



# Teachings of Sustainability, Stewardship, & Responsibility

Indigenous Perspectives on Obligation, Wealth, Trusts, & Fiduciary Duty



**RRII**  
Reconciliation &  
Responsible Investment  
Initiative



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This publication was produced as part of the Reconciliation and Responsible Investment Initiative (RRII) – a partnership between the National Aboriginal Trust Officers Association (NATOA) and the Shareholder Association for Research and Education (SHARE). NATOA is a charitable organization committed to providing Indigenous peoples with the resources and information that will help them efficiently create, manage, and operate trusts as a means to ensure the seven generations yet unborn can benefit from the goals and dreams of the present generation. SHARE is a national non-profit organization dedicated to mobilizing investor leadership for a sustainable, inclusive, and productive economy. Together, we envision a financial system that empowers Indigenous perspectives, recognizes the role of community values in investment decision making, and contributes to protecting Indigenous rights and title.

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# Executive Summary

For millennia, Indigenous communities have managed collective wealth with a strong sense of stewardship and consideration for future generations. Through shared stories, songs, dances, crests, and land and resources, legal principles and values were created, taught, and integrated into ways of being. Such values have marked peoples' relationship with the land, waters, plants, animals, themselves, and each other.

Many settlement processes, such as treaty and land claim agreements, have triggered the flow of financial capital into Indigenous communities, some of which are managed through trusts. Such trusts are intended to enable Indigenous trustees to manage and oversee financial assets for the benefit of their communities. In the process, trustees are bound by their duty as fiduciaries, including a duty of loyalty and a duty to act in good faith to the trusts' beneficiaries, which often comprise both current and future generations of community members. Despite recognition of the plurality of legal orders in Canada, there is a paucity of research on the ways in which various Indigenous legal orders intersect with fiduciary duties. As such, many Indigenous trusts' fiduciaries, including trustees and investment advisors, focus primarily on securing and maintaining steady financial returns.

This research explores how Indigenous law can inform fiduciaries' governance of Indigenous trusts and investments. To start, the report reviews the notion of fiduciary duty in Canada. Subsequently, we explore the legal orders of a small sampling of Indigenous nations and peoples to identify related notions of stewardship, loyalty, responsibility, good faith, obligation, and wealth within their traditional laws. In particular, we review Indigenous laws embedded in constitutions, land and resource plans and policies, and treaties or agreements of the Nisga'a, Gitksan, Cree, Anishinaabe, Mi'kmaq, Nlaka'Pamux, and Kwanlin Dūn, as well as the Māori in Aotearoa, New Zealand. We then explore how Canadian law might recognize these sources of law through *sui generis* formulations. Then, we briefly consider applicable western concepts that address long-term, collective considerations that many Indigenous communities contemplate. These include environmental, social, and governance (ESG) factors, which help measure the sustainability and societal impacts of investment. Finally, this paper contemplates the challenges of trust law as it pertains to the regulation and oversight of Indigenous trust structures, which may create barriers for Indigenous decision-makers in enacting their fiduciary obligations as understood through their own teachings and laws.

Indigenous concepts of fiduciary duty include obligations to the land, water, plants, and living creatures, as well as community members as beneficiaries. Indigenous legal orders record principles and processes related to fiduciary duty through narratives and traditional histories communicated through Indigenous languages, which can express connection and animacy. Such legal orders can inform fiduciary principles used to manage Indigenous financial assets held in trust.

This research suggests that Indigenous legal orders offer critical insights for ensuring the effective stewardship of Indigenous peoples' collective wealth. Contemporary laws must be reconciled with Indigenous legal traditions in order to empower the fiduciaries of Indigenous trusts and other collective financial assets to fulfill their fiduciary obligations as such responsibilities are understood through Indigenous legal orders.



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# 1. Introduction

For millennia, Indigenous communities have managed wealth in many ways. They developed strong values around nurturing the richness of their natural environments. Interpersonal prosperity flowed through sharing stories, songs, dances, crests, lands, and resources. Grandparents treasured their grandchildren, and parents, aunts, uncles, and cousins aspired to follow their cherished ancestral traditions. Moreover, the fur trade era, which began when Europeans arrived in North America, facilitated economic opportunities and introduced Indigenous peoples to global markets that initially flourished before intermediaries subordinated them. Subordination eventually gave way to predatory and aggressive plundering of Indigenous lands, resources, families, and environments. This impoverished communities in many ways. Fortunately, these encounters did not entirely destroy Indigenous peoples' social, natural, and cultural wealth. Although communities greatly suffered, as others took Indigenous wealth into their own hands, they managed to maintain their own measures of worth. They do not want to let go of these views. Indigenous communities want to ensure their own values prevail in relation to their wealth.

This paper aims at ensuring Indigenous peoples can accumulate, manage, invest, and dispose of wealth in accordance with their own laws. Indigenous peoples must be able to identify and organize their investments in accordance with their own spiritual priorities and material needs. Other people have long sought to divert them from their own investment priorities. Now is the time for Indigenous peoples' own laws to guide how they secure their future.

In recent decades, Indigenous communities have sought to reinvigorate their varied forms of wealth in many ways. They are increasingly securing financial resources through investment, trade, development, partnerships, and entrepreneurial initiatives. As Indigenous communities secure greater financial resources, the question of what successful Indigenous wealth and wellbeing looks like, and how it is measured, has been raised. Many pressing needs place demands on these resources and motivate a focus on short-term income, but at the same time questions exist about how success is measured. Indigenous peoples also cultivate other measures of prosperity. They openly talk of stewardship, cultural revitalization, and the healthy intergenerational transmission of care. They demand that their holistic measures of prosperity are recognized and measured in managing their affairs, along with more conventional principles of capital accumulation.

Indigenous peoples have filed grievances related to dispossession, dissipation, and mismanagement of their wealth. In regard to past wealth dissipation, communities have shown how Canadian governments prejudicially broke their historic chains of wealth transmission. In court cases and at negotiation tables, Indigenous communities have demonstrated that corporations and opportunistic individuals have previously seized what otherwise should have been within Indigenous control. In the process, Indigenous communities have received settlements compensating them for these and other losses. Lands claims, court cases, and impact benefit agreements have triggered the flow of additional capital into Indigenous communities.

Some of the money Indigenous peoples receive through settlement processes are invested in trusts. It is imperative that wealth managers, trust funds, investment brokers, and other financial advisors are not future targets of such suits because they failed to follow Indigenous stewardship priorities. The creation of so-called Indigenous trusts are intended to allow Indigenous trustees to manage and oversee financial assets for the benefit of their communities.<sup>1</sup> In the process, trustees are bound by their duty as fiduciaries, including a duty of loyalty and a duty to act in good faith to the trusts' beneficiaries, including both current and future generations. Where specific claims agreements, impact benefit agreements, or other financial settlements have resulted in the creation of Indigenous trusts, Indigenous peoples currently manage and oversee vast pools of financial capital held in trust for the benefit of others.

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This law does not sufficiently take into account Indigenous laws and values nor does it construe wealth in wide-enough terms. Boards of trustees and their agents can sometimes focus exclusively on short-term financial returns while disregarding an understanding of fiduciary duty grounded in Indigenous legal orders.

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Because of these gains and the successful creation of Indigenous trusts, circumstances have been created in which Indigenous trustees have expressed concern that fiduciary duties as expressed in Canadian law narrowly interprets trustees' obligations. This law does not sufficiently take into account Indigenous laws and values nor does it construe wealth in wide-enough terms. Boards of trustees and their agents can sometimes focus exclusively on short-term financial returns while disregarding an understanding of fiduciary duty grounded in Indigenous legal orders. This is another form of impoverishment which can thrive in the face of Indigenous peoples making significant amounts of money.

This paper takes up these concerns and considers how Indigenous laws and traditions related to the stewardship of collective assets might change how wealth is measured and managed. While every Indigenous community wants a solid return on their investments, many also want to see wealth returned to them in other ways as well. Natural environments, cultural investment, and intergenerational transmissions of care remain a priority for many Indigenous nations. If Indigenous peoples cannot cultivate advantages of their own choosing, we might ask whether trust and fiduciary law represent another form of subordination, in placing other interests above their own.

For these reasons, this paper explores fiduciary duties through Indigenous legal perspectives. The paper aims to show that Indigenous legal orders can provide an important basis for ensuring the effective stewardship of collective assets and fostering accountability. We conclude that Indigenous laws may help decision-makers align their investments with their community values. We support this view by discussing some of the varied ways which Indigenous law might frame the duties of someone who holds assets in trust for the benefit of others. We examine how Indigenous traditions might inform the duties of Indigenous trustees within specific legal orders. In the process, we argue that Indigenous law can speak to the issues of applying Indigenous values, beliefs, and interests in investment policy, including Indigenous understandings of conflict resolution.

Despite recognition of the plurality of legal orders in Canada, there is a paucity of research on the ways in which various Indigenous legal orders intersect

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<sup>1</sup> Some trusts have a non-Indigenous trustee or trustees exclusively or in combination with Indigenous trustees.

with fiduciary duties. Because of this, securing and maintaining steady financial returns constitutes the primary focus of Indigenous trusts' fiduciaries as trustees and investment advisors. This paper attempts to widen the lens on what constitutes successful wealth management. Without detracting from the importance of financial returns, this paper will suggest that effective stewardship can require the advancement of other values. Indigenous legal orders can provide key insights for ensuring accountability for the effective stewardship of Indigenous peoples' collective assets.<sup>2</sup>

By examining these issues, this work addresses the Truth and Reconciliation Commission's Principles of Reconciliation and Call to Action 92 directed at business sectors:

92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.<sup>3</sup>

In line with this Call, this report argues that Indigenous legal orders must inform fiduciary principles used to manage financial assets held in trust for and by Indigenous peoples. Indigenous law must be relevant for Indigenous investment policy to avoid further dissipation of Indigenous wealth. These principles will at times be comparable and at others contrast with Canadian or provincial conceptions of trust management and fiduciary responsibilities. A stronger use and integration of Indigenous law can help create remedies to enhance Indigenous economic justice.

To explore how Indigenous law might inform Indigenous trusts, fiduciaries, and investment, this report first explores Indigenous notions of stewardship, loyalty, responsibility, good faith, obligation, and wealth within the legal orders of a small sampling of Indigenous nations within Canada, as well as the Māori in Aotearoa New Zealand. Indigenous legal orders record their fiduciary principles and processes through narratives and traditional histories. They can embed these laws in constitutions, land and resource plans and policies, and treaties and agreements. These laws demonstrate that Indigenous concepts of fiduciary duty include obligations to the land, water, plants, and living creatures, as well as to community beneficiaries. These relationships represent a wealth that extends beyond financial assets, and are accounted for in many Indigenous legal principles. While communities holding Indigenous trusts seek financial gain through their investments, this paper argues that other important considerations may inform or impact their investment decisions.

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2 Researched in collaboration with SHARE as part of the preliminary Research Proposal. John Borrows, *Indigenous Legal Traditions in Canada*, 19 WASH. U. J. L. & POL'Y 167 (2005), [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol19/iss1/13](https://openscholarship.wustl.edu/law_journal_law_policy/vol19/iss1/13).

3 See the Canada, Truth and Reconciliation Commission of Canada, *Calls to Action: Business and Reconciliation: 92*, (Winnipeg, Truth and Reconciliation Commission of Canada, 2015) online (pdf): [http://trc.ca/assets/pdf/Calls\\_to\\_Action\\_English2.pdf](http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf).

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Every nation has its own unique legal traditions that could describe and interpret fiduciary standards within their own context.

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At the outset, it is important to highlight that the material in this report does not suggest a single overarching Indigenous legal order related to fiduciary duties. Every nation has its own unique legal traditions that could describe and interpret fiduciary standards within their own context. The examples provided in this paper are illustrative, not representative or exhaustive. Readers should recognize that fiduciary-like principles will vary from Indigenous nation to Indigenous nation. Readers should search for analogies within their own principles, processes, standards, authorities, precedents, stories, and histories to see how obligations to present and future generations are conceived. This paper offers a glimpse into some of the legal values of a few Indigenous communities in the hope that readers will search for wise practices for managing their trusts and stewarding their wealth in ways that are consistent with their contemporary aspirations and wider traditions.

The report also shows that Indigenous law and equity as incorporated in the common law can be a resource for Indigenous trust and wealth managers. While Indigenous law and common law are separate entities, and great caution must be exercised when considering their relationship, they can be used together. Though we must never lose sight of power imbalances that favour non-Indigenous laws in Canadian law, Indigenous laws should be an important source of authority for making decisions when the common law or equity is invoked. The Supreme Court of Canada has written that Indigenous legal perspectives and common law analogies can be given equal weight in understanding Aboriginal and treaty rights. The concept of reconciliation lies at the heart of this exchange. We would go one step further and suggest that Indigenous law must be given greater weight than the common law or equity when Indigenous peoples' legal relationships are involved. This report uses Canadian and comparative case law to show how Indigenous law could inform trust management as a part of Canadian law. In *R v. Van der Peet* (*Van der Peet*) the Supreme Court of Canada held that the essence of aboriginal rights is how they bridge Aboriginal and non-Aboriginal cultures.<sup>4</sup> This is what should occur in trust contexts involving Indigenous peoples. We must judge trust law and fiduciary duties in the light of Indigenous peoples' own authorities, precedents, rules, standards, principles, and processes. We must modify or discard laws which do not allow Indigenous peoples to be effective stewards of their own societies, assets, or resources.

This is all to say that Canadian case law has historically overlooked Indigenous interests, and detrimentally affected Indigenous rights. We should reject anything within Canada's legal system that strips Indigenous peoples of their wealth. Indigenous peoples have the right to self-determination, and by virtue of that right they should be able to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>5</sup> Canadian law has not implemented this principle. This might change. The court has called the law dealing with Aboriginal rights *sui generis*, meaning that they are unique and of their own kind. As

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<sup>4</sup> *R v. Van der Peet*, [1993] 4 CNLR 221 [*Van der Peet*] at 199, para 42.

<sup>5</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Sup No. 53, UN Doc A/RES/61/295 (2007) GA Res 61/295, UNGAOR, 61st Sess, Sup No. 53, UN Doc A/61/295 (2007) at 5-6.



a result, the courts will not apply conventional common law concepts to Indigenous peoples in cases involving Aboriginal rights because they come from an Indigenous legal source. Thus, the law dealing with Aboriginal peoples is born of more than one legal culture. This was first established in *Guerin v. The Queen*<sup>6</sup> (*Guerin*) in 1984. It has subsequently expanded in other cases to include Indigenous constitutional rights, title, and treaty rights.<sup>7</sup> There are significant implications for Indigenous trusts in this framework.

Finally, the report challenges the inflexibility of universal trust and investment principles. It recommends recognizing legal plurality and allowing for the incorporation of values that extend beyond solely short-term monetary conceptualizations. Indigenous wealth must be recontextualized with broader frameworks that allow Indigenous peoples to fully diversify their portfolios and prompt a reimagining of how trusts are governed, from establishment to stewardship of resources over time. Current trust law may not sufficiently contemplate the breadth of Indigenous wealth values within current Indigenous trust structures.

