ETUAPTMUMK: CONSIDERING INDIGENOUS ECONOMIC DEVELOPMENT THROUGH TWO-EYED SEEING

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Preface

All publications comprised in this portfolio of articles are solely authored by me. However, I benefited from the research assistance of a JD student researcher, Katy Healy, who compiled research for another project I was involved in. That research assisted me in understanding and formulating certain ideas discussed in the article on corporate law. In this way, Katy's contribution is valuable and should be acknowledged. All views expressed and all errors in this thesis are entirely my own.

Abstract

Indigenous economic development is not only about building processes for yielding financial assets. Rather, economic development that advances Indigenous prosperity is about respect for Indigenous legal orders, tradition, culture, distinct history, language, local geographical considerations, and how these are all connected to the attachment to place (land) and traditional territories. In a series of published articles, this portfolio seeks to address critical issues around how to build a more inclusive Canadian economy that advances Indigenous prosperity.

The articles critically analyse theoretical perspectives on law and economics; Indigenous economic perspectives; legal decisions and legislation that impact Indigenous peoples legal and economic interests; and asset governance structures in which Indigenous peoples engage. The articles contribute to the legal scholarship involving Indigenous peoples by advancing ways to understand the legal, economic and lived experiences of Indigenous peoples in Canada involved in economic development and working toward reclaiming self-determination. The articles address three key themes that emerged from the research: 1) Eurocentric laws had and continue to have a devastating impact on Indigenous peoples' legal rights and constrain their economies; 2) Indigenous peoples' positionality and perspectives must be respected if a pathway is to be built for Indigenous laws to be purposefully included in economic development initiatives that contribute to Indigenous prosperity; and 3) Indigenous ways of knowing exist as living sources of knowledge.

The articles are grounded in the Mi'kmaq principle of *Etuaptmumk*, Two-Eyed Seeing—concerned with engaging multiple perspectives. Two-Eyed Seeing may assist in removing legal constraints by first providing a framework for seeing and understanding some of those constraints imposed by a dominant worldview that does not contemplate various perspectives. Two-Eyed Seeing provides ways to engage with Indigenous legal, sovereign and economic perspectives such that building a more inclusive Canadian economy that advances Indigenous prosperity is possible. Engaging in multiple perspectives will only enrich Canadian society and foster economic reconciliation that benefits all.

Chapter 1: Introduction and Background of Portfolio Thesis

1.1. Positionality and Contemporary Context

In understanding the motivation for this work, personal context can be a precursory signal to the reader that behind the compilation of analytical, theoretical and technical analyses is a story.[1] My story is foundational to who I am and therefore informs the research, as it impacts my research lens. Accordingly, this section will serve as a "bridging device"[2] for both non-Indigenous and Indigenous readers to better understand my positionality. This is a time in Canada where many Indigenous communities are reclaiming what has been lost through a resurgence of Indigenous identity, language, values, tradition, culture, law, governance, and much more. To this end, numerous Indigenous people who were either separated from their communities and cultures due to assimilation strategies and racist *Indian Act* policies on who is considered "Indian" or were "adopted out" and stolen from their families and communities, are finding their way back home to build community and reclaim culture. The magnitude of the treacherous history of the Indian Residential School system is also getting revealed more and more each day. These are very painful times for many Indigenous peoples, and rebuilding efforts can have a restorative effect.

Only a generation ago being Indigenous was, to many, held as a source of family shame. Today there is Indigenous cultural, spiritual and political 'revival' in Canada through reshaping and reclaiming identity, culture and self-determination. However, as necessary as "reclamation" is, it can also be incredibly painful and difficult. The pain is inescapable because in reflecting on

[1] Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009).
[2] Brady Reid, "Positionality and Research: "Two-Eyed Seeing" With a Rural Ktaqmkuk Mi'kmaw Community" (2020) Vol 19:1-12 *International Journal of Qualitative Methods* at 4 [Reid].

the contextual nature of Two-Eyed Seeing in my doctoral research, I am reminded that trying to reconcile two worldviews is a complex and multi-faceted process with no obvious or easy answers. As a mixed-race Mi'kmaw woman who has struggled to find my place within my Newfoundland culture and community, I have considered the influences of both my Mi'kmaw ancestry and my English ancestry in all its richness and its oppression. It has been a complex journey, to make sense of how both realities have shaped my family and guided my way of being in the world.[3] My doctoral research work that aims to reintegrate those realities touches on the very economic, cultural and political displacement I examine within the research. I am inseparable from this work as my daily life is informed by the practices I promote - to see the world through more than one lens.

My lived reality informs my choice to connect with the principles of Two-Eyed Seeing and shapes the research contribution I am making for building prosperous Indigenous communities. I recognize and understand that while "truth must be spoken by the person to whom it is true",[4] I have a certain amount of privilege in being a mixed-race scholar. I must also grapple with how my way of being in the world has largely been impacted by the deliberate attempts to eradicate Indigenous peoples and cultures from Canadian society, in other words, my maternal ancestors.

While a non-Indigenous reader may read this scholarship from a detached and analytical lens, my complex identity does not afford me the ability to be detached from the research. Indeed, in Mi'kmaw culture there is no separation of thought, emotion, environment, or ideas. That is, I am personally implicated in my research work. There is considerable vulnerability in that for me because there are so many answers I do not yet have. However, those are the exact tensions that

[3] Bonita Lawrence deals with this in her book *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004).
[4] *Reid, supra* note 2.

the articles grapple with. I do not have them worked out, nor have institutions worked them out, and Canada does not have it worked out. Likely most Indigenous nations, denied access to the discussion, policy-setting and law making, do not have it worked out. All members of Canadian society are implicated in distinct, direct and indirect, and oppressive ways where colonization is concerned.

A general reader may view this research as one more research project on Indigenous economic development, but for me it is about a life project because the ways in which law and politics have impacted Indigenous identity, sense of belonging, culture, tradition, autonomy, etc. continues to haunt the lives of Indigenous communities, including my own. Perhaps it is as simple as Elder Marshall teaches: the weaving back and forth between worldviews allows one to benefit from multiple perspectives. Given the historical reality of the impacts of Eurocentric systems of law, governance and politics on Indigenous peoples' well-being, sovereignty and self-determination, the reconciliation of the different worldviews is a complex undertaking.

I have no illusions about the negative impacts of colonization on all Indigenous identity, culture and laws. While resurgence of Indigenous culture and traditions is critical, we cannot so easily get away from Western law because this law has materially shaped all individuals and communities in Canada. I am hopeful that by engaging in research that encourages respect for multiple perspectives, the resulting analyses offer ways to grapple with the complexities and tensions that lie within each of them, especially as it relates to promoting prosperity in economics, law and governance in Indigenous communities.

1.2. Background

Indigenous economic development is not only about building processes for yielding financial assets. Rather, economic development that advances Indigenous prosperity is about respect for Indigenous legal orders, tradition, culture, distinct history, language, local geographical considerations, and how these are all connected to one's attachment to place, land and resources, or traditional territories. In contrast, Canadian laws have historically worked to constrain Indigenous economic development while the Canadian state has undervalued and largely disregarded Indigenous legal and economic perspectives.

The value of Indigenous law cannot be understated. As a "living force that embodies the distinct traditions and knowledge-ways of Indigenous peoples,"[5] it enables distinct Indigenous peoples and cultures to survive and flourish. To move away from state control,[6] taking back the power over Indigenous governance, legal traditions and economic systems is necessary. This must involve comprehensive engagement by the Canadian state to support the revitalization and strengthening of Indigenous legal and economic systems, engagement that is led by Indigenous peoples for the benefit of Indigenous peoples.

In analyzing the key legal constraints of the Canadian legal system that have impacted Indigenous self-determination, three key themes emerged from the research: 1) Eurocentric laws had and continue to have a devastating impact on Indigenous peoples' legal rights and economies; 2) Indigenous peoples' positionality and perspectives must be respected if a pathway is to be built for Indigenous laws and perspectives to be purposefully included in economic development initiatives that contribute to Indigenous prosperity; and 3) Indigenous ways of knowing exist as living sources of knowledge. In analyzing the legal issues related to these themes, I engage the Mi'kmaq principle of *Etuaptmumk*, Two-Eyed Seeing—taught by Elder Albert Marshall regarding engaging multiple perspectives—as a methodology for following a particular, grounded

[5] Michael Coyle, "Indigenous Legal Orders in Canada - A Literature Review" (2017) Law Publications 92 at iv, online at: https://ir.lib.uwo.ca/lawpub/92 [Coyle].
[6] *Coyle*, *supra* note 5.

Indigenous way of knowing, restoring, and living Indigenous laws. The methodology can also assist in revealing how Indigenous realities are constrained by Canadian laws.

Two-Eyed Seeing provides a framework for seeing and understanding the constraints imposed by a dominant worldview that does not contemplate various perspectives and realities. Two-Eyed Seeing also provides ways to engage with Indigenous legal and economic perspectives, and thereby enables building a more inclusive Canadian economy that advances Indigenous prosperity. The benefit of engaging in multiple perspectives is that it will enrich all sections of Canadian society and foster economic reconciliation. Further, it has inherent value for Indigenous peoples because it affirms their unique contribution to the legal and economic systems of Canada.

Two-Eyed Seeing is nuanced and raises questions around its basis for application and the circumstances in which it could apply. Some background assists here. In considering the impacts of assimilation and colonial policies on Indigenous peoples, the seven-generation principle—that decisions are to be made with the next seven generations in mind—is informative. This principle is relevant because many Indigenous peoples believe that a living memory tied to local communities exists. In the Mi'kmaq tradition, Elder Marshall teaches that at least 120 years of living memories exist. This means that, while there is no doubt that colonial policies and assimilation tactics have had deleterious impacts on Indigenous communities, the living memories of Indigenous peoples are strong. As such, many communities are reclaiming their traditional ways of knowing and being. Given that Indigenous and non-Indigenous peoples are all here to live together, it is necessary to engage in transformative efforts to reconcile both Canadian law and realities and the distinct Indigenous cultures, legal traditions and realities. This is a complex undertaking.

The numerous ways in which Two-Eyed Seeing can apply is multi-faceted. Two-Eyed Seeing can be applied when attempting to reconcile two distinct legal and economic perspectives, such as Indigenous economic approaches and capitalism. Adopting Two-Eyed Seeing can also bring attention to the particular ways that certain laws, such as the *Indian Act*, impact First Nations realities. Furthermore, Two-Eyed Seeing can encourage paying attention to the ways that certain Canadian laws and Indigenous legal traditions can work together to provide a more well-rounded approach for attaining Indigenous self-determination. Moreover, from a legal scholarship perspective, Two-Eyed Seeing can disrupt the way research has traditionally been conducted—largely focusing on Eurocentric perspectives or engaging in research related to Indigenous peoples but not *with* Indigenous peoples.

With faculty approval, rather than a monograph thesis in which each chapter builds upon the previous one, I chose to write a portfolio thesis comprising a series of articles that critically analyze legal issues in Indigenous economic development. The analyses include: the foundational premise that draws upon theoretical perspectives on law and economics and Indigenous economic perspectives (article one); a critical review of legal decisions and legislation that impact Indigenous legal and economic interests (articles two and five); and examining asset governance structures in which Indigenous peoples can adopt to advance their economic development (articles three and four). These topics are considered against the backdrop of the principle of Two-Eyed Seeing. While normally one might provide a literature review in the introductory chapter, I have chosen to provide this as an independent publication - namely the first article because it informs legal scholarship and is timely and relevant for current events and trends in Canada.

1.3. Context and Objective

The objective of each of the published articles is to expose through analysis the ways in which Canadian law, by excluding Indigenous legal perspectives, negatively impacts Indigenous peoples and, by extension, their economic development. The articles demonstrate that to foster sustainable Indigenous economies, Indigenous realities, perspectives and legal orders must be embedded in contemporary economic development initiatives, models and processes. Collectively the articles seek to establish that only by developing Indigenous-centric legal and economic infrastructures will Indigenous peoples gain unprecedented opportunities to improve economic outcomes for many generations to come.

The articles fill a gap in legal scholarship in that each addresses a distinct way in which the law is implicated. By taking up a specific area or issue of law, each article addresses the unique nuances, tensions and possible solutions to advancing Indigenous peoples' legal and economic interests. As such, and from different "disciplinary angles", the papers challenge the reader to consider how embracing diverse Indigenous legal orders and economic approaches offers a way to promote economic reconciliation to benefit all.

I chose a series of publications so as to build a research portfolio, disseminate articles from which the Indigenous and legal communities can derive immediate benefit, and to also enhance my personal growth and professional development through the publication process. In my experience, because the articles required extensive investment to prepare the research for publication, the workload was much higher. However, this process has made me a much better person, scholar and educator by teaching me to balance life, teaching, research, and publishing. As the very first doctoral graduate law student at the University of Ottawa to develop a portfolio thesis, I hope I can encourage future scholars to take this path if it fits with their personal and professional life goals. I also encourage the legal academic community to be ever mindful of and willing to support students who engage with different approaches to scholarship.

The above stated, by bringing together the different articles, readers of the collection will be able to benefit from reading about diverse topics that would not ordinarily belong together. The articles are divergent in topics and are not meant to read as a thesis-based dissertation, although they all contribute to the larger themes. The technical content in the articles add a nuanced analysis of what is often overlooked. Further, Indigenous economic development is complicated, made up of many parts and specialties, each deserving of examination. An example of this complexity is found in seeking to adapt conventional instruments for asset management and business enterprise—namely, trusts and corporations—to align with Indigenous 'perspectives' on economic development.

Given the diverse legal issues impacting Indigenous economic development in contemporary times, the above approach is both effective and relevant. The first article indeed delves into "macro" or "conceptual" issues around economic development, while two others deal with the particular challenges surrounding trusts and corporations—from which Indigenous communities use major sources of funds to advance their economic development goals. Likewise, while the "macro" issues addressed in article one deal with broader themes around economic development, the technical analysis of *Indian Act* provisions in article five demonstrates that if the practical constraints in the law are not dealt with, all the grand theories of academia cannot inform efforts to advance Indigenous economic development. To that end, each article in the portfolio thesis deals with autonomous issues and offers individual analysis. Addressing issues that are not necessarily dependent on each other, as in a monograph thesis, adds overall value and nuance to the research.

1.4. Research Methodology

Several methodological approaches are applied in the series of articles produced for this research. The overarching Indigenous methodology was applied through the Mi'kmaw principle of *Etuaptmumk* , Two-Eyed Seeing. This principle is intended to demonstrate that Indigenous laws and Western laws can work together to provide the benefit of multiple perspectives in Indigenous economic development. Next, while not strictly legal history methodology, article two applies a legal history method to examine the circumstances leading up to the *Indian Act* amendments in 1951. This helps center the context around the time policy decisions were made that would impact First Nations. Further, there is also a comparative legal methodology applied in examining trusts and corporate structures in articles three and four. This comparative methodology provides a framework for distinguishing jurisdictional and legal differences in how Indigenous-centric trusts and corporations can be formulated in Canada.

A doctrinal approach is applied in examining current Canadian legislation and common law decisions were examined to demonstrate how the law had and continues to have negative impacts on Indigenous economies and self-determination. This approach also includes analyzing academic literature to evaluate what scholars and legal experts have written on these issues. The material was evaluated and used as relevant to the topics. Discussions also occurred with numerous Indigenous leaders, elders, and community members who provided practical context for many of the issues under study.

Finally, critical legal theory is applied to explain the ways that the law has been traditionally shaped and interpreted from the dominant perspective, in particular from those in positions of power and privilege. The critical analysis is intended to encourage a reconsideration of how laws should be created and interpretated with and on behalf of those who have been intentionally legally and politically excluded from the power dynamic - in this case, Indigenous people in Canada.

1.5. Value and Originality of the Research

The portfolio of articles makes an original contribution to the scholarship in this area by providing discourse, not previously addressed in legal scholarship, around economic reconciliation, broadly construed, and, more specifically, by addressing how the role of Western and Indigenous law, combined, can advance Indigenous economic growth. Given the current interest in reconciliation in Canada, this research champions incorporating Indigenous laws into economic development initiatives as a means to overcome the economic injustice Indigenous communities have historically experienced. The pragmatic benefits of this research mean that Indigenous leaders and community members, policy makers and governments can learn from the legal issues raised and solutions posited. Finally, examining the interpretations of sections 89 and 90 of the *Indian Act* and the role of trusts in providing collateral for borrowing is an original contribution and pragmatic issue that has not been treated at length in current scholarship.

1.6. Summary Framework of Published Articles

The portfolio is comprised of five research articles, broadly connected by their contribution to the overarching topic of the ways that Eurocentric laws and systems constrain Indigenous economic development and how Two-Eyed Seeing could be a way to lift those constraints. As set out below, they also contain independent topics that stand on their own.

1.6.1. Etuaptmumk: A Means to Advance Indigenous Economic Development "in a Good Way"

Article one reviews scholarship on the connection between law and economic development. From the review, I argue that Eurocentric laws have often been instrumental in advancing non-Indigenous economic interests to the detriment of Indigenous interests, largely because Indigenous laws have not been respected. The iniquitous impact certain laws have on Indigenous peoples' legal and economic interests has limited and continues to limit positive economic outcomes and advancement for Indigenous communities. I argue that a reckoning is required on how Eurocentric systems and laws are biased toward Western worldviews while not accounting for Indigenous realities, legal orders or economic perspectives. This is required, not only to promote inclusivity, but to honor Nation-to-Nation building and Indigenous self-determination and sovereignty. To this end, I argue that the principle of Two-Eyed Seeing could assist in reconciliation by encouraging both Western and Indigenous perspectives to be respected and embraced in economic development initiatives and processes.

The article makes a foundational contribution to the portfolio by setting the stage for how the role of law has been instrumental in promoting inequality due to its impact on Indigenous prosperity and economic development opportunities. This sets the stage for engaging with concrete examples in subsequent articles on how the law and the court's interpretations of the law is problematic for Indigenous peoples. Importantly, the article also explains the notion of Two-Eyed Seeing and the role of Indigenous law in overcoming economic inequity.

1.6.2. A Trojan Horse: Can Indian Self-Government be Promoted through the Indian Act?

Article two builds upon the concepts addressed in article one by providing a concrete example of how Eurocentric law can impact Indigenous sovereignty. To illustrate this, I critique the Supreme Court of Canada's interpretation of section 90(1)(b) of the *Indian Act* in *McDiarmid Lumber Inc. v God's Lake First Nation*.[7] Section 90(1), first included in the *Indian Act* in its present form in 1951, deems "treaty" or "agreement" property to be situated on reserve. It is read together with sections 87 and 89 to exempt Indian property on reserve from taxation or attachment.

[7] 2006 SCC 58, [2006] 2 SCR 846 [*McDiarmid*].

Chief Justice McLachlin was tasked with analyzing the word “agreement” in section 90(1)(b) to determine whether it was intended to pertain to only treaty-related agreements. She held that Parliament intended a narrow interpretation of section 90(1) such that reference to “agreement” means only treaty-related agreements. Therefore, only treaty-related property should be exempted; other property could be subject to attachment and used as collateral. Ostensibly this would promote Indian self-government and economic development.[8]

I argue that McLachlin J.’s legal interpretation demonstrates the dissonance and inherent conflict between how Indigenous peoples understand sovereignty and the resulting intrinsic right to self-government and economic development, and how the state and court in this case have interpreted Indian self-government. Indeed, the *Indian Act* was historically established as a legal mechanism to assimilate Indigenous peoples into the mainstream body politic, not to promote Indigenous autonomy. That said, the record demonstrates that Indian leaders of the day asserted that they have always maintained their sovereignty. Yet, it is clear from the examination of the historical record that Indigenous perspectives on the fundamental underpinnings of Indigenous sovereignty, self-government, and economic development were and are largely undervalued and not reflected in the jurisprudence.

The Court’s view that the promotion of Indian self-government and economic development can be achieved via the *Indian Act* is ill-conceived. I argue that because legal decisions are typically rendered from the “dominant group’s ideological headwaters,”[9] laws are established, and decisions rendered that perpetuate the dominant worldview. The result is that the status quo continues to be promoted through Canadian laws that have devastating impacts on Indigenous

[8] *McDiarmid, supra* note 7 at para 55.
[9] John Borrows, “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28:1 *UBC L Rev* 1 at 2.

peoples' autonomy. Article two makes a valuable contribution to the portfolio by demonstrating that when Eurocentric laws are created and then interpreted by the courts without accounting for Indigenous realities and legal perspectives, the results have profoundly detrimental effects on Indigenous legal and economic interests. This premise is one of the central elements of the portfolio.

1.6.3. Etuaptmumk: Considering Trust Investment Principles Through the Lens of Two-Eyed Seeing

Article three expands upon the significance of validating Indigenous realities and legal perspectives. The focus shifts to how Western law and its legal interpretations impact Indigenous peoples use of contemporary forms of asset management. I ground this discussion in Indigenous trusts, which offer a valuable tool to invest and manage Indigenous assets so communities can become self-sustaining. I argue that many Indigenous people do not invest only to achieve market-based results. Rather, their investment strategies are dynamic and more wholesome. Investments are informed by the community's values, such as sustainability, stewardship and accountability, and by community development objectives. They also reflect the larger ambitions of advancing economic reconciliation. Nevertheless, trust law requires trustees to act in a fiduciary capacity in carrying out their investment duties, thereby limiting a key focus to the yielding of financial returns.

I address the tension of diverse perspectives by applying the Mi'kmaw concept of Two-Eyed Seeing to examine both the Canadian law and fiduciary principles that apply to trust investments, viewed through one eye, and Indigenous law and investment principles that promote the *sui generis* priorities of self-determining Indigenous communities, viewed through the other eye. I argue that, in adapting to new circumstances, trust law is evolving regarding the scope of trustees' investment duties, such that there is more flexibility to consider Indigenous investment values if the trust instrument is designed to embody Indigenous values. Two concerns remain: how the scope of trustee investment duties have been, and could be dealt with in common law decisions; and whether there is a sufficient base of ecofriendly or socially responsible companies that align with Indigenous values for communities to invest in.

This article argues that the adaptation of the practice of Socially Responsible Investment (SRI) could assist Indigenous communities in increasing Indigenous assets without compromising community values. The impetus for developing SRI policies is to improve working relationships between Indigenous peoples and investment companies as a means to support reconciliation efforts, empower communities and respect sovereignty by reflecting traditional and cultural values in investment policies.

Article three makes a valuable contribution to the portfolio by demonstrating that it is possible to reconcile two legal orders and perspectives. In developing reciprocal relationships, there must be a willingness to view economic engagement from an Indigenous legal and economic perspective. While the issues raised in the previous articles clearly emphasize how Two-Eyed Seeing can be beneficial, this article offers a demonstration of Two-Eyed Seeing in action.

1.6.4. Indigenous Economic Development and Sustainability: Maintaining the Integrity of Indigenous Culture in Corporate Governance

Article four expands on the impact of Western law in contemporary forms of asset management by grounding the discussion in forms of corporate models. I note that in managing assets in contemporary times Indigenous communities may also establish non-profit or corporate statutory forms of asset management[10] to advance economic development. I argue that regardless

[10] To name a few, Mushkegowuk Development Corporation; Mississaugas of the Credit Business Corporation; Six Nations of the Grand River Development Corporation; Gitga'at Development Corporation; Campbell River Indian Band Development Corporation; Tahltan Nation Development Corporation; Gull Bay Development Corporation; Fort McKay Group of Companies; Penticton Indian Band Development Corporation; and Membertou Economic Development Corporation.

of the corporate structure, incorporating Indigenous legal and economic perspectives to advance economic development is key. To do this, I assert that Indigenous communities in Canada could benefit from international Indigenous-centric corporate models, mainly those developed in the United States and Australia. Designed to respect the *sui generis* nature of Indigenous perspectives, these models could be more effective in achieving the goal of economic reconciliation.

