualification, and context-boundedness to be frustrating at times. His openness to legislation as a potential means of instituting Indigenous rights might be one such case.

This conception of freedom is of a piece with his adherence to a grounded, located, philosophy of acting in the world, which he calls physical philosophy—*akinoomaagewin*. This philosophy consists in "[s]tarting in the middle of the complex state in which we find ourselves, and working towards a better state . . . Anishinaabe physical philosophy is inductive and derives conclusions from experience, observation, and discussion. This approach does not claim to reveal uncontested or absolute truth."[35] There are clear affinities between Borrows' approach and James Tully's "public philosophy," which similarly conjoins thinking with acting in the world. Indeed, Borrows' dialogue with Tully is represented in his endnotes.[36] Borrows concludes: "As Indigenous peoples, we cannot just theorize our way to freedom—we must act well in the world. We must more fully and responsibly own, relate to, and control how we interact with others."[37]

C. Final Comments

Borrows captures the interconnection of all these themes in the following compelling paragraph:

> This book contends that, as we make these decisions and distinguish between helpful and harmful traditions, our freedom is at its strongest when it is publicly interactive and aimed at good living. In a respectful relational context, the quest for freedom to live a good life becomes a self-governing activity, a simultaneously individual and collective practice. It embodies self-determination *and* individual self-examination, critique and deliberation. In this respect, freedom is pursued inter-subjectively, meaning that Indigenous peoples' identities are non-binary, and are continuously recreated in the context of their struggles against and alliances with one another, occurring under the influence of competing and complementary traditions. There is no relationship-free place for Indigenous or any other peoples, whether positively, negatively, or "mixedly" construed.[38]

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34. See, for example, *ibid* at 55, 58, and 100–102.

35. *Ibid* at 10–11.

36. *Ibid* at 219–220. Tully's principal work on public philosophy is James Tully, *Public Philosophy in a New Key* (Cambridge: Cambridge University Press, 2008), 2 volumes.

37. Borrows, *supra* note 1 at 17.

38. *Ibid* at 10.

This book captures, without a doubt, the spirit in which Borrows has conducted his own thought and action. It is an open and generous vision of encounter, co-existence, and relationship, as will become abundantly clear in the assessments that follow.

II PHYSICAL LEGAL METHODOLOGY

Patricia Cochran[39]

Freedom and Indigenous Constitutionalism both explains and demonstrates a particular methodology for understanding law. From the perspective of seeking to generate just relationships between Indigenous and non-Indigenous communities, this methodology is at once liberating and deeply challenging, and it is this methodological freedom and difficulty that are the focus of this commentary.

I have chosen to offer my reflections on *methodology* because, in my own work as a scholar of Canadian constitutional law, I am interested in connections between methods for legal scholarship and substantive values about pluralism and relationality. This includes thinking about how Canadian constitutional law can work to generate and sustain more just relationships between Indigenous and settler communities, and between Canadian and Indigenous legal orders. Borrows' methodology, bound as it is to the specific and concrete freedoms of Indigenous peoples, is useful as a way to think about relationships, including from the perspective of a settler Canadian seeking to make good on the transformative potential of state constitutional law.

In this spirit, this commentary offers three short reflections about methodology, in the hopes that this will help others imagine how they might relate to or learn from this work, both in form and substance. The themes I address are (1) the physicality of law and freedom; (2) access to the natural world; and (3) the comparative or relativizing consequences of the methodology.

A. Physicality

The language that Borrows uses to explain his methodology is *akinoomaagewin*, or "physical philosophy":

> Starting in the middle of the complex state in which we find ourselves, and working towards a better state, is what I term *akinoomaagewin*, or physical philosophy. *Akinoomaagewin* is derived from observation and practice; learning in this way does not stem from identifying first principles and deducing conclusions from abstract propositions . . . Anishnaabe physical philosophy is inductive and derives conclusions from experience, observation, and discussion.[40]

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39. Faculty of Law, University of Victoria.

40. Borrows, *supra* note 1 at 10.

Physical philosophy has much in common with other inductive or deeply contextualized methods of analysis and discovering. For example, there are resonances with Antonio Gramsci's philosophy of praxis, which also demands a relational approach grounded in lived experiences, and which also has much to offer when thinking about questions of law and justice.[41] However, I think there are ways that Borrows' approach is importantly different and original.