There are many challenges with this work. Fiduciary principles flow from the ancient English law of equity as incorporated into the common law. They will not fit perfectly into conceptions of Indigenous laws, nor *vice versa*, nor should they. This research simply attempts to further understand the significance of Indigenous legal orders for trust management and it does so from an outsider perspective, meaning that we are not experts in the legal orders of every Indigenous community that is represented in this work, nor will we ever be. There will always be limitations to how one legal tradition can illuminate a very different legal tradition without undermining either tradition.

Further, we must reiterate that we can only discuss a limited number of Indigenous legal orders within a small number of communities and nations. There are hundreds of communities within Canada. We are barely scratching the surface in this work. We realize that we will never understand other legal systems the way we do our own. We cannot assume that the Indigenous laws discussed in this report are shared by all Indigenous communities, nations, investors, trustees, or leaders. Not every community adheres to their traditional legal orders and teachings in their entirety. Some administer and oversee their affairs using a blend of common law principles and their traditional principles, while others lean more towards one way or the other. Some reject the common law as a Canadian colonial imposition. We must not paint everyone with the same brush. We must concede that values, aspirations, and mechanisms will be distinctive within every individual community. The hope is that this work will begin a conversation that encourages the recognition and acceptance of Indigenous law for trustees with responsibilities for Indigenous trusts.

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<sup>6</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 [*Guerin*].

<sup>7</sup> See *R v. Simon*, [1985] 2 SCR 387 [*Simon*], *R v. Sioui*, [1990] 1 SCR 1025 [*Sioui*], and *R v. Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

## 2. What is a Fiduciary Duty?

Since trustees must act in accordance with fiduciary duties, it is important to briefly describe them. A fiduciary duty is an obligation in which one party is required to ensure the best interests of another when they are in a trust-like relationship. The Canadian courts have established a basic test for determining whether fiduciary obligations arise: first, the fiduciary has the ability to exercise some discretion or power; second, the fiduciary can unilaterally exercise that power so as to affect the interests of the beneficiary; third, the beneficiary is in a position of vulnerability at the hands of the fiduciary.<sup>8</sup> These relationships are apparent in areas such as corporate law, and illustrate the obligations of those such as trustees to beneficiaries, corporate board members to shareholders, and investment corporations to investors.

A primary understanding or first glance at the concept may regard fiduciary law to appear relatively transparent and straightforward. However, the complexities of the fiduciary concept cannot be overstated. Fiduciary law only protects “important social and economic interactions of *high* trust and confidence that create an *implicit* dependency and *peculiar* vulnerability of beneficiaries to their fiduciaries.”<sup>9</sup> Not all relationships attract fiduciary duties.<sup>10</sup> The fiduciary concept is the purest doctrinal expression of equity that prioritizes the protection of public confidence and trusted relationships as central to its conceptualization.<sup>11</sup> *Meinhard v. Salmon*<sup>12</sup> (*Meinhard*) and *Keech v. Sandford*<sup>13</sup> (*Keech*) have strongly articulated the uniqueness of fiduciary relationships to those formed under contract, tort, or unjust enrichment, due to the broad nature of fiduciary concepts.<sup>14</sup>

As noted earlier, in an Indigenous context the Supreme Court of Canada has characterized the concept as a *sui generis* fiduciary duty, meaning it is unique or of its own kind.<sup>15</sup> Quoting the leading Supreme Court of Canada case dealing with Aboriginal Rights, *R. v. Sparrow*, the court said the following about this duty:

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<sup>8</sup> M. m. Litman, “Law of Fiduciary Obligation”, *The Canadian Encyclopedia* (7 February 2006) online: [www.thecanadianencyclopedia.ca/en/article/law-of-fiduciary-obligation](http://www.thecanadianencyclopedia.ca/en/article/law-of-fiduciary-obligation).

<sup>9</sup> Leonard I. Rotman, “Understanding Fiduciary Duties and Relationship Fiduciarity” (2017) 62:4, McGill LJ at 14.

<sup>10</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 (S.C.C.) [*Wewaykum*].

<sup>11</sup> Rotman, *supra* note 9 at 45.

<sup>12</sup> *Meinhard v. Salmon*, [1928] 164 N.E. 545, 249 N.Y. 458 [*Meinhard*].

<sup>13</sup> *Keech v. Sandford* [1726] EWHC Ch J76, Sel Ca t King 61, 25 ER 223 [*Keech*].

<sup>14</sup> Fiduciary relationships also differ from tort, contract and unjust enrichment due to their emphasis on selfless behaviour, utmost good faith, and conscience as summarized in additional detail in Rotman, *supra* note 9 at 50-56.

<sup>15</sup> *Wewaykum*, *supra* note 10 at para 45.

The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>16</sup>

This case is important because it emphasizes that fiduciary duties related to Aboriginal rights exist at the highest levels of Canadian law – the Constitution. At the same time, these duties are more pervasive. The Supreme Court of Canada also made the point that fiduciary duties are not limited to Aboriginal rights or treaty rights in section 35(1) of the Constitution. As the Court has written, “The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.”<sup>17</sup> Thus, when Indigenous peoples are subject to Crown assumptions of a high degree of discretionary control, fiduciary duties exist in this context. However, the “fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests,”<sup>18</sup> the duty “depends on identification of a cognizable Indian interest, and the Crown’s undertaking of discretionary control in relation thereto in a way that invokes responsibility “in the nature of a private law duty.”<sup>19</sup> Therefore, understanding fiduciary duties in an Indigenous context means that one may pay attention to the specific obligations required by the relationship between Indigenous peoples and the government entity with whom they deal. Crown-Indigenous relationships constitute one area where they arise. As noted, fiduciary duties with Indigenous peoples can also be engaged in the private law context “where important social and economic interactions of high trust and confidence that create an implicit dependency and peculiar vulnerability of beneficiaries to their fiduciaries.”<sup>20</sup> In our view, this means that those who are responsible for managing Indigenous wealth must ensure that they take account of the specific vulnerabilities Indigenous peoples face when dealing with equity and the common law. Investment and trust managers must also understand Indigenous aspirations in relation to Indigenous wealth.

Despite the fact that traditional investment approaches favour purely monetary and short-term perceptions of wealth, approaches such as stakeholder capitalism and ethical investing have begun to garner support within the corporate zeitgeist.<sup>21</sup> The

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<sup>16</sup> *Sparrow*, *supra* note 7 at 1108.

<sup>17</sup> *Wewaykum*, *supra* note 10 at para 79.

<sup>18</sup> *Ibid.* at 81.

<sup>19</sup> *Ibid.* at 85.

<sup>20</sup> Rotman, *supra* note 9 at 14.

<sup>21</sup> Geoff Zochodne, “Canadian companies can care about more than profit, and could pay a price if they don’t,” *Financial Post* (June 3, 2020), online: [business.financialpost.com/business/canadian-companies-can-care-about-more-than-profit-and-could-pay-a-price-if-they-dont](https://business.financialpost.com/business/canadian-companies-can-care-about-more-than-profit-and-could-pay-a-price-if-they-dont).

necessity of placing value in tangible environmental, social, and governance (ESG) considerations, such as environmental impact, safe working conditions, and executive compensation, in conjunction with financial profit considerations, are becoming more prevalent.<sup>22</sup> For pension trustees in Canada, for example, legal research has supported increasing recognition of the need to adopt longer term and more systemic views of fiduciary obligations, thus fostering the inclusion of ESG risks in investment management.<sup>23</sup> However, traditional approaches to investing can make it challenging for those who value matters related to sustainability and ethics to balance these considerations against the prioritization of short-term financial returns.

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<sup>22</sup> David Gelles & David Yaffe-Bellany, "Shareholder Value Is No Longer Everything, Top C.E.O.s Say," *The New York Times* (April 19, 2019), online: [www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html](http://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html).

<sup>23</sup> Researched in collaboration with SHARE as part of the preliminary Research Proposal. See Murray Gold & Adrian Scotchmer, *Climate Change and the Fiduciary Duties of Pension Fund Trustees in Canada*, 2015, online: (pdf): [kmlaw.ca/wp-content/uploads/2015/10/KM\\_Climate\\_Change\\_Paper\\_06oct15.pdf](http://kmlaw.ca/wp-content/uploads/2015/10/KM_Climate_Change_Paper_06oct15.pdf), and Edward J. Waitzer & Douglas Sarro, "The Public Fiduciary: Emerging Themes in Canadian Fiduciary Law for Pension Trustees" (2013), *Comparative Research in Law & Political Economy. Research Paper No. 24/2013*, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1271&context=clpe>.



### 3. Indigenous Legal Orders and Principles

Legal orders have been in place within Indigenous communities and nations since time immemorial. Teachings and language have been passed down through generations, *among other ways*, through oral histories, songs, dances, rock art, scrolls, ceremonies, ecological experience, poles, regalia, and crests that were and are essential to the creation of properties, house groups, clans, and community structures. These subsequently fostered notions of loyalty, respect, and responsibility. The sense of responsibility and obligation to family, the community, the land, plants, animals, waters, and oneself continues to be central to many Indigenous laws, languages, and constitutionalism to this day.

It is possible to identify at least five sources of Indigenous law.<sup>24</sup> Understanding these sources will help those working with Indigenous law see where obligations of good faith, care, responsibility, protection, and growth arise. *Sacred law* can flow from creation stories or extends from teachings ascribed to the Creator which have been passed down through generations.<sup>25</sup> *Natural or environmental law* derives from the physical world and flows from consequences and teachings from the land, waters, and beings of the natural world.<sup>26</sup> *Deliberative law* allows for revision and re-examination within formal and informal meetings, councils, circles, and feasts over time and through generations, elucidating the non-static nature of Indigenous legal principles.<sup>27</sup> *Positivist law* is based on command, using rules, regulation, teachings, and the order of law in public settings such as feast halls, wampum readings, and band council chambers.<sup>28</sup> Finally, *customary laws* are defined through binding repetitive patterns and customs in which individuals and community engage.<sup>29</sup>

The varied sources of Indigenous law described above are not exhaustive nor are they locked into silos. They dynamically interact with each other as people work to faithfully respect one another's power when they are in relationships which require them to look after another's interests. Collectively, duties, entitlements, and obligations can be recorded in dances, as well as narratives, traditional stories, and songs that are told through traditional languages and depict history, teachings, and connection. These laws grow from tragedy, happiness, humour, seriousness, fear, struggle, triumph, wisdom, and beauty. They form the legal orders by which many

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<sup>24</sup> John Borrows, *Canada's Indigenous Constitution*, 1st ed (Toronto: University of Toronto Press, 2010).

<sup>25</sup> *Ibid* at 24.

<sup>26</sup> *Ibid* at 28.

<sup>27</sup> *Ibid* at 35.

<sup>28</sup> *Ibid* at 47.

<sup>29</sup> *Ibid* at 51.

Indigenous nations live and learn. They are always gendered.<sup>30</sup> These ancient and sophisticated laws have been passed through generations for thousands of years and they have been modified as the need arises. They were here before the arrival of non-Indigenous people, and although some have been lost, others have remained in the face of assimilation, suppression, and eradication.

The traditional stories depicted in this section are a small fragment of the narratives that exist as publicly available to outsiders, and the analysis given is only an attempt to minimally capture some of the meanings, lessons, and histories of the peoples who keep them.<sup>31</sup> As authors peering at these legal principles through our own extremely limited perspective (as Nisga'a and Anishinaabe), we must recognize that we can never fully understand them the way they are meant to be understood. The depictions of the cited narratives are in no way meant to be a collective analysis, as it is not our job nor our place to do this.

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Each Indigenous legal tradition has its own ways of relating to one another when it comes to taking care of something on behalf of others. While these laws can be learned, you have to work in deeper relationship with communities to understand their laws in practice. Laws are best learned and practiced relationally.

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A large reason for our lack of understanding involves our own limited experience with these traditions, despite significant work in the field. Each Indigenous legal tradition has its own ways of relating to one another when it comes to taking care of something on behalf of others. While these laws can be learned, you have to work in deeper relationship with communities to understand their laws in practice. Laws are best learned and practiced relationally. We do not presume to speak for others who have developed this expertise.

We also face etymological challenges in our work. Since Indigenous laws were developed using distinct languages, law and language are closely intertwined, making it impossible for us to fully understand a legal order in translation. In broader terms, Indigenous languages are used to communicate and represent their own laws. Much of the cultural significance within Indigenous nations is derived from their respective languages and cannot be accurately translated to extraneous languages without a loss of some meaning, appreciation, and nuance.

Fortunately for English speakers, the expression of Indigenous legal orders has expanded to include constitutions, treaty agreements, and other policies in the English language. Although these creations have been informed by the common law and can be problematic in some contexts, they now make up a component of many communities' legal orders and have been utilized in this work to illustrate the use of traditional principles in a variety of platforms.

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<sup>30</sup> Emily Snyder, Val Napoleon, & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593; John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50:3 Osgoode Hall LJ 699.

<sup>31</sup> All perceptions and conclusions drawn from each traditional story are not our own but have been gathered and synthesized from the materials cited and discussions from academics, who all belong to the nations who hold them. It is not our place to 'analyse' or draw our own conclusions regarding these oral histories and traditional stories and what they mean to convey, as outsiders.

## Nisga'a

As previously mentioned, Indigenous laws take on different forms in different communities and nations. The Nisga'a Nation of the Nass Valley have *Ayuukhl Nisga'a*, which is an ancient code of laws and customs that details Nisga'a history and its image of the world.<sup>32</sup> *Ayuukhl Nisga'a* establishes and defines Nisga'a<sup>34</sup> institutions and code of conduct, which also oversees the *wilp*<sup>33</sup> structure that defines every Nisga'a. Everyone one of the approximately 60 Nisga'a *huwilp*<sup>35</sup> own their own songs, crests, dances, adaawak (oral histories), and territories.<sup>36</sup> *Ayuukhl Nisga'a* also illuminates the responsibilities and obligations that the Nisga'a perceive themselves to have. The *K'il'hl wo'osihl Nisga'a*<sup>37</sup> or Nisga'a "Common Bowl" is one such concept, which elucidates the interconnectedness of all life and the external world.

We eat the roots of one type of plant, the leaves of another. We make medicine from the roots of trees. We eat what comes from the hemlock, spruce, jack pine and balsam, for medicine. All the trees and different leaves in the Nass we use – this is what the white man has taken out. They think the trees are for nothing. The trees are there for a purpose. They are just like us. We're all born for a purpose, for a job in this world. Some of us do lots, some of us a little. But we're all used for one thing or another.<sup>38</sup>

This passage<sup>39</sup> connotes the traditional sentiment that everything has a purpose, and that purpose must be respected. This respect is based on a connection to the natural world, creating conceptions of value and wealth that the Nisga'a people acknowledge. Nisga'a narratives express the wealth within knowledge as well as the values of consequences. Narratives that epitomize the deeds and misdeeds of the lawgiver and trickster *Txeemsim*<sup>40</sup> describe that every single decision or action that one makes is a moral one and will affect others, positively or negatively.<sup>41</sup> *Txeemsim's* life proves that selfish behaviour is ultimately destructive for oneself as well as for society. *Txeemsim* is the exemplification and personification of human struggles with morality, consequences, greed, hope, and fear.