I first discuss the US tribal corporation which empowers tribes to engage in economic development by establishing federally chartered corporations under section 17 of the *Reorganization Act*.[11] This model has several notable benefits, including the possibility of a broader corporate purpose clause that accommodates any changes in subsequent business activities,[12] and asset distribution is not restricted to constrain a tribe's autonomy.

Likewise, the *Corporations (Aboriginal and Torres Strait Islander) Act* (*CATSI Act*)[13] in Australia could also provide guidance to Canadian lawmakers in providing a framework for an Indigenous-centric corporate model. This corporate structure was established to specifically suit the needs of Aboriginal and Torres Strait Islander communities. *CATSI Act* corporations are

[11] 25 U.S.C. § 477, s 17 [*Reorganization Act*]. First the tribe must draft a charter, which operates much like the articles of incorporation in that it contains the corporation's organizational framework, purpose and management details. If the tribal council approves the charter (this procedure is set by tribal law), the tribal council must submit the charter along with a petition expressing a desire to form a section 17 corporation to the Bureau of Indian Affairs. The Bureau reviews the charter to ensure it is consistent with federal law and, if approved, the tribal council must then ratify the charter prior to the section 17 corporation becoming operable. Tribes can also incorporate under state law just as any other corporation or establish tribally-chartered corporations under their own tribal codes. Karen J. Atkinson and Kathleen M. Nilles, Tribal Business Structure Handbook IV-1 (Office of Indian Energy & Economic Development 2008), online at: https://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf at III-11-12 [Tribal Business Handbook]; US Department of the Interior Assistant Secretary—Indian Affairs Office of Indian Energy and Economic Development, Division of Economic Development, "Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure" online at: www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf at 5 [US Indian Affairs].

[12] *Tribal Business Handbook, supra* note 11 at III-10-12.

[13] No 124, 2006 [*CATSI Act*].

intended to strike a compromise in Aboriginal business development by respecting both Aboriginal laws and ways of doing business and the Western legal system and business culture.[14]

In conclusion, while there are notable advantages in each of the US and Australian models, there is much to be worked out in both jurisdictions. However, I assert that the Australian model may be more likely to assist in advancing "economic reconciliation" vis-à-vis an Indigenous-centric corporate form because it is specifically designed to be flexible and suit the local needs of Indigenous communities. Arguably, Canada could learn from both the best and worst characteristics of the US and Australian models to establish a relevant corporate structure. This kind of corporate structure, developed by Indigenous peoples, supported by Indigenous processes, and grounded in Indigenous values and traditions in corporate governance, is another way to promote Indigenous sovereignty.

Article four is significant to the portfolio for its detailed look at the impact of Western law on Indigenous peoples' legal and economic interests and its offer of better ways forward. The long historical impact that corporate developments have had on Indigenous lands and territories and the significance of the laws that have enabled these impacts, underpin the Truth and Reconciliation's call to action for corporate Canada to be more inclusive of Indigenous peoples. Reflecting Indigenous values in the ways in which Indigenous companies are established and managed could be instrumental for promoting economic reconciliation. Here I offer a starting point to reconcile Western and Indigenous perspectives by an examination of international examples of doing business.

1.6.5. The Implications of Sections 89 and 90 of the Indian Act in Using Trust Assets as Collateral in First Nations' Secured Personal Property Transactions

[14] Ian Murray, Joe Fardin, and James O'Hara, "Co-designing Benefits Management Structures" (8 Aug 2019, Perth) Centre for Mining, Energy and Natural Resources Law, UWA Law School, The University of Western Australia at 21 [Murray at al].

The final article of the portfolio expands on the impact of the law on Indigenous legal and economic interests by demonstrating how First Nations are constrained by the *Indian Act* when making financial decisions that require the availability of collateral to advance economic development. Section 89(1) of the *Indian Act* prevents the seizure of First Nations property on reserve. Ostensibly to ensure the preservation of property connected to reserve lands, it prohibits property located on reserve from use as collateral. In doing so, this provision denies First Nations resources for advancing economic development by constraining access to credit. This is because lenders may be reluctant to grant credit to persons or bands if no legal recourse is available to enforce the debt.

I analyze the key legal factors financiers should be aware of regarding the application of section 89(1) to First Nations property. In particular, I examine the viability of using Indigenous trust assets—a form of intangible personal property—as collateral in secured property transactions. There are unique features and nuances that relate to using Indigenous trust assets as collateral. That is, pursuant to section 90(1) of the *Indian Act*, because treaty or agreement property may be *deemed* to be situated on reserve, the source of the trust funds is relevant to the analysis as well as the location of the funds for the purposes of section 89(1).

As such, in determining the credit worthiness of an Indigenous debtor seeking to enter into a secured personal property transaction, a fact-specific analysis—i.e., one that considers the kind of settlement "agreement" the trust assets result from—is required to determine whether Indigenous trust assets can be used as collateral. Under current law, if the trust funds are found to result from treaty and therefore are connected to the reserve they cannot be used as collateral because they are not subject to attachment, pursuant to section 89(1). This issue leads some lawyers and scholars to argue that First Nations should have their own *Personal Property Security Act* that deals with the localized realities on reserve so that Indigenous debtors can work around the constraints of the *Indian Act*. This is certainly a viable solution as long as it is created and interpreted by First Nations for the benefit of First Nations.

The technical analysis presented in this article is aligned with the overarching theme of the portfolio thesis. Demonstrating the interrelatedness between Western and Indigenous law in economic development, this analysis highlights a key example of how Canadian law, the *Indian Act,* works to *constrain* First Nations legal interests in economic development. In the previous articles, I have already addressed how historically laws have had deleterious impacts on Indigenous economic well-being.

Indeed, the *Indian Act* has been a tool of choice for the assimilation of Indigenous peoples and the dispossession of and control over Indigenous lands, which has negatively impacted Indigenous economies and shattered sovereignty. Usurping this very collateral - personal property - is central to the purposes of colonization. The ability to use collateral, which is often a prerequisite to economic development, is one way for Indigenous communities to take back their economies.[15] In the same way that alternative governance structures are explored earlier in this portfolio, it is also critical to consider concerns around raising capital and seeking alternative methods.

From the lens of Two-Eyed Seeing, article five makes an important contribution to the scholarship by affirming the central themes of the portfolio. It underscores that creating sustainable Indigenous economic development requires a rethinking of how Western law impacts Indigenous development, and how laws that apply to Indigenous people should be created and interpreted with

[15] Relatedly, I examine trust assets because many communities are already establishing trusts and beginning to use them as collateral to advance economic development.

and on behalf of Indigenous people. By elaborating on how local Indigenous realities and Western law's constraint on these realities should be reason for pause, article five contributes to the portfolio in that asset management and the ability to use collateral to secure funding are foundational to procuring Indigenous economic development opportunities. Moreover, by revealing one of the ways that existing Eurocentric federal law, the *Indian Act*, constrains First Nations economic development goals, it also demonstrates how in the shorter term it is necessary to adapt existing laws to First Nations realities.[16]

[16] Notwithstanding, truly respecting Indigenous sovereignty and law would mean replacing the *Indian Act* with a governance framework informed by Indigenous peoples, which is a subject for another time and place.

Etuaptmumk: A Means to Advance Indigenous Economic Development "in a Good Way"

> *Etuaptmumk or Two-Eyed Seeing is the gift of multiple perspectives treasured by many Aboriginal peoples. We believe it is the requisite Guiding Principle for the new consciousness needed to enable Integrative Science work, as well as other integrative or transcultural or transdisciplinary or collaborative work.*
>
> Elder Albert Marshall, Eskasoni First Nation[1]

1. The Gift of Multiple Perspectives in Indigenous Economic Development

Eurocentric laws have been instrumental in advancing non-Indigenous people's economic interests to the detriment of Indigenous peoples' interests. Indeed, the iniquitous impact certain laws have on Indigenous peoples' legal and economic interests has limited and continues to limit positive economic outcomes and advancement for Indigenous communities. The role of law has therefore been instrumental in creating inequality because of its impact on Indigenous prosperity and economic development opportunities. This is exacerbated because Indigenous living legal traditions have not been historically recognized by the greater Canadian legal system. Arguably, a reckoning is required by the Canadian state to recognize how Eurocentric systems and laws are biased toward Western worldviews while not accounting for *Indigenous realities, legal orders or economic perspectives*. This article therefore challenges the way that Canadian economic and legal structures were and are designed to entirely disenfranchise Indigenous communities from their

[1] Elder Albert Marshall is a respected Mi'kmaw elder from Eskasoni First Nation in Unama'ki (Cape Breton) in Nova Scotia, the Traditional Territory of Mi'kma'ki. He is from the Moose Clan. He was conferred the Doctor of Letters honoris causa degree by Cape Breton University for his tireless efforts to help promote Mi'kmaw culture and language in conjunction with cross-cultural understandings, reconciliation, and healing. Both he and his spouse, Murdena, helped develop KECCA (Knowledge Education & Culture Consultant Associates) to better enable and encourage a strong future for the Mi'kmaw Nation. Elder Marshall coined the phrase Etuaptmumk/Two-Eyed Seeing for the gift of multiple perspectives as a guiding principle for the co-learning journey of different cultural knowledges working together.

sources of power by strengthening Western law to advance economic development that benefited and benefits non-Indigenous peoples to the detriment of Indigenous people's economies and laws.

This discourse reflects on the purpose for which legal orders are developed and the intended beneficiaries of the laws. It reveals that in the Canadian state, the purpose was to advance and strengthen the economic power of non-Indigenous governments while simultaneously de-legitimizing the power and legal orders of the Indigenous governments who occupy the same spaces. This connection between economic development and the rule of law in Canadian society suggests that the common law legal tradition is taken for granted by Canadians. Ostensibly, challenging Canadian legal sovereignty is the biggest barrier to Indigenous self-determination that advances legal legitimacy and economic prosperity.

To advance Indigenous economic development "in a good way," a phrase often used by Indigenous peoples to reflect wellness-centred choices that respect local needs, traditions, cultures, and resources, it is imperative that living Indigenous legal traditions are honoured and embedded in economic development processes. In recognizing that Indigenous prosperity lies in the connection between *Indigenous law* and economic development, the strength of Indigenous laws and economic values must be entrenched in Canada's legal and economic infrastructures.

The guiding Mi'kmaw principle of *Etuaptmumk*, Two-Eyed Seeing, can assist here to benefit both Indigenous societies and Canadian society. Respecting Two-Eyed Seeing means 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 learning to use both these eyes together, for the benefit of all."[2] The application of this principle can provide a pathway for

[2] Cheryl Bartlett, Murdena Marshall & Albert Marshall, "Two-Eyed Seeing and Other Lessons Learned with a Co-learning Journey of Bringing Together Indigenous and Mainstream Knowledges and Ways of Knowing" (2012) Vol 2: 331-340 *Journal of Environmental Studies and Sciences* at 335 [Bartlett et al, "Two-Eyed Seeing"]. See also Cheryl

progress in many areas or disciplines because it enables knowledges from different perspectives to work together. According to Mi'kmaw Elder Albert Marshall, this principle can be applied to a range of circumstances and in many areas of society:

> Two-Eyed Seeing…does not fit into any particular subject area or discipline. Rather, it is about life: what you do, what kind of responsibilities you have, how you should live while on earth…i.e., a guiding principle that covers all aspects of our lives: social, economic, environmental, etc. The advantage of Two-Eyed Seeing is that you are always fine tuning your mind into different places at once, you are always looking for another perspective and better way of doing things.[3]

Being willing to look from two eyes by engaging with different perspectives—which contain both similarities and differences—is a more inclusive way to formulate a complete knowledge system in a given area.[4] The different perspectives discussed in this article mainly relate to Euro-centric market-based economic approaches (i.e., capitalism) versus Indigenous economic approaches that respect Indigenous connection to place (i.e., land), environment, sustainability and responsibility.[5]

The long historically complex, intricate and intertwining nature of relationships between Indigenous governments and citizens and non-Indigenous governments and citizens, make Two-

Bartlett, "Two-Eyed Seeing" presentation to Public and Indigenous Affairs and Ministerial Services Branch within Environment and Climate Change Canada/Government of Canada (August 23, 2017, Dartmouth, NS) [Bartlett]; Cindy Pelletier, "An Application of Two-Eyed Seeing: Indigenous Research Methods With Participatory Action Research" (2018) Vol 17:1-12 *International Journal of Qualitative Methods* [Pelletier]; Brady Reid, "Positionality and Research: "Two-Eyed Seeing" With a Rural Ktaqmkuk Mi'kmaw Community" (2020) Vol 19:1-12 *International Journal of Qualitative Methods* [Reid].

[3] C. Bartlett, M. Marshall, A. Marshall, & M. Iwama, "Integrative Science and Two-Eyed Seeing: Enriching the Discussion Framework for Healthy Communities" in L.K. Hallstrom, N. Guehlstorf, & M. Parkes (eds), *Beyond Intractability: Convergence and Opportunity at the Interface of Environmental, Health and Social Issue* (Vancouver: UBC Press, 2012) at 11 [Bartlett et al, "Enriching the Discussion"].

[4] *Bartlett et al, "Two-Eyed Seeing", supra* note 2.

[5] It is worth noting here that while certain simple binaries are noted within this article, such as Indigenous versus Eurocentric economic perspectives, others are more nuanced. For instance, Indigenous economic development and capitalism are somewhat ambiguous binaries. That is, capitalism is one economic system used to increase economic development but does not necessarily equate with economic development. Rather, economic development includes those means used to engage the *process* of economic growth, including investment projects, development initiatives and/or establishing asset governance models. These terms are important because ambiguous binaries may shape decision making in economic development.

Eyed Seeing a suitable lens from which to examine Indigenous economic development. Carol Anne Hilton asserts that Indigenous peoples ought to be given a "seat at the economic table."[6] Arguably, in participating at the "economic table", there must be a willingness to consider, assess and articulate both shared and divergent values and knowledges because historically Eurocentric economic systems and laws have dominated the ways that business was conducted at the "economic table" in Canada.

According to Elder Marshall, considering both shared and divergent values require a weaving back and forth between worldviews.[7] Searching for ways of weaving between Indigenous worldviews and knowledge systems and Eurocentric worldviews and knowledge systems to create a new approach to "Indigenous Economic Development" requires one to ask certain critical questions. What is a worldview? Why hold on to Eurocentric worldviews? Is Eurocentrism the same as colonial worldviews or Western-sourced knowledge? If a worldview is a society's shared philosophy, values and customs, indeed it is important to grapple with these critical questions because admittedly many people associate Eurocentrism—a shared philosophy that implicitly regards European culture or history as preeminent to the exclusion of other worldviews—with colonialism and white supremacy. Under this view, Eurocentrism should be rejected.

An approach that values mutual respect for different ways of knowing is key for Indigenous peoples' self-determination in economic development, especially because of the legacies of colonial policies, laws and assimilation strategies that have largely *not* respected Indigenous

[6] Carol Anne Hilton, *Indigenomics: Taking a Seat at the Economic Table* (Gabrioloa Island: New Society Publishers, 2021) at 148 [Hilton].
[7] *Bartlett et al, "Two-Eyed Seeing", supra* note 2 at 331. I recognize that use of the term "worldview" is very broad in nature. As such, one should not make generalizations about all Indigenous cultures sharing the same worldviews or all Eurocentric cultures sharing the same worldviews. Indeed, there are unique nuances within individual cultures under the broader category of one "worldview" or another.

values, legal traditions or unique cultures in Canada. Indigenous peoples have had to contend with and navigate Eurocentric worldviews and laws while experiencing a decimation of their traditional values and laws in their own territories. Historically there have been systematic efforts in all areas of Canadian society—including in governance, politics, health care, education, law, and economic development—to privilege Eurocentric worldviews while subjugating Indigenous worldviews. Essentially, this has meant colonial policies and practices have negatively impacted self-determination in that Indigenous legal and economic values have been and are largely disregarded as an effective means to support Indigenous sovereignty. Leroy Little Bear notes that "Indigenous traditions, laws and customs are the practical application of Indigenous values grounded in their particular experience and worldview."[8] Yet, through concerted efforts to assimilate Indigenous peoples into the greater body politic, a Eurocentric "one-eyed" view of critical areas of socio-political and economic engagement were imposed.

This has placed pressure on many Indigenous communities to conform to the demanding global economy by adopting Eurocentric market-based forms of production and economic development.[9] If integration into a market-based economy means that the focus is solely on fiscal profit, then Indigenous economic principles—which incorporate other indicators of well-being including adherence to traditional laws, connection to land and environment, sustainability, reciprocity and responsibility, to name a few—run the risk of being compromised. It does not mean

[8] L.L. Bear, "Jagged Worldviews Colliding" in M. Battiste (ed.), *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000) at 79 [Bear].

[9] *Hilton, supra* note 6 at 30; Jannie Lasimbang "Indigenous peoples and local economic development" (2008) Issue No 5, Indigenous People Local Economic Development at 47 (retrieved on April 21, 2021 online at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---led/documents/publication/wcms_108574.pdf [Lasimbang]; Rauna Kuokkanen, "Indigenous Economies, Theories of Subsistence, and Women: Exploring the Social Economy Model for Indigenous Governance" Vol 35, No 2 *American Indian Quarterly*, pp 215-240 (Spring 2011) at 217 [Kuokkanen]; See more generally, John Borrows & Sarah Morales, "Challenge, Change and Development in Aboriginal Economies" in Dwight Dorey & Joseph Magnet, editors, *Legal Aspects of Aboriginal Business Development* (Markham, ON: LexisNexis Canada, 2005)

that profit does not align with Indigenous economic principles, rather that profit must not be the sole focus.

In more recent times, there has been a strong resurgence of Indigenous traditional values in how many communities socially organize, including in governance, education, health care, law, and economic development. This is not to say that there is no trepidation around the ways Indigenous legal and economic principles have been and continue to be disregarded in the greater Canadian society. Elder Marshall notes that those who are forced to abandon their unique ways of knowing, seeing and being in the world, have their spirits destroyed, which makes the ways they experience the world incomplete and lacking harmony.[10] That is, to be complete and harmonious, the spiritual, physical, emotional and intellectual well-being of a community must be intact and work together in a balanced way.[11] Many communities are not there yet, and moreover, are trying to find the balance Elder Marshall speaks of from within an ongoing context of colonial laws.

Two-Eyed Seeing respects the balance necessary in how communities engage in economic development. In its simplest form economic development involves those activities engaged to acquire material wealth.[12] However, attempting to portray development in a value-neutral manner by focusing on market outcomes[13] negates the fact that economic theory is not value-free, rather it embodies the worldview that structures the investigation of economics under study.[14] This is

[10] *Bartlett et al, "Enriching the Discussion", supra* note 3 at 296.
[11] *Bartlett et al, "Enriching the Discussion", supra* note 3 at 296.
[12] Robert Hamilton, John Borrows, Brent Mainprize, Ryan Beaton, & Joshua Ben David Nichols, *Wise Practices* (University of Toronto Press: Toronto, 2021) at 4 [Hamilton et al].
[13] *Hamilton et al, supr*a note 12. The editors note that this is a result of the modernization theory of the post-war period that conceived of development as a means of social differentiation that would produce Western economic, political and social institutions. See also Brian Tamanaha, "The Lessons of Law-and-Development Studies" (1995) 89:2 *American Journal of International Law* 470 at 471 [Tamanaha].
[14] Charles K. Wilber, "Economics and Ethics" in Charles K. Wilber and Amitava Krishna Dutt, eds., *New Directions in Development Ethics: Essays in Honor of Denis Goulet* (Notre Dame: University of Notre Dame Press, 2010) at 157 [Wilber].

critical because Indigenous economic development is inevitably linked to the self-determination of Indigenous peoples. As Carol-Anne Hilton notes, in contemporary times many communities seek to achieve economic independence by combining traditional values and customs with modern-day approaches to economic development.[15] Because Two-Eyed Seeing challenges one to embrace the strengths of Indigenous knowledges and ways of knowing coupled with the strengths of Western knowledges and ways of knowing, Elder Marshall emphasizes that one must acknowledge this interdependent relationship and be willing to engage in a co-learning journey.[16]

Elder Marshall is concerned with the ways Western knowledges, typically central to Eurocentric worldviews, have tools and systems that can be beneficial when working together with Indigenous knowledges. While keeping in mind there are unique cultures within a worldview, key differences exist more generally between Indigenous and Western knowledge systems. Based upon thousands of years of lived experiences, Indigenous cultures tend to focus on aspects of spirituality, oral tradition, values, culture, language, governance, and the natural world as a more holistic way of understanding the world and its interconnectedness. For instance, the circle is significant to many Indigenous cultures to signify interconnectedness and equality. On the contrary, Western knowledge systems generally compartmentalize knowledge into categories or disciplines, such as science, math, geography, etc., to focus on rational inquiry. Further, Western cultures are generally concerned with hierarchal structures where power is typically held at the top.

Elder Marshall teaches that equality is more likely to be achieved when there is a willingness to take the best of Indigenous knowledges and the best of Western knowledges so that both can work together in a cohesive way to benefit all. This, he asserts, is an important mechanism

[15] *Hilton, supra* note 6 at 157-160.
[16] *Bartlett et al, "Two-Eyed Seeing", supra* note 2 at 334.

for achieving cultural harmony, balance and respectful relationships. Elder Marshall emphasizes that there must be flexibility in the ways Indigenous and Western worldviews intertwine. To this end, in any given set of circumstances where certain applicable strengths from one worldview or another are relied upon, one must be willing to accept that, as circumstances change, alternative strengths may need to be relied upon to guide the situation.[17]

Two-Eyed Seeing is a principle that guides behaviour, whether that be the behaviour of an individual, a group, or even the relationship between Indigenous and non-Indigenous business partners. It is grounded in mutuality. This relates to developing reciprocal relationships within and between communities that hold different perspectives. Cheryl Bartlett asserts that integrating numerous principles throughout the co-learning journey can accomplish this, including: 1) recognizing that in working together, holders of diverse knowledges are capable of facilitating transformation; 2) understanding and accepting there can be a common ground; 3) understanding, accepting and respecting the differences in knowledges; and 4) recognizing the need to work together on the co-learning journey.[18]

These principles are key because bringing together both Eurocentric and Indigenous legal worldviews in economic development processes could be a means to provide a more equitable basis from which to promote Indigenous self-determination, community engagement, empowerment and capacity building,[19] and respect for Indigenous sovereignty. These are crucial objectives that, when achieved, will advance the emancipation of Indigenous peoples. However, these objectives cannot be achieved without understanding the impact of colonial laws on

[17] *Bartlett et al, "Two-Eyed Seeing", supra* note 2 at 335.
[18] C. Bartlett, "Knowledge Inclusivity: "Two-Eyed Seeing" for Science for the 21st Century" in M. Wiber & J. Kearney (eds), (2006) Proceedings of the Workshop on Learning Communities as a Tool for Resource Management (November 4-5, 2005, Halifax) pp 70–76 at 73 [Bartlett, "Knowledge Inclusivity"].
[19] *Pelletier, supra* note 2 at 4.