First, the language of *physical philosophy* prompted me to focus on the physical, embodied, and material aspects of the work. Physical philosophy is not just a contextualized (as opposed to abstract) way of thinking about a problem. It is an approach that attends specifically to the physical context of law and freedom. For example, Borrows writes extensively on mobility, not just as a concept or feeling but in terms of *physical freedom to travel over the land* and the way this physical freedom may be a kind of precondition for some kinds of understanding.[42]

Second, the language of the physical in physical philosophy allows Borrows to draw attention to the ways in which practices of freedom are physically constitutive. Our practices are constitutive—with repetition and embeddedness in our lives, they become us. So, in pursing freedom, we shape our bodies, our lives, and our ideas.[43]

This is a substantive argument about freedom, but it is also about methodology, in the sense that beginning with the complex practices and experiences of real life is what gives us access to meaningful understanding and a basis for reflecting on and evaluating our practices. In Borrows' language: We will encounter both "real" and "false" limits on our freedom.[44] And it is engagement with, rather than abstraction from, our practices and traditions that gives us a critical perspective and the opportunity to maintain or transform constitutive practices accordingly. This methodological approach explains why, in various contexts, Borrows endorses both *resistance to* and *engagement with* oppressive legal structures, variously or simultaneously.[45]

B. The Natural World

The methodology of physical philosophy is also valuable in the way that it provides intellectual access to knowledge arising from the natural world. For example, Borrows invokes the image of the "living tree" that structures Canadian constitutional interpretation as a way to shed new light on the interpretation of Canada's constitutional documents based on Indigenous diversity and the demands of freedom.[46]

The metaphor of the living tree is a powerful one in Canadian constitutional law. Indeed, it is the governing metaphor in many respects. I have thought about the living tree metaphor a

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41. Antonio Gramsci, *Selections from the Prison Notebooks*, translated by Quentin Hoare & Geoffrey Nowell Smith (New York: International Publishers, 1971).

42. Borrows, *supra* note 1 at chapter 1: Physical Philosophy: Mobility and Indigenous Freedom.

43. See, for example, *ibid* at 8.

44. *Ibid.* at 20.

45. *Ibid* at 14 and chapter 2: Civil (Dis)Obedience, Freedom, and Democracy.

46. Specifically, Borrows contrasts the way Canadian courts have interpreted s 35 of the *Constitution Act, 1982*, which protects Aboriginal rights, with the way they have interpreted the provisions of the *Constitution Act, 1867,* which identifies that only qualified "persons" can be appointed to the Senate. *Ibid.* at chapter 3: (Ab)Originalism and Canada's Constitution.

lot, but I have to admit that until I gained the perspective offered by this book, I have always thought about it as just that: *a metaphor*.

The metaphor of the living tree generates debates about how best to approach the sources of constitutional meaning, including the historical context of a document's negotiation and enactment and the shifting context of its use and implementation. In contrast, physical philosophy asks us to attend to the physical reality of a tree. This method asks that we go beyond the metaphor to consider what an actual living tree requires to survive and thrive. The living tree becomes not only a metaphor to guide interpretation, but a concrete source of law and legal analysis. What constitutional analogues exist for rain or a forest ecosystem, and what insights might these physical legal sources provide when we struggle to think about what is required to sustain freedom, equality, or democracy?

Borrows points out that many Indigenous communities also use constitutional concepts that are metaphors to living things. For example, he describes how some coastal communities in British Columbia carve poles to describe constitutional relationships:

> Unlike living trees, which metaphorically grow forever, totem poles are designed to eventually fall down and decay as they return to the earth. This reinforces the idea that constitutional laws, though carved from deep histories, are to be reinscribed every few generations to ensure they remain relevant through time.[47]

C. Indigenous Freedom And The Constructive Relativization Of Canadian Constitutional Law

The methodology of physical philosophy—*akinoomaagewin*—is tied to the concrete, lived experiences of Indigenous peoples. In the context of Canadian constitutional law, this necessitates accounting for the ways in which Indigenous peoples and Indigenous approaches to constitutionalism have been harmed and undermined by colonial domination. In critiquing the capture of constitutional law by "false" Canadian traditions, Borrows provides this account, thus opening the space for more practices of freedom for Indigenous peoples.