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<sup>32</sup> Joseph Gosnell Sr. et al, *Nisga'a: People of the Nass River*, 1st ed (Vancouver: Douglas & McIntyre, Nisga'a Tribal Council, 1993) at 4.

<sup>33</sup> *Wilp* translates to 'house', which refers to a familial-like social structure.

<sup>34</sup> Gosnell, *supra* note 32 at 4.

<sup>35</sup> Houses, plural of *wilp*. See note 32.

<sup>36</sup> Gosnell, *supra* note 32 at 4.

<sup>37</sup> Mansell Griffin & Antino Spanjer, "The Nisga'a Common Bowl in Tradition and Politics" in Kerstin Knopf, ed, *Aboriginal Canada Revisited*, 1st ed (Ottawa: University of Ottawa Press, 2008) at 74.

<sup>38</sup> Gosnell, *supra* note 32 at 7.

<sup>39</sup> These passages, and those throughout the work, seek to illustrate traditional laws and ways or thinking using tangible examples of conceptions of wealth, responsibility, stewardship, and respect as relating to the lands, communities, values, and practices of each nation included in the report.

<sup>40</sup> Discussed in *Ibid* at 15. *Txeemsim* was a supernatural being that brought fire to the Nisga'a and created many Nass landscapes. He also identified 10 areas that became law and are observed and considered hallowed today (see *Ibid* at 125). He was the grandson of the Creator, or Chief of Heavens (*K'amligihahlhaahl*) and was kind but was also a trickster. Stories featuring *Txeemsim* and other characters are often preserved and passed through generations in oral form.

<sup>41</sup> *Ibid*.

As is apparent in the following passages, another large aspect of wealth that the Nisga'a recognize is the land and culture itself:

People often refer to us as rich people, because we can make food of all kinds in every season. Our land is very rich.<sup>42</sup>

The valley is the wealth of the Nisga'a, a storehouse that produced a civilization as rich in art and family history as that of Renaissance Italy long before the European sailing ships arrived on the West Coast in the eighteenth century. This is a culture that transforms everything – masks, spoons, totem poles, the cedar panels of finely wrought long houses – into elaborate works of art.<sup>43</sup>

A component of the conception of wealth as related to the land is grounded in its traditional means for survival for the Nisga'a people. It is where they have lived for thousands of years. The land provides – not only for human life, but for all aspects of life. As illustrated in Nisga'a laws, this life must be protected and respected. A Nisga'a narrative, owned by the Raven Clan, describes the story of a youth who had ridiculed and abused the salmon, knowingly going against the teachings of their elders. It is said that this act of disrespect triggered the eruption of a volcano, killing many in the community.<sup>44</sup> The salmon is highly valued, for it provides for the people, and like all other beings, has a distinct purpose.

You respect the creatures, the fish, the fowl of the air, and the animals. We don't allow our fish to rot without using it [...] it is forbidden. You take what you need [...] to survive—only—and leave the rest, that's conservation [...] You can process more oolichan grease than you need, then go out to the people that live by the sea and trade for some seaweed and herring eggs...abalone, clams and cockles.<sup>45</sup>

This passage not only demonstrates the responsibilities and obligations that the Nisga'a people have to the creatures that inhabit their land, but also that fish, creatures, and their derivatives represent currency via trade. Therefore, perceptions of wealth and value that extend beyond dollars are relevant and meaningful to this day.

The connection to the land continues in stories regarding the Great Flood, in which the Nisga'a saved themselves from being swept away by using rafts and canoes, tying them to the four highest peaks in Nisga'a territory. These peaks then became known as the Saviour Mountains.<sup>46</sup>

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<sup>42</sup> *Ibid* at 71.

<sup>43</sup> *Ibid* at 6 para 2.

<sup>44</sup> R. E. Pfister, "Aboriginal Views of Storytelling" in Pamela M. Godde, Martin F. Price & Friedrich M. Zimmermann, eds, *Tourism and Development in Mountain Regions*, 1st ed (Oxon: CABI Publishing, 2000) at 130.

<sup>45</sup> Gosnell, *supra* note 32 at 66.

<sup>46</sup> "Txeemsim (Superbeing)" online: *Nisga'a Lisims Government* <https://www.nisgaanation.ca/txeemsim-superbeing>.



In more recent frameworks, legal principles and narratives that depict connection, obligation and respect are presented as an authoritative source of law within constitutional documents. The Constitution of the Nisga'a Nation came into effect in 2000 and provides for the establishment of Nisga'a Lisims Government, each of the four Nisga'a Village Governments, and the three Nisga'a Urban Locals.<sup>47</sup> It sets out components such as rights, governing principles, government composition, and authority, as well as financial and public administration. Section 5(7) of the Constitution reads:

5. (7) This Constitution is a symbol of the restoration of our personal and community relationship to the land.<sup>48</sup>

The Constitution also clearly outlines the fundamental values that are held by the Nisga'a,<sup>49</sup> such as the principle of the common bowl, the Creator *K'amligihahlhaahl*, the authority of the *Ayuuk*,<sup>50</sup> and the spirituality and dignity of each person. The founding provisions related to the Nisga'a traditional territory<sup>51</sup> describe a deep, spiritual attachment to the land as central to the identity of each person:

5. (2) Nisga'a individuals and families have a deep spiritual attachment to the land and natural resources, which, together with our culture, language and ancient traditions, define what it means to be Nisga'a.<sup>52</sup>

Many of the philosophies illustrated in the Nisga'a Constitution, such as those depicted in the above passage, are prevalent within the Nisga'a Final Agreement ("Nisga'a Agreement") as well. The Nisga'a Agreement outlines the jurisdiction of the Nisga'a to self-govern and create laws pertaining to their own lands, citizens, communities, court, and administrative and social structures.<sup>53</sup> The Nisga'a Agreement was created through negotiations between the Nisga'a Government, the Government of Canada, and the Government of British Columbia that began in 1976. Similar to a municipality, all Nisga'a laws that are created operate alongside provincial and federal laws. The Nisga'a Agreement's purpose and authoritative nature is set forth in an accompanying resource, as illustrated below:

The Nisga'a Treaty establishes decision-making authority for [the] Nisga'a Government within a model that the Nisga'a have been accustomed to and have accepted for many years. The Nisga'a Government model is designed as a practical and workable arrangement that provides the Nisga'a Nation with a significant measure of self-government that is consistent with the overall public interest and within Canada's constitutional framework.<sup>54</sup>

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<sup>47</sup> "Constitution" online: *Nisga'a Lisims Government* <https://www.nisgaanation.ca/constitution>.

<sup>48</sup> *The Constitution of the Nisga'a Nation* (1998), s 5(7), online (pdf): <http://www.nisgaanation.ca/sites/default/files/legislation/Constitution%20of%20the%20Nisga'a%20Nation%20-%201998-10-01.pdf>.

<sup>49</sup> *Ibid* at s 2(a-e).

<sup>50</sup> Another name that depicts Nisga'a law. Compared to the *Ayuukhl Nisga'a*, which refers to traditional law, or ways of being.

<sup>51</sup> *Constitution of the Nisga'a Nation*, *supra*, note 48 at 7, s 5(1-7).

<sup>52</sup> *Ibid* at 7, s 5(2).

<sup>53</sup> *Nisga'a Final Agreement*, 27 April 1999, online (pdf): Nisga'a Nation <http://www.nnkn.ca/files/u28/nis-eng.pdf>.

<sup>54</sup> *Understanding the Treaty*, online: *Nisga'a Lisims Government* <https://www.nisgaanation.ca/understanding-treaty> at para 8.

Further, the Nisga'a Agreement was used to establish protection for sites within the Nisga'a territory, such as the *Anhluut'ukwsim Laxmihl Angwinga'asanskwhl Nisga'a*, or the Nisga'a Memorial Lava Bed Park,<sup>55</sup> and the *Gingietl Creek Ecological Reserve*.<sup>56</sup> The Nisga'a Agreement ensures that the Nisga'a are actively involved in the management, use and development of the ecological areas. The protection of the Lava Bed Park also allows for the protection of Nisga'a history and culture, being that the park has particular cultural significance to the Nation. The Nisga'a Agreement is a tool through which the Nisga'a can carry out their obligation and responsibility to the protection of the lands within their territories, as they have done since before the arrival of Europeans.

Subsequent to the creation of the Nisga'a Agreement, the Nisga'a Settlement Trust was established. The primary goal of this trust is to provide financial stability to the Nisga'a Nation through the seventh generation.<sup>57</sup> This trust was created through the negotiations of the Nisga'a Agreement and capital transfer paid to the Nisga'a over 14 years. The most recent Implementation Report states that the annual budget spend rate is set at a maximum of 1.8 percent, with the trust fund value increasing by over 800 percent from 2003 to 2015.<sup>58</sup> The emphasis on planning for and supporting future generations is indisputable within the values of this trust structure, providing for a framework that encourages the application of traditional principles of sustainability and stewardship.

## Gitxsan & Gitanyow

The dispositions of the Nisga'a are comparable in many ways to the Gitxsan people of Northern British Columbia, whose territories border the Nisga'a. Indeed, many aspects of the language and property laws are akin, and intermarriage between the two nations is common. Like the Nisga'a, the Gitxsan have narratives that involve the use of *Naxnox*, which are spirits and beings that personify human characteristics and connect people to the land.<sup>59</sup> There are different types of stories that are present within the Gitxsan Nation. The first is the *adaawk*, which are stories that are privately owned and protected by each house and vary between the house groups, similar to the crests, songs, and dances, as described on the following page:

<sup>55</sup> *Nisga'a Final Agreement*, *supra* note 52 at 48-49, s 103-113.

<sup>56</sup> *Ibid* at 50, s 114-118.

<sup>57</sup> See "Nisga'a Settlement Trust" online: *Nisga'a Lisims Government* <https://www.nisgaanation.ca/nisgaa-settlement-trust>.

<sup>58</sup> *Nisga'a Final Agreement Implementation Report 2014-2015*, online (pdf): <https://www.nisgaanation.ca/sites/default/files/NLG-AR2014-15-ENG-Online.pdf> at 23.

<sup>59</sup> Richard Overstall, "Encountering the Spirit in the Land: Property in a Kinship-Based Legal Order" in John P.S. McLaren, A.R. Buck & Nancy E. Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies*, 1st ed (Vancouver: UBC Press, 2004) at 29-30.

The *adaawk* are the personal properties of each house group. Therefore, one cannot write or discuss the *adaawk* of another house group. Being ignorant of the *adaawk* puts one at risk of unintentionally breaking the Gitxsan laws. Artists cannot use the *ayuxws* (crests) that are integral to an *adaawk* unless the chief who owns the story commissions them.<sup>60</sup>

However, the *ant'imahlasxw* are narratives that are considered to be the properties of all the Gitxsan and are used to inform and instruct.<sup>61</sup> *Wiigyet* plays the role of *Txeemsim* in these Gitxsan narratives as the trickster who often serves as a warning against selfish or greedy behaviour when he appears. He is the essence of human frailty. Various narratives, such as those titled *Wiigyet and the Abalone*<sup>62</sup> and *How the Lynx Got Tufted Ears*,<sup>63</sup> detail overharvesting and greed displayed by *Wiigyet*. *Wiigyet* is later punished by fate or natural forces, effectively allowing him the opportunity to reflect on his mistakes and learn from them. In narratives such as *Wiigyet Brings Water to the World*,<sup>64</sup> *Wiigyet* plays an alternative role of the hero, enacting justice on a chief who has broken these laws by hoarding water from others and was therefore not acting in the best interests of his people. In these narratives, forces and spirits also enact punishments upon humans who disregard their laws and the teachings of their elders. The story of *Madiik*<sup>65</sup> delineates the spirit of a bear who destroys the village of *Temlaham* following the disrespect witnessed as village maidens fashioned fish skeletons into garlands and wore them, ignoring the warnings of the elders. *The Dispersal*<sup>66</sup> and *The Halayt*<sup>67</sup> are both narratives that describe how children and villagers mock the fish, sun, and snow, which leads to tragic consequences, such as starvation caused by salmon population declines, and catastrophic snow falls.

These oral histories collectively become part of the law of the Gitxsan by reiterating the respect, selflessness, and humility by which the Gitxsan people have traditionally lived. These stories also connect people to the land and animals by illustrating how and why various landscapes and animals look the way they do. This connection creates an appreciation and perception of wealth and value of

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<sup>60</sup> M. Jane Smith, *Placing Gitxsan Stories in Text: Returning the Feathers*. *Guuxs Mak'am Mik'aax* (PhD Dissertation, University of British Columbia, 2004) [unpublished] at 50, para 4.

<sup>61</sup> *Ibid* at 50, para 5.

<sup>62</sup> Neil J. Sterritt, *Mapping My Way Home: A Gitxsan History*, 3rd ed (Smithers: Creekstone Press Ltd., 2017) at 23-24. There are many narratives like these that are owned by different houses, many of which are secret to the house and are not allowed to be shared with outsiders.

<sup>63</sup> *Ibid* at 21-22.

<sup>64</sup> *Ibid* at 21.

<sup>65</sup> *Ibid* at 28.

<sup>66</sup> *Ibid* at 29. *The Dispersal* tells the story of a villager named *Gyagan* who mocks the sun, fish and snow, which angers the natural forces of the world, resulting in a snowfall that buries the village of *Stekyawden* and causes starvation throughout.

<sup>67</sup> *Ibid* at 71-74. *The Halayt* describes how children and parents at *Gitanmaax* disrespected the salmon, causing the *halayt*, who was a law keeper and healer, to embark on a spiritual journey/ceremony and learn that the consequences of this disrespect would result in a bad year for salmon populations and that the people may starve and die.

the world around them. For instance, *Legend of Wii'axgats'agat*<sup>68</sup> tells the story of the origin of mosquitoes, while *Legend of the Little Porcupine*<sup>69</sup> offers lessons of the importance of respect for all things and explains why porcupines are easily irritated and quick to discharge their quills. *How the Lynx Got Tufted Ears* not only describes its namesake, but also explains how multiple landscapes within the territory came to be formed:

It was [...] how *Wiigyet's* large footprint came to be atop a small knoll beside the Kispiox River at Seventeen Mile Bridge, and why the outline of his body is pressed into the rock at *Ts'ilaasxwit*.<sup>70</sup>

Stories are also used to explain the names given to rivers, lakes, and landmarks. For instance, *Ska'woo*<sup>71</sup> is a narrative that is used to describe how *Xsi'yeen* (the Skeena river) received its name.<sup>72</sup>

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These connections to the land create obligations and responsibility for its care and protection. By connecting the land to the people, an appreciation and value is placed upon it that translates to prosperity and equates it to wealth. The connection is further deepened as the land, songs, crests, dances, and history also come to represent the Gitxsan identity. *Amsisa'ytxw* (Victoria Russell), a member of the *Luuxhon* House within the Gitxsan Nation, describes the connection between owning and belonging<sup>73</sup> that exists among the Gitxsan people:

"Belonging means owning something [...] We actually have a place in the world; it makes a difference for me as a *Luuxhon* House member emotionally because it makes me feel proud to know I own land. Without the land, the songs, the crest, the history [...] I would be nothing."<sup>74</sup>

Notions of relationship, connection and identity are also communicated in central governing documents employed by some of the Gitxsan Nation's communities. Gitanyow, which is a politically independent community of the Gitxsan Nation, has a constitution titled *The Gitanyow Ayookxw: The Constitution of the Gitanyow Nation*.