Indigenous legal and economic interests and the way in which Indigenous laws have gone unrecognised.

As such, this article first briefly discusses the ways Indigenous laws have been under-recognised in the greater Canadian legal system. I subsequently examine how the connection between law and economic development has had deleterious impacts on Indigenous peoples' economic outcomes. I argue that Eurocentric laws have worked to increase wealth for governments and third parties and have historically aided in the dispossession of Indigenous lands and the decimation of Indigenous legal traditions and economic values. I then consider the views of a number of scholars on whether the dichotomy between Indigenous economic values, such as sustainability, stewardship and accountability, and Eurocentric economic values, such as capitalism, are reconcilable. Understanding the divergent views provides context for determining whether and how different views can be reconciled to advance economic reconciliation, which means providing equal economic opportunity for all members of Canadian society.

I conclude that while there is no doubt a complex history between Indigenous and non-Indigenous governments and peoples in Canada, a pathway to peacefully co-exist and advance economic reconciliation may be found in applying Two-Eyed Seeing. This is because advancing economic development in contemporary times means that certain Eurocentric legal and economic structures and processes are used by Indigenous communities to further the economic and social well-being of their citizens. However, in keeping with the principle of Two-Eyed Seeing these structures and processes should be established with Indigenous legal traditions and cultural values intact and flourishing.

2. Whose Legal Tradition is it Anyway?

> 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.[20]

As Borrows and Praud note, legal principles that include stewardship responsibilities have been at the heart of managing Indigenous wealth and resources since time immemorial, with great diversity across Indigenous cultures in how resources are managed. Stewardship is shaped by the existential realities of a specific group of Indigenous people and their relationship with the ecological system around them.[21] As a fundamental principle that guides the relationship Indigenous peoples have with their ecosystems, deliberate and resourceful stewardship is a means to "create and maintain Indigenous thought, languages, stories and ceremony",[22] which is critical to political and cultural survival and economic prosperity.

Although numerous Indigenous communities and First Nations in Canada have successfully pursued economic development,[23] many communities fall far behind mainstream

[20] John Borrows and Shayla Praud, "Teachings of Sustainability, Stewardship, & Responsibility: Indigenous Perspectives on Obligation, Wealth, Trusts, & Fiduciary Duty" 2020 *Reconciliation and Responsible Investment Initiative* at 3, see online at https://reconciliationandinvestment.ca/portfolio-item/teachings-of-sustainability-stewardship-responsibility/ [Borrows & Praud].

[21] JS Youngblood Henderson, "Ayukpachi: Empowering Aboriginal Thought" in Marie Battiste, ed, *Reclaiming Indigenous Voices and Vision* (Vancouver: UBC Press, 2000) at 252 [Henderson].

[22] Tuma Young, "L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System" (2016) Vol 13, No 1 *Indigenous Law Journal* at 79 [Young].

[23] To name a few: the Membertou Mi'kmaq Nation realized $67 million in revenue last year from diversified interests ranging from fishing to real estate; the Haida Nation is the largest forestry leaseholder on Haida Gwaii with $22 million in assets and $35 million in annual sales; the Fort McKay and Mikisew Cree First Nations acquired $503 million piece of the East Tank Farm portion of the Fort Hills oilsands mine near Wood Buffalo; the First Nations in Fort Chipewyan completed the Three Nations energy project, the largest remote, off-grid solar farm in the country; the Wei Wai Kum First Nation completed the Discovery Harbour 60 million commercial development which includes retail outlets such as Walmart, Staples, Home Depot and other retailers; the Tahltan Nation Development Corporation a profitable organization that works to generate wealth, economic and employment and training opportunities for

Canada in terms of access to resources, funding and economic opportunities. Disparity continues to exist between Indigenous and non-Indigenous communities in this regard. This gap does not exist because Indigenous peoples do not have the ability to economically flourish and succeed in Canada.[24] On the contrary, Indigenous peoples have a long history of engaging in rich subsistence practices connected to their traditional territories. Canada also has a well-documented history of developing and prospering from the dispossession of Indigenous lands and resources, which has devastated traditional economies. Indigenous territorial dispossession, resulting in a loss of economic livelihood and dependency on the state,[25] has largely been abetted by the rule of law.

Eurocentric legal systems have largely worked to advance non-Indigenous economic interests to the detriment of Indigenous peoples' economic interests. In fact, not only have Indigenous peoples experienced the negative effects from being removed from resources, but non-Indigenous people have also directly prospered from Canada's act of claiming sovereignty, using European land-based value systems to justify economic development, and using Euro-centric legal orders to legitimize their sovereignty claims. In that many Eurocentric laws have been instrumental

members of the Tahltan Nation. Currently there are over 250 economic development corporations in Canada. For relevant information see the Canadian Council for Aboriginal Business, online at: https://www.ccab.com/ [CCAB].

[24] Yellowhead Institute, "Cash Back: A Yellowhead Institute Red Paper" (May 2021) at 6, retrieved online June 9, 2021 at https://cashback.yellowheadinstitute.org [Cash Back]; *Hilton, supra* note 6 at 94; See more generally the Royal Commission on Aboriginal Peoples, "Sharing the Harvest: The Road to Self-Reliance", Report of the National Round Table on Aboriginal Economic Development and Resources (1993) [RCAP]; Robert B. Anderson, Leo Paul Dana, & Teresa E. Dana, "Indigenous Land Rights, Entrepreneurship, and Economic Development in Canada: "Opting-in" to the Global Economy" (2006) 41 *Journal of World Business* 45–55 at 47 [Anderson et al, "Opting in"].

[25] Tyler A. Shipley, *Canada in the World: Settler Colonialism and the Colonial Imagination* (Halifax & Winnipeg: Fernwood Publishing, 2020) at 86-7 [Shipley]; Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis, 2017) at 3 [Hanna]; Hilton, *supra* note 6 at 21; *Cash Back*, *supra* note 24 at 6; Yellowhead Institute, "Land Back: A Yellowhead Institute Red Paper" (October 2019) retrieved online June 9, 2021 at https://redpaper.yellowheadinstitute.org/. [Land Back]; Michael Torrance, *Equator Principles and Performance Standards on Environmental and Social Sustainability* 2nd ed (Toronto: LexisNexis, 2021) at 337-8 [Torrance]; Clifford Gordon Atleo "Aboriginal Capitalism: Is Resistance Futile or Fertile?" (2015) Vol 9:2 *The Journal of Aboriginal Economic Development* 41 at 42 [Atleo]; *Anderson et al, "Opting-in", supra* note 24 at 46.

in facilitating the dispossession of Indigenous lands,[26] the effect is that Indigenous sovereignty has been disrupted and Indigenous peoples' territorial rights have been oppressed. To this end, the rule of law has had a detrimental impact on advancing Indigenous economic development.[27] The effects were and are compounded as Indigenous legal systems have been largely disregarded and not recognized by the Euro-legal systems of law. This prejudice has functioned to dispossess Indigenous peoples of their traditional territories, negatively impacting Indigenous cultures, languages and legal traditions—all of which are linked to land.

The strength of Indigenous laws and knowledge systems is that they are guided by a unique connection to place, resources and environments and focus on collective well-being. This collectivity demonstrates a deep respect for the interrelationships between *all* life forms, which are believed to be in constant motion and instilled with energy and spirit.[28] Leroy Little Bear notes

[26] See e.g., *Royal Proclamation, 1763* (UK), reprinted in RSC 1985, Appendix II, No 1; *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, SC 1850, c 74; *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, SC 1868, c 42; *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869 c 6; *Indian Act*, RSC 1985, c I-5. See also *St Catherine's Milling and Lumber Co. v R*, (1887) 13 SCR 577 (for a comprehensive discussion of this case see Kent McNeil, *The Flawed Precedent* (Toronto: UBC Press, 2019)). McNeil notes that the Doctrine of Discovery—a Eurocentric legal principle that surmises that European countries upon 'discovering' Indigenous peoples, extinguished their sovereignty and acquired the underlying title to Indigenous lands—was validated in 1887 in the first major Canadian court decision to address Indigenous land rights, the *St. Catherine's Milling* decision. He asserts that this Doctrine established an erroneous foundation for the Supreme Court of Canada's interpretation of section 35 of the Constitution. See also John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia" (2015) 48 *UBC L Rev* 701-742 [Borrows, "Terra Nullius]; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 113-131; Wendy Moss & Elaine Gardner-O'Toole, Law and Government Division "Aboriginal People: History of Discriminatory Laws" (1987) online at: https://publications.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm; Bob Joseph, *21 Things You May Not Know About the Indian Act* (Port Coquitlam, BC: Indigenous Relations Press, 2018) at 7 for a discussion of the *Bagot Report 1844*.
[27] Doug Sanderson, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, but How Do You Build it in Canada" (2012) 53 *Canadian Business Law Journal* 92 at 94 [Sanderson]; Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today" (1998) 22 *Am Indian Cult and Res J* 187. Sanderson notes that while some scholars deny the correlation between development and the rule of law (see e.g., Stephen Cornell and Joseph P. Kalt, "Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development'' (2000) 29 J of Socio Economics 443 at 458-461), this has been contradicted by others (see e.g., Martin Mowbray, "Localising Responsibility: The Application of the Harvard Project on American Indian Economic Development to Australia" (2006) 41 *Aus J of Soc Issues* 87 at 96).
[28] *Bear, supra* note 8 at 79.

that a holistic and cyclical view of the world is integral to Indigenous worldviews; he asserts that the constant moving and changing requires one to look at the whole in order to see the connections.[29] These cyclical patterns found in recurring phenomena, such as the seasons of the year, the migration of the animals, renewal ceremonies, songs, and stories, focus on process rather than a particular end product.[30] As such, the distinctiveness of many Indigenous laws is the focus on the ways that process is engaged.

Bestowed by Creator, rich and diverse traditional laws govern Indigenous peoples' relationships with each other and with the land and resources. This connection to land is critical because as Anderson, Dana and Dana note, traditional lands are where the nation dwells and cannot be considered separate from the people, culture, identity,[31] and law. These are all interconnected and create a stewardship obligation to protect and preserve all life forms, including people, fauna and flora, in their traditional territories.[32] Furthermore, when land and resources are the means from which Indigenous peoples can re-establish their rich economies,[33] Indigenous laws are implicated in new ways.

From an Indigenous *economic* perspective, the idea of process is a critical component of economic development. For example, a deference for process is found in the seven-generation principle, wherein communities make economic decisions based upon the potential impact on the next seven generations.[34] Economic production, in this view, is guided by sustaining current and

[29] *Bear, supra* note 8 at 79.
[30] *Bear, supra* note 8 at 79.
[31] *Anderson et al, "Opting In", supra* note 24 at 46.
[32] *Kuokkanen, supra* note 9 at 219; For a general discussion see W. Wuttunee, *Living Rhythms: Lessons in Aboriginal Economic Resilience and Vision* (Montreal: McGill- Queen's Press, 2004) [Wuttunee].
[33] *Anderson et al, "Opting In", supra* note 24 at 46.
[34] Ashley Julian, Thinking Seven Generations Ahead: Mi'kmaq Language Resurgence in the Face of Settler Colonialism (Masters of Education Thesis, University of New Brunswick, 2016) [unpublished] at 1; see also the Great Law of the Haudenosaunee (Iroquois) Confederacy, "What is the Seventh Generation Principle?" (Port Coquitlam, B.C.: Indigenous Corporate Training Inc., May 30, 2020), online: https://www.ictinc.ca/blog/seventh-generation-

future generations. In stark contrast, operation only for profit is key in Eurocentric systems that favour capitalism. Maintaining land tenure and control of resources is key under this kind of European economic system. Rather than focusing on cooperation and consensus building, individual advancement and wealth accumulation is celebrated, often at the expense of present and future collective well-being.[35] Competition between individuals and corporations is therefore encouraged and privileged.[36] Competition negatively impacts Indigenous peoples' ties to land and resources, which in turn impacts collectivity and connection to place and environments. Therefore, if Indigenous laws are not accounted for, inequality results.

A place-based existence is integral to how Indigenous laws develop because of the belief that community members share specific spaces or territories with other life forces, such as plants and animals; in turn, the interconnectedness with all aspects of the environment has the effect of energizing the powerful relationships between the different life forms.[37] Building and maintaining these relationships, grounded in "place", is also a part of the very fabric of the principle of sustainability, a principle that often guides Indigenous economic development. Through the principle of sustainability, Indigenous peoples are able to distinguish the ecological limits of economic pursuits.

This contextual backdrop is critical because societies whose laws have focused on strengthening the capitalist economic system (the market economy) reveal a repugnant history of dispossessing Indigenous peoples of place, that is, of lands and resources.[38] This disrupts the

principle#:~:text=The%20Seventh%20Generation%20Principle%20is,seven%20generations%20into%20the%20future.

[35] *Atleo, supra* note 25 at 42.
[36] *Atleo, supra* note 25 at 42.
[37] *Young, supra* note 22 at 78.
[38] *Atleo, supra* note 25 at 41.

principle of sustainability and prevents Indigenous peoples from being self-determined.[39] Consequently, the reclamation of lands and resources as a way to advance economic development is also a means to revitalize Indigenous legal traditions.

Borrows notes that the strength of a legal tradition is not dependent upon how other legal traditions either accept or receive it as a vital legal tradition.[40] Furthermore, he emphasizes that to remain relevant and strong, a legal tradition need not adhere to its original form. Rather, it may evolve to withstand changing circumstances.[41] In fact, if provided recognition and the opportunity to evolve, a legal tradition can remain a relevant, authentic and living tradition in contemporary times.[42] Further, legal traditions can exist simultaneously within legal systems and can therefore invoke diverse rules of law applicable in identical situations.[43]

Although Canada has a multi-juridical legal system—comprised of the common law, civil law and Indigenous legal traditions—the predominant legal traditions given effect by the courts and recognized by parliament and provincial legislatures, has been the common law or civil law traditions and the relative enacted legislative provisions. Further, the principally recognized laws that regulate the ability of Indigenous peoples to engage in economic development initiatives—especially in initiatives between Indigenous peoples and other governments or third parties—are

[39] *Atleo, supra* note 25 at 41. Atleo asserts that capitalism has been a major avenue for mainstream society to assail Indigenous peoples of their lands, thus having a key impact on Indigenous sovereignty and well-being.
[40] John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 *Wash UJL & Pol'y* 167 at 175 [Borrows, "Indigenous Legal Traditions"].
[41] *Borrows, "Indigenous Legal Traditions," supra* note 40 at 175. See also Katharine T. Bartlett, "Tradition, Change, and the Idea of Progress in Feminist Legal Thought" (1995) *Wis L Rev* 303 at 331 [K.T. Bartlett].
[42] *Borrows, "Indigenous Legal Traditions," supra* note 40 at 175.
[43] *Borrows, "Indigenous Legal Traditions," supra* note 40 at 174. See also M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Oxford University Press, 1976) [Hooker].

largely Canadian laws[44] that do not always recognize or give credence to Indigenous legal traditions. This has the effect of nullifying the ways Indigenous peoples engage in economic activities through the application of their own laws and processes.

While Indigenous legal traditions do not require validation to survive, there is no doubt that Eurocentric laws have impacted how Indigenous peoples have organized their societies.[45] Despite the importance of maintaining the integrity of a nation's unique traditional laws,[46] the negative impact of colonial laws on Indigenous peoples' legal interests continues. Borrows notes that notwithstanding their lack of prominence in broader circles, Indigenous legal traditions are authentic and should be recognized for the strength and influence they have within communities.[47]

[44] For example, the power of First Nations to enact laws under the *Indian Act*, *supra* note 28 (often distinct from a nations' own traditional laws); see also *First Nations Land Management Act*, SC 1999, c 24, LC 1999, ch 24; *First Nations Oil and Gas and Moneys Management Act,* SC 2005, c 48; *First Nations Commercial and Industrial Development Act*, SC 2005, c 53; *First Nations Fiscal Management Act* SC 2005 c 9; *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35. For selective commentary see: Malcolm Lavoie and Moira Lavoie, "Special Issue: Introduction to the Law and Markets: Regulating Controversial Exchange Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act," (2017) 54 *Osgoode Hall LJ* 559-607; Dwight Newman, "Business Implications from a Public Law Doctrine: Judicial Interpretations of Canada's Indigenous Rights Clause and Their Relationship to Economic Reconciliation," (2018) 83 *SCLR* (2d) 3-16; Harold Cardinal, The Unjust Society: The Tragedy of Canada's Indians (Edmonton: Hurtig, 1969) at 72; Robert Yalden et al., *Business Organizations: Practice, Theory and Emerging Challenges,* 2nd ed (Toronto: Emond Montgomery, 2018), Chapter 4; Ken Coates and Blaine Favel, "Indigenous Business and Canadian Law: Defining Commercial Opportunities for Indigenous Entrepreneurs and Communities" (2018) 83 *SCLR* (2d) 83-103; Brian Crane, Robert Mainville & Martin W. Mason, *First Nations Governance Law* (Markham: LexisNexis, 2008); Angela D'Elia Decembrini, Kate Gunn & Bruce McIvor, *Annotated Aboriginal Law: The Constitution, Legislation, Treaties and Supreme Court of Canada Summaries* (Toronto: Thomson Reuters, 2021).

[45] The way in which the elected system under the *Indian Act* was asserted over traditionally governed communities causing a break down in traditional governance, social organization, and respect for Indigenous laws is a notable example. Furthermore, see footnote 26 for a list of laws that have impacted the way that Indigenous communities functioned socio-politically, economically and legally.

[46] For examples of legal decisions that have recognized the validity of Indigenous legal traditions see: *Pastion v Dene Tha' First Nation* [2018 4 FCR 467; *Alderville First Nation v Canada*, [2014] FC 747; *Connolly v Woolrich*, [1967] 17 RJRQ 75 (Qc Sup Ct); *Re Adoption of Katie*, E7-1807 32 DLR (2d) 686; *Henry v Roseau River Anishinabe First Nation Custom Council*, [2017] FC 1038; *Alexander v Roseau River Anishinabe First Nation*, [2019] FC 125; *Campbell v British Columbia (Attorney General)*, [2000] BCJ No 1524; *Casimel v Insurance Corp. of British Columbia,* [1993] BCJ No 1834 (QL) (BCCA); *R v Marshall,* [2005] SCC 43.

[47] *John Borrows, "Indigenous Legal Traditions", supra* note 40 at 174. See also James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995). An adjudication under *Ǧviḷás*, Heiltsuk traditional law, related to how an oil spill impacted the Heiltsuk's environment and resources is attached. The Heiltsuk assert that *Ǧviḷás*—which has existed since time immemorial—regulates the balance of the health of the water and land with the needs of the people to ensure there will *always be plentiful resources*. The legal

The recognition of Indigenous law is key for advancing Indigenous self-determination and supporting sovereignty.

Ostensibly, when seemingly incompatible values exist between Indigenous societies, with their distinct laws and economic values,[48] and Eurocentric societies, where colonial laws and the capitalist market economy are significant driving forces,[49] how law impacts economic development requires interpretive skill since law can mean different things depending upon the legal tradition at hand. While there is ongoing debate about how Indigenous legal traditions can or will be reconciled within the greater Canadian legal system, there can be no doubt that Canadian laws have impacted Indigenous sovereignty, economic autonomy and self-determination. The role that Eurocentric laws have played in this regard is elaborated on in the next section.

3. Economic Development and the Rule of Law

The idea that a country's economic and social development is directly affected by its legal system can be traced as far back as the eighteenth century.[50] Conflicting views have nonetheless evolved around the rule of law's precise correlation to economic development. Michael Trebilcock asserts there is little agreement around the core elements of the rule of law, and how one might measure the efficacy of strategies in legal reform.[51] This article is not meant to provide an in-depth

analysis of the incident according to Heiltsuk Law informed the legal action taken by the Heiltsuk in the common law courts (statement of claim attached). While clearly the Heiltsuk view their laws as binding on Heiltsuk interests, this case is still pending and will be an important case to follow in terms of whether/how the common law courts consider the role of Heiltsuk traditional law in resolving the claim. Heiltsuk Adjudication Report (2018):http://www.heiltsuknation.ca/wpcontent/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf. See also Heiltsuk Notice of Claim (2018) http://www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk-Notice-of-Civil-Claim.pdf.

48 *Anderson et al, "Opting In", supra* note 24 at 46.

49 *Kuokkanen, supra* note 9 at 215; David R. Newhouse, "Resistance is Futile: Aboriginal Peoples Meet the Borg of Capitalism" in *Ethics and Capitalism*, edited by John Douglas Bishop (Toronto: University of Toronto Press, 2000) at 145 [Newhouse, "Borg of Capitalism"].

50 David Trubek, "Law and Development: Forty Years after "Scholars in Self-Estrangement" (2016) 66 *UTLJ* 301 at 303 [Trubek, "Scholars in Self-Estrangement"].

51 Michael Trebilcock, "Between Universalism and Relativism: Reflections on the Evolution of Law and Development Studies" (Summer 2016) Vol 66, No 3 *University of Toronto Law Journal* 330-352 at 331 [Trebilcock,

analysis of the history of the field of law and economic development.[52] But pertinent foundational ideas and subsequent contemporary understandings are reviewed to illustrate that the characterization and enactment of law has worked to strengthen Euro-economic development while negatively impacting Indigenous peoples sovereignty and prosperity.

As far back as the late 1800s, after the first theories of law and economic development began to emerge, the German sociologist, Max Weber, asserted that industrialization and the rise of capitalism—an economic and political system focused on *private trade and industry for profit*—was significantly influenced by Western (Occidental) law because of the legal security found in a legal system that has been rationalized and systematized.[53] Indeed, Weber believed that the "calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic enterprise."[54] He posited that because

"Universalism"]; For a more in depth discussion see Brian Tamanaha, *On the Rule of I.aw: History, Politics, Theory (*Cambridge: Cambridge University Press, 2004) [Tamanaha, "Rule of Law"]. On the efficacy of legal reform see Thomas Carothers, ed, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006) [Carothers]; Michael Trebilcock & Ronald Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham: UK Edward Elgar, 2008) [Trebilcock & Daniels]; Lindsey Carson and Ronald Daniels, "The Persistent Dilemma of Development: The Next Fifty Years" (2010) 60 *UTLJ* 491 [Carson & Daniels].

[52] For comprehensive overviews see Liliana Lizarazo-Rodriguez, "Mapping Law and Development" (October 2017) IV *Indonesian Journal of International Comparative Law* 761-895 [Lizarazo-Rodriguez] and Trebilcock, "Universalism", supra note 52. Trebilcock, in particular, notes that themes around law and development evolved from various versions of modernization, state-led theories of development that persisted through the first three post-war decades. This was followed by the antithetical neo-liberal policies that emphasized the role of markets and limited capacity of governments. In the late twentieth century it was believed that development prospects were determined by the role and quality of institutions in developing regions. It has ultimately come to be accepted that there is no general blueprint for the design of political, bureaucratic, and legal institutions in developing regions.