At the same time, by analyzing freedom through *akinoomaagewin*, Borrows reveals the ways in which *Canadian* constitutional law is also harmed by the unjust relations that exist between settler and Indigenous peoples and legal orders. Canadian law is cut off from Indigenous insights, and Canadian people lose the opportunity to discover agency-enhancing practices.[48]

Thus, the methodology of physical philosophy offers another valuable intervention, almost as an incidental effect: It relativizes Canadian law. Importantly, this relativization is not achieved by abstracting parallel concepts or placing different traditions on an undifferentiated plane. Because it is so deeply rooted in the experiences and ideas of Indigenous communities, especially the specific Anishnaabe ideas that Borrows recounts in personal and community narratives, the methodology of *akinoomaagewin* prevents constitutional arguments from being

47. *Ibid* at 152.

48. See, for example, *ibid* at 17.

abstracted away from the substantive justice concerns of Indigenous freedom and the quality of the relationships at hand.

III LESSONS FROM INDIGENOUS (DIS)OBEDIENCE

Avigail Eisenberg[49]

In the first chapter of *Freedom and Indigenous Constitutionalism*, John Borrows explains the pragmatic aim of his project: "This entire book is devoted to deconstructing grand theories . . ."[50] His approach to freedom—what he calls physical philosophy—is designed to recognize the fluid, hybridized, contingent, contested, cross-cutting, and ever-changing nature of Indigenous traditions, and to map these more accurately onto real life. Physical philosophy is "a pragmatically engaged approach that rejects idealized views of Indigenous life"[51] and recognizes that freedom is not attained when people must follow a defined path. Physical philosophy pulls away from discourses about what is authentic to Indigenous tradition and instead focuses on what is happening and, specifically, on the question of how action and experience create space and require space for Indigenous peoples to enjoy freedom and have agency in their quest for a good life.

In this commentary, I focus on the second chapter of Borrows' book, entitled "Civil (Dis) Obedience, Freedom, and Democracy," in part because it provides a good illustration of the unique and insightful perspective found throughout the book. As the chapter title indicates, disobedience to one law could well be obedience to another. The title is a reminder that Indigenous peoples live under regimes in which their efforts to reoccupy their lands, re-establish their communities, and exercise rights that have been denied to them are interpreted by the settler majority and state as disobedience and dissent. The chapter draws this state-centred interpretation into question but then moves away from the abstract questions of legitimacy entailed by it. Borrows argues that conflicts among Indigenous communities and between Indigenous and settler communities are not best resolved by appealing to arguments about which side is right or whose principles or truths are higher, more absolute, universal, and valid. Questions like who is "right" and who is "wrong" do not interest Borrows here, although it's clear he has opinions.

Instead, Borrows' approach is to discuss nine recent cases of (dis)obedience by Indigenous communities in Canada in terms of their success or lack thereof. He finds four cases display "best practices," two have mixed results, and three are unsuccessful. His assessments focus on the mutual dependences of people and communities at stake in each case. The potential for political change to result from (dis)obedience depends on social actors recognizing that they are bound to each other through systems of intricate cooperation. Borrows begins the chapter by referring to Gene Sharp's observation that "[w]hen people persist in their disobedience and defiance, they are denying their opponent the basic human assistance and cooperation

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49. Department of Political Science, University of Victoria.

50. Borrows, *supra* note 1 at 47.

51. *Ibid* at 49.

which any government or hierarchical system requires."[52] Through disobedience, those who are powerless underscore that those who dominate them, despite their powerful position, are reliant on those they dominate to cooperate. And cooperation, even from people who are oppressed, can be revoked and refused.

As this chapter shows, mutual dependence is a two-way street. Dominant groups depend on the cooperation of those they dominate and, as Borrows shows, dissenters are also bound to others in relations of mutual dependence. Successful resistance and dissent requires dissenters to recognize that success depends on their capacity to expand and escalate defiance by appealing to those outside their immediate circle. Similar observations have been made in the context of other historically important protest movements, including the US civil rights movement and the anti-Vietnam protests. The case studies Borrows explores show that instances of resistance tend to succeed when Indigenous movements attract and build a coalition of people, some of whom have interests that overlap but are not identical to each other. This is true, for instance of the coalition of Indigenous and environmentalist groups that succeeded in stopping logging in Clayquot Sound. It is also true of the James Bay Cree, who succeeded in stopping the Great Whale River Project in northern Quebec by developing strategic alliances among Indigenous and environmental groups and, crucially, convincing New York State to cancel a hydroelectric contract with Quebec.