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<sup>68</sup> Jane Smith Mowatt, *Gitxsan Storytelling: The Breath of our Grandfathers* (PhD Dissertation, University of British Columbia, 2000) [unpublished] at 38-44.

<sup>69</sup> *Ibid* at 34-36.

<sup>70</sup> Sterritt, *supra* note 62 at 22 para 5. The landscapes described have since been destroyed; the outline of Wiigyet's body during bridge re-construction and his footprint during a power line installation (Sterritt at 22).

<sup>71</sup> *Ibid* at 26-28.

<sup>72</sup> *Ibid* at 28 para 2. Skeena translates to 'river of mist'.

<sup>73</sup> See Richard Overstall, "The Law is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow" in Catherine Bell & Val Napoleon, eds, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*, 1st ed (Vancouver: UBC Press, 2008) at 107.

<sup>74</sup> *Ibid* at 107-108.



The Constitution states that the Gitanyow Ayookxw is the supreme law within the community:<sup>75</sup>

This Constitution is a living document that exists alongside of Gitanyow oral traditions.<sup>76</sup>

The constitution also clearly outlines the *wilp* structure, the leaders and their traditional names, management of land and resources, governing structures, and member roles alongside their responsibilities. Comparable to the Nisga'a constitution, the Gitanyow constitution also integrates traditional language throughout, allowing the reader to comprehend some of the meaning of the terminology as it relates to the English language, although it does not always translate smoothly. For example, the Gitanyow have a phrase within their traditional language that refers to the wealth that extends beyond monetary sums. The *Hla' Am Wil* is defined as the wealth of each *Wilp Lax'yip*,<sup>77</sup> which comes from the land and allows the *wilp* to prosper and uphold the *Ayookw*. This wealth includes forestland, the waters, airs, food sources, and animals.<sup>78</sup> The connection that the Gitanyow people have to their traditional territories is prevalent within their constitution and their agreements with other governments, allowing those who read them a glimpse of the legal principles of these people that exist today.

Furthermore, the Gitanyow people reiterate these sentiments of wealth within documents such as *The Gitanyow Huwilp Recognition and Reconciliation Agreement*. This agreement between the Gitanyow Nation (as represented by the Gitanyow Hereditary Chiefs) and the Government of British Columbia (as represented by the Minister of Aboriginal Relations and Reconciliation and the Minister of Forests, Lands, and Natural Resources Operations) seeks to establish a respectful government-to-government relationship regarding land and natural resources management.<sup>79</sup> The agreement promotes sustainability in part through providing the basis for the creation of a sustainable land use plan and sharing the wealth of the Gitanyow *Lax'yip* (referring to the land and resources within the territory) through paths of negotiations.<sup>80</sup> The priorities of the Gitanyow people are prevalent in documents such as these and are established in the context of their relationship with the provincial and federal governments.

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<sup>75</sup> *The Gitanyow Ayookxw: The Constitution of the Gitanyow Nation* (2009), s 3(4), online (pdf): [http://www.gitanyowchiefs.com/images/uploads/constitution/Gitanyow\\_Constitution\\_2009.pdf](http://www.gitanyowchiefs.com/images/uploads/constitution/Gitanyow_Constitution_2009.pdf).

<sup>76</sup> *Ibid* at 4 s 3(1).

<sup>77</sup> *Ibid* at 6 s 4(4). *Lax'yip* refers to the land and resources that are available to a *wilp* (house), within their territorial boundaries.

<sup>78</sup> *Ibid* at 6 s 6(b).

<sup>79</sup> *Gitanyow Huwilp Recognition and Reconciliation Agreement*, 2016, online (pdf): Gitanyow Hereditary Chiefs <http://www.gitanyowchiefs.com/images/uploads/land-use-plans/Gitanyow-R-R-Agreement-2012.pdf> at 5 s 2.

<sup>80</sup> *Ibid* at 7 s 2.3.

## Gitxsan House Structures

Within nations such as the Nisga'a, Gitxsan, and others, the house structures are immensely sophisticated and intricate, and also demonstrate the existence of trust-like relationships within the communities in which they operate. For example, within the Gitxsan society, the traditional house system exemplifies the relationship that the people have to the physical and spiritual worlds. Each of the more than 50 *huwilp*<sup>81</sup> (houses), which all belong to one of four larger clans,<sup>82</sup> holds ownership over their own *lax yip* (territories), songs, dances, *ayuuuk* (crests), and *adaawk* (oral histories).<sup>83</sup> Each *wilp*, through the *Simoogit* (house chief), who holds the name of the house itself, has the power to grant permissions to non-house members to access the house territory, such as the *yuugilatxw* (law that governs access to territory for non-members) and *yuugwilatxw* (law that governs access to territory for the husband of a house member).<sup>84</sup>

The roles of the house chiefs within the house structures have been viewed as trust-like relationships by those who have attempted to articulate their nature in common law terms. As described below, they are expected to operate solely in the interest and benefit of their people rather than their own:

The chief, then, acts as a trustee. When he or she directs the House members to manage their territories and follow the laws, the originating power is recreated. The resulting wealth in people and resources feeds the name of the Chief in the Feast Hall. The power, the *daxgyet*, thus circulates from the spirit of the land, through the chief, to the house members, through their use and care of the territory to create wealth that returns back through the chief to the marriage with the spirit that is created in the feast hall.<sup>85</sup>

The notions of the trust-like relationships between the chiefs, house members, and territories are further maintained within some of the testimonies given during the proceedings of *Delgamuukw v. British Columbia*.<sup>86</sup> Specifically, *Tenimyget* (Art Matthews Jr) described an account in which a member outside of his house assumed a traditionally high-ranking name to show jurisdiction and ownership when no one else within the house was able to and held it until someone else was able to assume the name in articulating, "You might say that type of *amnigwootwx* he took the territory and held it

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<sup>81</sup> See "The Traditional System Today" online: *Gitxsan* <http://www.gitxsan.com/about/our-way/traditional-system/#:~:text=The%20traditional%2C%20hereditary%20system%20is, social%2C%20economic%20and%20political%20purposes>.

<sup>82</sup> The four Gitxsan clans are *Lax Gibuu* (Wolf), *Lax Seel* or *Lax Ganeda* (Frog), *Gisgaast* (Fireweed), and *Lax Skiik* (Eagle) as listed on *Ibid*. A person's clan is determined by matrilineal descent.

<sup>83</sup> Val Napoleon, Ayook: *Gitksan Legal Order, Law and Legal Theory* (PhD Dissertation, University of Victoria, 2009) [unpublished] at xi-xvi.

<sup>84</sup> *Ibid*. This is also described in the account and testimony given by *Tenimyget* (Art Matthews Jr) in the transcripts of *Delgamuukw v. British Columbia*.

<sup>85</sup> Overstall, *supra* note 59 at 32 para 2.

<sup>86</sup> *Delgamuukw v. British Columbia*, [1997] SCJ No 108 [*Delgamuukw*]

in trust [...] for our house.<sup>87</sup> Although it is not regarded in traditional Gitxsan law as a 'trust,' this word has been used in an attempt to illuminate the system and processes that are in place regarding the power that is held by the *Simoogit* on behalf of the *wilp*. It may also be examined as a profound instance of a fiduciary-like obligation, in the sense that the *Simoogit* is bound to act within the best interests of the rest of the house, as beneficiaries.

With regard to trusts in the contemporary sense, the Gitxsan communities and collective peoples operate and manage their wealth through a variety of trust structures. The Lipgyet Trust is one such trust that is composed of 5 members; one from each of the four Gitxsan Clans and one chairman. The Lipgyet Trust is one of two shareholder groups of the Gitxsan Development Corporation (GDC), which makes business decisions that are informed by the overarching cultural values of the Gitxsan people:

The Gitxsan Development Corporation is unique, melding the traditional governance of the Gitxsan with the contemporary needs of business, yet remaining faithful to the principles of the Gitxsan *Ayookw* (laws). Every Gitxsan person, who is a member of a *wilp* (house group), has a stake in GDC.<sup>88</sup>

The ability to make decisions that are grounded in the perspectives of contemporary and traditional principles allows the Gitxsan people to engage with non-Indigenous business and investment entities and platforms, while also integrating the values of their communities.

## Cree

Propensities for humility, connection, and wealth as stemming from the land are shared by Cree nations throughout Canada. Although some narratives are communal between different Cree communities, the details often vary among them, while other narratives are present in communities that are not present in others. In accordance with narratives that are owned by the aforementioned nations that we briefly explored, Cree traditional stories depict, among other things, tragedy, humour, and balance. Their principles are present within governing documents, and their sentiments are shared and practiced by many today.

Many of the sentiments of connection to the land that exist in the legal orders of the Gitxsan and Nisga'a are comparable within the legal orders of the Swampy Cree

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<sup>87</sup> *Delgamuukw v. British Columbia*, 79 DLR (4th) 185, [1991] 3 WWR 97 (BCSC) (trial transcript 14 March 1988, Art Matthews Jr (*Tenimyet*) 4513 at 4556) [Art Matthews Jr. (*Tenimyet*), 14 March 1988]. The word *Amnigwootwx* is used to describe a type of privileged rights. This trust-like relationship is used to represent public, collectively owned Gitxsan property rather than instances of private property ownership.

<sup>88</sup> See "Governance", online: *Gitxsan Development Corporation* <https://gitxsanbusiness.com/pages/governance#:~:text=The%20Lipgyet%20Trust%20holds%20100,four%20Gitxsan%20Clans%20is%20elected>.

of James Bay and Hudson Bay in Manitoba.<sup>89</sup> *Mi-she-shek-kak (The Giant Skunk)*<sup>90</sup> tells the legend of a time when giant animals lived on the land. This narrative demonstrates the responsibility to help, in which people are compelled to assist when asked, if they are capable of doing so, or to ask for help when they are not.<sup>91</sup> There are animals within this narrative, such as Wolverine and the Big Cat, who are capable of killing *Mi-she-shek-kak* and therefore have an obligation to do so when asked to protect the lives of the other animals. *The Wailing Clouds*<sup>92</sup> story teaches the natural consequences of ignoring the teachings of elders as well as crimes against nature.<sup>93</sup> As expanded upon below, this traditional story is a complex narrative that illustrates aspects of Cree history, such as the tragedy of introductory disease as well as the practice of cultural festivals.

“The Wailing Clouds” locates traditional practices like hunting and competitive games within a cultural fabric and tells about the seasonal migrations of the people, the spring festivals, and the use of the wealth of resources in the region as seen by the *Omushkegowak*, though sometimes missed by Europeans. The story is embedded in and enriches *Omushkego* places like the *Ekwan* River and *Akimiski* Island, while preserving *Omushkego* names in language and history. Today this rich narrative continues to resonate as it provides a sense of continuity between past and present, an understanding of foundation and change, and a source of insight into *Omushkego* worldview for both *Omushkego* and other audiences.<sup>94</sup>

As articulated above, *The Wailing Clouds* communicates collective cultural values and wealth within the natural world. It also connects people to the land, and to past and future generations.

In narratives such as *Wesakaychuk and the Startlers*<sup>95</sup> and *Adventure with the Stone*,<sup>96</sup> the Plains Cree in Saskatchewan share a disapproval for disrespect and selfishness, respectively. Both of these attributes are exhibited by *Wesakaychuk*, the Cree trickster who faces repercussions from animals and natural forces. *The Markings on the Birch Trees*<sup>97</sup> not only describes why birch trees and buzzards appear the way they do, but also sees *Wesakaychuk* face punishment for his

<sup>89</sup> The Cree First Nations are the most widely distributed indigenous peoples in Canada. The Swampy Cree are one of 8 larger groups, which are then divided into smaller subgroups. Some of the Cree nations have similar narratives whose details vary, while some nations hold narratives that are not present in others.

<sup>90</sup> Louis Bird, *Telling Our Stories: Omushkego Legends & Histories from Hudson Bay*, 2nd ed (North York: University of Toronto Press, 2011) at 69-73.

<sup>91</sup> Hadley Friedland, “Cree Legal Summary” in Jessica Asch, Hadley Friedland, Maegan Hough and Renée McBeth (eds), *Accessing Justice and Reconciliation: Cree Legal Traditions Report* (2014), online (pdf): [https://www.indigenousbar.ca/indigenousslaw/wp-content/uploads/2017/10/cree\\_legal\\_summary.pdf](https://www.indigenousbar.ca/indigenousslaw/wp-content/uploads/2017/10/cree_legal_summary.pdf) at 32.

<sup>92</sup> Bird, *supra* note 90 at 169-188.

<sup>93</sup> See introduction by Anne Lindsay at *Ibid* at 163.

<sup>94</sup> *Ibid* at 163-164.

<sup>95</sup> Rev. E. Ahenakew, “Cree Trickster Tales” (1929) 42:166 J Am Folk 309 at 333-334.

<sup>96</sup> *Ibid* at 335-337.

<sup>97</sup> *Ibid* at 332.



nefarious ways to restore balance. This narrative connects people to the land while simultaneously teaching lessons to discourage attributes that may be harmful to it.

The values of environmental respect and protection are at the forefront of the *Constitution of the Cree Nation of Eeyou Istchee*, which governs eleven Cree communities located primarily in northern Quebec, including the eastern James Bay and south-eastern Hudson Bay regions. This Constitution discusses matters and details pertaining to law-making procedures, election structuring, financial administration, and meeting protocols.<sup>98</sup> The Cree values and principles are clearly summarized at the beginning of the document, which include the assertion of self-government, with its own distinctive language, culture, and customs.

1.4 The Cree Nation subscribes to the fundamental values of freedom, human dignity, equality, justice, mutual care and assistance, respect for individual and collective rights, protection of the environment and wildlife, and honour for the Creator, Cree ancestors and Cree traditions.<sup>99</sup>

As there are an abundance of Cree communities, so there are trusts and trust structures within the Cree nations. The Bigstone Cree Nation Trust is one such example and is the largest trust within the Bigstone Cree Nation, which is composed of three communities in Alberta; Calling Lake, Chipewyan Lake, and Wabasca. No more than half of the account interest on the funds in this trust will ever be used in a fiscal year.<sup>100</sup> Similar to the Gitksan and Nisga'a trusts, the Nation Trust is intended to protect the long-term interests of members, although the nation has expressed concerns regarding challenges with fund access due to the restrictive nature of the contract governing the trust.<sup>101</sup>

## Anishinaabe

The legal orders of the Anishinaabe people of eastern North America have similar perceptions about wealth as their Cree relatives. The Seven Ancestral Teachings<sup>102</sup> are an integral part of Anishinaabe law and culture and are used by Anishinaabe peoples as a guide regarding the treatment of and relations between others, the land, plants, animals, and oneself. These teachings are *dibaadendizowin* (humility), *gwayakowaadiziwin* (honesty), *manaaji'iwewin* (respect), *zoongide'ewin* (courage), *nibwaakaawin* (wisdom), *debwewin* (truth), and *zaagii'idiwin* (love).<sup>103</sup>

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<sup>98</sup> *The Constitution of the Cree Nation of Eeyou Istchee* (2017), online (pdf): [https://stage.cngov.ca/wp-content/uploads/2018/03/07\\_-\\_constitution\\_of\\_the\\_cree\\_nation\\_of\\_eeyou\\_istchee-1.pdf](https://stage.cngov.ca/wp-content/uploads/2018/03/07_-_constitution_of_the_cree_nation_of_eeyou_istchee-1.pdf).