[53] Max Weber, *Economy and Society*, eds Ruth Guenther & Claus Wittich (Berkeley, Los Angeles, London: University of California Press, 1978) vol 2 at 883 [Weber]. See also David M. Trubek, "Max Weber on Law and the Rise of Capitalism" (1972) *Wis L Rev* 720 at 721 [Trubek, "Max Weber"]. Numerous scholars have addressed this view: Marc Galanter, "The Modernization of Law" at 153 in *Modernization: The Dynamics of Growth* (M. Weiner ed, 1966); Milton Friedman, "Legal Culture and Social Development" (1969) 4 *Law & Soc'y Rev* 29; Milton Friedman, "On Legal Development" (1969) 24 *Rutgers L Rev* 11; Kenneth L. Karst, "Law in Developing Countries" (1967) 60 *Law Lib J* 13; Peider Konz, Legal Development in Developing Countries, 1969 *Proc Am Soc'y Int'l* L. 91; Wallace Mendelson, Law and the Development of Nations, 32 *J Pol* 223 (1970); Robert B. Seidman, Law and Development: A General Model, 6 *Law & Soc'y Rev* 311 (1972); David I. Steinberg, Law, Development, and Korean Society, 3 *J Comp Ad* 215 (1971); Henry Steiner, Legal Education and Socio-Economic Change: Brazilian Perspectives, 19 Am J Comp L 39 (1971).

[54] *Weber, supra* note 53 at 883.

capitalism was most conducive to a legal order grounded in a high degree of rationality, the progression of rational law enabled the advancement of modern, industrial capitalism.[55] Some scholars' views that legal institutions themselves determine the boundaries of economic activity,[56] supports Weber's assertion.

While capitalism can take many forms of economic organization,[57] including free market, state and welfare capitalism, a capitalist economy is mainly distinguished by its relentless focus on constant growth and profit maximization.[58] Although capitalism is fluid and adaptive, Atleo believes that its core tenets, such as constant growth and profit, remain constant.[59] If indeed legal institutions are instrumental in creating the boundaries of economic activity, it is likely that the systematic nature of Eurocentric legal institutions and the formal features of the legal process play a critical role in advancing economic activity. This systematic nature is key because, as Weber notes, the driving force of all economic activity in the market economy is the constant striving for income.[60]

Notably, Weber contended that an element of physical or psychological *coercion*, intended to ensure compliance, is built into the system of Eurocentric laws.[61] He also alleged that any structured source of guidelines for right conduct are a form of legitimate legal order.[62] The

[55] *Weber, supra* note 53 at 882-4.
[56] Jackie Vandermeulen & Philippe Perron-Savard, "Law and Capitalism: A Book Review" vol 67(2) *University of Toronto Faculty of Law Review* 327 at 328 citing Douglass C. North, *Institutions, Institutional Change and Economic Performance* (New York: Cambridge University Press, 1990) at 3-4 [Vandermeulen & Perron-Savard].
[57] William J. Baumol, Robert E. Litan, and Carl J. Schramm (Eds.), Good Capitalism, Bad Capitalism, and the Economics of Growth and Prosperity (New Haven & London: Yale University Press, 2007) at vii.
[58] *Atleo, supra* note 25 at 42.
[59] *Atleo, supra* note 25 at 42.
[60] *Weber, supra* note 53 at 203. The European legal system was considered distinct for myriad of reasons: its unique legal organization, the separation of law from aspects of political activity, the existence of specialized legal professionals, the existence of intentionally shaped legal rules (which he asserted were "rational"), and the existence of concrete legal decisions that were based on the application of universal rules. See *Trubek, "Max Weber", supra* note 53 at 724.
[61] *Weber, supra* note 53 at 34.
[62] *Weber, supra* note 53 at 31-36.

concepts of coercive influence and assumptions about legitimate legal orders, are significant for their impact on Indigenous peoples' sovereignty. Borrows asserts that at the time the common law was being adopted in various regions in Canada many Indigenous people wondered how the common law could be applied when those regions were already subject to living Indigenous legal traditions.[63] The common law was nonetheless thrust upon Indigenous peoples who were forced to conform to non-Indigenous laws. Indeed, this element of coerciveness and legitimacy clarifies some of the longstanding conflicts between Indigenous peoples and the Canadian state, resulting from the assault on Indigenous sovereignty when the more pervasive and dominant Eurocentric "rational" laws were centered in Canada, while subjugating Indigenous living "relational" laws. This tension is augmented by the fact that Canadian courts have struggled to give effect to Indigenous laws,[64] which has had significant impacts on Indigenous sovereignty and economic outcomes.

Moreover, the historical theoretical underpinnings found in classic political economy also highlight this tension. Law and economic development are largely linked through the protection of property rights and the ability to enforce contracts.[65] Ostensibly, this protection was meant to provide investors with the assurance that if they invest the law will facilitate predictability,

[63] *Borrows, "Indigenous Legal Traditions", supra* note 40 at 188. Depending upon the region in question English governors arrived in various parts of Canada and asserted common law. As such the dates for the common law's reception varies across the country, anywhere from 1763 to 1870.
[64] And, in fact, rather than give effect to Indigenous laws the courts have treated them as evidence and fact. See *R v Van der Peet* [1996] 2 SCR 507 at 84-91; Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation *W*ithout Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada (ed) *Indigenous Legal Traditions* (Vancouver, Toronto: UBC Press, 2007) at 87-89; Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61(4) *McGill LJ* 725 at 735; Karen Drake, "Indigenous Oral Traditions in Court: Hearsay or Foreign Law?" in Karen Drake & Brenda L Gunn (eds) *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Centre, 2019) at 17-21.
[65] Stephan Haggard, Andrew MacIntyre, and Lydia Tiede, "The Rule of Law and Economic Development" (2008) 16:7 *Annual Review of Political Science* at 206 [Haggard et al).

enforceability and market activity, barring which transaction costs would be largely excessive.[66] As Haggard, MacIntyre and Tiede note, at its most fundamental level, economic growth and development is fueled by investment and trade, from which the legal effect given to property rights and the ability to contract is key to growth.[67]

For Indigenous peoples who typically view the concept of a "property right" not as a right at all, but rather as a *responsibility to* and a reciprocal *relationship with* land and resources, "ownership" or access rights through contract have traditionally been foreign values. Atleo asserts that the prioritizing of legal rights associated with property, advances and celebrates individual accumulation of wealth, which often leads to inequality.[68] He argues the protection of private property for profit, and the commodification of all things being prioritized over life forms, requires a radical re-orientation of Indigenous worldviews[69] and laws.

In summary, Eurocentric laws meant to protect property and enforce contracts have been largely revered and privileged. Certainly, the attributes valued in particular Eurocentric legal institutions[70] were instrumental in advancing economic development. That billions of dollars spent by institutional policymakers to strengthen the rule of law around property rights and contract law[71] reveals the privilege given to Eurocentric laws.

[66] *Vandermeulen & Perron-Savard, supra* note 56 at 328. See also Curtis J. Milhaupt & Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (Chicago: The University of Chicago Press, 2008) at 17 [Milhaupt & Pistor].
[67] *Haggard et al, supra* note 65 at 205.
[68] *Atleo, supra* note 25 at 42.
[69] *Atleo, supra* note 25 at 42.
[70] See *Carothers, supra* note 51 for further discussion on these attributes.
[71] David M. Trubek, "The 'Rule of Law' in Development Assistance" in David M. Trubek and Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 74 at 74 [Trubek, "Rule of Law"]; Lisa Bhansali, "Defining our Path to the 'Rule of Law' (World Bank Blog, April 17th, 2012) retrieved online on June 12, 2021 at:
https://blogs.worldbank.org/governance/defining-our-path-to-the-rule-of-law?cid=SHR_BlogSiteEmail_EN_EXT.
Given the massive investment in strengthening the rule of law, the recent announcement by the Department of Justice in Canada that an investment of $500,000 would be provided to assist in the revitalization of Indigenous laws hardly

Despite the primary focus on strengthening Eurocentric colonial laws, Tamanaha notes that distinct variations of the rule of law—including both "individualist-oriented" and "communitarian-oriented"—have often co-existed.[72] Law is more than a set of legal conventions; it also relies on interpretation to be enacted. If the interpretation of law is therefore that which gives it its legitimacy, it should be created and interpreted based on local realities. Trubek and Galanter note that the liberal legalism approach, reinforced by policymakers working to strengthen the rule of law, should be rejected in favor of a more relativistic approach.[73] In their view, liberal legalism is considered an "ethnocentric and naive" approach because the formal legal system, which is the key focus of liberal legalism, is not necessarily accessible to the majority of the population in less developed regions.[74]

Differences exist between the conditions of developing regions and those of developed ones, which means legal reform based on externally driven top-down efforts, common to developed regions, may have little positive effect on the social or economic conditions in developing regions.[75] In fact, of particular concern is the way top-down efforts have had detrimental political, social and economic impacts for Indigenous peoples. This is largely because, in strengthening the rule of law, laws were used as levers to facilitate the dispossession of

seems notable. See announcements made by the Justice Minister David Lametti on the support provided for the revitalization of Indigenous laws: https://www.youtube.com/watch?v=P3maKESNYsg and https://www.youtube.com/watch?v=BX5gD7nMgzc.

[72] Brian Tamanaha, "The Lessons of Law and Development Studies" (1995) 89 *Am J Int'l L* 470 at 476 [Tamanaha, "Lessons"]. This idea is complicated by the disagreement around what the rule of law includes. For instance, Tamanaha sets out the various beliefs held around the rule of law: it should include protection of individual rights; democracy should be a part of the rule of law; it should be solely formal in nature by being set out in clear terms and applied equally to all; it should encompass the "social, economic, educational, and cultural conditions under which man's legitimate aspirations and dignity may be realized"; and/or the rule of law can be a tool of government oppression. *Tamanaha, "Rule of Law", supra* note 71 at 3.

[73] David Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections the Crisis in Law and Development in the United States" (1974) *Wis L Rev* 1062 at 1080 [Trubek & Galanter].

[74] *Trubek & Galanter, supra* note 73 at 1081.

[75] *Trubek & Galanter, supra* note 73 at 1080.

Indigenous lands. This is evident in how laws historically reinforced state governmental and third-party interests, while diminishing Indigenous sovereignty in traditional territories.

Indeed, providing greater deference to Eurocentric law by strengthening the protection of property rights and the ability to enforce contracts is connected to larger political systems that promote underlying political bargains and institutions.[76] Atleo claims that "ambitions for riches, the transformation of Indigenous lands into private property, and all life into commodities" has been at the heart of Eurocentric approaches to wealth.[77] Laws were and are created from this dominant perspective. This is problematic because, as Borrows notes, judicial power "often cascades from the dominant group's *ideological headwaters*" from which "bias spills onto the pages of legal decisions from a contextualized, politically hued stream."[78]

Historically discriminatory and paternalistic legislation and legal decisions rendered from a dominant Eurocentric perspective, demonstrate the ways that Indigenous sovereignty and traditional land rights have been limited by the law.[79] Since its creation in 1876 as a consolidation of previous statutes, the paternalistic *Indian Act* has severely limited First Nations sovereignty and legal and economic rights.[80] In 1996, the Royal Commission on Aboriginal Peoples found that the *Indian Act's* paternalistic approach has worked to "interfere profoundly in the lives, cultures and communities of First Nations peoples," and is unlikely to provide emancipatory legal protection

[76] *Haggard et al, sup*ra note 65 at 206.
[77] *Atleo, supra* note 25 at 49.
[78] John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28:1 *UBC L Rev* 1 at 2 [emphasis added] [Borrows, "Constitutional Law"].
[79] See *supra* note 26 for a list of certain laws.
[80] See e.g., John Borrows, "Unextinguished: Rights and the Indian Act" (2016) 67 *UNBLJ* 3; Richard Bartlett, "The Indian Act of Canada" (1978) 27:4 *Buff L Rev* 581; Richard Bartlett, "Indian Act of Canada: An Unyielding Barrier" (1980) 6:4 *Am Indian J* 11; Robert G Moore, *The Historical Development of the Act*, 2nd ed (Canada: Treaties and Historical Research Centre, Indian and Northern Affairs, 1978); Wayne Daugherty & Dennis Madill, *Indian Government under Indian Act Legislation: 1868-1951* (Ottawa: Department of Indian and Northern Affairs Research Branch, 1980).

for First Nations peoples.[81] Canada's Department of the Interior's Annual Report in 1876 also stated:

> Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the state... [T]he true interests of the aborigines and of the State alike require that every effort should be made to aid the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.[82]

Moreover, due to a narrowly constructed framework established by the Supreme Court of Canada, laws intended to recognize Aboriginal and treaty rights affirmed in the Constitution focus on historical contact, assertions of Crown sovereignty and negotiated agreements.[83] Borrows asserts that this framework equates law with history such that the past is a large determinant of present legal reasoning. The effect is that Indigenous peoples are severely disadvantaged because they cannot prove connections to past practices.[84]

Trubek asserts that in the post-liberal legalism period, prevailing law and economic development ideologies were reconsidered largely because there was no proof of how developing regions could benefit from imitating the widely prevalent laws, policies and approaches of Eurocentric institutions.[85] This is certainly true for the Indigenous peoples in Canada. Several themes emphasized by Trubek inform more inclusive ways to consider law and economic development: change through cultural reform; constant experimentation in economic

[81] Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol 1 (Ottawa: Canada Communication Group, 1996) at 601.
[82] Canada, Department of the Interior, *Annual Report for the Year Ended 30th June, 1876, Sessional Papers*, 1877, vol 7, no II, xiv.
[83] John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" *The Canadian Historical Review* (March 2017) Vol 98: No 1, 114-135 at 115 [Borrows, "Originalism"].
[84] *Borrows, "Originalism", supra* note 83 at 116.
[85] *Trubek, "Scholars in Self-Estrangement", supra* note 50 at 306.

development; recognizing that capitalism can take many forms and therefore law can and will vary depending upon the form of economic system; and appreciating that legal rights are a part of economic development rather than simply a means to an end.[86]

Furthermore, Davis and Trebilcock emphasize that the field of law and development is evolving to promote and respect a broader range of social outcomes—including respect for human rights, gender equality and distributive justice—as a means to advocate for legal reform.[87] For Indigenous peoples whose rights have often been narrowly defined, this requires legal actors and governments to reimagine how the Canadian legal system can be more inclusive of Indigenous legal orders as a means to support Indigenous sovereignty and promote self-determination.

Similarly Milhaupt and Pistor argue that strengthening property rights and contract law to advance economic development are not the only ways law can promote market activity.[88] Market development requires other factors beyond law to be considered, including social norms and values, best practices, self-regulation, and certain principles and values not necessarily legally enforceable.[89] To this end, how market proponents participate in the shaping of the law is critical because legal systems should have the capacity to balance competing interests beyond the private ordering generated by property and contractual rights.[90]

The views of Milhaupt and Pistor more closely align with how law is implicated in Indigenous economic development. That is, for Indigenous economic development initiatives and processes to be inclusive and impactful, rather than a sole focus on Eurocentric laws, the

[86] *Trubek, "Scholars in Self-Estrangement", supra* note 50 at 318-320.
[87] Kevin E. Davis & Michael J. Trebilcock, "The Relationship Between Law and Development: Optimists Versus Skeptics" (2008) Vol 56, No 4 *American Journal of Comparative Law* at 7 [Davis & Trebilcock].
[88] *Milhaupt & Pistor, supra* note 66 at 20-21.
[89] *Milhaupt & Pistor, supra* note 66 at 21.
[90] *Milhaupt & Pistor, supra* note 66 at 21.

contribution of local Indigenous laws, environments, cultures and histories is required in order to meet local requirements and capabilities. As Trebilcock asserts, law and economic development scholars have come to recognize that the unique idiosyncrasies of various regions—including their history, culture, geography, politics, economics, ethnics, religions, demographics, and other features—shape the regions' economic development initiatives and processes.[91] The next section will build on this point by exploring how Indigenous laws and perspectives is therefore critical to achieving positive Indigenous economic development outcomes.

4. Reconciling Indigenous Laws and Perspectives in Contemporary Economic Development

Having experienced pressure to conform to the global market economy through purely profit-driven development projects,[92] many Indigenous peoples are, in contemporary times, seeking to incorporate Indigenous laws, culture and tradition into their economic development initiatives and processes. Including Indigenous laws and ways of knowing in economic development is critical to Indigenous well-being and sustainability, particularly because of the devastating impacts Eurocentric laws have had on Indigenous sovereignty and prosperity. Whether the values inherent to the market economy can be reconciled with Indigenous economic values has been the subject of much debate.

Atleo asserts that capitalism and Indigenous economic values are incompatible in that capitalism cannot be Indigenized without either radically altering the core tenets of capitalism, or by radically changing Indigenous core values and principles.[93] He asserts that there could be viable alternatives to capitalism to achieve Indigenous well-being, however, he acknowledges that

[91] *Trebilcock, "Universalism", supra* note 51 at 333.
[92] *Kuokkanen, supra* note 9 at 217.
[93] *Atleo, supra* note 25 at 41.

finding alternatives that do not involve compromise is challenging.[94] Atleo is firm on his stance that the two worldviews are diametrically opposed and he does not believe that Indigenous peoples need to succumb to the lure of capitalism to engage in economic development. He asserts that an Indigenous renaissance of sorts, where cultural and traditional values are reclaimed and affirmed, is one way to resist the negative impacts of capitalism on Indigenous peoplehood.[95]

In contrast, Robert J. Miller contends Indigenous peoples should indeed participate in market-based activities, which he calls "reservation capitalism", on the same level as non-Indigenous peoples. In his view, participating in market-based business activities is a way to attain the same level of prosperity as non-Indigenous people.[96] Miller is not so much concerned with how distinct Indigenous conceptions of prosperity and economic well-being depart from the principles generally espoused in capitalism. Indeed, he argues that the negative impacts of Indigenous poverty on cultural integrity overshadow any effects of capitalism.[97] Ostensibly, Miller fails to recognize that Indigenous poverty has largely been caused by capitalism.

Reconciling Indigenous values and Eurocentric capitalist values in economic ventures does not appear to be of consequence to Miller in that he asserts Indigenous peoples have always incorporated free market economic principles in economic development. According to him, the values championed in capitalism can be and are embraced by Indigenous peoples.[98] Overall Miller encourages economic investment, both in fiscal and human capital, to increase economic development in Indigenous territories.[99]

[94] *Atleo, supra* note 25 at 42.
[95] *Atleo, supra* note 25 at 50.
[96] Robert J. Miller, *Reservation "Capitalism": Economic Development in Indian Country* (Lincoln: University of Nebraska Press, 2013) [Miller].
[97] *Miller, supra* note 96 at 3.
[98] *Miller, supra* note 96 at 11.
[99] *Miller, supra* note 96 at 93.

Undoubtedly, engaging in economic development has the potential to untether Indigenous peoples from historical cycles of poverty; however, freedom from poverty is distinct from sovereignty and the wholistic nature of Indigenous well-being. Notwithstanding, overcoming poverty can certainly contribute to Indigenous well-being. In advocating for "reserve capitalism," Miller does not seem to contemplate that historically, Indigenous peoples engaged in economic development in distinct, non-capitalist ways, mainly through operating in subsistence economies. The historically damaging impacts of capitalism—largely engaged in profit maximization and/or resource depletion—on Indigenous lands, cultures and environments cannot be minimized in this regard.

David Newhouse also considers how Indigenous peoples engage in capitalism, which he calls "capitalism with a red face".[100] Unlike Miller, Newhouse believes the two worldviews are entirely distinct and it would be naïve to believe Indigenous peoples can engage with capitalism and not be changed by it.[101] Newhouse's views align with Atleo in that he too is more critical of the negative impacts of capitalism on Indigenous well-being. He nonetheless is more optimistic that capitalism and Indigenous values can be reconciled provided Indigenous values and realities are centered in economic development initiatives and processes.[102]

Likewise, Duane Champagne asserts that Indigenous peoples' involvement in what he calls "tribal capitalism", is necessary to advance broader economic development initiatives that promote Indigenous self-determination.[103] He concedes that Indigenous values do not align with capitalist

[100] See David Newhouse, "Modern Aboriginal Economies: Capitalism with a Red Face" vol 1(2) *The Journal of Aboriginal Economic Development* [Newhouse, "Capitalism with a Red Face"].
[101] *Newhouse, "Borg of Capitalism", supra* note 49 at 152.
[102] *Newhouse, "Capitalism with a Red Face", supra* note 100 at 57. Newhouse offers ten points that demonstrate how "capitalism with a red face" is set apart (see 59-60).
[103] Duane Champagne, *Social Change and Cultural Continuity Among Native Nations* (Lanham: Altamira Press, 2007) at 46 [Champagne].

values. Champagne nonetheless asserts that maintaining connection to land and culture is possible if contemporary Indigenous economic development initiatives are to be balanced with traditional values to ensure Indigenous identities and cultures remain intact.[104]

Similarly, Anderson, Dana and Dana assert that Indigenous economic participation is to be grounded in traditional values. They advocate for the principles of social entrepreneurship, which align economic engagement with a defined social purpose. Social entrepreneurship takes into account certain socially defined limits on economic activity. Through social entrepreneurship, Indigenous peoples can benefit from long-term economic growth not as an end in itself, rather as a means to promote the control of traditional lands and local activities.[105]

As wealth increases and communities are able to provide targeted access to education, housing, social programs and health care, to name a few, the well-being of community members also increases.[106] While this is an effective means for Indigenous entrepreneurs, models of social entrepreneurship developed by non-Indigenous peoples do not entirely consider the role of Indigenous legal traditions and values in shaping business, including social enterprises.

Each of the above authors make a valuable contribution to the scholarship on Indigenous economic development. In expanding upon these scholarly contributions, this article is concerned with the role law has played, and can play, in shaping Indigenous economic development. Given the impact law has had in advancing capitalism and decimating Indigenous sovereignty, one cannot consider solutions exclusive of the law. It is not enough to say that capitalism and Indigenous economic values diverge, or that the core tenets of capitalism are so dominant that they will lessen

[104] *Champagne, supra* note 103 at 46.
[105] *Anderson et al, "Opting-in", supra* note 24 at 46.
[106] *Anderson et al, "Opting-in", supra* note 24 at 46.

the value of Indigenous traditions.[107] Rather, examining the legal system that was, and is, instrumental in advancing capitalism may assist in dismantling the effects of capitalism. This requires a reckoning with how one economic system became *the* most pervasive and dominant system for conducting business and engaging in economic activity in the Western world.

As discussed above, protecting property rights and buttressing contract law provided a means for stakeholders to feel more secure around the risk assumed in operating in the market economy through commerce and trade. Undoubtedly, multi-billion-dollar investments, intended to strengthen Western law to create predictability and certainty for stakeholders, has profoundly contributed to the advancement of capitalism. Just as strengthening Eurocentric law played a critical role in advancing capitalism, arguably strengthening Indigenous law can play a profoundly critical role in advancing Indigenous sovereignty, self-determination and prosperity. One cannot so easily get away from the way law materially shapes the lives of individuals in the particular societies in which they live. Although Western law has been, and is, a powerful accomplice in the dispossession of Indigenous sovereignty and lands—which has resulted in substantial economic inequity—*reclaiming and incorporating* Indigenous laws into Indigenous economic development initiatives and processes is a way to counter these effects.