By highlighting the centrality of mutual dependence in acts of (dis)obedience, Borrows points to some difficult and not altogether hopeful lessons. First, disobedience is a risky strategy that usually does not succeed. In part, this is because people fail to recognize their mutual dependence, which failure leads to reprisals and to the fragmentation of dissenting communities. The standoff at Oka is a good example of this failure. The failure by all sides—the Mohawk community, the province of Quebec, and the city of Montreal—to recognize their mutual dependence, which was nonetheless so clearly underscored by the blockade of Mercier Bridge, led to an armed standoff and ultimately a violent clash after which the province called in the army.

Second, violence is sometimes difficult to avoid in acts of (dis)obedience. At the same time, it almost always damages the conditions for success. Numerous scholars of dissent, including Gene Sharp, Mahatma Gandhi, and Henry David Thoreau, also argued that violent dissent undermines the possibility of securing just ends. This is because enacting violence rests on a mistaken belief that one party can control the other. Violent dissent buys into a view of the modern subject as independent, competitive, and fearful. A subject with these traits will perpetuate violence even as it seeks peace through political means. For this reason, violence is never agency enhancing.

Third, successful dissent relies on building coalitions. This is difficult work. It is often unpredictable where coalition partners will be found and whether or how they can work together. Potential partners and allies can be separated by colonialism or white supremacist ideologies, which makes coalitions both difficult to rely on and especially fragile.

The success or failure of direct action campaigns is notoriously difficult to gauge in part because the kinds of problems that dissenters typically aim to address are complex along numerous dimensions and tend to change over time. Borrows argues that direct action is

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52. *Ibid* at 51, quoting Gene Sharp, "Nonviolent Action: An Active Technique of Struggle," in Robert L Holmes & Barry L Gan, eds, *Nonviolence in Theory and Practice*, 2nd ed (Long Grove, IL: Waveland Press, 2005) at 253.

successful if it opens up democratic space and enhances democratic communication. But why must dissenters, who are colonized, marginalized, and often poor, be committed to these democratic ideals as a means to solve their problems? According to Borrows' analysis, those cases in which (dis)obedience has opened up democratic space and communication tend to be more successful. But successful at what? The answer in this book returns the reader to ideas at the heart of physical philosophy, namely that people's freedom and capacity to live good lives have improved in communities where direct action has followed best practices.

This might seem to be an optimistic conclusion, but Borrows' account of Indigenous (dis) obedience is neither pessimistic nor optimistic. Borrows assesses these cases in context and in light of whether they strengthen conditions consistent with good relations among peoples, such as the creation of democratic spaces, clear communication, and recognition of mutual dependence, rather than in terms of the rightness or goodness of one side or another. The method employed here echoes the pragmatist idea that the success of any project is neither inevitable nor impossible but a "possibility" that becomes more of a probability the more numerous the actual conditions for success are in place.[53] In this way, Borrows leads us to think about what has to be done, but offers no guarantees or promises of success, which is yet more evidence of his deeply pragmatic perspective.

IV MOBILIZING INDIGENOUS FREEDOM

Heidi Kiiwetinepinesiik Stark[54]

John Borrows' body of scholarship has been transformative, opening new intellectual pathways for thinking about Indigenous legal traditions, Canadian law, and the power and potential of stories and dreams—all while continually resisting and refusing prescribed modes for transmitting knowledge. You will often find the trickster Nenabozho traversing the page or engaging Supreme Court judges in the hope of kindling the fires that have kept the Anishinaabe warm. Borrows' work illustrates the fluidity and complexity of life, reminding us that just as Nenabozho has the potential to rekindle fires, he also risks being burned. Drawing on Anishinaabe pedagogies, Borrows challenges his readers to draw out their own conclusions and insights instead of producing prescriptions for how to be in the world. His newest work, *Freedom and Indigenous Constitutionalism*, is no different.

Much like Nenabozho, Borrows steadfastly resists and refuses categorization. He asserts as much, stating "I believe categorizations are often inaccurate and do not capture the fluidity, ambiguity, and contradictory aspects of human nature."[55] Indeed, the limits of categories drive *Freedom and Indigenous Constitutionalism*, which begs the reader to question and challenge conceptions of tradition "rooted in fundamentalist views about the immutable nature of Indigenous peoples and their societies."[56] Borrows is concerned by the treatment of traditions

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53. See Alexander Livingston, *Damn Great Empires! William James and the Politics of Pragmatism* (Oxford: Oxford University Press, 2016) at 153–165.