<sup>99</sup> *Ibid* at 5 s 1.4.

<sup>100</sup> See "Welcome to the Bigstone Cree Nation Trust," online: *Bigstone Trust* <https://www.bigstonetrust.ca>.

<sup>101</sup> *Ibid*.

<sup>102</sup> Also known as the 7 grandfather, grandmother, or ancestral teachings. The name varies depending on the nation, community or individual.

<sup>103</sup> David Bouchard & Dr. Joseph Martin, *Seven Sacred Teachings: Niizhwaaswi Gagiikwewin*, 1st ed (Vancouver: More Than Words Publishers, 2009).

As is the case with many Indigenous nations, etymology of Anishinaabemowin is crucial to the understanding of Anishinaabe law's guidance for relationships. Many Indigenous languages, such as Ojibwe, Odawa, and Potawatomi, are closely related languages of the Anishinaabe nations. They indicate animacy and agency to things that are considered inanimate in the English language, further deepening the connection of inanimate elements to humans.

In Potawatomi [...] rocks are addressed as animate, as are mountains and water and fire and places. Those beings imbued with spirit deserve their own grammar—including our sacred medicines, our songs, drums and even stories are animate. The list of the inanimate seems to be smaller - objects which are made by people often fall in this category. Of an animate being, like a table we say, "What is it?" And we answer, *Dopwen yewe*. Table it is. But of apple, we must say, "Who is it?" And reply, *Mshimin yawe*. Apple he is.<sup>104</sup>

The recognition of animacy within Anishinaabe linguistic patterns suggests that responsibilities to others cannot be responsibly exercised without accounting for the agency of those other than human beings. You cannot manage those who own themselves without their participation and consent. You cannot assume that sources of wealth that comes from the natural world are there for human use without asking permission and developing relations with the beings in that world. The natural world takes care of us, and we likewise should take care of it. The mutuality involved in caring for one another is an obligation of the highest order.

Using history, stories, and language, the Anishinabek teach lessons about obligations, duties, and responsibilities that were given to them from birds, insects, animals, and plants. The *Origin of Corn* narrative<sup>105</sup> teaches to Anishinaabe people to respect elders and the gifts given. The *Origin of Tobacco* story<sup>106</sup> demonstrates the value of reciprocity, and *Raspberries*<sup>107</sup> explains sustainability and the importance of caring for each other. Many stories about plants teach Anishinaabe about the deep wealth within the natural world and the connection that the people have to it. Insects also teach Anishinaabe people their responsibilities. The *Mosquitoes* narrative<sup>108</sup> communicates that all beings have agency and cannot be deemed as less important than humans. The treatment of all living creatures with respect and dignity is paramount. *Cicadas – The Painters*<sup>109</sup> reiterates previously discussed notions of the purposes that all beings have. Cicadas give the flowers their colour and work under the direction of *Nana'b'oozoo*,<sup>110</sup> who is the Anishinaabe trickster.

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<sup>104</sup> Robin Wall Kimmerer, "Learning the Grammar of Animacy" (2017) 28 *Anthropology of Consciousness* 128-134 at 133.

<sup>105</sup> Basil H. Johnston, *Honour Mother Earth*, 1st ed. (Warton: Kegedonce Press, 2003) at 40-43.

<sup>106</sup> *Ibid* at 51-52.

<sup>107</sup> *Ibid* at 45-47.

<sup>108</sup> *Ibid* at 81.

<sup>109</sup> *Ibid* at 68-72.

<sup>110</sup> May also be known as *Nanabush* or other names, depending on the narrative or community.

This story connects the cicadas to the land, and from the land to the people. Animals also impart vital ideas about how to live responsibly. The *Snakes and Rabbits story*<sup>111</sup> tells the Anishinaabe how snakes received their fangs and venom and denounces the disrespect and abuse of power presented by the rabbits, as well as affirms the agency of other beings. Narratives involving other animals also accomplish this. Storytellers describe First Man being escorted by a wolf, who taught him some of the ways of the world and how to survive within it.<sup>112</sup> This story depicts the dependency of humans on other beings.

Right from the beginning humans depended on animals, whom they often referred to as “our older brothers and sisters,” meaning those who knew more and were stronger [...] Our ancestors owed their lives and what they knew of food, medicine, life and living from the animals, birds and insects. Our storytellers readily admitted humans’ dependence upon deer, whitefish, geese, bees.<sup>113</sup>

The above passage effectively illustrates an aspect of humility, as present within the Anishinaabe Ancestral Teachings. Humans are not at the centre of our decision-making systems. These principles are key to understanding Anishinaabe obligations related to more than the human world. Humans need and depend on the natural world for life, which galvanizes the Anishinaabe people, and many other Indigenous peoples, into take action to protect it, as their ancestors have done. These relationships have significant implications for understanding the need for good faith, loyalty, and care when dealing with the natural world. You cannot merely do what you want when it comes to drawing out varied types of wealth. Analogies from nature could be drawn into the human world.

If an investor, trust manager, or fiduciary acted with humility this would give prominence to those who have less formal power over the resource, financial asset, or person over which they otherwise have responsibility. You often have to place other’s needs before yourself in the system. This includes putting the plants, insects, and animals above human needs in many instances. In Anishinaabemowin, the word for humility is *dibaadendizowin*. Humility counsels us to measure our thoughts in a certain way: *dibaa* (measure), *endam* (thoughts), *izi* (state or condition), *win* (making the verb into a noun) – to measure our thoughts in a certain way. The word can also be written as *dabaadendiziwin*.<sup>114</sup> The morpheme ‘*dabaa*’ roughly translates as low or lower. This would mean that humility in an investment context could involve ensuring that those with power do not act with their own interests in mind. Constitutionally, humility would obligate those who hold power in relation to a person or asset to act without placing their own power over others. The teaching

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<sup>111</sup> Basil Johnston, *Ojibway Heritage* (Lincoln NB: Bison Books, University of NB Press, 1990) at 48-49.

<sup>112</sup> Johnston, *supra* note 105 at 112 para 2.

<sup>113</sup> *Ibid* at 112 para 1-2.

<sup>114</sup> For a discussion of humility from both an Anishinaabe and Canadian legal perspective see “Dabaadendiziwin: Practices of Humility in a Multi-Juridical Landscape” (2016) 33 *Windsor Yearbook of Access to Justice* 149.

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In an Anishinaabe constitutional context, humility counsels fiduciaries to think of others and act for their best interests, and to not make themselves the measure of their obligations, duties, or decisions.

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surrounding humility is that ultimately, we are not greater or lesser than the people, animals, plants, rocks, and waters which surround us. We are a part of the world, and not separate from it. As such, in an Anishinaabe constitutional context, humility counsels fiduciaries to think of others and act for their best interests, and to not make themselves the measure of their obligations, duties, or decisions.

The Ancestral Teachings are prominent in developing contemporary written frameworks. The Anishinabek Nation Constitution, called the *Anishinaabe Chi-Naaknigewin*,<sup>115</sup> integrates them as principles and values of their governance structure.

1.1 The Anishinabek Nation Government shall be guided by the principles and way of life of the seven sacred gifts given to Anishinaabe, namely: Love, Truth, Respect, Wisdom, Humility, Honesty, and Bravery.<sup>116</sup>

The preamble of the constitution is expressly written in Anishinaabemowin<sup>117</sup> and is listed as the primary language, with English being the second.<sup>118</sup> The point to make for a study of obligations for Anishinaabe people is that the Anishinaabe language contains guiding authority for understanding obligations related to wealth, growth, and vulnerability. For example, the reference to honesty in Anishinaabemowin is *gwayakwadizin*, which represents acting with good character.<sup>119</sup> The smaller morpheme in the word, *gwayak*, means “straight, right, correct or proper.”<sup>120</sup> Trust managers and those with fiduciary obligations could see their role in this light, as ensuring that their duties are performed with variation from instructions or obligations implied by their roles.

## Mi'kmaq

The value of traditional language carries over to the Mi'kmaq<sup>121</sup> Nation, whose traditional territories reside across Eastern Canada and the North-eastern United States. Like the Cree and Anishinaabe, their language is part of the Algonkian family group. *Netukulimk* illustrates a complex cultural concept that guides beliefs and behaviours relating to the protection and management of natural resources for future generations.<sup>122</sup> It encompasses a way of being that bestows responsibility

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<sup>115</sup> *Anishinaabe Chi-Naaknigewin: Anishinabek Nation Constitution* (2011), online (pdf): <http://www.anishinabek.ca/wp-content/uploads/2016/05/Anishinaabe-Chi-Naaknigewin-modified.pdf>.

<sup>116</sup> *Ibid* at 5 s 4.1.

<sup>117</sup> Anishinaabemowin is the name of one of the traditional languages of the Anishinaabe people.

<sup>118</sup> Anishinaabe Constitution, *supra* note 115 at 5, s 2.1.

<sup>119</sup> See the Ojibwe online dictionary at <https://ojibwe.lib.umn.edu/main-entry/gwayakwaadiziwin-ni>.

<sup>120</sup> *Ibid* at <https://ojibwe.lib.umn.edu/word-part/gwayakw-initial>.

<sup>121</sup> Mi'kmaq is plural to Mi'kmaq. As described within the *Mi'kmaq Resource Guide*, online (pdf): <http://cmmns.com/wp-content/uploads/2014/01/MIKMAWRGWeb.pdf> at 2, “The variant form Mi'kmaq plays two grammatical roles: 1) it is the singular of Mi'kmaq and 2) it is an adjective in circumstances where it precedes a noun (e.g. Mi'kmaq people, Mi'kmaq treaties, Mi'kmaq person, etc.).”

<sup>122</sup> Kerry Prosper, L. Jane McMillan, Anthony A. Davis & Morgan Moffitt, “Returning to Netukulimk: Mi'kmaq cultural and spiritual connections with resource stewardship and self-governance” (2011) 2:4 IIPJ 7 at 1 para 1.

on the people to respect and steward their lands and resources. A personification of *netukulimk* has been described within the processes of moose hunting. As a traditional practice to many Mi'kmaw people, there are "spiritual and traditional rituals and practices such as sharing meat and communal feasting, which are integral to expressions of *netukulimk*."<sup>123</sup> Sentiments of reciprocity, connection, and respect carried over to treatment of the moose itself:

The Mi'kmaq practiced ceremonies and rituals that demonstrated respect and expressed gratitude to the spirits of the animals for their meat, hides and other body parts. The bones of the animals were always treated with great care. It was considered spiritually dangerous to throw them into the fire or to feed them to dogs [...] These acts were considered disrespectful to the animal hunted because they did not allow the spirit of the moose, for example, to regenerate naturally through decomposition and re-absorption into other life forms. Burning the bones, for instance, interrupted the perpetual reciprocity of the life and death relationship between humans, animals and other than human worlds. This sacred connection, as expressed in the nature of the hunt and acts of *netukulimk*, were integral to the belief systems and law ways governing the relations between humans and animal spirits. The success of the hunt and the availability of the moose depended on the maintenance of this connection by respecting the moose during life and death. Rituals were carefully constructed to ensure the cycle of regeneration was not interrupted.<sup>124</sup>

After the arrival of Europeans, it became increasingly difficult for the Mi'kmaw people to continue to live this way, with their land and resources severely destroyed and diminished in the name of colonial progression. As the effects of colonization attempted to supplant these ways of being, the Mi'kmaw people created principles through their traditional language that sought to reconcile a variance of perspectives. Albert Marshall is a Mi'kmaw elder from the Eskasoni First Nation in Eastern Cape Breton Island who established the principle of *etuptmumk*, which translates to "two-eyed seeing." *Etuptmumk* is the practice of considering traditional principles alongside western principles:

Two-Eyed Seeing is the gift of multiple perspective treasured by many aboriginal peoples and explains that it refers to learning to see from one eye with the strengths of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of Western knowledges and ways of knowing, and to using both these eyes together, for the benefit of all.<sup>125</sup>

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<sup>123</sup> *Ibid* at 4 para 3.

<sup>124</sup> *Ibid* at 5 para 3.

<sup>125</sup> Cheryl Bartlett, Murdena Marshall, & Albert Marshall, "Two-Eyed Seeing and Other Lessons Learned Within a Co-learning Journey of Bringing Together Indigenous and Mainstream Knowledges and Ways of Knowing" (2012) 2:4 J Environ Stud and Sci at 8 para 5.

Accountability, sustainability, and best-interest practices are core values that are encompassed by this principle. It is possible and indeed encouraged to explore the use of two-eyed seeing in a multitude of circumstances. Frankie Young discusses how *etuaptmumk* may be used in a variety of niche areas, including trust law. As the below passage alludes, through the application of a tangible framework to these areas, the possibilities of exploring Indigenous perspectives may be accessible to a broader audience:

Indigenous lawyers, scholars, researchers and other experts can be said to engage in two-eyed seeing when they conduct research and provide knowledge that will directly benefit Indigenous communities and inform non-Indigenous people of how respecting and honouring Indigenous laws and traditions can enrich critical areas of Canadian society including economics, business, education, the socio-political domain, and law (and in this case trust law).<sup>126</sup>

*Etuptmumk* is an example of how the Mi'kmaw people have shifted to acknowledge the prevalence of contemporary conventions, while still honouring their traditional origins through language. In conjunction with Mi'kmaw languages, traditional stories continue to be used to personify meaning, power, and purpose in the world. Many view *Glooscap* as the Mi'kmaw trickster character or hero, who is featured in a version of the Creation Story as the first man on earth, and in others, with bringing man into being.<sup>127</sup> He is also credited with the creation of some landscapes. In *Muin, The Bear's Child*, *Glooscap* punishes an evil stepfather who had attempted to kill his stepson by burying him beneath the earth with a great blow by his spear into the earth, splitting it open. The split is still visible at the cape at *Blomidon*.<sup>128</sup> The narrative concludes with the teaching to refrain from killing a mother bear and her cubs. Notions of respect and sustainability are strongly discernible within this story, as the mother is raising her cubs and must be respected, possibly in part because the mother bear in the story cares for a human child as one of her own. The story may recognize that the death of a mother bear is also not a sustainable event because if there is no mother to raise the cubs, they will likely also perish. It is common practice among many Indigenous communities to refrain from hunting an animal that is clearly a mother. The people have an obligation to ensure that animal populations sustain the people and lands for generations.

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<sup>126</sup> Frankie Young, "Considering Indigenous Trust Investments Through the Lens of Two-Eyed Seeing" (2020) 40:1 ETPJ at 4 para 1.

<sup>127</sup> See "Cultural Heroes", online: *Mi'kmaw Cultural – Oral Tradition* <http://www.muiniskw.org/pgCulture3c.htm>.

<sup>128</sup> See "Muin, The Bear's Child", online: *Mi'kmaw Culture – Oral Tradition* <http://www.muiniskw.org/pgCulture3c.htm>.