While Newhouse did not specifically implicate the law, he illuded to the ways that capitalism could be countered by incorporating Indigenous values in economic development. Likewise, Atleo also concedes that a resurgence of Indigenous knowledges, traditions, culture, and values may counter the impacts of capitalism on Indigenous economic development. Arguably, there needs to be something more. That "something more" is the way in which law is understood

[107] *Atleo, supra* note 25 at 50.

in Canada. As discussed in section two, Indigenous legal traditions have a long history in Canada and many communities developed complex systems of law based upon traditional knowledge and stories. Nonetheless, under colonialism and assimilation policies, within the greater Canadian legal system, Indigenous laws have largely been ignored and more importantly *overruled* by Western law.[108] Consequently, their authority has been significantly eroded.[109]

Notwithstanding that many Indigenous peoples continued to be guided by their distinct laws within their communities, and others are currently in the process of reclaiming their distinct laws, the Canadian legal system has also begun to recognize the importance of Indigenous legal traditions and the value of Indigenous law-making to Canada's pluralistic legal identity.[110] It is in redefining legal identity in Canada that the law has the potential to have an emancipatory effect for Indigenous peoples, and a positive impact on Indigenous prosperity. Specifically, the application of *Indigenous legal orders* can have an emancipatory effect for Indigenous peoples. The ways Western law has been applied to determine the significant legal, economic, political and social outcomes of Indigenous peoples can no longer be reinforced by the Canadian state. Concrete solutions must come from Indigenous peoples' purposeful and meaningful contribution to shaping legal pluralism in Canada, in particular to the way Indigenous law can shape economic development. To this end, in being willing to apply Two-Eyed Seeing to the law-making processes,

[108] Law Commission of Canada, "Indigenous Legal Traditions" (Toronto, Vancouver: UBC Press, 2007) at ix [Law Commission].
[109] *Law Commission, supra* note 108.
[110] Minister of Justice and Attorney General of Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" (2018) https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html. Principle 4 (accessed January 25, 2021); *Law Commission, supra* note 105; Truth and Reconciliation Commission of Canada, Truth and Reconciliation (*Commission of Canada: Calls to Action*, 2015) < http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>, No 42, 45(iv) (accessed January 25, 2021).

the potential for engaging with purposeful, Indigenous guidance that positively impacts Indigenous peoples' rights and economic development is realized.

In advocating for Indigenous engagement in economic development initiatives and processes, it is clear many of these initiatives will likely involve capitalist means of accumulating assets. While there is no denying the devastating impacts of capitalism, the starting point should be where Indigenous peoples are positioned today and not where they were before capitalism became so pervasive. The reality is that many communities *are* engaging in the market economy. Accordingly, the question should be around how to engage in a manner that supports Indigenous sovereignty and prosperity. It is necessary to reimagine how Indigenous peoples' economic development opportunities—largely disrupted by Eurocentric legal systems instrumental in recognizing non-Indigenous interests at the expense of Indigenous interests—can be informed by Indigenous legal orders.

Newhouse suggests it is possible for nations to work with modern-day understandings of traditional values to adapt capitalist values[111] in economic development. Certainly, in the process, many communities may be inspired to denounce the more destructive aspects of capitalism.[112] Nevertheless, presenting a simple, binary characterization of "capitalism" versus "Indigenous economic values" does not consider the numerous and diverse ways Indigenous peoples can engage in economic development and the role law can play. Without the lever the law provides, resisting the "borg of capitalism" may very well be futile. In that Newhouse suggests embracing

[111] *Newhouse, "Capitalism with a Red Face", supra* note 100 at 56; See also, *Hilton, supra* note 6 at 157-160.
[112] *Atleo, supra* note 25 at 49.

what he considers a more "compassionate capitalism,"[113] privileging and incorporating Indigenous legal orders in the decision-making processes of Indigenous engagement is a way to achieve this.

To this end, Two-Eyed Seeing provides some context for meaningful engagement by creating the conditions for respecting and honouring Indigenous legal orders and for recognizing them as an integral part of Canada's legal institution. This in turn enriches critical areas of Canadian society, including law and economics, business, and the socio-political domain. The contextual nature of Two-Eyed Seeing provides a pathway for the strengths of both Indigenous laws and Eurocentric laws to benefit Indigenous economic development. One need not be exclusive of the other because economic development initiatives are, by definition, contextual in nature. From a practical perspective, not only do many Indigenous communities use contemporary models of business management, but they are also entering into a variety of different business arrangements with non-Indigenous persons and companies.

In one sense, it wouldn't be wrong to say that taking diverse approaches or what might be recognized as a "Two-Eyed Seeing" approach is already happening. Tuma Young, a Mi'kmaw lawyer who teaches Indigenous studies at Unama'ki College in Mi'kma'ki, asserts that doing business with Indigenous people is not only about knowing how Canadian law applies to their interests. Rather, it is about knowing how Indigenous legal traditions themselves work, such as how collective versus individual rights are viewed in commercial enterprises. Indeed, through Indigenous peoples' contributions to shaping the legal system in Canada, the objective of establishing a more inclusive understanding of "law" and its impact on diverse economic interests can be realized.

[113] David Newhouse, "The Challenges of Aboriginal Economic Development in the Shadow of the Borg" 4(1) *The Journal of Aboriginal Economic Development* at 41 [Newhouse, "Shadow of the Borg"].

Although dealing with multiple legal orders within one broader legal system is complex, it is possible. In applying what Elder Marshall believes is the spirit of co-existence[114] to economic development, a weaving back and forth between Eurocentric laws and Indigenous laws in economic development ventures may be required in some instances. Admittedly, applying Two-Eyed Seeing in Indigenous economic development is multi-faceted and will require ongoing examination of the diverse legal principles involved. More importantly, Indigenous participation in law making in Canada, not only informs their own interests, but likewise informs the shaping of Canada's pluralistic legal and economic systems.

Miller, Dana and Dana provide an example of how social enterprise combines social mission with profit. Indeed, the development of social enterprise law—which provides legal infrastructure for social enterprises in the same way that for-profit and non-profit legal infrastructures have been built—signifies that the law can be a powerful ally to effect change for those seeking to combine profit with social mission.[115] Additionally, while certain responsible investment principles can be traced to the early 1900's, in contemporary times there is more visibility around Socially Responsible Investing (SRI)—investment that works to have a measurable and positive social and/or environmental impact in addition to financial return. Moreover, Environmental, Social and Governance (ESG) factors—financially material ESG

[114] *Bartlett et al, "Two-Eyed Seeing", supra* note 2. Elder Marshall also notes Indigenous peoples and stakeholders must also be open to the possibility that it will not always turn out the way one might envision, which is why revisiting and finetuning will be so critical.

[115] Dana Brakman Reiser & Steven A. Dean, *Social Enterprise Law: Trust, Public Benefit and Capital Markets* (New York: Oxford University Press, 2017). Reiser and Dean provide a thorough analysis of how social enterprise law is advancing. In Canada, only Nova Scotia and British Columbia have enacted corporate laws that deal with hybrid corporate structures. For a full discussion see, Frankie Young, "Indigenous Economic Development and Sustainability: Maintaining the Integrity of Indigenous Culture in Corporate Governance" (2021) vol 17:2 *MJSDL* 147.

information (risk and opportunities)—are currently more likely to be included as part of a standard investment analysis.[116]

Similar to how social enterprise law is finding ways to merge social mission with profit (although the law is a work in progress),[117] there is the possibility of a convergence between Indigenous laws, economic development and wellbeing, and Western laws and ways of engaging in economic development. For example, the Mi'kmaq principle, *netukulimk,* which means "achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity, or productivity of [the] environment,"[118] guides behaviours and relationships within Mi'kmaq territories. It is also a principle that can be incorporated into Indigenous trust investments or corporate governance structures to guide Indigenous business and investment decisions.

One cannot deny that corporate development and market-based business activities have had negative impacts on Indigenous rights and territories. However, this is not to say that corporate and/or trust models that privilege and incorporate Indigenous legal orders cannot be developed with an aim to respect sovereignty and promote respect for attachment to and relationship with the

[116] Max M. Schanzenbach and Robert H. Sitkoff, "Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee" (2020) 72 *Stanford L R* 381 at 392- 397 (Schanzenbach & Sitkoff); See also Benjamin J. Richardson, "Protecting Indigenous Peoples Rights Through Sustainable Investing" (2016), 6 *Indigenous LJ* 205; Rory Sullivan, Will Martindale, Elodie Feller, Margarita Pirovska and Rebecca Elliott, "Fiduciary Duty in the 21st Century: Final Report" (London, U.K.: Principles for Responsible Investment, 2020). While public disclosure requirements around governance are well known, there are currently no separate specific requirements mandating environmental and social-related disclosure, however, some jurisdictions in Canada provide education and reporting disclosure information in the event that companies decide to incorporate ESG factors. See the Financial Services Commission of Ontario at http://www.fsco.gov.on.ca/en/.

[117] For a discussion on people, planets and profits see: Feona Wilson & James Post, "Business models for people, planet (& profits): exploring the phenomena of social business, a market-based approach to social value creation" (2013) *Small Bus Econ* 40:715–737; Annemieke Roobeek, Jacques de Swart, & Myrthe van der Plas, *Responsible Business: Making Strategic Decisions to Benefit People, the Planet and Profits* (London, New York: Kogan Page Ltd, 2018); and Samuel O Idowu, Abubakar S Kasum, & Asli Yuksel Mermod, *People Planet and Profit: Socio-Economic Perspectives of CSR* (Aldershot: Taylor & Francis Group, 2014).

[118] See Unama'ki Institute of Natural Resources, "Netukulimk", retrieved on July 25, 2021 at: www.uinr.ca/programs/netukulimk.

land and environments, including air, water, resources and animals. The revitalization of Indigenous laws and the development of Indigenous legal processes, incorporated into business development, directed by Indigenous people for the benefit of Indigenous people, is more likely to advance Indigenous prosperity.

5. Conclusion

We must learn to live together or perish together as fools.

Martin Luther King Jr.

Recognizing the richness of distinct Indigenous legal and economic values and taking concrete action to include those values in legal and economic processes is a way to promote economic reconciliation. Applying Two-Eyed Seeing is a multidimensional approach to understanding diverse worldviews and realities. Such an approach promotes the reconciliation of diverse and rich cultures, and laws, to address complex issues.[119] Elder Marshall emphasizes that one should approach diverse knowledges with an "it's us, together" consciousness.[120] It is about more than looking for another perspective or recognizing the differences in worldviews. Rather, Two-Eyed Seeing emphasizes that embracing relationships, responsibilities, commitments, and accountabilities is necessary.[121] In the process, it may be required to re-examine and re-interpret the various issues under study as circumstances warrant.

As argued, Eurocentric law has been indiscriminately applied to Indigenous interests with little regard for the authority of Indigenous legal orders. Efforts to strengthen Eurocentric laws have been to the detriment of Indigenous legal and economic interests. I argue that embedding Indigenous legal orders in contemporary economic development initiatives and processes is one

[119] *Bartlett et al, "Enriching the Discussion", supra* note 3 at 1.
[120] *Bartlett et al, "Enriching the Discussion", supra* note 3 at 11.
[121] *Bartlett, supra* note 2.

way to foster sustainable Indigenous economic development. Developing Indigenous-centric legal and economic infrastructures provides unprecedented opportunities for Indigenous peoples to take back their economies and sustain their communities for many generations to come.

In recognizing the effect of legal rules and economic development from a variety of legal norms and values, the normative approaches to economic development and law can be challenged. Notably, the variety of norms and values in law have distinct implications depending upon the community members in question. This article challenges the way in which Western law has been strengthened to advance economic development that benefits non-Indigenous peoples. In recognizing that Indigenous prosperity lies in the connection between *Indigenous law* and economic development, the strength of Indigenous laws and economic values must be embedded in Canada's legal and economic infrastructures.

A TROJAN HORSE: CAN INDIAN SELF-GOVERNMENT BE PROMOTED THROUGH THE *INDIAN ACT*?

Frankie Young*

Section 90(1), first included in the Indian Act ("Act") in its present form in 1951, deems "treaty" or "agreement" property to be situated on reserve. It is read together with sections 87 and 89 of the Act to exempt Indian property on reserve from taxation or attachment. Historically, all Indian property on reserve was broadly exempted from possible taxation or attachment. In McDiarmid Lumber Ltd v God's Lake First Nation, the Supreme Court of Canada held that Parliament intended a narrow interpretation of section 90(1) such that only treaty-related property should be exempted in order to promote Indian self-government. I deconstruct the historical, social, and political events leading up to 1951 as depicted in Parliamentary records to demonstrate that the Court's interpretation in McDiarmid is not supported by the record. I first argue that the promotion of Indian self-government cannot be achieved through the assimilation effect of the Act. Next, I argue that, because only half of the Indian population were treaty Indians in 1951, it was unlikely that Parliament would have contemplated only treaty Indians in making amendments to the Act. I conclude that McDiarmid-type decisions demonstrate dissonance in the Court's interpretation of laws that impact Indigenous peoples. The consequence for Indigenous peoples is that the status quo remains.

Selon le paragraphe 90(1), qui a fait son apparition dans la Loi sur les Indiens (la Loi) sous sa forme actuelle en 1951, les biens [donnés aux Indiens ou à une bande] en vertu d'un traité ou d'un accord sont réputés situés sur une réserve. Lu de pair avec les articles 87 et 89 de la Loi, ce paragrapghe exempte d'imposition ou de saisie les biens sis sur les réserves et appartenant à des Indiens. Par le passé, tous les biens sis sur les réserves et appartenant aux Indiens étaient globalement exemptés d'une possible imposition ou saisie. Dans l'arrêt McDiarmid Lumber Ltd. c. Première Nation de God's Lake, la Cour suprême du Canada a affirmé que le Parlement avait eu

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l'intention de restreindre l'interprétation du paragraphe 90(1) pour faire en sorte que seuls les biens connexes aux traités soient exemptés, afin de promouvoir l'autonomie gouvernementale indienne. L'auteure déconstruit le contexte historique, social et politique qui a conduit à la rédaction du paragraphe de 1951 tel que les archives parlementaires le décrivent afin de démontrer qu'il ne justifie pas l'interprétation faite par la Cour dans l'arrêt McDiarmid. Dans un premier temps, l'auteure fait valoir que la promotion de l'autonomie gouvernementale indienne ne peut être atteinte au moyen de l'effet d'assimilation découlant de la Loi. Ensuite, elle soutient que parce que seulement la moitié de la population indienne de 1951 était visée par les traités, il était fort peu probable que le Parlement ait envisagé ces seules personnes lorsqu'il préparait les modifications à la Loi. L'auteure conclut que les décisions du genre McDiarmid créent de la dissonance dans l'interprétation de la Cour quant aux lois qui ont des répercussions sur les peuples autochtones. Il s'ensuit que pour ces derniers, le statu quo demeure.

Contents

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1. The Promotion of Indian Self-government through the Trojan Horse of Section 90(1)

> Since the source of judicial power often cascades from the dominant group's ideological headwaters, bias spills onto the pages of legal decisions from a contextualized, politically hued stream.[1]

Although distinct legal doctrines that applied to Indians[2] can be traced as far back as the eighteenth and nineteenth centuries, the *Indian Act* ("*Act*")[3] was created in 1876 as a consolidation of previous statutes.[4] The *Act* has been under political, social and legal scrutiny since its inception. In fact, this statute has been criticized for its overreach into the affairs of Indigenous peoples in Canada and its inability to fully reconcile Indigenous peoples as sovereign peoples within the context of Canadian society.[5] In 1996, the Royal Commission on Aboriginal Peoples found that, historically, the *Act* has worked to "interfere profoundly in the lives, cultures and communities of First Nations peoples" and that within the confines of the *Act*, change is unlikely to occur.[6] However, out of fear that historical rights will not be protected, unless and until a new legal basis is

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1 John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28:1 UBC L Rev 1 at 2 [Borrows, "Self-Government and the Royal Proclamation"].

2 Indian is defined in section 2 of the *Indian Act* as: "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian": *Indian Act*, RSC 1985, c I-5, s 2 [*Act*]. I use this term interchangeably with Indigenous to be consistent with the *Act*.

3 *Act*, *supra* note 2.

4 See e.g. *Royal Proclamation, 1763* (UK), reprinted in RSC 1985, Appendix II, No 1; *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, SC 1850, c 74 [*Indian Protection Act*]; *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, SC 1868, c 42 [*Act providing for the organization*]; *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6 [*Act for the gradual enfranchisement*].

5 See e.g. John Borrows, "Unextinguished: Rights and the Indian Act" (2016) 67 UNBLJ 3; Richard Bartlett, "The Indian Act of Canada" (1978) 27:4 Buff L Rev 581 [Bartlett, "Indian Act of Canada"]; Richard Bartlett, "Indian Act of Canada: An Unyielding Barrier" (1980) 6:4 Am Indian J 11 [Bartlett, "Act of Canada: An Unyielding Barrier"]; Robert G Moore, *The Historical Development of the Act*, 2nd ed (Canada: Treaties and Historical Research Centre, Indian and Northern Affairs, 1978); Wayne Daugherty & Dennis Madill, *Indian Government under Indian Act Legislation: 1868-1951* (Ottawa: Department of Indian and Northern Affairs Research Branch, 1980).

6 Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol 1 (Ottawa: Canada Communication Group, 1996) at 601 [RCAP, *Looking Forward*].

created for Indigenous peoples, many communities will continue to fall within the purview of the *Act*.[7]

Historically, the *Act* extended broad exemptions from attachment to Indian property located on or connected to the reserve. The use of the terms "any real or personal property" in provisions of the *Act* of 1876 and 1927[8] signified that all Indian property was broadly exempt from seizure. Notwithstanding, provisions such as sections 89(1) and 90(1) of the *Act*[9] are double-edged swords for Indigenous peoples. Whereas these provisions were allegedly intended to preserve and protect Indigenous property, the same provisions constrained Indigenous peoples from engaging in economic development because property on reserve could not be used as collateral in credit arrangements. In *McDiarmid Lumber Ltd v God's Lake First Nation*,[10] the Supreme Court of Canada noted that—from the 1920's to 1950's—the broad exemption of virtually *any* real or personal property came into question because exempting all Indian property from being pledged or mortgaged constrained Indians from engaging in economic development initiatives.[11] In addition, by the 1940's, Indian leaders in Canada argued that the *Act* stood in the way of good Indigenous governance. Consequently, leaders called for a review of the *Act* by a Royal Commission to investigate Indian and government relations.[12]

A Royal Commission was eventually directed and a Special Joint Committee of the Senate and House of Commons ("Committee") was created in 1946 to examine the administration of Indian affairs under

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7 *Ibid*.

8 *Indian Act*, SC 1876, c 18, s 66 [*Act*, 1876]; *Indian Act*, RS 1927, c 98, ss 1, 105 [*Act*, 1927].

9 *Act*, *supra* note 2, ss 89(1), 90(1):

> 89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.
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> 90(1) For the purposes of sections 87 and 89, personal property that was purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situated on a reserve.

10 *McDiarmid Lumber Ltd. v God's Lake First Nation*, 2006 SCC 58, [2006] 2 SCR 846 [*McDiarmid*].

11 *Ibid* at para 51.

12 Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*, 20-2, No 9 (27 June 1946) at 420 [Committee 1946, No 9].

the *Act*.[13] Even though Indians had requested there be comprehensive Indian participation in the process, consultation was mainly restricted to Indian leaders being permitted to make written and oral submissions to the Committee. Indian leaders were not in fact permitted to be actual participating members of the Committee.[14] When a final Committee report was provided to Parliament, the Committee recommended, among other things, that more progressive measures involving Indian self-government be implemented.[15] It was after the Committee's final report was submitted that Parliament first included section 90(1) in the *Act* to narrow the normative broad exemptions over *any* Indian property to only property that resulted from "treaty" or "agreement".[16] Because section 90(1) *deems* treaty or agreement property to be "situated on reserve," when it is read together with section 89(1), only treaty-related property is exempt from seizure.[17] The effect is that unrelated Indigenous property may form a valid attachment in credit arrangements.

Insofar as the consultation process leading up to this *Act* amendment, the manner in which government representatives engaged with Indian leaders was criticized. In 1984, Ivan B Johnson wrote a report for the Treaties and Historical Research Centre, Indian and Northern Affairs Canada about the *Act* consultation process, criticizing government representatives for the lack of deep consultation with Indian leaders.[18] Johnson also accused representatives of engaging in a kind of double-mindedness in delivering recommendations on critical policies that impacted Indians. He claimed that while government representatives touted the need to promote Indian self-government on the one hand, they supported assimilationist policies on the other. I build on Johnson's criticisms to argue that the social and political consequences for Indigenous peoples is further exacerbated when courts render legal decisions that

13 *Ibid*.

14 Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*, 20-2, No 11 (9 July 1946) at 492–4 [Committee 1946, No 11].

15 Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Continue and Complete the Examination and Consideration of the Indian Act, *Minutes of Proceedings and Evidence*, 20-4, No 5 (13 April–21 June 1948) at 187 [Committee 1948, No 5].

16 Section 69 was an antecedent provision in the *Act*, 1876, *supra* note 8 that was somewhat similar to section 90. It exempted "presents" and "annuities" given to Indians from seizure. Similar provisions appeared in versions of the *Indian Act* up until 1951 when section 90 first appeared. See *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 129, 71 DLR (4th) 193 [*Peguis*].

17 *Peguis*, *supra* note 16.

18 Ivan B Johnson, *Helping Indians to Help Themselves – A Committee to Investigate Itself: The 1951 Indian Consultation Process* (Canada: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1984).

reflect this double-mindedness. The *McDiarmid* decision is particularly insightful in this regard. In this decision, the Court considered the period leading up to the 1951 amendment to surmise Parliament's motivation for including section 90(1) in the *Act*. The Court held that Parliament intended a narrow interpretation of this provision in that exemptions were to be restricted to only treaty-related property in order to promote Indian self-government.[19] It will become apparent in this paper that self-government means different things to different groups, whether it be the Court, the government, Parliament or Indian leaders.

While the Court in *McDiarmid* asserted that Parliament intended to promote Indian self-government by narrowing exemptions to treaty property via the section 90(1) amendment, the regulation of Indian affairs through every kind of legislative reach, such as the *Act*, is wholly inconsistent with the nature of Indian self-government that imbues nation-to-nation relationships between settler and Indian societies. The Court's legal analysis in *McDiarmid* erroneously presumes that Indian self-government can be promoted within the context of the *Act* via a mere tweak of a provision. This presumption fails to consider that the insidious effect of the *Act* has historically been to assimilate Indians. Ultimately, it is likely that Parliament's eventual inclusion of section 90(1) was merely a stopgap mechanism to tout support for Indian self-government on the one hand while supporting larger assimilationist policies on the other. Pursuant to the Court's interpretation in *McDiarmid*, self-government would resemble a form somewhat akin to municipal government and the assimilation of Indians into the broader political system. However, Indian leaders at that time claimed that self-governance was consistent with the pre-existence of sovereign Indigenous nations. For example, some leaders claimed that treaties were the result of nation-to-nation agreements.[20]

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19 In Canada we often see the terms "self-government" and "self-determination" used interchangeably. Typically, the term "self-determination" is used more prevalently in international law, while in Canada, "self-government" is predominantly viewed as an expression of the right of self-determination. See Jennifer E Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21:1 CJLS 11 at 13.