54. Department of Political Science, University of Victoria.

55. Borrows, *supra* note 1 at 279.

56. *Ibid* at 3.

"as timeless models of unchanging truths that require unwavering deference and unquestioning obedience."[57] He shows the reader in each chapter how this framing of tradition can be oppressive and exclusionary, reminding us that traditions must be understood as contextualized practices, not as *a priori*. Each chapter details the physical and ideological barriers erected through the treatment of tradition as temporally and geographically fixed.

Borrows offers a compelling vision of the transformations that can occur if we see the limits of Western conceptions of freedom and begin to understand ourselves as inhabiting relations of interdependence with one another and with the world we live in. His proposal represents a shift away from views of Indigenous peoples frozen in time and toward a relational way of being that is inspired by the principles of interconnectedness inherent in many Indigenous legal and political orders. Borrows outlines the need to attend to the underlying relationships that configure and delimit Indigenous peoples' contemporary political movements. These include relations between humans, with Creation, and between Indigenous governments and state institutions. In fact, he succinctly outlines the aim of the work in his conclusion when he asserts that "we must seek out those traditions that enhance our relationships and increase our abilities to live in accordance with our own dreams, while simultaneously rejecting any tradition which thwarts the realization of these goals."[58] In the process, Borrows encourages us to be ever attentive to the physicality of our circumstances, even as we reach toward more emancipatory alternatives.

Focusing on Borrows' first chapter, which takes up physical philosophy and mobility, his work encourages us to be attentive to colonial efforts to restrict Indigenous mobility by tethering Indigeneity to land. He highlights that state framings of Indigenous mobility produce a lose-lose situation where Indigenous peoples find ourselves damned if we move and damned if we don't. We are framed as either too nomadic or too static. He notes that "despite the reality of our near-constant motion, most legal systems manipulate conceptions of mobility to deny or diminish Indigenous freedom. Laws are devised to limit our movements and to foster confinement within ever-diminishing spaces."[59] He also cautions us to consider the philosophical confinements these discourses produce by discouraging our freedom to integrate others into our communities or our authority to regulate others across our lands. In doing so, Borrows calls for the mutual harmonization of Indigenous and non-Indigenous laws.

Borrows' work on mobility and the reminder of our need to resist the entrapments that keep us fixed temporally and geographically enabled me to think through Indigenous resurgence efforts in new ways. By centring mobility, we are reminded that it is through the activation of our relationships with the living entities that constitute this expansive space known as Creation—the land, animals, spirits, and humans—that knowledge is produced and transmitted. The generative quality of our movement across Creation is too often eclipsed by narratives that tether Indigeneity in space and time, positing our knowledge and relationships to Creation as innate and natural. Borrows' work begs the question of what alternative pathways we have foreclosed by centring our attention on articulations of land that reify statist notions of bounded space.

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57. *Ibid* at 4.

58. *Ibid* at 206.

59. *Ibid* at 27.

As Vince Diaz reminds us, we need to be "cognizant of how we as Native peoples sometimes unwittingly perpetuate colonial definitions of land (and self) through ways that we invoke primordial connectedness to landedness, particularly in political programs of reclaiming stolen land bases."[60] This romanticizing of pre-contact Indigenous life covers up the hard work that is carried out when we engage with our territories in the respectful, responsible, and reciprocal ways that produced the very traditions and practices that are too often essentialized. To understand how settler colonialism has (re)ordered our relationships to place requires us to take greater care in understanding our engagement with place as a series of meaning-making practices. We must bring forward our own rich stories about how we relate to Creation, which means we must expand our focus to include both the other living beings that have shaped and regulated our relationships to land as well as how our relationships with and across land are generated through our movements across these territories.

The containment of Indigenous lands to reserves, or even the more expansive Aboriginal territory, can risk us assuming that our movements through our own territories are not also always regulated and conditioned by relationships and responsibilities. In fact, it is our engagement with place and with others in these places that gives rise to our political practices, exchanges, and the development of new relationships. A greater understanding of how our mobility is generative can also enable us to see how discourses that fix us spatially (as well as temporally) are reductive. The greatest tool available to Indigenous peoples is not just in the revitalization of our traditional practices, but in the processes that gave rise to these ever-growing and flourishing traditions.