## Nlaka’Pamux

The Nlaka’Pamux Nation is akin to other nations in many of its values, specifically those of connection and environmental protection. These values reach far back into ancestral generations. The name Nlaka’Pamux itself means “People of the Canyon,”<sup>129</sup> illustrating a historical relationship with their territory that is tied with a tenacious and unyielding sense of identity.

As the below passage suggests, connection, both to each other and the natural world, was at the forefront of traditional life within the Nlaka’Pamux Nation. This connection presented itself in a variety of both philosophical and tangible forms.

Traditional Nlaka’Pamux life contained everyday aspects of life all connected to each other. On a daily basis, children, parents, grandparents, animals, sky, and land all touched each other in ways simple, practical, educative, and easily explained. In a very real way, they were woven together just as a basket is, with a simple tool fashioned from the hind leg of a deer bone.<sup>130</sup>

Today, these values and principles are still present in many internal contemporary frameworks. They have implications for understanding obligations that people have for one another. In 2005, the leaders of nine communities within the Nlaka’Pamux Nation signed the *Nlaka’Pamux Nation Resolution on Natural Resources and the Principles of their Management* (“Nlaka’Pamux Nation Resolution”), which commits the signing communities to the initiation of management principles involving resource development for the economic benefit of their communities, while resolving to ensure the protection and sustainability of their natural resources, their relationships and mutual respect for each other, and Aboriginal rights and title.<sup>131</sup>

One of the signing communities of the Nlaka’Pamux Nation Resolution, the Kanaka Bar Indian Band, located in British Columbia’s Fraser Canyon, has been involved with various initiatives with the intention of promoting long-term sustainability in the face of various circumstances. Many of these plans and policies effectively illustrate their commitment to environmental protection and long-term economic sustainability as reflective of their traditional values. These documents are used to educate the community and inform decision-makers. For example, the *Kanaka Bar Climate Change Vulnerability Assessment* is a document that was created with the intent to engage the community and develop adaptation strategies that create resiliency to the effects of climate change.<sup>132</sup>

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<sup>129</sup> The Fraser Basin Council, *Bridge Between Nations: A History of First Nations in the Fraser River Basin*, (2006), online (pdf): [https://www.fraserbasin.bc.ca/\\_Library/Ab\\_NonAb\\_Relations/bridge\\_between\\_nations.pdf](https://www.fraserbasin.bc.ca/_Library/Ab_NonAb_Relations/bridge_between_nations.pdf) at 6.

<sup>130</sup> William Rowluck, *A Narrative Inquiry into Nlaka’pamux Children’s Responses to Online Digital Curriculum: Featuring Nlaka’pamux Parents and Elders* (PhD Dissertation, University of Saskatchewan, 2016) [unpublished] at 51 para 2.

<sup>131</sup> *Nlaka’Pamux Nation Resolution on Natural Resources and The Principles of their Management*, 2 February 2005, online (pdf): <http://www.kanakabarband.ca/downloads/nlakapamux-nation-signed-resolution-on-natural-resource-management.pdf>.

<sup>132</sup> Kanaka Bar Indian Band, *Climate Change Vulnerability Assessment* (2018), online (pdf): <http://www.kanakabarband.ca/downloads/climate-change-vulnerability-assessment.pdf> at 5 para 9.

Through the advancement of the Kanaka Bar Climate Change Vulnerability Assessment, Kanaka Bar is working to understand its vulnerabilities, prepare for a community transition, and develop adaptation strategies for the environment and economies of tomorrow.<sup>133</sup>

As the passage above suggests, climate effects that would adversely impact water resources, traditional food sources, access roads, and the frequency and severity of forest fires are of paramount concern as addressed in the assessment. Moreover, the responsibility that this community feels towards their lands, waters, forests, and animals is prevalent throughout. It is an exemplification of the paramountcy that many Indigenous communities' value regarding environmental sustainability, not only for those who are currently impacted, but for future generations as well. This is in fact a major focus of the *Climate Change Vulnerability Assessment*.

Additionally, the Kanaka Bar Indian Band has created a *Traditional Territory Land and Resource Strategy*, which clearly articulates decision-making protocols of future projects, best practices for engagement with the community, and strategic implementation geared towards external groups that may be looking to engage with the community in a variety of ways. The previous mentioned themes that are found in the community's *Climate Change Vulnerability Assessment* are present throughout, while also reiterating Kanaka Bar's responsibility as stewards and protectors of their territory:

Kanaka Bar maintains its authority and caretaker responsibility over the Traditional Territory. As stewards of the Territory, Kanaka Bar strives to protect it from unsustainable use, while maintaining the access and use of the land for the benefit of the entire community today and into the future.<sup>134</sup>

The idiom "what we do to the land, we do to ourselves" is a core value that is indicated within both of these Kanaka Bar documents, both materially and immaterially.<sup>135</sup> It suggests an almost familial, internalized connection to the land that relates to the sense of identity that was reflected in the aforementioned nations. It also effectively demonstrates a responsibility that is felt by the community to protect the land, because any act that damages the land in turn will damage the ability to enjoy the benefits of the land and natural resources – for themselves and generations to come.

With regard to trust structures that are present within the broader Nlaka'Pamux Nation, the Nlaka'Pamux Legacy Trust (NLX Trust) is collectively shared between the Ashcroft Indian Band, Boston Bar, Coldwater, Cook's Ferry, Nicomen, Nooaitch, Shackan, and Siska Indian Bands within the Nlaka'Pamux Nation. The establishment of this trust followed the creation of the *Economic and Community Development*

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<sup>133</sup> *Ibid* at 1 para 4.

<sup>134</sup> *Traditional Territory Land and Resources Strategy, 2017, online Kanaka Bar Indian Band (pdf):*  
<http://www.kanakabarband.ca/downloads/territorial-land-and-resources-strategy.pdf> at 4 para 1.

<sup>135</sup> *Ibid* at 1-2.

*Agreement* (ECDA) in 2013 between the participating bands as well as the Province of British Columbia and Highland Valley Copper Mine (HVC). The trust is managed by three Nlaka'pamux trustees and one administrative trustee. The trust indenture authorizes spending in nine key areas, such as governance, social and economic development, recreation, education, environment, and culture and heritage.<sup>136</sup> This trust is meant to be in place for 80 years after its creation, in which this final distribution date will see the distribution of the remaining trust property to the Participating Bands. The Bands may then choose to create another trust in place of the existing.<sup>137</sup> Although this particular trust structure contrasts with those previously mentioned, such as seven generation structures, it is still intended to contribute to the expansion and support of community social and environmental infrastructures that will benefit future generations.

## Kwanlin Dün

Trust structures further expand within many of the Yukon First Nations, in which much of the wealth that has been accumulated is from land claim compensation. Nine of the eleven self-governing Yukon First Nations have established trusts with varying structures, such as economic development and investment trusts. These trusts effectively contribute to long-term sustainability, independent governance, and self-sufficiency in conjunction with the agreements that have been negotiated. The Kwanlin Dün First Nation in Whitehorse is one such nation that has created a trust following the negotiation of *The Kwanlin Dün First Nation Final Agreement* ("Kwanlin Dün Final Agreement") in 2005.

Many traditional values exist within these agreements that apply to practical and specific circumstances that are unique to the community. Particularly, and akin to many other nations, the Kwanlin Dün Final Agreement is a self-governance agreement that has various sections which endorses the protection of heritage or culturally relevant sites, as well as language and traditional knowledge.<sup>138</sup> Chapter 13.1.1.2, for example, specifically acknowledges the need to preserve and protect cultural knowledge for future generations, while Chapter 13.4.6.1 establishes the Canyon City historic site as a Designated Heritage Site under the *Historic Resources Act*,<sup>139</sup> ensuring its protection and providing for Kwanlin Dün input regarding its management and oversight. Many of the principles and aspirations that are prevalent in agreements are apparent in additional governing documents, such as constitutions, that clearly state the values of the community.

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<sup>136</sup> See "The Nlaka'pamux Legacy Trust: Summary" (2013), online: *CNA Trust* [https://cna-trust.ca/about-funding\\_new.htm](https://cna-trust.ca/about-funding_new.htm).

<sup>137</sup> *Ibid.*

<sup>138</sup> *The Kwanlin Dün First Nation Final Agreement*, 19 February 2005, online: *Kwanlin Dün First Nation* <https://www.kwanlindun.com/wp-content/uploads/2020/05/KDFN-Final-Agreement.pdf>.

<sup>139</sup> *Historic Resources Act*, R.S.Y. 2002, c.109.

As previously indicated, constitutions elucidate fundamental legal principles that inform, instruct, and support communities as they carry out their obligations as protectors of their land, culture, and heritage. The *Constitution of the Kwanlin Dün First Nation*, among other things, details matters pertaining to financial and administrative considerations, citizenship, rights and freedoms, governmental structure and powers, legislative processes, and fundamental principles.<sup>140</sup> Listed in these fundamental principles are specific responsibilities that Kwanlin Dün citizens have to each other, their culture, and their land. These responsibilities allow a glimpse into some traditional legal principles that have carried over into the constitutional framework:

## Responsibilities of Kwanlin Dün Citizens

### (I) The Kwanlin Dün acknowledge their desire and commitment to

- a. honour and carry forward their culture, languages, traditions, clan system and laws;
- b. care for and protect the land, resources and all living things on the land within our Traditional Territory;
- c. respect the Elders;
- d. nurture the youth and children who are the future of the Kwanlin Dün First Nation;
- e. nurture family life and promote the value of the traditional family;
- f. respect one other, and all of those who come into contact with then Kwanlin Dün First Nation;
- g. create and maintain a warm and healthy community; and
- h. respect the rights and entitlements of the Beneficiaries.<sup>141</sup>

Many of these responsibilities and priorities are delineated in Acts that narrow the scope of considerations to those that are tangible and specific. The 2020 *Kwanlin Dün First Nation Lands Act* ("Lands Act") details a variety of protocols and regulations as pertaining to zoning, assessment, land interests, development, registration, and enforcement.<sup>142</sup> The purpose of the Lands Act is to ensure that the implementation of interests in settlement land include the full consideration of the economic, environmental, social, cultural, traditional, and historic values.<sup>143</sup> Some of these

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<sup>140</sup> *Constitution of the Kwanlin Dün First Nation*, 2016, online (pdf): <https://www.kwanlindun.com/wp-content/uploads/2020/05/Kwanlin-Dun-First-Nation-Constitution.pdf>.

<sup>141</sup> *Ibid* at 9-10, s 5.

<sup>142</sup> *Kwanlin Dün First Nation Lands Act*, 2020, online (pdf): *Kwanlin Dün First Nation* <https://www.kwanlindun.com/wp-content/uploads/2020/06/KDFN-Lands-Act.pdf>.

<sup>143</sup> *Ibid* at 13, part 2, s 4.

values are portrayed within the Land Act's preamble, of which a portion is shared below:

Together we are determined to maintain and preserve our relationship with the land, resources, and living things on the land in the Traditional Territory of the Kwanlin Dün First Nation, now and into the future. We are committed to managing the land in a respectful and sustainable way, allowing for the protection of Kwanlin Dün First Nation culture, traditions, values and way of life.<sup>144</sup>

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It is apparent that a fiduciary-like responsibility extends past the individual members of the community...

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The above passage illustrates an obligation to the protection of traditional culture, values, animals, and the land. It is apparent that a fiduciary-like responsibility extends past the individual members of the community towards these matters. The specific statement of a relationship with the land and living things connotes a connection to them that non-Indigenous entities may not always identify or understand. Many view relationships as those with animate other beings, such as pets or humans, that they are familiar with. The wider understanding of relationships does not typically extend to beings that we do not know, even less so to things that are deemed to be inanimate. To have a relationship with another is to engage in a connection with that being that we recognize as being a friend or family member. Comparable to the familial connections discussed in relation to Kanaka Bar, or the animacy within the languages of the Anishinaabe people, stating a relationship with the land, and living things that we may or may not know personally, strengthens the connection and sense of obligation to take care of these elements, the way we would for those directly within our familial networks.

Moreover, creation stories further accentuate these points of powerful connection. Almost every nation or community has a creation story in one form or another, which tells of how humans, clans, crests, and languages came to be. Some of these traditional stories have various versions between communities who share them. The Kwanlin Dün First Nation has the Crow creation stories. Crow is a transformer who is often known as the Yukon trickster character. It has been said within some stories that Crow created men and women, while some stories focus on how Crow made the world a suitable place for humans to live.<sup>145</sup> Creation stories create a connection that exhibits itself in notions of reciprocity. Creation stories illustrate how people came to be on the land. They recognize that many beings, such as plants and animals, inhabited the earth before humans. Like some of the aforementioned Anishinaabe stories connote, humans have a dependency on the land and animals for survival. They can survive without us, but we as human beings cannot survive without them. Many Indigenous people feel the need to take care of and protect the best interests of the land and animals, as they have cared for ancestors for thousands of years, and as they will continue to do for future generations.

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<sup>144</sup> *Ibid* at 9, s b.

<sup>145</sup> Jody Beaumont & Michael Edwards, *An Introduction to First Nations Heritage Along the Yukon River*, online (pdf): [http://lss.yukonschools.ca/uploads/4/5/5/0/45508033/an\\_introduction\\_to\\_first\\_nations\\_heritage\\_along\\_the\\_yukon\\_river.pdf](http://lss.yukonschools.ca/uploads/4/5/5/0/45508033/an_introduction_to_first_nations_heritage_along_the_yukon_river.pdf) at 23.

## Māori

Māori social organization and constitutional frameworks vary significantly from Indigenous peoples in Canada. However, the Indigenous people of Aotearoa New Zealand do share some important similarities. Māori narratives and traditional stories (called *pūrākau*) play a role in the historical significance of these Indigenous people and are used to describe legal principles and teachings through generations. A story of *Tamatea* mentions a character named *Rātā* and his attempts to cut down a tree to create a canoe. The spirits of the forest put the tree back together again each night after *Rātā* goes home, because he did not give thanks to *Tāne* and the forest spirits as he should, to respect in the proper way according to the *tikanga* (law).<sup>146</sup> Narratives and traditional stories personify who the Māori people were and continue to be. Through stories of tricksters, leaders, and spirits, *pūrākau* elucidate genealogy, identity, and ways of being.

The important thing is that we keep telling the stories of our *tīpuna* [...] Because that's who we are as Māori, as *Ngāti Kahungunu*, as *Ngai Te Apatu*. If we stop telling those stories, we start to lose control of our own stories.<sup>147</sup>

Many stories involving the character of *Māui* imbue teachings of right and wrong, how things should be and how the Māori should meaningfully and respectfully interact with the world around them.

The *Māui* traditions illustrate fundamental behaviours active in Māori society and also highlight various concepts of traditional Māori culture that applied in everyday life. The *Māui* traditions highlight and illustrate morals, themes, models, and behaviours from which Māori can learn and apply.<sup>148</sup>

A more precise example some of the themes and behaviours that are broadly mentioned in the above passage are demonstrated in narratives such as *Māui and the Jawbone*, which demonstrates the importance of respect for *kaumātua* (elders) within Māori society.<sup>149</sup> Relationships with *kaumātua* that are based on trust and respect allow for knowledge and *taonga* (possessions or belongings) to be passed down through generations, such as how the enchanted jawbone, owned by *Murirangawhenua*, was passed down to *Māui*. The story titled *Māui Snaring the Sun* describes how *Māui* slowed down the sun using his enchanted jawbone, allowing the days to become longer.<sup>150</sup> This story reiterates the importance of appreciating

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<sup>146</sup> Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori law*, 1st ed. (Vancouver, UBC Press, 2016) at 4.