20 This paper is not intended to be a comprehensive assessment of the merits of Indian self-government, rather it argues that Indian self-government when interpreted through a colonial lens in Canadian jurisprudence leads to conflicting policy decisions that negatively impact Indigenous peoples. Currently there are 22 self-government agreements across Canada involving 43 Indigenous communities. See "Self-government" (last modified 27 August 2019), online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100032275>. Having these agreements in place does not obviate the interpretation of this case. In fact, it highlights the problems with the *McDiarmid* decision: out of well over 600 different groups in Canada, only 22 self-government agreements exist involving 43 Indigenous communities.

The Court's claim that exemptions be limited to treaty property is also curious given that only half of the Indian population in Canada at that time were treaty Indians. The government acknowledged in the House of Commons in 1951 that it was concerned for *all* Indians in Canada—not just treaty Indians. That Parliament would subsequently intend a narrow interpretation of section 90(1), so that only treaty Indians would be exempted, is improbable.

This article is divided into three sections. In section two, I discuss the *McDiarmid* decision against the backdrop of the social and political milieu regarding Indians up to and at the time of the amendment. I then discuss the sovereignty of Indigenous nations and the disruption of this sovereignty by settlers, legislation and the process of colonization. Here, I also demonstrate that little weight was given to Indian evidence on self-government during the *Act* amendment consultation process. In section three, I argue that the *McDiarmid* decision perpetuates conflicting Indian policies in its double-minded legal reasoning that Indian self-government could possibly be promoted through an amendment to the *Act*. I discuss how these double-minded decisions have implications for Indigenous peoples in that conflicting laws continue to be created that promote the historical status quo for Indigenous peoples. I conclude that it is troubling that the Court claimed Parliament had intended a narrow interpretation of section 90(1)(b) as a means to advance the promotion of Indian self-government. While there are some Indian governance powers under the *Act*,[21] the administration of the *Act* in relation to Indian affairs is largely inconsistent with Indian self-government. In addition, the historical record indicates that all Indians were in the purview of government representatives at the time of the amendments. It is difficult to fathom then that Parliament subsequently intended that only treaty property be exempted. The deleterious impacts of these kinds of legal decisions on Indigenous peoples is augmented by this kind of specious interpretation because laws continue to be constructed under conflicting policy goals. Without due consideration given to the historically sovereign nature of Indigenous societies, these legal pronouncements undoubtedly promote the status quo. In the next section, I discuss the historical incongruencies in Indian policy that continue to be perpetrated through contemporary legal decisions such as *McDiarmid*.

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[21] See e.g. sections 74–80 of the *Act*, *supra* note 2 provide for election powers and sections 81–86 of the *Act*, *supra* note 2 provide for the power to make by-laws.

2. Gauging Incongruencies in Indian Policy that Result from *McDiarmid*-type Interpretations

McDiarmid—a case involving God's Lake First Nation, an isolated Indian Band in northern Manitoba who entered into Treaty No. 5 with the federal government—is widely regarded as a key decision in Canada on the interpretation of sections 89(1) and 90(1) of the *Act*. This sensitive decision was decided in 2006 at a time when Indian self-government and the Indian economy was at the forefront of discussions around Indian policy in Canada.[22] The key issue was whether certain Band bank account funds could be considered property situated on reserve because they resulted from treaty or agreement. This issue relates more specifically to section 90(1)(b) which indicates that property given to Indians or Bands under "treaty" or "agreement" shall be "*deemed* always to be situated on reserve."[23] The Band claimed that, although certain bank account funds were located in Winnipeg, the funds should be exempted from seizure under sections 89(1) or 90(1)(b) of the *Act*; it claimed that these funds were a result of treaty or agreement because they resulted from a "Comprehensive Funding Arrangement" which was provided to the Band in exchange for the extinguishment of claims against the Crown.[24] If the funds were found to result from treaty or agreement, they would be *deemed* situated on reserve and exempt from seizure, pursuant to section 89(1).

In this decision, the Court affirmed *Mitchell v Peguis Indian Band*,[25] the first key legal decision rendered on the interpretation of section 90(1) in which the Court held that the section should be narrowly interpreted based upon both the rules of statutory interpretation and the history of this provision.[26] The reliability of the Court's interpretation of the history of the provision, however, should be assessed against the backdrop of

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22 See e.g. Canada, Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol 2 (Ottawa: Canada Communication Group, 1996); John Provart, "Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada" (2003) 2:1 Indigenous LJ 117; Sally Weaver, "An Assessment of the Federal Self-Government Policy" in Andrea P Morrison, eds, *Justice for Natives: Searching for Common Ground* (Montreal & Kingston: McGill-Queen's University Press, 1997); John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38:2 UBC L Rev 285.

23 *Act*, *supra* note 2, s 90(1)(b) [emphasis added].

24 *McDiarmid*, *supra* note 10 at paras 1–2.

25 *Peguis*, *supra* note 16.

26 Before the *Peguis* decision, the Court found in *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36, 144 DLR (3d) 193 [*Nowegijick*], that when dealing with the interpretation of statutes that apply to Indigenous peoples, a liberal interpretation should be applied, and any doubt or ambiguity should be resolved in favour of Indians.

that which was actually happening at the time of the 1951 section 90(1) amendment.

Chief Justice McLachlin (as she was then) claimed that the history of section 90(1)(b) supports the likelihood that Parliament intended a narrow interpretation of the word "agreement" in order to promote Indian self-government. The Court asserted that exempting property broadly would be inconsistent with self-sufficiency by depriving Indians of credit opportunities, a cornerstone of economic development.[27] On the other hand, eliminating all exemptions could run the risk of Indian exploitation.[28] McLachlin claimed that the re-emergence of traditional Indigenous values signified that a shift in the law was necessary to promote Indian self-government and entrepreneurship.[29]

McLachlin's assertion necessarily presumes that, in Parliament's view, Indian self-government could be promoted within the confines of the administration of the *Act*. This presumption is a curious one to say the least. If McLachlin's analysis is correct, the Court would have one believe that the *Act* can "aid the red man in lifting himself out of his condition of tutelage and dependence"[30] and that section 90(1) could assist in guiding Indians to independence. What has become more obvious through decisions such as *McDiarmid* is that Indian self-government means different things to different parties. While the Court alleges that Parliament intended to promote Indian self-government through the section 90(1) provision, it is far more likely that Indian leaders viewed the mechanisms within the *Act* as instruments of colonialism rather than a means to assert Indian self-government.

Ostensibly, the colonization of Indians has been at the centre of Indian policy conflict for hundreds of years. Given this history, the apparent conflict in the Court's interpretation that Parliament undertook *Act* amendments as a means to advance Indian self-government seemingly demonstrates that the "process of colonization which began hundreds of years ago" was "still going on, using the same strategies and many of the same tools developed in past centuries."[31] When courts of competent jurisdiction are complicit in making precedent-setting legal decisions that do not call out these strategies and, in fact, perpetuate conflicting legal policies as it relates to Indigenous peoples, the status quo remains.

27 *McDiarmid*, *supra* note 10 at para 55.

28 *Ibid*.

29 *Ibid* at para 66.

30 Bartlett, "Indian Act of Canada", *supra* note 5 at 582, citing Canada, "Report of Department of Interior" *Sessional Paper*, No 9 (1876).

31 Mary Eberts, "Still Colonizing After All These Years" (2013) 64 UNBLJ 123 at 124.

McLachlin's claim that section 90(1) signified a necessary shift in the law does not hold up to scrutiny when considering the continued overall assimilationist effect of the *Act*. In what follows, I examine the social and political circumstances that existed up to and around the time of the amendment to consider the veracity of the Court's claim that the section 90(1) amendment was, indeed, intended to loosen the constraints of paternalism.

A) The Pre-1951 Social and Political History of Indian Policy

In the early to mid-1900's the "broad exemption of Indian property" approach was beginning to be abandoned in favour of limiting exemptions to only certain kinds of Indian property.[32] While the record is not entirely definitive on the 'whys' and 'wherefores' of this shift,[33] prior critical developments signified that a certain change in philosophy was impending. For instance, by the early 1920's it became apparent that Indians on reserves were undeniably disadvantaged economically.[34] As has been reiterated by both the Court and the Royal Commission for Aboriginal Peoples, the persistence of toxic social conditions of Indigenous peoples historically included "ill health, insufficient and unsafe housing, polluted water supplies, inadequate education, poverty and family breakdown at levels usually associated with impoverished developing countries."[35]

By the early 1930's the federal government began to support new forms of development for Indians. In 1938, during a debate in the House of Commons, the Honourable TA Crerar, Minister of Mines and Resources, recommended that the Department of Indian Administration be more open to encouraging a "spirit of self-reliance and independence in our Indian wards."[36] Crerar proposed an amendment to the *Act* whereby the government would be able to introduce a revolving loan fund in which the Minister of Finance could advance loans of up to $350,000 to individual Indians or nations on reserve.[37] The loans would be used generally for development purposes[38] by enabling the Superintendent-General "to make loans to Indian Bands, group or groups of Indians or individual Indians

32 *McDiarmid*, *supra* note 10 at para 49.

33 *Ibid*.

34 *Ibid* at para 27.

35 Canada, Royal Commission on Aboriginal Peoples, *Gathering Strength*, vol 3 (Ottawa: Canada Communication Group, 1996) at 1, online (pdf): *Government of Canada* <data2.archives.ca/e/e448/e011188230-03.pdf>. See also *R v Kapp*, 2008 SCC 41 at para 59, [2008] 2 SCR 483 [*Kapp*].

36 *House of Commons Debates*, 18-3, vol 3 (30 May 1938) at 3350 (Hon TA Crerar) [Debates 1938, vol 3].

37 *Ibid* at 3349.

38 *Ibid*.

for the purchase of farm implements, machinery, live stock, fishing and other equipment, seed grain and materials to be used in native handicrafts and to expend and loan money for the carrying out of cooperative projects on behalf of the Indians."[39] It appeared that the motivation for making a revolving loan fund available was to provide solutions for Indians to secure credit for economic development purposes. The revolving loan fund was not to be connected, directly or indirectly, with any proceeds directed from the alienation of lands or mineral rights.[40]

This was but one example of circumstances that would eventually lead to abandoning the approach of exempting Indian property broadly. Agreeing to extend credit in order to rework the Indian economy—in hopes of promoting Indian economic development—would seemingly be a new direction for Indian policy. By the time of the *Act* consultation period, there was a certain government impetus to consider Indian policy as it related to economic advancement. Nonetheless, Indian leaders, who had called for a review of the *Act* through the formation of the Committee, were only able to present limited evidence to the Committee on the effects of the *Act* upon the pre-existing Indian sovereignty. Below, I discuss this Indian evidence on self-government to demonstrate that, in the end, little weight was likely given to Indian views on Indian self-government.

B) Sovereign We Stand: Neglecting Indian Evidence on Self-Government

The tone was set from the outset denoting the manner that the Committee was willing to engage with Indian leaders in contemplation of the effects of the *Act*. As the process unfolded, Indians were not an integral part of the investigation into the effects of the *Act* as only government representatives comprised the Committee. Whether having Indians on the Committee may have made a difference is debateable but after the Committee came under public scrutiny,[41] it eventually accepted submissions from Indian leaders across Canada. Based upon the standards of the day, and up to that

39 *An Act to amend the Indian Act*, SC 1938, c 31, s 2. Loan funds would be advanced from the Consolidated Revenue Fund of Canada. The livelihood of Indian hunters and trappers was also under attack due to a diminishing wildlife population and Indian Game Reserve and fur-conservation programs were created; legislation was enacted that regulated the buying of skins and other parts of wild animals only from Indians in designated regions in northern Canada. See Moore, *supra* note 5 at 127–9.

40 Debates 1938, vol 3, *supra* note 36 at 3352.

41 Notably, newspaper articles were published informing the public of the fact that the Committee did not want to engage Indian leaders in reviewing the *Act* and so members later agreed to accept submissions from Indian leaders.

See Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*, point in time, it was likely considered the most extensive "consultation" that had occurred between government representatives and Indians. It nonetheless appeared that, if given the chance to participate in a more complete consultative process, more Indian leaders would have participated.[42] Yet, other than accepting oral and written submissions, Indian views were not meaningfully considered to inform the direction that Indian policy should take.[43]

As Indian leaders made these numerous submissions to the Committee, there was a demonstration of a persistent and common theme. The leaders emphasized the veracity of both Indian sovereignty and self-government, which pre-dated any alleged notion of Crown sovereignty. Andrew Paull, President of the North American Indian Brotherhood, presented before the Committee and immediately made it clear that he stood before the Committee "not as a suppliant" but as somebody who was an equal in every sense.[44] He declared that Indians condemned the *Act* as a "piece of useless legislation" that they would like to see changed; he addressed the issue of self-government to say that lifting up the morale of Indians was most critical. He further remarked that passing useless legislation about a variety of issues, without enabling Bands to look after themselves and their people, was futile.[45] Paull also reminded the Committee that Indian nations were not Canadian subjects, rather were allies of the Crown.[46]

Brigadier OM Martin, Magistrate for the County of York and a Six Nations Band member, recommended greater autonomy in controlling education and public services; he suggested that the interest from Indian Trust Accounts could be used to facilitate operational budgets.[47] Reginald Hill, representing the Six Nations Council, also made an oral statement

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20-2, No 12 (11 July 1946) at 512 [Committee 1946, No 12]. See also "Defeat Move to Let Indians Give Opinion", *Toronto Star* (10 July 1946).

42 Paull, the President of the International Brotherhood of Indians, informed the Committee that he had invited Indian leaders to attend Committee meetings and the Committee, in turn, notified them to not come. See Committee 1946, No 9, *supra* note 12 at 419.

43 For example, Committee member Reid indicated that he thought it was "useless to have Indians sitting around here" in response to a suggestion that at least five Indian leaders from across Canada should constitute members of the Committee: Committee 1946, No 11, *supra* note 14 at 485. For a discussion more generally, see Johnson, *supra* note 18 at 21–2.

44 Committee 1946, No 9, *supra* note 12 at 419.

45 *Ibid* at 426–7.

46 *Ibid* at 421.

47 Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Examine and Consider the Indian Act, *Minutes of Proceedings and Evidence*, 20-2, No 20 (8 August 1946) at 762–3 [Committee 1946, No 20].

reminding government representatives that the Haudenosaunee's origins were rooted in sovereignty, as is conveyed by the Haldimand Deed to the Grand River Valley, and that the British historically recognized them as allies, rather than subjects.[48] Hill did concede that the Council was aware that absolute self-government might be impractical at this time[49] but that the Committee should be reminded that Six Nations held a unique position with the Crown through the Haldimand grant.[50] Chief Sam Lickers of Six Nations further asserted that the 1784 Treaty, made with their great forefathers, was an agreement between "two *equal sovereign nations*".[51] He told the Committee that the colonialists created Bands and that Band entities should only be comprised of non-sovereign nations, which did not apply to the Indians of the Six Nations.[52] A further assertion was made by the Akwesasne Mohawk from the St. Regis Reserve in which it was emphasized that:

> We members of the St. Regis Iroquois Band want to retain our tribal identity, with our reservations. We have no desire to cast these aside. We have no wish that white men enter our reservations, using the Indian Act as an excuse, to create works of any kind (over the heads of our Chiefs and people) to interfere with our tribal life … We are confined and dictated to by federal and bureaucratic departments with no representations by our chiefs or by our people. We have no share in the disposing of our destiny and rights![53]

This submission was supplemented by the Longhouse Chiefs of Akwesasne who stated that, as "Chiefs of the Mohawk Nation who swear allegiance to the Six Nations Confederacy, as the only *true government* for our people," we assert that:

> 1) We occupy our territory, not by your grace, but by a right beyond your control.
>
> 2) We hold original title.

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48 Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Continue and Complete the Examination and Consideration of the Indian Act, *Minutes of Proceedings and Evidence*, 20-3, No 25 (22 May 1947) at 1273 [Committee 1947, No 25].

49 *Ibid* at 1274.

50 *Ibid* at 1284.

51 Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Continue and Complete the Examination and Consideration of the Indian Act, *Minutes of Proceedings and Evidence*, 20-3, No 33 (12 June 1947) at 1708 [Committee 1947, No 33] [emphasis added].

52 Committee 1947, No 25, *supra* note 48 at 1285.

53 Committee 1947, No 33, *supra* note 51 at 1744.

> 3) We have never voluntarily submitted to the domination of the Canadian government, and have never been conquered by it in a just war.
>
> 4) According to International Law, no nation can legislate over another without first acquiring title to the land.[54]

As submission after submission was made, it became apparent that Indian leaders were most passionate about their firmly held position that the historical existence of Indian sovereignty prevailed over the *Indian Act*.

Indian leaders sought to impress upon the Committee the significance of Indian self-government and the existence of organized Indian societies that predated contact, independent of Crown control. Further, the leaders asserted that concluding alliances and treaties with the French and British Crowns demonstrated that Indian nations were *sovereign nations* with some form of self-government. In fact, on the issue of treaties Paull enquired of the Committee: "[w]hy does someone make a treaty with somebody? You have to be equal to somebody before you can make a treaty with somebody. We say to you now that those Indians at that time were your equal when they made the treaty."[55] Through entering treaty agreements, Indians regarded themselves as autonomous nations with their own systems of dealing with property; in fact, initially when Europeans first arrived, some nations made efforts to acquaint them with the Indian traditional systems of land use.[56] Indians have long argued that, to enter into treaties, they must have held independent land interests.[57] There was no indication that Indian nations viewed themselves as less than equal in entering into treaty agreements. Paull's statement was not surprising given that Indians have historically claimed that treaties set the terms between Indigenous peoples and Britain in the form of "*nation-to-nation* agreements".[58]

Notwithstanding Indian submissions, the Committee viewed evidence submitted by a non-Indian anthropologist, Dr. Diamond Jenness, Chief of

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54 Committee 1948, No 5, *supra* note 15 at 209, Appendix ID [emphasis added].

55 Committee 1946, No 9, *supra* note 12 at 422.

56 John J Borrows & Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary,* 5th ed (Toronto: LexisNexis Canada Inc, 2018) at 1, 193. Powers of governance were closely connected to land and family with an emphasis on the spiritual, familial, economic and political spheres.

57 Brenda L Gunn, "Exploring the International Character of Treaties 1–11 and the Legal Consequences" (January 2018) Canada in International Law at 150 and Beyond Paper No 5, online (pdf): *Centre for International Governance Innovation* <www.cigionline.org/publications/exploring-international-character-treaties-1-11-and-legal-consequences> at 1.

58 *Ibid* [emphasis added].

the Inter-Services Topographical Section, Department of National Defence as highly regarded. In a submission before the Committee in 1947, Jenness introduced a *Plan for Liquidating Canada's Indian Problem Within 25 Years* to solve this "Indian problem".[59] The objective of Jenness's plan was to "abolish, gradually but rapidly, the separate political and social status of Indians (and Eskimos)" while also working to "enfranchise them and merge them into the rest of the population on an equal footing."[60] The plan included the eradication of Indian reserves, which Jenness labelled as "leprous spots", and the assimilation of Indians through an integrated education system.[61] Jenness received overwhelming support for his proposed plan, which emphasized education as a key tool to assimilate Indians.[62] Committee member, Mr. Reid, surmised that he was confident that the Committee representatives unanimously supported Jenness's proposed plan; he stated: "I think I voice the views of all the committee when I say that this is one of the finest talks we have heard, and at the same time we have had presented to this committee a real plan, and with most of what has been said by Dr. Jenness I am personally in *entire accord*."[63] Despite the Committee's acknowledgement of the inability of government to fully accomplish the assimilation objective,[64] Jenness's proposed plan was well-regarded.

Apparently, the Committee did not fully grasp that Indian self-government and Indian assimilation were not compatible policy objectives that, if met, have different outcomes. Assimilation demands that Indians conform to the mainstream economy and denies Indians control over their affairs. Self-government assumes Indians the responsibility of maintaining their own political and economic systems without external control. Yet the Committee, demonstrating a diminished understanding of Indian autonomy, followed the same 100-year-old government pattern of thinking in acclaiming an extreme assimilationist plan. Notwithstanding that Indian self-government could be better understood through careful deliberation with Indian leaders, the differences in Indian and government philosophies seemed to be insidiously present throughout the consultation process. Johnson acknowledged this in his 1984 government report on the *Act* amendment process. He noted that a "significant philosophical dichotomy" existed between Indian leaders and

59 Canada, Special Joint Committee of the Senate and the House of Commons Appointed to Continue and Complete the Examination and Consideration of the Indian Act, *Minutes of Proceedings and Evidence*, 20-3, No 7 (25 March 1947) at 310–11 [Committee 1947, No 7].

60 *Ibid* at 310.

61 *Ibid.*

62 *Ibid* at 311.

63 *Ibid* [emphasis added].

64 Bartlett, "Indian Act of Canada", *supra* note 5 at 586.

government representatives in that in "examin[ing] the same facts and focused on the same Institutions, they did so with fundamentally different visions of the future for Indian people."[65] The presence of this kind of philosophical dichotomy meant that the prevailing and predominant government objective was to attain Indian assimilation; Indian leaders, on the contrary, had the objective of Indian self-government in mind.[66]

Seemingly, from the Committee's view, self-government was somewhat akin to municipal government that would still permit the assimilation of Indians into the broader political system.[67] It is most certain that from the Indian leaders' perspective, limited governance provisions and self-administration cannot be equated with Indian self-government of the kind that existed at contact. Indeed, the Court's interpretation that Parliament was motivated by the desire to promote Indian self-government and entrepreneurship should be viewed with scepticism. From all accounts, it appears that while the 1951 *Act* appeared to remove some of the government controls and cultural prohibitions on reserves, the policy of encouraging Indian dependence continued and comprehensive powers that approximated that of Indian self-determination or self-government were not conferred.[68]

Furthermore, the historical events at the time of the section 90(1) amendment, as it relates to confining exemptions to only treaty Indians, should be considered. In *McDiarmid*, McLachlin found that "Parliament's documented desire to move away from a purely paternalistic approach and encourage Indian entrepreneurship and self-government is consistent with an intention to confine protection from seizure to benefits flowing from treaties."[69] If the Chief Justice's analysis is correct, that protection should be limited to only treaty Indians, it would necessarily be presumed

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65 Johnson, *supra* note 18 at 43.

66 *Ibid.*

67 Committee 1948, No 5, *supra* note 15 at 187. In the end, the Committee recommended: 1) that greater responsibility and more progressive measures of self-government of Reserve and Band affairs be granted to Band Councils to assume and carry out such responsibilities; 2) that financial assistance be granted to Band Councils to enable them to undertake, under proper supervision, projects for the physical and economic betterment of the Band members; and 3) that such Reserves as become sufficiently advanced be then recommended for incorporation within the terms of the Municipal Acts of the province in which they are situate. See also *House of Commons Debates*, 21-4, vol 2 (16 March 1951) at 1352 (Mr. Harris Grey-Bruce) [Debates 1951, vol 2] where MP for Grey-Bruce, Mr. Harris, indicated that "we can impose safeguards to see that a band council does not exercise authority greater than a municipal council unless it is in the interests of the band".

68 Bartlett, "Act of Canada: An Unyielding Barrier", *supra* note 5 at 14; Bartlett, "Indian Act of Canada", *supra* note 5 at 587.

69 *McDiarmid*, *supra* note 10 at para 66.

that Parliament was only concerned with the possible exploitation of treaty Indians. Given that section 90(1) is read together with sections 87 and 89, it is curious that section 90(1) should only apply to treaty-related assets. Indigenous societies in Canada at the time of the section 90(1) amendment were comprised of diverse nations with a range of personal circumstances.