It is our mobility, our movement across the lands and waters, that activates our relationships and responsibilities. Attention to how we relate to one another can combat colonial containments of Indigenous political authority. For the Anishinaabe, we speak of ourselves as the last of Creation. This is not just some inversion of the hierarchy of Creation, with ourselves as the lowest and thus the least valuable. Instead, Anishinaabe attention to our order of placement on the earth reminds us of our obligations to those who came before us, who already governed the territories we came to inhabit. As our stories and the practices they give rise to denote, the animals stood up for us and brought us into an already regulated and governed territory. Our clan governance is the extension of these relationships, reminding us that whether we are moving through our lands or visiting the lands of others, we must account for the web of relationships that order these spaces. We offer tobacco to the water beings before we enter our canoes; we petition the plants and animals in recognition of their agency and our relationships with these beings; we engage in political exchange and the expansion of kin relationships when moving into the territories of others. We are always in relationship and are also always aiming at nurturing and expanding these relationships. We contend that attention to Indigenous mobility enables us to unearth the generative nature of our relationships with Creation and with others in our movements across Creation. Borrows' attention to mobility is just one of the many chapters in this book that asks us to give serious consideration to how ideological and physical containments have constrained us in achieving freedom and the good life.

Borrows concludes his book with the story of Opichi, relaying his commitment in the telling of this story to his daughter time and again so that she realizes she is always free to

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60. Vince Diaz, "No Island Is an Island" in Stephanie N Teves, Andrea Smith, & Michelle H Raheja, eds, *Native Studies Keywords* (Tucson: University of Arizona Press, 2015) at 91.

follow her own path in life. He notes that the Anishinaabe word for father is *noo-se*, meaning "one that creates paths which make it easier for his family to follow."[61] Much like *noo-se*, Borrows clears the path in *Freedom and Indigenous Constitutionalism*. He leaves it to the reader to interpret and take up his concerns and cautions as they each see fitting. Borrows uncovers the multiplicity of pathways possible for achieving freedom and the good life. While some readers unfamiliar with the landscape may miss out on understanding the wider terrain, as a result of a lack of knowledge of the well-trodden roads, the new pathways Borrows' work illuminates provide openings for additional approaches and possibilities for the achievement of freedom and the good life. Indeed, many of Borrows' concerns centre on the ways in which well-trodden roads have been later traversed without consideration to alternative pathways. These roads risk being overdirective if we don't look up and consider other approaches in determining the best pathways forward. This tension for Borrows is driven by his commitment to Anishinaabe pedagogies that resist directing individuals toward a particular or singular option. Instead, he highlights how Anishinaabe thought posits that each individual has his or her own unique purpose and gifts. If we overly direct others or let ourselves be overly directed, we risk interfering with the fulfilment of these gifts. Borrows notes, in the words of Thomas Peacock, "Ojibwe teachings say that we exist to live out and give expression to our vision, and that in so doing we find meaning and purpose in life. And because each of us has a different vision, it must be lived as we alone can understand it."[62] Borrows therefore recognizes that each of us may consider travelling down the pathways he has opened up, or we may reject them for the well-trodden pathways we already know, or alternatively may carve out others yet to be imagined. The freedom to travel our own paths is his aim.

V CONSTITUTIONAL SUFFERING: A RESPONSE

John Borrows[63]

Professors Cochran, Eisenberg, and Stark discuss how legal doctrines, civic (in)activities, and Indigenous pedagogies can either capture or liberate Indigenous peoples, depending on how they are used. Each commentator highlights the importance of resisting categorizations drawn from abstract characterizations when considering Indigenous peoples' relationships with the world around them. This is one of the central themes in *Freedom and Indigenous Constitutionalism*. Both fixed and fluid classifications can negatively impact Indigenous peoples' relationships when they are based on inalterable first principles. Freedom is the ability to own your responsibilities within your relationships (*dibenindizowin*) and "bob and weave" between what appear to be inconsistent alternatives that do not necessarily represent essentialized "truths."[64] As each commentary in this volume demonstrates, we must constantly attend to context in the constitutional realm. The book itself argues that freedom is not just an idea, it is a practice. As Hannah Arendt observed, "the raison d'être of politics is freedom, and

61. Borrows, *supra* note 1 at 207, quoting Dr Basil Johnston.

62. *Ibid* at 6, quoting Thomas Peacock, *The Four Hills of Life: Ojibwe Wisdom* (Afton, MN: Afton Historical Press, 2006) at 105.