<sup>147</sup> *Ibid* at 151.

<sup>148</sup> Ministry of Justice, *He Hinātore ki te Ao Māori: A Glimpse into the Māori world: Māori Perspectives on Justice*, 1st ed (Wellington, Ministry of Justice, 2001), online (pdf): <https://www.justice.govt.nz/assets/Documents/Publications/he-hinatora-ki-te-ao-maori.pdf> at 21.

<sup>149</sup> *Ibid* at 23-24.

<sup>150</sup> *Ibid* at 24.



the natural world, thus illustrating that value and respect for the environment and the natural world is present within traditional Māori values.

Moreover, many of these narratives inform traditional notions of wealth within Māori families and communities. A recent study that discussed socio-economic disparities between the Māori and Pākehā (New Zealand European population) recommended the availability of financial education programmes that reflect Māori cultural values, such as relational concepts of wealth<sup>151</sup> and well-being.<sup>152</sup> Further, the study confers pre-contact economics, which were non-monetary and were based solely on social relations (through *whānau*, which is similar to what we recognize as an extended family), and that this sentiment carries over, in part, today to Māori perceptions of wealth.<sup>153</sup>

*Houkamau (2016) found that whānau rarely defined themselves as being poor or in hardship—even though they often struggled to cover their basic needs for food, clothing and housing. Whānau defined wealth in terms of the quality of whānau relationships, whānau cohesion and children’s capacity to thrive.*<sup>154</sup>

Comparable to the importance of traditional narratives to convey legal principles, the Māori also share the use of trusts with Indigenous peoples in Canada. Many of the *iwi* and *hapū*<sup>155</sup> hold their financial assets in trust structures, many of which are the result of historical claim settlements regarding the Treaty of Waitangi.<sup>156</sup> The *Te Ture Whenua Māori*, or the *Māori Land Act 1993*, has since been amended to include protocols and regulations pertaining to various trust structures.<sup>157</sup>

Through traditional stories, oral histories, songs, dances, and crests, traditional legal principles are conveyed that have been in place since time immemorial. Through more contemporary frameworks, such as constitutions, policies, plans, agreements, and treaties, many of these principles are expressed in ways that can be used to inform and instruct communities and wider populations. Using all of these frameworks and platforms, Indigenous peoples are able to accomplish their obligations and responsibilities as stewards and protectors of their communities and governance, as well as the land, waters, plants, and animals. Many of these responsibilities are fuelled by strong and powerful connections to these elements that may create familial-like relationships and an unwavering sense of identity that has withstood the hindrances of colonial history.

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<sup>151</sup> This study uses the definition of relational wealth as cited: Relational Wealth. (2013). Routledge dictionary of economics (3rd ed.). London, UK: Routledge. “Non-material wealth based on service to the community and other people, a healthy environment and the time to develop and maintain personal relationships, rather than on consumer goods produced by the market”.

<sup>152</sup> Carla Houkamau, Alexander Stevens, Danielle Oakes & Marino Blank, “Embedding Tikanga Māori into financial literacy training for Māori” (2020) Ngā Pae o te Māramatanga’s Te Arotahi series Working Paper No 05 at 2 para 3.

<sup>153</sup> *Ibid* at 3.

<sup>154</sup> *Ibid* at 4, as found in Houkamau, C. A. (2016). Māori narratives of poverty. Retrieved from [https://everychildcounts.org.nz/uploads/sites/everychildcounts/files/Maori\\_Narratives\\_of\\_Poverty.pdf](https://everychildcounts.org.nz/uploads/sites/everychildcounts/files/Maori_Narratives_of_Poverty.pdf).

<sup>155</sup> *Iwi* and *hapū* are used to refer to different communities or groups of varying sizes throughout the island.

<sup>156</sup> “Settling Historical Treaty of Waitangi Claims”, online: New Zealand Government <https://www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/settling-historical-treaty-of-waitangi-claims>.

<sup>157</sup> *Te Ture Whenua Māori 1993*, pt 12.

## 4. Sui Generis in Canadian Jurisprudence

We must be careful when interpreting Indigenous laws and stories. We must go beyond familiar categories and recognize that Indigenous laws have their own interpretive mechanisms. Each Indigenous community has unique methodologies and ethical requirements for working with Indigenous law. We cannot and should not assume that we can assimilate Indigenous laws into a western context. They stand on their own. Indigenous law is best understood and practiced within its own setting.

There is a problem that arises when Canadian law attempts to recognize and affirm Indigenous law. Typically, Indigenous law is filtered through a colonial lens because colonial law is the dominant legal narrative in English-speaking Canada. This has led to great injustice. Indigenous wealth has been stripped away through the common law's application. Canadian law must be decolonized. Indigenous laws must be exercised in their own terms through self-determining structures.

Although a large focus of this paper is the exploration of Indigenous legal concepts and their living constitutionalism, or evolution over time, it is also possible to consider better relationships between common law and Indigenous legal tradition. Indigenous communities operate in the modern world. Indigenous peoples attempt to use Canadian law to get people to respect their legal capacities and governance powers. As noted, this is a frustrating thing to do. It is also dangerous. Canadian law seems to continually transform in ways to contain, marginalize, and dispossess Indigenous peoples. We acknowledge the detrimental effects that Canadian case law has traditionally had on Indigenous laws, rights, and interest. At the same time, Indigenous peoples turn to Canadian law to advance their rights and interests. The Supreme Court of Canada has identified a framework for seeing Indigenous law on its own terms before considering its relationship to common law. The Court's framework comes from the Latin term *sui generis*. While there are dangers in using this framework, we acknowledge that such a concept could support the growth of Indigenous laws and interests alongside or within the common law.

*Sui Generis* is a common law term that has been established within Canadian jurisprudence to describe the nature of Aboriginal rights as being unique and distinct. After receiving this label, Aboriginal rights and treaty rights were partially litigated by reference to Indigenous peoples' history, customs, traditions, and perspectives. While Canadian legislation and case law has historically diminished the efficacy of Indigenous law and Indigenous rights, the *sui generis* principle has had some positive effects:

[...] the *sui generis* appellation potentially turns negative characterizations of Aboriginal difference into positive points of protection. Its very existence recognizes that Aboriginal rights stem from alternative sources of law that reflect the unique historical presence of Aboriginal peoples in North America.<sup>158</sup>

<sup>158</sup> John Borrows & Leonard Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36:1 Alta. Law Rev. at 11 para 1.

The first instance of the use of *sui generis* is found within the 1984 court case, *R v. Guerin* (*Guerin*),<sup>159</sup> in which this word was used to broadly describe how Canadian law could recognize Indigenous peoples' distinctive relationships. The Supreme Court of Canada in this case established the federal government's fiduciary duty to First Nations as *sui generis* regarding the use of reserve lands as per s. 18(1) of the *Indian Act*.<sup>160</sup> This terminology continued to be used in later cases. In 1985, the Supreme Court further extended and affirmed its applications of *sui generis* conceptualizations to treaty rights and interpretations in *Simon v. R*<sup>161</sup> (*Simon*). The description of treaty rights as *sui generis* gives effect to the pre-existing occupancy and laws of First Nations, while simultaneously stating the nature of treaties as the product of a fusion of legal systems and thus could not be interpreted to the effect of bestowing preference to one legal system over another. In *R. v. Sparrow*, in 1990,<sup>162</sup> (*Sparrow*), the Supreme Court of Canada recognized the *sui generis* nature of aboriginal rights. It held that an existing right should not be restricted to be considered in the context of a traditional practice at any specific point in time but should be analysed broadly to allow for the evolution of the practice over time. The Supreme Court in *Delgamuukw v. British Columbia*<sup>163</sup> (*Delgamuukw*) further expanded *sui generis* to include Aboriginal title in 1997.

*Sui generis* recognizes the unique nature of Indigenous rights outside of common law or equity and may be an avenue for the recognition of Indigenous trust structures and other fiduciary relationships. Indeed, there is a possibility that Indigenous trusts may eventually be presumed to be *sui generis* as well, due to their unique nature and their operation within factions that have already been deemed to be *sui generis*, such as Indigenous rights, title, and by extension, laws. Currently, trusts are being held for and overseen by distinctive Indigenous societies in Canada yet are bound by antiquated trust-related Canadian legal structures that do not fit many of the trusts' purposes, nor the interests of their beneficiaries.

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*Sui generis* recognizes the unique nature of Indigenous rights outside of common law or equity and may be an avenue for the recognition of Indigenous trust structures and other fiduciary relationships.

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<sup>159</sup> *Guerin*, *supra* note 6.

<sup>160</sup> *Indian Act*, RSC 1985, c I-5.

<sup>161</sup> *Simon*, *supra* note 7.

<sup>162</sup> *Sparrow*, *supra* note 7.

<sup>163</sup> *Delgamuukw*, *supra* note 86.

## 5. Beyond Financial Returns: The Presence of ESG Matters in Investment

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Many non-Indigenous entities may consider the inclusion and consideration of environmental sustainability, self-governance, and relationships with human and non-human beings by Indigenous communities regarding decision-making to be a form of ESG or responsible investing.

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Having considered Indigenous peoples' own legal traditions as sources for authority for trust and fiduciary duties dealing with Indigenous peoples, and how Canadian law might recognize these sources through sui generis formulations, we briefly consider responsible investment (RI) practices that integrate environmental, social, and governance factors (ESG) in investment decision-making. ESG has emerged in recent decades and gained prominence recently, capturing the attention of investors and corporations alike.<sup>164</sup> We wanted to include a brief overview of ESG investing to recognize the existence of these considerations in decision-making practices within corporate and investment branches. Many non-Indigenous entities may consider the inclusion and consideration of environmental sustainability, self-governance, and relationships with human and non-human beings by Indigenous communities regarding decision-making to be a form of ESG or responsible investing. Indeed, when it comes to investment considerations, Indigenous investors may look towards corporations that take various ESG elements to heart. However, there may be some contrasts regarding the galvanizations or inspirations for ESG considerations, particularly as related to perceptions of finance and the scope of fiduciary duty.

Climate change is a clear example of an ESG factor that investors are beginning to consider in decisions pertaining to how they invest their capital and steward these assets. Where the implications of climate change may be germane to the avoidance of undue loss, investment strategies may be informed by climate considerations.<sup>165</sup> Other examples of ESG factors include human and Indigenous rights considerations, fair and safe working conditions, executive compensation, corruption and bribery, and board diversity.

In recent years, alongside the growing interest in responsible investment, methods of addressing ESG considerations have emerged through frameworks that appeal to institutional investors. Frameworks for addressing ESG matters in investment have emerged particularly in the past 15 years. For instance, investors may look to the international six Principles of Responsible Investment,<sup>166</sup> the United Nations-endorsed

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<sup>164</sup> Names such as 'Ethical Investing', 'Impact Investing', 'Socially Responsible Investing', 'Sustainable and Responsible Investing', 'Stakeholder Capitalism', 'Green Investing', etc. all refer to practices that involve a variety of other considerations as well as financial returns, although their details and perceptions may vary.

<sup>165</sup> See reports such as the Canada, Environment and Climate Change Canada, *Canada's Changing Climate Report*, (Ottawa: Environment and Climate Change Canada, 2019) online (pdf): [https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/Climate-change/pdf/CCCR\\_FULLREPORT-EN-FINAL.pdf](https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/Climate-change/pdf/CCCR_FULLREPORT-EN-FINAL.pdf); and The UN IPCC's climate change report at IPCC, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, UNEP, 2019, online: <https://www.ipcc.ch/srccl>.

<sup>166</sup> See the Principles of Responsible Investment at <https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment>.

Financial Sector Initiative's "Who Cares Wins" recommendations in 2005,<sup>167</sup> and the Recommendations of the Task Force on Climate-related Financial Disclosures in 2017<sup>168</sup> as three of a multitude of frameworks for incorporating ESG issues into investment decision-making and corporate oversight.

Contemporary literature echoes that ESG matters have begun to formally impact the decisions of institutional investors on a larger scale. This is due to multiple factors, such as pressure from the public, shareholders, and asset owners; increasing recognition of the materiality of ESG factors to economic performance and long-term outcomes; and the gradual expansion of perceptions of fiduciary duty to include these factors.<sup>169</sup>

Institutional investors were initially reluctant to embrace the concept, arguing that their fiduciary duty was limited to the maximization of shareholder values irrespective of environmental or social impacts, or broader governance issues such as corruption. Incredibly, such arguments are still being made. But as evidence has grown that ESG issues have financial implications, the tide has shifted. In many important markets, including the U.S. and the EU, ESG integration is increasingly seen as part of fiduciary duty.<sup>170</sup>

These sentiments are further supported in documents such as the UNEP and PRI's report on *Fiduciary Duty in the 21st Century*, in which the 2015 version of this report found that the "failure to consider all long-term investment value drivers, including ESG issues, is a failure of fiduciary duty."<sup>171</sup>

Although the term "ESG" was not officially coined until 2005, integration of ESG factors are not a new concept within the corporate sphere, as they have been considered as part of decision-making practices for over a century.<sup>172</sup> However, neither is it new for Indigenous communities, many of whom have included environmental, social, and governance factors within the scope of decision-making considerations for millennia.

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<sup>167</sup> UN Global Compact, *Who Cares Wins: Connecting Financial Markets to a Changing World* (2005), online (pdf): [https://d306pr3pise04h.cloudfront.net/docs/issues\\_doc%2FFinancial\\_markets%2Fwho\\_cares\\_who\\_wins.pdf](https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FFinancial_markets%2Fwho_cares_who_wins.pdf). This report is also the first instance in which the term 'ESG' was coined in the finalized version.

<sup>168</sup> Task Force on Climate Related Financial Disclosures, *Recommendation of the Task Force on Climate-related Financial Disclosures* (2017), online (pdf): <https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf>.

<sup>169</sup> See Zochodne, *supra* note 21 at para 6-9; and Robert G. Eccles and Svetlana Klimenko, "The Investor Revolution", *Harvard Business Review* (Spring 2019), online: <https://hbr.org/2019/05/the-investor-revolution>.

<sup>170</sup> Georg Kell, "The Remarkable Rise of ESG", *Forbes* (June 11, 2018), online: <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/#72134cc11695> at para 5.

<sup>171</sup> Rory Sullivan, Will Martindale, Elodie Felle, Margarita Pirovska & Rebecca Elliot, *Fiduciary Duty in the 21st Century: Original Report* UNEP, 2015, online (pdf): [https://www.unepfi.org/fileadmin/documents/fiduciary\\_duty\\_21st\\_century.pdf](https://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf) at 9.

<sup>172</sup> This news article describes an unnamed general counsel's statement that their Fortune 200 company has been incorporating ESG factors for 40 years: Christopher Burnham, "ESG versus Impact Investing", *Forbes* (February 28, 2020), online: <https://www.forbes.com/sites/christopherburnham/2020/02/28/esg-versus-impact-investing/#6f62f69569ce>; also see Russell Sparks, "A historical perspective on the growth of socially responsible investment" in Sullivan and Mackenzie, eds, *Responsible Investment* (Greenleaf, 2006) for a historical overview.