While it is no doubt that Indians were granted a special political status through treaties to facilitate assimilation, Indians were also given special status through enacted legislation.[70] Section 18(1) of the *Act* indicates that reserves are held for the "*use and benefit*" of Bands whether by "treaty or surrender".[71] Numerous "formal and informal instruments" had been used to set apart reserve lands recognized under the *Act*.[72] As such, reserves were also created through other means besides the entering into of treaty. In fact, section 3(6) in the *Indian Act*, 1876 defined a reserve to include land "set apart by treaty *or otherwise*" such that there were several ways by which a reserve could be created.[73] Between the 1790's and 1840's in Lower Canada and the Maritimes small reserves were established in response to the many Indian disruptions by European settlers.[74] Therefore, many reserves were created long before the federal government assumed jurisdiction over Indians, pursuant to section 91(24) of the *Constitution Act, 1867*.[75] Some of the non-treaty reserves currently administered under the *Act* had already been established in Nova Scotia, New Brunswick, Quebec's pre-union borders and the southern portion of Upper Canada or Ontario by the date of confederation; notably, the reserves created at that time (as a result of formal treaty negotiations) consisted of only

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70 Bartlett, "The Act of Canada", *supra* note 5 at 583. See e.g. *Indian Protection Act*, *supra* note 4; *Act providing for the organization*, *supra* note 4; *Act for the gradual enfranchisement*, *supra* note 4.

71 *Act*, *supra* note 2, s 18(1) [emphasis added]. The *Act* is not instructive on the creation of reserves, rather, it provides mechanisms for the management and protection of existing reserves.

72 *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para 10, [2002] 2 SCR 816 [*Ross River*]; *Canadian Pacific Ltd. v Paul*, [1988] 2 SCR 654, 91 NBR (2d) 43; Richard Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland—A Study in Law and History* (Saskatoon: Native Law Centre, University of Saskatchewan, 1990) [Bartlett, *Indian Reserves and Aboriginal Lands*]; Jack Woodward, *Native Law* (Toronto: Carswell, 2001). For example, a reserve may be created via an Order-in-Council under the royal prerogative.

73 *Act*, 1876, *supra* note 8, s 3(6) [emphasis added].

74 See Robert K Groves, "The Curious Instance of the Irregular Band: A Case Study of Canada's Missing Recognition Policy" (2007) 70:1 Sask L Rev 153 at 161.

75 Bartlett, *Indian Reserves and Aboriginal Lands*, *supra* note 72 at 24–5; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

a few reserves in Upper Canada.[76] The process of reserve creation in Canada, whether via treaty or non-treaty measures, has gone through "many stages and reflects the outcome of a number of administrative and political experiments" and over time "procedures and legal techniques" have changed.[77]

Notably, Justice Binnie's assertions that Parliament could not have intended to only be concerned about treaty Indians is supported by communications, depicted in the historical record, between members in the House of Commons at the time of the amendment period. Given the varied circumstances under which reserves were created in Canada, the issue of whether Parliament had intended to extend equal exemptions to all Indians on reserves arose during the *Act* amendment period. This issue was addressed in the House of Commons during the period that Bill 76 (the specific Bill on the 1951 *Act* amendments) was being contemplated by Parliament. Member of Parliament, Mr. Blackmore, questioned whether the Crown should have further obligations to certain groups of Indians who did not have treaty rights, for instance.[78] Blackmore indicated that some people believed that because the numbered treaties were not signed with Indians in the east, they were not entitled to as fair a consideration as Indians in the west.[79] Notably, Blackmore went on to emphasize that the concern was for all Indians and he clarified on the record that "our fathers had become a great deal more civilized by the time they dealt with the Indians of the west than their fathers were several generations before when they dealt with the Indians in the Maritimes."[80]

Discussions by government at the time of the amendments demonstrated then that the focus was necessarily on *all* Indians and not just treaty Indians. Member of Parliament for Grey-Bruce, Mr. Harris, also pointed out to the House that only half of the Indians in Canada (69,000) were treaty Indians, while just under half were non-treaty Indians.[81] He noted that twelve Treaties were negotiated by commissioners to

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76 Groves, *supra* note 74 at 161.

77 *Ross River*, *supra* note 72 at para 43. The legal and political methods gave form and existence to a reserve and evolved over time. Reserves were created by various methods in the Maritimes, Quebec, Ontario or later in the Prairies and in British Columbia. In *Ross River* the Court found that the historical circumstances of the "agreement" that resulted in reserve lands being set aside determine whether a reserve was actually created.

78 *House of Commons Debates*, 21-4, vol 4 (15 May 1951) at 3048 (Mr. Blackmore) [Debates 1951, vol 4]. At that time, apart from the peace and friendship treaties, Indians in eastern Canada had not entered into treaty in the same manner that Indians in the western provinces had become treaty Indians.

79 *Ibid*.

80 *Ibid*.

81 *Ibid* at 1351.

obtain the surrender of the Indian interest in lands and so the lives and property of Indians from roughly Lake Simcoe in Ontario to the Rocky Mountains would be affected.[82] This meant that Indians in all other parts of Canada were non-treaty Indians. It is inconceivable that Parliament would not have contemplated the effect of the *Act* on just under half of the Indian population at that time. It is conceivable, however, that given the contemporary significance of Indian treaties in Canadian society, McLachlin may have erroneously imparted that significance to Parliament's intentions at the time of the 1951 amendments.

Justice Binnie presumed, and rightly so, that if the record is any indication, Parliament would have been aware of the dire conditions on most reserves.[83] Arguably, Parliament would have intended section 90(1)(b) to "operate equitably to all Indian bands, and should not be given an interpretation that favours treaty bands over non-treaty bands."[84] It was more likely that, if Parliament had intended such inequitable treatment between treaty and non-treaty Indians, it could have demonstrated this in clear language.[85] We see this in earlier provisions of the *Act,* 1876 where Parliament explicitly stated that exemptions applied to both "Indians and non-treaty Indians."[86] It stands to reason then that Parliament could have just as easily indicated that section 90(1) works to apply to "treaty Indians and *not* non-treaty Indians" if it had intended to distinguish the two.

Putting the issue of the alleged promotion of self-government and treaty obligations aside, it is clear that because the Committee—with its Euro-centric bias and proclivity for assimilation—did not involve Indian leaders in the decision-making process, its representatives likely did not fully grasp the rationale of the Indian's political positions at the time (or at least chose to ignore it). It was nonetheless apparent from the Indian leader's submissions that they viewed having comprehensive control over Indian affairs as being consistent with the pre-existence of sovereign Indigenous nations. Regardless, without meaningful engagement with Indigenous leaders, it should not be surprising that, in the end, the Committee was ambiguous in its recommendations, which were captured in the Committee's final report.[87] On the one hand, the Committee recommended that sections of the *Act* be repealed or amended to enable

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82 *Ibid.*

83 *McDiarmid*, *supra* note 10 at para 82.

84 *Ibid* at para 78.

85 *Ibid.*

86 See e.g. *Act*, 1876, *supra* note 8 and *Act*, 1927, *supra* note 8, ss 64, 66, 102, 105 respectively.

87 Committee 1948, No 5, *supra* note 15 at 186–90.

Indian self-government and advance Indian economies.[88] On the other hand, the Committee overwhelmingly supported Jenness's assimilation plan, meant to assist in liquidating Canada's "Indian problem", and recommended that provisions be included in the *Act* to regulate the affairs of Indians not "sufficiently advanced to manage their own affairs."[89] All in all, the recommendations made by the Committee demonstrated a misguided view of Indian self-government in that the limited governance powers presented in the *Act* only provided Indians with restricted control over Indigenous affairs. This control merely amounted to Indian self-administration in that reserves and treaties were administered by Indian Affairs with limited control exercised by Bands.[90]

This inconsistency in approach is strangely reminiscent of the *Indian Advancement Act* of 1884.[91] This statute sought to confer wider powers upon the Band Council, including the raising of money, while at the same time an Indian Agent was appointed chairman of the Council to oversee Indian affairs.[92] Notably, over 60 years later, we see the same tension in competing Indian policy considerations. This tension was conveyed by Minister Walter Edward Harris in 1951 when he asserted that the problem was to maintain a balance between providing for Indian self-determination and self-government in the one instance, while maintaining legislative authority through administration of the *Act* in the other instance.[93] It becomes even more problematic, and serious implications result for Indigenous peoples, when this incongruency in Indian policy is crystallized and reflected in key legal decisions, especially those from the highest court in the land. These resulting implications will be briefly discussed in the next section.

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88 *Ibid*. Bartlett writes about this as well. See Bartlett, "Indian Act of Canada", *supra* note 5 at 586.

89 Committee 1948, No 5, *supra* note 15 at 187.

90 Bartlett, "Indian Act of Canada", *supra* note 5 at 581. For example, Indians can create by-laws pursuant to sections 81–86 of the *Act*, but the by-laws must be consistent with the *Act*. Further, the election powers under provisions 74–80 of the *Act* provide for the election of Band leadership under an electoral system. While some Bands still adhered to an election of leadership based upon the custom of the Band, the majority of Bands in Canada adhered to the *Act* system of elections. See Canada, Special Joint Committee of the Senate and House of Commons on Indian Affairs, *A Commentary of the Act* (Ottawa: Department of Citizenship and Immigration, 1960) at 29.

91 *Indian Advancement Act, 1884,* SC 1884, c 28.

92 Bartlett, "Indian Act of Canada", *supra* note 5 at 585.

93 Debates 1951, vol 2, *supra* note 67 at 1352.

3. The Implications of *McDiarmid*-type Decisions: The Status Quo Remains

The record is not entirely clear on Parliament's motivations for the specific manner in which section 90(1) was included in the *Act* after receiving the Committee's recommendations. The Court's interpretation in *McDiarmid* was that Parliament created section 90(1) to deal with the tension in Indian policy objectives. Allegedly, Parliament sought to strike a balance between encouraging Indians in self-government and managing their own internal affairs, while allowing the Crown to retain legislative authority over Indian property.[94] Pursuant to this kind of interpretation, the Court did not actually resolve the long held incongruencies in Indian policy that constrain Indigenous self-sufficiency. In fact, Binnie, writing for the dissent in *McDiarmid*, acknowledged that this incongruency is likely exacerbated by following a narrow interpretation of the word "agreement", purportedly to promote Indian self-government, because it eliminates exemptions for non-treaty Indians. The result would be a kind of "checkerboard of exemptions and non-exemptions" across Canada.[95] Binnie found that this would *not be consistent* with promoting Indian self-government for those Bands attempting to provide public services to their members through Comprehensive Funding Arrangements. That is, if a Band is concerned with the possibility of taxation, seizure or garnishment of funds that are supposed to be allocated for essential services on reserve, the Band is better off allowing the government to provide essential services directly to the reserve so that those funds cannot be intercepted off-reserve by creditors.[96] In the end, section 90(1) does not really serve the alleged purpose that the Court has set out in *McDiarmid* for Bands like God's Lake First Nation who are situated in remote areas and have not yet attained self-sufficiency.

Furthermore, if this interpretation were correct, the section 90(1) amendment proved that the inconsistency in Indian policy in Canada established at least by 1869—where the Superintendent General had full control over Indian affairs and yet sought to encourage Indian self-government[97]—continued to 1951. In its interpretation of section 90(1), which does not demonstrably deviate from the earlier justifications of the *Act,* the Court has merely promoted Crown "internal colonization".[98] That is, despite the claim of the promotion of Indian self-government, the effect of this legislation is that it enables the Crown to attempt to "complete the job which was begun over a century and a half ago"—to assimilate

94 *Ibid* at 1353.

95 *McDiarmid*, *supra* note 10 at para 124.

96 *Ibid* at para 94.

97 Bartlett, "Indian Act of Canada", *supra* note 5 at 584.

98 Eberts, *supra* note 31 at 124.

Indians.[99] While certain paternalistic controls adopted in the first half of the twentieth century seemed to be loosened through the section 90(1) amendment, aggressive Indian assimilation was still encouraged.[100] It is necessarily presumed then that section 90(1) was merely a stopgap mechanism. The Court's claim that section 90(1) advanced Indian policy for the "benefit" of Indians, without the Committee having conducted any meaningful consultation to address Indian concerns, is duplicitous at best.

The *McDiarmid* decision continues to be a critical Canadian legal decision in determining key legal issues in relation to *Indian Act* exemptions. The Court's reasoning has been applied in subsequent legal decisions as a leading precedent on sections 89 and 90.[101] As was the case for God's Lake First Nation, these decisions demonstrate that the current interpretation of these exemptions by the Court do not "prevent creditor enforcement from disrupting a Band's provision of important public-sector services,"[102] thus having a detrimental impact on the self-determination of Indigenous Nations on reserve. Consequently, laws that continue to be created and interpreted with little regard for the inherent nature of Indian sovereignty, or whether the impacted groups have been restored to a level of self-sufficiency,[103] likely make a *McDiarmid*-type outcome an unjust one. The irony is that the circumstances like those at God's Lake were the very circumstances that Indian leaders sought to address during the *Act* consultation process. They cried for greater control over all matters on reserve so that Nations could be restored to self-sufficiency. Nevertheless, seemingly a mere tweak of the *Act* was interpreted by the Court as the means to accomplish this. The depth of the philosophical dichotomy that separates Indians, governments and apparently the Court cannot be underestimated. The impact is great for Indigenous peoples because, as has been so eloquently enunciated, "judicial power that cascades from the dominant group's ideological headwaters" advances a kind of bias that "spills onto the pages of legal decisions from a contextualized, politically hued stream."[104] The end result is that the status quo remains. The

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99 *Ibid* at 125.

100 Bartlett, "Indian Act of Canada", *supra* note 5 at 587; Johnson, *supra* note 18 at 25.

101 *Pavage Levesque Paving Ltd. v Eel River Bar First Nation*, 2007 NBCA 31, 314 NBR (2d) 90; *Joyes v Louis Bull Tribe No 439*, 2009 ABCA 49, 2 Alta LR (5th) 84; *Borden & Elliot v Temagami First Nation*, [2009] 3 CNLR 30, 2009 CarswellOnt 211 (WL Can) (Ont Sup Ct J). See also Anna Lund, "Judgment Enforcement Law in Indigenous Communities —Reflections on the Indian Act and Crown Immunity from Execution" (2018) 83 SCLR (2d) 279.

102 *Lund*, *supra* note 101 at 291.

103 Lest we forget that the plight of Indigenous peoples was created in the first place due to the absolute dispossession and unjust seizure, in many cases, of Indigenous lands.

104 Borrows, "Self-Government and the Royal Proclamation", *supra* note 1 at 2.

status quo has remained and will remain for Indigenous peoples if legal decisions continue to be rendered from the "dominant group's ideological headwaters."[105]

Conclusion

> It is clear from this legislation that Canada wanted Indians to adopt Euro-Canadian social norms and wished to suppress Indian values and Native culture through education in 'white' religion, political systems, economic principles, concepts of property and social mores. The goal was to annihilate Indians as a separate and distinct ethnic group, after which the social laboratories designed to achieve this end would disappear as well.[106]

In the above-noted quote in which Ivan Johnson was referring to the *Act*, 1876, he may as well have been referring to the *Act, 1951*. Just as Indian leaders rejected the *Act* in 1876,[107] they also rejected the *Act* in 1951. In this paper, I examined the historical circumstances of the *Act* consultation period to analyze the context in which section 90(1) was included in the 1951 *Act*. I found that government representatives, tasked with making recommendations to Parliament regarding amendments to the *Act*, failed to consider Indian views on Indian self-government and entrepreneurship. Therefore, any acknowledgement of Indian self-government and entrepreneurship by government representatives must be regarded as insincere when viewed in conjunction with the reluctance to meaningfully engage with and include Indian leaders in the *Act* amendment process. Further, in spite of previous acknowledgment by policy makers that Indian assimilation had not succeeded, the Committee fully supported Diamond Jenness's *Plan for Liquidating Canada's Indian Problem Within 25 Years*. The government's continued support of assimilationist policies demonstrated that it did not fully grasp the incongruency between the policy goal of Indian assimilation through provisions in the *Act* and that of Indian self-government. This incongruency became apparent in the Committee's final recommendations to Parliament that Indians be given the responsibility of self-government but also be properly supervised on projects for the economic betterment of the Band. If the Court in *McDiarmid* is correct, Parliament appeared to run with this incongruency.

In parsing out and deconstructing the history that led to this amendment, I found that the Crown has historically engaged an indomitable commitment to assimilate Indians into Western culture. The *Act* is merely an extension of those assimilation policies. By its very

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105 *Ibid*.

106 Johnson, *supra* note 18 at 7.

107 *Ibid* at 8.

nature, legislation that regulates Indian affairs also promotes Indian assimilation into the greater colonial society. Is it possible to promote Indian self-government while maintaining legislative authority over Indians? In *McDiarmid*, the Court asserts that section 90(1) was born of the tension between the two.[108] Notwithstanding, Parliament's notion of Indian self-government, allegedly promoted through limited provisions in an otherwise restrictive *Act*, and the Indian's notion of the inherency of Indian self-government are in opposition to each another. Arguably, Parliament's enactment of section 90(1) was a regulatory stopgap, that is, a contrived way to assert that it supported Indian self-government while continuing adherence to the assimilationist mechanism of the *Act*.

The Court's finding in *McDiarmid* that Parliament intended to promote Indian self-government by reforming the *Act* clearly demonstrates a lack of understanding that legislating Indians is wholly inconsistent with the inherent nature of Indian self-government in which Indian peoples have claimed for hundreds of years. These kinds of legal decisions ensure that Indigenous peoples will almost certainly continue to be disadvantaged. Contradictory laws impacting Indigenous legal interests continue to be created and construed from the dominant power structure of Western laws which, in the end, results in inconsequential change for Indigenous peoples. The double-mindedness found in the Court's interpretation of the 1951 amendment in *McDiarmid* exclusively privileges the settler interpretation of self-government. Further, the attempt to contextualize the amendment through Parliament's desires at the time means that Indigenous leaders' understandings of self-government as sovereignty were overlooked. As such, inscribing colonialist legal interpretations continues to promote the status quo for Indigenous peoples. Despite the *McDiarmid* decision and the alleged promotion of Indian self-government, self-government is a non-reality for most Indigenous nations in Canada today.

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108 *McDiarmid*, *supra* note 10 at para 55.

CONSIDERING INDIGENOUS TRUST INVESTMENTS THROUGH THE LENS OF TWO-EYED SEEING

Frankie Young*

ABSTRACT

Some Nations establish trusts to invest and manage assets as a means for Indigenous communities to become self-sustaining. Operating from the principle that decisions are to be made with the next seven generations in mind increases the likelihood that Nations will become self-sustaining. In considering how to invest trust assets, Nations value investment principles that promote sustainability, stewardship and accountability. By applying the concept of Etuaptmumk — the Mi'kmaq principle of viewing a concept through two-eyed seeing — this article examines both the Canadian law and fiduciary principles that apply to trust investments (viewed through one eye), and Indigenous law and investment principles that promote the sui generis needs of Indigenous Nations (viewed through the other eye). Arguably, in adapting to new circumstances, trust law is evolving regarding the scope of a trustee's investment duties. The flexibility for trustees to consider Indigenous investment values may be possible because the trust instrument can be designed to embody Indigenous values. However, there are still concerns related to how the scope of trustee investment duties have been dealt with in common law decisions. Further, while the law may be evolving to expand the scope of trustee investment duties, there is still the lack of eco-friendly or socially responsible companies for Nations to invest in.

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> *We have to refocus on our experiences as Indigenous peoples and what this means to us, in order to transform legal consciousness. Discovering and understanding the dynamics of legal transformation will, in turn, create fresh awareness. This new awareness must inform an interdisciplinary synergy in law and related disciplines. This synergy is vital to healing and restoring our intercultural or transcultural integrity and our human dignity. This synergy is necessary to put Eurocentric thought in its proper place.*[1]

I. INTRODUCTION

While reconciliation with Indigenous peoples has been the subject of much discussion in Canada, the concept of economic reconciliation — the notion that equal economic opportunity should be promoted for all Canadians, including Indigenous Nations[2] — has drawn less attention. Yet, to overcome the historical injustice Indigenous peoples have experienced, related to the theft of lands, territory and sovereignty and the subsequent impact on Indigenous economies, thought should be given to how to develop sustainable Indigenous economies that provide a means to increase Indigenous assets over the long term. Increasing Indigenous assets provides a pathway for Indigenous Nations to become self-sustaining and thus self-determined.

One way to increase Indigenous assets is through the use of Indigenous trusts ("trusts"). Trusts are economic vehicles that some Nations establish to manage assets and advance economic development, thus increasing the likelihood of Nations becoming self-sustaining. This article mainly deals with trusts that involve funds rather than land or other kinds of property. The trust principles that apply to investing these funds are examined through the lens of two-eyed seeing, known as *Etuaptmumk*, the Mi'kmaq principle of viewing a particular concept through two eyes. Two-eyed seeing respects the strengths of both Indigenous ways of knowing and Euro-centric perspectives, and combines both to establish a more equitable baseline for viewing the world. In applying two-eyed seeing to trust investment principles, both Canadian trust law as it applies to investments and Indigenous ways of investing are examined.

1. James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002), 1 Indigenous L.J. 1, at pp. 12-13.
2. Frankie Young, "Indigenous Economic Development and Sustainability: Maintaining the Integrity of Indigenous Culture in Corporate Governance" (2020), 16:1 M.J.S.D.L. [forthcoming].

This examination through two-eyed seeing necessarily involves a discussion around how trust law is evolving, as well as how Indigenous law, customs and tradition[3] are recognized in Canada. Trust law requires trustees to act in a fiduciary capacity in carrying out their investment duties. Historically, the law required that trustees be concerned with and attentive to market-based results. However, to adapt to new circumstances, the law is evolving to expand trustee investment duties so that other considerations, such as ethical or social factors, may be taken into account.

The recognition of Indigenous law is also evolving in Canada. Just as laws in various countries or provincial jurisdictions are diverse to suit the unique needs of the citizens subject to the jurisdiction, so too are Indigenous laws. Throughout Canada, Indigenous law varies from the Mi'kmaq Nations, located in Atlantic Canada, to the Wet'suwet'en Nations in the far western region of British Columbia, to the Nunavut Nations in the far north, and all Nations in between. Rather than discussing any particular Nation's laws, this article more generally recognizes the historical significance of Indigenous law to Canada's legal traditions, and in particular, how Indigenous tradition is relevant to a trustee's decision-making process in trust arrangements.

While historically Canadian trust law that applies to investments and Indigenous ways of investing would have been more at odds with each other, the evolution in trustees' duties has the potential to bridge the divide.

As such, Indigenous ways of investing — in which the trustee is more generally understood as acting in a fiduciary capacity when following the principles of sustainability, accountability and stewardship — may be more likely to be supported. The flexibility to consider Indigenous investment principles is possible when the trust instrument is designed to embody Indigenous values. As such, Indigenous investors should be strategic about developing investment policies that promote specific community values and traditions that are fundamental to the well-being of the Nation.