63. Faculty of Law, University of Victoria.

64. Borrows, *supra* note 1 at 18.

its field of experience is action."[65] Canada's constitution facilitates freedom when it practically helps to improve lives in physically tangible ways.

For these reasons, as the book posits, we must continuously evaluate Canada's constitution in the light of our physical circumstances, which includes our physical health, safety, and well-being. When this occurs, it is impossible to ignore the fact that Indigenous peoples' lives are drastically shorter than other Canadians. They are marked by greater suffering, as measured by considerably higher rates of poverty, injury, and incarceration, and significantly lower levels of education, income, and health.

By these measures Indigenous suffering is a contemporary part of our country's constitution. Suffering is a constitutional, constituted, and constituting experience for Indigenous peoples—it is not just a conceptual hypothesis. Indigenous peoples in Canada are living through a period of profound, extended, multigenerational trauma. Of course, some are doing well, either living in relative peace in their homelands or increasingly joining the country's shrinking middle class. Indigenous peoples have long taken daily and longer-term steps of resistance and adaptation to protect their lands, languages, and resources. This occurs, even while others within our midst "silently" succumb to the despair spawned by the overwhelming challenges presented by Canada's constitutional law.

Unfortunately, our constitution has not effectively addressed Indigenous suffering when measured against these material realities; legislation, litigation, education, and economic development have not turned the tide. Sixty-four per cent of the children under provincial care in British Columbia are Indigenous, and these numbers are even higher on the prairies. There are more Indigenous children under provincial care than was the case during the height of the residential school era. Furthermore, 28 per cent of the prison population is composed of Indigenous people, which is almost six times higher than their representation in the adult population (5 per cent). No set of cases nor policies have been able to effectively address these challenges. This is a constitutional problem of grave significance.

Despite signals running in other directions, the philosophy that most strongly characterizes Canada's constitution still bends toward liquidating Indian reserves, dismantling distinctive Indigenous-run governments, and educating "Indians" to participate in the broader society. This is as true today as it was in the first decades after Confederation. In 1876, the *Indian Act* was passed to assimilate Indigenous peoples. This legislative framework still permeates most First Nations communities today. Métis and Inuit people encounter similar pressures in their dealings with the courts, legislatures, and Parliament. While assimilation has failed miserably, it has not been clearly rejected as a constitutional principle in day-to-day legal experience. Indigenous land, governance, and resource use continues to be subject to federal and provincial authority and priorities. In practical terms this means that Indigenous peoples do not have the ability to effectively manage their relationships with their natural environments or one another.

As Professors Cochran, Eisenberg, and Stark discuss (mirroring themes in the book), the practical elements of Indigenous peoples' lives have not been adequately accounted for in Canada's constitution. Indigenous peoples suffer because they have been constrained by conceptions that falsify or misrepresent the level of consensus needed to improve relationships, as the book discusses. We should reinvigorate the diversities within Canadian and Indigenous law by recognizing that the relativization of Canadian law "is not achieved by abstracting

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65. Hannah Arendt, *Between Past and Future* (Toronto: Penguin Books, 2006) at 145, cited in *ibid* at 6.

parallel concepts or placing different traditions on an undifferentiated plane," as Professor Cochran argues. In line with Professor Eisenberg's insights, we should treat the country's constitution as a site of possibilities for enhancing freedom, "which becomes more of a probability the more numerous the actual conditions for success are in place." This means, as Professor Stark suggests, that we must resist approaches that encourage singular solutions in forging freedom.

Canada's ability to incorporate diversity through democratic means in broader political, legal, and social processes is one of its pillars of strength. Recognition of this fact could extend these same privileges to Indigenous peoples. As *Freedom and Indigenous Constitutionalism* suggests, constitutional traditions can be hollow, frozen, and empty if they are solely based on *a priori* and universal forms. Alternatively, tradition can help stir us to action in contemporary, dynamic ways if it "reminds us that we do not have to accept the world as we find it; we can challenge and change how and where we live, think and speak, at least to a degree."[66] As Hannah Arendt observed, "to be free and to act are the same."[67] Constitutional traditions must engage living complex relationships to facilitate action in the real world. They must address suffering. This is a broad theme in the book, among others, and I am pleased to see how Professors Cochran, Eisenberg, and Stark have highlighted these ideas in their commentaries.

66. Borrows, *supra* note 1 at 9.

67. Arendt, *supra* note 65 at 150.