Like ESG and responsible investing more broadly, impact investing considers non-financial impacts of investments and decision-making. However, there are notable differences between ESG and impact investing, particularly as related to principle considerations:

Terminology should be clarified here because [impact investing] and Environmental, Social and Governance (ESG) factors are distinguished, but are often erroneously used interchangeably. The latter takes into account the “systemic inclusion of financially material ESG information (risk and opportunities) to complement standard investment analysis,” while [...] impact investing [...] is investment that works to generate “measurable positive, societal and/or environmental impact and a level of financial return.” In developing an economic analysis, the law permits ESG integration to achieve financial goals, while achieving [impact] objectives is arguably more arbitrary and nuanced.<sup>173</sup>

Although it is not as widely perceived, impact investing may be more focused than ESG on engaging a multitude of perspectives that do not solely prioritize financial considerations but also those that align with an Indigenous community’s traditional values.<sup>174</sup> Rather than favouring financial returns over non-financial considerations, impact investing endeavours to recognize financial returns *alongside or secondary* to non-financial considerations.

The need to engage in long-term analysis when making investment decisions has also garnered support in recent decades.<sup>175</sup> Investors are increasingly recognizing that evaluating ESG considerations in the long-term is often critical relative to securing short-term returns. This is especially the case amongst institutional investors whose time horizons are relatively long, as is the case with trusts. A term that has been used to describe the considerations of ESG and other factors on multiple generations is intergenerational equity.<sup>176</sup> This may encompass generations who are living and those who will be in the future. As previously noted, the theme of long-term sustainability as a factor in the decision-making processes of many First Nations is almost universal and has been consistently demonstrated throughout traditional laws and contemporary documents.

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<sup>173</sup> Young, *supra* note 126 at 12.

<sup>174</sup> See this developed and discussed in more detail throughout *Ibid*.

<sup>175</sup> Chief Investment Office, “Impact Investing: The Long-Term View” *Merrill*: A Bank of America Company (September 2019), online: [https://mlaem.fs.ml.com/content/dam/ML/pdfs/Impact-Investing-The-Long-Term-View\\_ML.pdf](https://mlaem.fs.ml.com/content/dam/ML/pdfs/Impact-Investing-The-Long-Term-View_ML.pdf).

<sup>176</sup> See articles such as Karen Foster & Tamara Krawchenko, “Governments across the world are grappling with problems of intergenerational inequity, but Canada trails far behind other industrialized nations in its attention to this issue” *Policy Options* (November 4 2016), online: <https://policyoptions.irpp.org/magazines/november-2016/how-policy-can-support-intergenerational-equity> that explore the logistics and implications of this concept.



## 6. Trust Law in Canada

The final section of this paper considers why trust law is not an effective concept for managing Indigenous trusts. While it has many strengths, there are also significant gaps and failings in this law. Though there are some important parallels in Indigenous law dealing with obligations, duties, and responsibilities to those who are vulnerable, there are also significant differences. This makes it difficult for some Indigenous peoples to use trust law as vehicle to advance their normative standards and thus ultimately could frustrate Indigenous self-determination. Indigenous peoples are not the only ones that have difficulty understanding trust law. The law of trusts is difficult to define in a manner that fully encompasses all its aspects and captures its evolution over centuries. Some academics have attempted to capture the nature of trusts in previous works as a mechanism for dealing with property:

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.<sup>177</sup>

Within English law, some legal precedent has been set regarding the scope of fiduciary obligations of trustees. Cases such as *Cowan v. Scargill*<sup>178</sup> (*Scargill*) and *Harries v. Church Commissioners for England*<sup>179</sup> (*Harries*) established the role of trustees from a financial standpoint of paramount importance to other non-financial considerations. The courts in these cases was of the mind that it would amount to fiduciary irresponsibility to place anything but yielding financial returns as the principal analysis or concern.<sup>180</sup>

Although the law of trusts has expanded through the centuries to include a wide range of situations within both the public and private sectors, as noted, there are discernible discrepancies within aspects of trust law that have compromised its applicability to Indigenous trusts. Although exploring these disparities in detail is not the focus of this paper, they are worth noting, as they have and continue to adversely affect many Indigenous trust structures. Some of these aspects include the

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<sup>177</sup> G.W. Keeton and L.A. Sheridan, *The Law of Trusts*, 10th ed. (London: Barry Rose Law Publishers, 1993) at 3.

<sup>178</sup> *Cowan v Scargill*, [1985] Ch270, [1984] 2 All ER 750 [*Scargill*].

<sup>179</sup> *Harries v Church Commissioners for England*, [1992] 1 WLR 1241 [*Harries*].

<sup>180</sup> See Young, *supra* note 126 for a detailed analysis of *Scargill*, *Harries*, and other cases as they related to contemporary and indigenous trust structures.

rule against perpetuities, and the 21-deemed disposition rule.<sup>181</sup> However, it is crucial to point out that since there is a substantial amount of flexibility in the creation of trusts, many nations and communities have divergent trust foundations and therefore the concerns mentioned below may not be applicable to all Indigenous trusts. Indeed, some Indigenous nations and communities that have negotiated self-governing or tax agreements with the federal government will not have the same tax issues as those described below. Moreover, not all communities are classified as Bands under the Indian Act, which may result in further discrepancies.

The rule against perpetuities states that future trust interests must vest within the perpetuity period that applies to the trust, which is typically a lifetime plus 21 years, in order to prevent an individual from controlling property over an extended period of time. This rule can complicate the nature of Indigenous trusts that are put in place to benefit future generations. The rule itself has been scrutinized within Canada,<sup>182</sup> but is either still upheld in provincial statutes or remains relevant in provinces that have repealed the rule by statute.<sup>183</sup>

The time dimension in the Income Tax Act 21-year deemed disposition rule is another gap, and likely a more pressing one for Indigenous trusts. Briefly put, this set of rules deems disposition of trust property at fair market value when a trust reaches the age of 21 years, regarding it as taxable after that time. The dearth of research and legislation has created obscurities in regard to the regulations on Indigenous settlement fund taxation and this rule.

One of the most important features of any such financial arrangement is to ensure that the income earned on the settlement funds is not taxable; much the same as any other government treasury. Because of the lack of formal legislation generally exempting first nation investment trusts from taxation, in a manner similar to municipal, provincial or federal treasury funds, it is necessary to establish settlement trusts which divert taxable income to tax exempt First Nations without forcing a distribution of the settlement funds or the income earned on them.<sup>184</sup>

There are a wide variety of tax issues that may present themselves differently depending on the infrastructure of the community or trust structure. One point worth noting that may be more broadly applicable is that the current tax legislation neglects the purposes and objectives of these trusts, which are to provide services for the Indigenous communities that they serve, contributing to a foundation for long-term sustainability and economic dependence by allowing

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<sup>181</sup> There may be a variety of other complex issues that other trusts may have, that are not mentioned here.

<sup>182</sup> See reports like the one described in Michael McKiernan, "Scrap rule against perpetuities on trusts: N.S. report, *Canadian Lawyer*, (2 January 2011), online: <https://www.canadianlawyermag.com/news/general/scrap-rule-against-perpetuities-on-trusts-n.s.-report/270604>.

<sup>183</sup> See relevant statutes from Nova Scotia, Manitoba and Ontario.

<sup>184</sup> William (Bill) H. Cooper, "The Essentials of First Nation Settlement Trusts", *Broughton Law* (April 2014), online: <https://www.broughtonlaw.com/2014/04/essentials-first-nation-settlement-trusts> at para 4.

for the establishment of much-needed services. First Nations Settlement Trusts, for example, may be subjected to high rates of tax<sup>185</sup> even though they are directly intended to provide for the advancement of the community. Tax complications on Indigenous trusts can be avoided in some ways, such as through the qualification of the trust as a charitable purpose trust, although this can be a challenge to accomplish and is not always possible. Section 75(2) of the *Income Tax Act*<sup>186</sup> outlines the attribution rule, which may also be an avenue that a community could pursue for tax exemptions.<sup>187</sup> Additionally, communities may have to wind up their trusts, which may then come with its own series of complications.<sup>188</sup> There may be other methods that communities use to work with tax regulations that are not mentioned here.

Common law, civil law, and equity have evolved over the years in Canada due to considerations of technological advances, social developments, and historical events. However, some of the challenges with trust law for Indigenous trustees, decision-makers, and communities elucidate an example of how contemporary bodies of law have yet to accommodate or include Indigenous legal considerations.<sup>189</sup>

The current infrastructure of the law of trusts, as well as within potential other contemporary principles, create circumstances and situations that do not adequately represent Indigenous interests, viewpoints, and values. Ongoing trust regulations do not account for the unique nature of Indigenous trust structures, which are used for the benefit of Indigenous communities, specifically with goals that encompass elements such as long-term environmental, economic, and social sustainability. Although these gaps are displayed in a variety of ways and are contingent on the structure of the community and trust, they are unmistakable and are in need of scrupulous evaluation.

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<sup>185</sup> *Ibid* at para 6.

<sup>186</sup> *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)).

<sup>187</sup> As detailed throughout Frankie Young, "Indigenous Settlement Trusts: Recharacterizing the Nature of Taxation" (2019) 24:3 Appeal.

<sup>188</sup> See the wind up processes as described in Houser Henry & Syron LLP, "Winding Up Trusts" (13 December 2017), online: <https://houserhenry.com/resources/homepage-red-carousel/winding-up-trusts>.

<sup>189</sup> This is to say that although it is not nearly enough, we do see progress in some areas. In July 2020, Equator Principles Financial Institutions (EPFIs) incorporated the principles of Free Prior and Informed Consent (FPIC) into their guiding principles. See *The Equator Principles: July 2020*, online (pdf): <https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf> at 5. Furthermore, there are a plethora of other factions that Indigenous people have entered that do not reflect or include Indigenous aspirations. The US Generally Accepted Accounting Principles (GAAP), and International Financial Reporting Standards (IFRS) which are used by Canada are examples of universal foundations that are widely used and accepted (although in some cases modified) by governing bodies and organizations, but do not account for the unique needs of indigenous peoples. GAAP and IFRS include key insights, however they do not include some of the issues being raised by Indigenous peoples who engage with accounting, although there has been very little, if any research that has examined this. While this material is beyond the scope of this report, many of these areas may be underinclusive and merit further consideration.

## 7. Conclusion

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The nature of Indigenous trusts is such that they may be understood as operating in a *sui generis* framework. They are unique and of their own kind. Indigenous trusts must be managed by reference to Indigenous law.

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Indigenous decision-makers and trustees who have fiduciary obligations to fulfil must be empowered to apply Indigenous law.

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The *sui generis* nature of Indigenous peoples' Aboriginal and treaty rights has been entrenched in Canadian jurisprudence. The nature of Indigenous trusts is such that they may be understood as operating in a *sui generis* framework. They are unique and of their own kind. Indigenous trusts must be managed by reference to Indigenous law. Were Indigenous trusts to be recognized as *sui generis*, this recognition would open a viable pathway to ease the confusion and frustration that arises in relation to the establishment and governance of Indigenous trusts:

It cannot be emphasized enough that these Trusts are important fiscal management vehicles for Bands and must therefore be carefully considered as unique and viable mechanisms to increase wealth in Indigenous communities.<sup>190</sup>

Based on the information that has been gathered from Indigenous traditional stories, constitutions, agreements and treaties, and policies and plans, it is abundantly clear that many Indigenous communities operate through obligations of protection, stewardship, and care towards the land, waters, plants, and animals, as well as their communities. Within traditional stories, the consequences for ignoring or disregarding these obligations are apparent. Thus, these narratives emphasize the value and significance of these reciprocal obligations within the communities who keep them. Legal principles within Indigenous constitutions and agreements highlight unique values that have endured throughout colonial history. We must ensure that Indigenous peoples' own sense of their obligations are safeguarded within policies, plans, and projects that aim for long-term environmental and economic sustainability. We must find ways to advance economic justice for Indigenous peoples through ecologically-based economies. Indigenous decision-makers and trustees who have fiduciary obligations to fulfil must be empowered to apply Indigenous law.

Nearly all of the nations discussed have trust structures of some kind in place, varying dependant on its origins and the needs, requirements, values, and challenges of each community. The trust structures that we have identified are not meant to be exhaustive. Many nations and communities have multiple trusts and trust structures in place that serve a variety of purposes. We have merely tried to suggest ways that Indigenous peoples' own values, norms, standards, principles, processes, precedents, and authorities can guide decision-making in this field.

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<sup>190</sup> Young, *supra* note 187 at 17 para 2.

Now that Indigenous communities have these trust structures in place, trustees are exercising their fiduciary obligations to their beneficiaries. Trustees are acting in communities' best interests to make decisions that will lead to increases in capital to promote long-term sustainability, self-sufficient governance, and economic independence. Many Indigenous decision-makers incorporate their nation's traditional principles and values in considering how their decisions will not only impact their people in present day, but also future generations, as well as plants, animals, and their lands and waters. Notions of fiduciary duty are present in traditional Indigenous legal principles. Yet questions remain. How are Indigenous trustees to enact their fiduciary duties as prudent investors when, in many cases, they are attempting to reconcile conflicting legal principles in various jurisdictions? These questions, and more, need to be considered in order to overcome historical injustices that have adversely impacted Indigenous economies and work towards economic justice, or equal economic opportunity for Indigenous people and communities.

We have access to the tools to carry out many of these endeavours in the mainstream world. Concepts of responsible investing, ESG, and intergenerational equity exist in the investment sphere. Their expansion and development to suit Indigenous perspectives and communities' use may support Indigenous decision-makers in exercising their fiduciary obligations, and may also ultimately benefit others involved in the investment sector and beyond. The creation of legislation that properly addresses Indigenous trust structures in their *sui generis* nature using both Indigenous and Western lenses may also help ensure that Indigenous trustees and decision-makers can fully exercise their fiduciary obligations. The prevalence of ESG investing, intergenerational equity, and other concepts in the mainstream investing world elucidates that policies, practices, and law associated with investing is capable of expanding and evolving over time. As such, the thorough inclusion of Indigenous viewpoints and laws in investment and trust governance is conceivable.

In an attempt to abolish Indigenous peoples' laws and languages, colonial law has forcefully thrust the common law and colonial structures onto Indigenous communities. We are in an era where Indigenous legal orders and values must be used to inform, displace, change, or transform broader law in Canada. As Nisga'a Chief Gosnell and Nisga'a elder Rod Robinson implored: Now is the time to listen.

Meanwhile, a growing respect for aboriginal culture has crossed over into popular thinking. Driven by the increasingly common view that something is terribly awry with modern life, many people appear to suffer from a crisis of identity in an incoherent world. "There is a sense that economic growth and prosperity are not enough anymore," [...] "Being a part of a community, being really connected to each other in your own place are what really count. That is what our ancient stories tell us. We are willing to share those stories with white people. If only they would listen."<sup>191</sup>

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<sup>191</sup> Gosnell, *supra* note 32 at 11.





Photo: The Shores of Hudson Bay

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