To this end, the development of current socially responsible

3. Indigenous law, the traditional customs that have historically guided Nations — but that nonetheless may evolve over time — as a basis for social, political and economic decisions, is distinguished from "Aboriginal law", a Western system of laws that have been established to deal with Indigenous peoples rights from the Canadian state's perspective.

investment ("SRI") policies — developed through the Reconciliation and Responsible Investment Initiative ("RRII"),[4] a joint project between the National Aboriginal Trust Officers Association ("NATOA")[5] and the Shareholder Association for Research and Education ("SHARE")[6] — is a positive means to respect the principle of two-eyed seeing by valuing both Indigenous ways of investing and the trustees' fiduciary obligations situated in trust law. Further, SRI is a means to increase Indigenous assets, without compromising community values because community values, community development objectives, and the larger ambitions of advancing economic reconciliation are emphasized.[7] These policies will improve working relationships between Indigenous Nations and investment companies. The key impetus for this initiative is to support Indigenous Nations in their effort to "invest in ways that reflect traditional and cultural values while meeting their communities' immediate and long-term needs."[8] However, the availability of eco-friendly or socially responsible companies in which Nations can invest is still a primary issue.

To set the backdrop for the trust law-related issues discussed in the rest of this paper, section II discusses the concept of *Etuaptmumk* (two-eyed seeing). By engaging this concept, this section considers the trust law principles that apply to investments, and then discusses more generally Indigenous law as a tradition in Canada, before finally examining the Indigenous investment principals in which Nations seek to abide. Section three discusses a way forward by emphasizing that engaging in the practice of SRI, which can improve sustainability outcomes for Indigenous communities, is a way to respect the principle of two-eyed seeing. Arguably, in formulating investment policies unique Indigenous objectives should be considered by trustees and investment companies. Further, forming partnerships between investment companies

4. See the "Reconciliation and Responsible Investment Initiative", online: <https://www.reconciliationandinvestment.ca>.
5. See National Aboriginal Trust Officers Association ("NATOA"), online: <www.natoa.ca>.
6. See Shareholder Association for Research and Education ("SHARE"), online: <www.share.ca>.
7. Jason Campbell and Mark Sevestre, "Responsible Investment and Indigenous Trusts" (Hagersville, Ontario: National Aboriginal Trust Officers Association, March 2018), at p. 3.
8. Campbell and Sevestre, *ibid.*, at p. 5.

and Indigenous Nations promotes respect and reciprocity in engaging with Indigenous approaches to sustainable investing.

In conclusion, the article reiterates how current investment policies are problematic if trustees that administer trusts experience a burden to solely focus on market-based approaches to investing. Unnecessary pressure should not be placed on trustees administering trusts as they seek to respect Indigenous investment values, including sustainability, stewardship and accountability. Investment managers that partner with Nations in developing SRI practices demonstrate a keen respect for Indigenous culture and traditions. However, while the law may be evolving to expand the scope of trustee investment duties, a Nation's investment outcomes will only be improved when there are more companies and funds in which to invest that support Indigenous communities' long-term sustainability goals.

II. ETUAPTMUMK: TWO-EYED SEEING IN INDIGENOUS TRUST INVESTMENTS

Trusts have been used by Indigenous communities for many years, and trust assets may result from both settlement claims or other own-sourced Nation revenues. Because trusts act as a valuable conduit for control and ownership of Indigenous property,[9] settlement funds and other kinds of community assets are protected. Since trusts are a valuable tool for asset management, they are making a difference for many Nations in Canada.[10] Meghan Shannon, Senior Manager of Indigenous Markets for CIBC, and Vickie Whitehead, Director of Indigenous Services for Crowe MacKay LLP indicate that trusts provide numerous benefits for Nations including:[11]

9. Eileen E. Gillese and Martha Milczynski, *The Law of Trusts*, 2nd ed (Toronto: Irwin Law, 2005), at p. 5. See also, *e.g.*, Albert H. Oosterhoff, Robert Chambers and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014), at p. 8; Dennis Pavlich, *Trusts in Common-Law Canada*, 2nd ed. (Toronto: LexisNexis, 2016), at p. 5.
10. James I. Reynolds, "Trusts for First Nations" (2014), 34 E.T.P.J. 95, at p. 104; Frankie Young, "Indigenous Settlement Trusts: Recharacterizing the Nature of Taxation" (2019), 24 Appeal 3.
11. Meghan Shannon and Vickie Whitehead, cited in Shannon Rohan, Mark Sevestre, and Katie Wheatley, "Investing for Today, Tomorrow and Future Generations: A Guide for Indigenous Investors" (Reconciliation and Responsible Investment Initiative, 2019), at p. 11.

> [T]he Trust assets are segregated and protected from all other Nation funds, including debts or liabilities; the founding agreement provides transparency and accountability (which means full disclosure and reporting to beneficiaries) for how the Trust property is to be used; when governance changes occur Trusts are not impacted by the Nation's election cycle; robust community engagement processes are incorporated into the Trust agreement so that communities can inform trustees on whether funds are meeting the beneficiaries' needs; taxation benefits are generated from the earnings and income; Trusts provide communities with the ability to assert sovereignty by using their financial resources in a manner that reflects their traditions and cultural values; and Trusts provide a means for the intergenerational transfer of wealth for future generations.

The issue that arises in dealing with trust assets is whether Indigenous ways of investing align with the investment principles recognized in trust law. Given the many factors that trustees are required to consider, it should not be surprising that carrying out investment duties is one of the most difficult tasks a trustee will perform in that, based upon market conditions, the trustee is required to invest as wisely as possible, while at the same time investment plans must be adjusted to meet the needs of the trust objects.[12] This is certainly the case in instances where a trust instrument might allow for non-market based criterion, which makes the parameters of prudent investment less clear-cut. What happens if there is a significant loss to the beneficiaries? What if some trustees or beneficiaries view such losses as acceptable (to promote ethical considerations) and others do not? For trustees and investment managers who predominantly focus on financial returns and have a track record of garnering proven market-based results, are there risks in involving other considerations? Ideal results are those where neither ethical nor financial outcomes are compromised. For Nations seeking to balance trust objectives, these are important matters to consider.

Two-eyed seeing is particularly relevant here. *Etuaptmumk* (two-eyed seeing) refers to the Mi'kmaq principle of viewing aspects of one's world through two eyes. Through one eye a concept is viewed through a westernized lens and through the other eye the same concept is viewed through an Indigenous lens. Thus, two-eyed seeing is: "[T]o see from one eye with the strengths of Indigenous ways of knowing, and to see from the other eye with the strengths of western ways of knowing, and to

12. Donovan Waters, ed., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Reuters, 2012), at p. 996.

use both of these eyes together."[13] The underlying premise is that, rather than devalue western approaches, engaging an Indigenous knowledge system is concerned with illuminating how Indigenous peoples see and experience the world around them.[14] 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).

Privileging Indigenous perspectives and Indigenous ways of knowing provides a pathway for the increased and ongoing engagement of Indigenous peoples in the Canadian market economy. Arguably, Nations should not have to compromise community values in their decision-making processes in advancing their economies. For Nations that establish trusts, because the trustees have a fiduciary duty to the beneficiaries, the community members, to act with their best interests in mind, the ways in which Canadian law delineates the parameters of a trustees' fiduciary duty is critical to the decisions made around trust investments.

To be clear, the concept of a fiduciary duty is not new to Indigenous Nations in Canada, nor confined to investing assets in a trust. As Aboriginal law (see footnote 3) developed over several decades in Canada, dating back to 1984, the concept of a fiduciary duty emerged in Supreme Court of Canada decisions; here we saw trust-like principles begin to emerge.[15] Further, numerous legal decisions have also dealt with the fact that the Chief and Council of a Nation owe a fiduciary duty to the

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13. Cheryl Bartlett, Murdena Marshall, and 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 J. Environ. Stud. Sci. 331, at p. 335.
14. D.H. Martin, "Two-Eyed Seeing: A Framework for Understanding Indigenous and Non-Indigenous Approaches to Indigenous Health Research" (2012), 44 Can. J. Nurs. Res. 20; D. Lewis, S. Francis, K. Francis-Strickland, H. Castleden, and R. Apostle, "If only they had accessed the data: Governmental failure to monitor pulp mill impacts on human health in Pictou Landing First Nation", *Social Science & Medicine* (July 15, 2020), online: <https://doi.org/10.1016/j.socscimed.2020.113184>.
15. Reynolds, *supra*, footnote 10, at p. 95. For instance, see *Guerin v. The Queen*, (*sub nom. Guerin v. Canada*) [1984] 2 S.C.R. 335 (S.C.C.).

members of the Nation in relation to all aspects of the relationship including dealing with Band assets and the membership.[16] However, the ways in which Indigenous peoples view themselves as fiduciaries, particularly as it relates to the management of trust assets, should be considered because the validity of Indigenous laws and traditions is a reality within the greater Canadian society. Indigenous legal traditions have also been more critically considered by courts and policy makers in recent years.

In dealing with trust assets, the safeguarding of a Nation's legal traditions and values means that Nations can operate their trusts on their own terms. Further, operating from a culture that respects the overall well-being of the community enables Nations to preserve historical communal values and traditions, values that in many cases have been impacted by assimilation and colonial methods of socio-economic engagement. Operating with Indigenous culture in mind means Nations will make investment decisions that may consider other factors aside from purely financial returns. To this end, with more recent awareness of Indigenous legal traditions and culture in general, and more recent developments in investment policies, reconciling both trust law principles that apply to investments and Indigenous ways of investing will be critical. To understand what is at stake and now possible, the ways in which fiduciary duties have been defined and set out in trust law should first be examined.

1. Trust Law and Market-Based Investing

The fiduciary obligation that arises in a trust relationship is an equitable obligation and arises as a result of the need to protect the beneficiary, from whom trust and confidence in the trustee is placed.[17] Because the trustee acts as a fiduciary in the trust relationship, the paramount duty of a trustee is to give

16. See, *e.g.*, *Leonard v. Gottfriedson* (1980), 21 B.C.L.R. 326, (*sub nom. Kamloops Indian Band v. Gottfriedson*) [1980] B.C.J. No. 551 (B.C. S.C.); *Westbank Indian Band v. Derrickson*, 1993 CarswellBC 2418, (*sub nom. Louie v. Derrickson*) [1993] B.C.J. No. 1338 (B.C. S.C.), affirmed 1995 CarswellBC 1844 (B.C. C.A.); *Ermineskin Cree Nation v. Minde*, 2010 ABQB 93 (Alta. Q.B.); *Barry v. Garden River Ojibway Nation No. 14* (1997), 33 O.R. (3d) 782, [1997] O.J. No. 2109 (Ont. C.A.); *Lower Nicola Indian Band v. Trans-Canada Displays Ltd.*, [2000] B.C.J. No. 1672, 2000 BCSC 1209 (B.C. S.C.); and *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, [2002] S.C.J. No. 79 (S.C.C.).
17. Mark R. Gillen and Faye Woodman, "The Law of Trusts: A Contextual Approach" (Toronto: Emond Montgomery, 2015), at p. 773.

effect to the trust instrument.[18] The law is such that, barring illegality, deference is given to the wishes of the settlor of the trust, who typically spends significant time considering the objectives and purpose of holding and investing assets for the benefit of the beneficiaries. Other duties that inform decisions made under the trust include the trustee's overarching duty to act loyally and in good faith, as well as the duty of personal performance, the duty to act impartially, and the duty to invest.

As it relates to the duty to invest, establishing investment policies is not as straightforward as one would assume. Because trusts are meant to endure for considerable lengths of time and will face varying market conditions over time, settlors may be reticent to place firm restrictions on the trustees in their choice of investments.[19] It has only been in the last 75 years that it has become more common that the majority of trusts in Canada authorize the trustees to use their discretion in making investment decisions. In fact, it is also only more recent that Canadian provinces have updated the legislative trustee investment standards to account for contemporary philosophies on investment strategy that move from limiting the trustee to lists of authorized investments to the prudent investor standard.[20] This has the effect of expanding the trustee's investment obligations to a less strict approach to investment.

Bearing in mind that the basis for the trustee investment duties is found in the trust document itself, legislation, and the common law, the guiding principle is found in the long-standing "prudent investor rule." The trustee, acting in a fiduciary capacity, is required to follow this rule in managing investments for the benefit of the beneficiary. In Ontario, for example, this means that pursuant to s. 27(1) of the *Trustee Act*, the trustee must "exercise the care, skill, diligence and judgement that a prudent investor would exercise in making investments."[21] Further, pursuant to s. 27(6) of the *Trustee Act*, a trustee must diversify the investment of trust property in a manner

18. *Ibid.*, at p. 253.
19. *Ibid.*, at p. 284; Waters, *supra*, footnote 12, at p. 997. Notably, prior to the Second World War trustees were subject to some degree of control as to the trust investment decisions, and in many instances, trustees could only place funds in investments authorized by the legislature.
20. Waters, *ibid.*, at p. 1006; Gillen and Woodman, *supra*, footnote 17, at p. 285.
21. R.S.O. 1990, c. T.23 ("*Trustee Act* (Ontario)"), s. 27.1. For a comprehensive discussion on the prudent investor rule see B. Longstreth, *Modern Investment Management and the Prudent Man Rule* (New York: Oxford University Press, 1986).

appropriate to the requirements of the trust, and general economic and investment market conditions.[22] Because the trustee must give effect to the trust instrument, the law may be satisfied if the trust instrument permits investment in a particular manner,[23] or in some cases legislation is explicit that if the trustee invests in this manner and is still able to satisfy the prudent investor rule, no breach of trust is committed.[24]

Notably, while the Supreme Court of Canada has recognized the common law standard of care as one measured by the level of reasonable skill and competency one would apply to managing one's *own* affairs,[25] in some jurisdictions legislation is explicit that the standard is measured by the level of judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of *others*.[26] Further, trustees also have the protection, which in some jurisdictions is explicit in trust statutes, that investments will be assessed across the entire portfolio of investments and not on an investment by investment basis (modern portfolio theory);

22. *Trustee Act* (Ontario), *supra*, footnote 21, s. 27(6).
23. *Ibid*., s. 68:

> 68. Nothing in this Act authorizes a trustee to do anything that the trustee is in express terms forbidden to do, or to omit to do anything that the trustee *is in express terms directed to do* by the instrument creating the trust. [emphasis added]

See also *Trustee Act*, R.S.A. 2000, c. T-8, s. 2(1); *Trustee Act*, R.S.B.C. 1996, c. 464, s. 15.1(2); *The Trustee Act*, R.S.M. 1987, c. T160, CCSM, c. T160, s. 72 ("*The Trustee Act* (Manitoba)"; *The Trustee Act*, *2009*, S.S. 2009, c. T-23.01, s. 4; Gillen and Woodman, *supra*, footnote 17, at p. 289. This could include direction to a trustee to restrict investments to particular kinds of investments, such as Canadian common and preferred stock, or direction to restrict investments so as to avoid investment in certain industries for ethical reasons.

24. *The Trustee Act* (Manitoba), *ibid*., s. 79.1:

> 79.1 Subject to any express provision in the instrument creating the trust, a trustee who uses a *non-financial criterion* to formulate an investment policy or make an investment decision does not thereby commit a breach of trust if, in relation to the investment policy or investment decision, the trustee exercises the judgement and care that a person of prudence would exercise in administering the property of others. [emphasis added]

25. *Fales v. Canada Permanent Trust Co.; Fales v. Wohlleben Estate*, [1976] 6 W.W.R. 10, [1976] S.C.J. No. 72 (S.C.C.). Nonetheless, *Learoyd v. Whiteley* (1887), L.R. 12 App. Cas. 727 (U.K. H.L.) was decided prior to *Fales* (on the standard of care and the adoption of prudent investor rules) and is still often cited as the leading authority on standard of care in the context of investments (the level of reasonable skill exercised in administering the property of others).
26. *The Trustee Act* (Manitoba), *supra*, footnote 23, s. 68(2); *Trustees Act*, S.N.B. 2015, c. 21, s. 2.

therefore, the trustee may escape liability for a loss resulting from a particular investment if it can be shown that it was part of a larger portfolio investment policy which itself was prudent.[27] Moreover, if a settlor makes one's intentions clear that the trustees are to invest in a specific manner, it is the duty of the trustees to carry out that direction and they will allegedly escape liability for any loss that ensues as a consequence.[28] However, there is also the prevailing view amongst investment institutions that an investor's key priority is to focus on earning the highest risk-adjusted financial returns possible.[29]

The ways this tension could play out was found in *Critchley v. Critchley* in Nova Scotia where a testator had specifically directed the trustees to invest in a particular manner (mainly in Canadian common and preferred stock, and any other investments deemed appropriate).[30] Warner J. for the Supreme Court, found that where such instruction is given, the standard of care is to be assessed against that instruction.[31] However, Warner J. also found that specified investment direction by the settlor does not relieve a trustee of the obligation to act prudently and to diversify the investments as conditions warrant.[32] Further, if the trust investments suffer a marked

27. *The Trustee Act* (Manitoba), *ibid*., s. 79.
28. Waters, *supra*, footnote 12, at p. 1012; For historical context, see *Toronto General Trusts Corp. v. Cobham*, [1944] 2 D.L.R. 207 (Ont. H.C.). To be clear, the investment policy on its own is not legally binding, rather is a guide that dictates the strategy and conduct of how the investments shall be carried out. While the investment policy should be consistent with the trust agreement, the trust document dictates the trustee's legal obligations.
29. Paul Brest, Ronald J. Gilson and Mark A. Wolfson, "How Investors Can (and Can't) Create Social Value" (2019), 44 J. Corp. L. 205, at p. 206; Benjamin J. Richardson, "Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment" (2008), 46 Osgoode Hall L.J. 243, at para. 49; Max M. Schanzenbach and Robert H. Sitkoff, "Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee" (2020), 72 Stanford L.R. 381, at p. 426 ("Schanzenbach and Sitkoff"); Max M. Schanzenbach and Robert H. Sitkoff, "The Prudent Investor Rule and Market Risk: An Empirical Analysis" (2017), 14 J. Empir. Legal Stud. 129, at p. 134. This view predominantly prevailed in numerous historical cases including: *Buttle v. Saunders*, [1950] 2 All E.R. 193 (Eng. Ch. Div.); *Re Wyvern Developments Ltd*., [1974] 2 AII E.R. 535, [1974 1 W.L.R. 1097; *Cowan v. Scargill* (1984), [1984] 2 All E.R. 750, [1985] Ch. 270 (Eng. Ch. Div.); *Harries v. Church Commissioners for England*, [1992] 1 W.L.R. 1241; and *Re T.'s Settlement Trusts* (1963), [1963] 3 All E.R. 759, [1964] Ch. 158 (Eng. Ch. Div.).
30. *Critchley v. Critchley* (2006), 26 E.T.R. (3d) 290, 2006 NSSC 219 (N.S. S.C.).
31. *Critchley*, *supra*, footnote 30, at para. 50.
32. *Critchley*, *supra*, footnote 30, at para. 86.

deterioration based upon the investment direction given, a prudent trustee should seek direction from the court or consent of the beneficiaries to continue carrying out the instruction.[33]

The Nova Scotia Supreme Court held that the trustee did not act prudently in managing the investments. However, Warner J. refused to remove the trustee as he was most familiar with the circumstances of the trust and could subsequently be counselled as to managing the investments as prudently as possible. This decision demonstrates that trustees could be found to have breached their duty even in following a settlor's direction for the trustee to invest in a certain manner. However, there may still be some protection (and grace) for trustees who work to adhere to the settlor's direction, irrespective whether an investment in another manner would yield a higher return for the beneficiaries. In fact, in *Ermineskin Indian Band and Nation v. Canada* the Supreme Court of Canada confirmed that trustees do not have a duty to guarantee either against the risk of loss or that an increase in the trust will occur.[34] The trustee is required rather to invest prudently. Notwithstanding, as was seen in the *Critchley* decision, even in cases where certain investments are authorized, the trustee must carry out her/his duty in compliance with the requisite standard of care.

It is also notable that taking into account factors that relate to non-financial criteria, such as the purpose of the trust, is mandatory in some jurisdictions,[35] while only permissive in others. Notwithstanding, that which is reasonably permitted in investment for non-financial or socially beneficial reasons, which may or may not lower the returns in the funds and, therefore, the disbursements to beneficiaries, has not been thoroughly canvassed in Canadian legal decisions. However, the parameters of how much trustees could take non-financial or ethical criterion into account were addressed in two U.K. cases. In

33. *Critchley*, *supra*, footnote 30, at para. 53. Provincial legislation may indicate that trustees can apply to court for an opinion, advice or direction. Notably, once declaration of the court is obtained, the trustee is no longer responsible if he follows the direction of the court (unless found guilty of fraud, willful concealment or a misrepresentation in seeking the court's opinion). Example provisions include: *Trustee Act* (Ontario), *supra*, footnote 21, s. 60; *Trustee Act* (B.C.) *supra*, footnote 23, s. 86; *Trustee Act* (Alberta), *supra*, footnote 23, s. 43; *Trustee Act* (Manitoba), *supra*, footnote 23, s. 84.
34. *Ermineskin Indian Band & Nation v. Canada*, [2009] 1 S.C.R. 222, 2009 SCC 9 (S.C.C.).
35. For, *e.g.*, *Trustee Act* (Alberta) *supra*, footnote 23, s. 3(5)(a); *Trustee Act* (Ontario), *supra*, footnote 21, s. 27(5).

Cowan v. Scargill, the trust involved a pension fund set up for coal miners and managed by 10 trustees.[36] Five of the trustees appointed by miners wished to adopt a policy that the trust would not invest in industries that were in direct competition with the coal industry; on the contrary, the other trustees took the view that investment decisions could only be based on financial criteria.

In order to overcome disagreement amongst the trustees, five of the 10 trustees sought direction from the court to determine if the investments were permissible. Megarry V.-C. rejected the position of the trustees appointed by the miners and found that when the purpose of the trust is to provide financial benefits for the beneficiaries, the best interests of the beneficiaries is their financial interests; as such, the trustees would have breached their fiduciary duty if they took non-financial criteria into account. It is notable here that the court considered the purpose of the pension trust, which was to provide financial benefits to miners.

In *Harries v. Church Commissioners for England*, the court was required to consider these same principles in the case of a charitable trust administered for members of the Church of England.[37] The trust had an ethical investment policy based upon Christian teachings and moral values. While Nicholls V.-C. accepted that a charitable trustee would not be expected to invest in a manner that is inconsistent with the objectives of the trust, he also recognized that because the goal of investment is to generate income, charitable trustees are limited in the decisions they can make that might financially disadvantage the beneficiaries. That is, trustees cannot use investments of charity money for non-investment purposes. Moreover, Nicholls V.-C. found that yielding financial returns should be a fundamental starting point so that only in extremely rare cases should trustees depart from that position. Notably, the Nicholls V.-C. found that the trustees could take non-financial considerations into account as long as investment profits were not interfered with.

The trust document may certainly direct ethical investment because it is recognized in law that the intention of the settlor governs and the trustees as fiduciaries must carry out their legal duties based upon the objectives and purposes of the trust. However, the U.K. cases demonstrate that there could still be

36. *Cowan v. Scargill*, *supra*, footnote 29.
37. *Church Commissioners*, *supra*, footnote 29.

tension between how a trustee reconciles non-financial objectives with the duty to maximize a trust's investment returns for the benefit of the beneficiaries, so as to avoid undue risks of loss. Moreover, if the trust document is silent on specifically providing direction as to authorized ethical investment it will be a matter of how fiduciary law is applied to determine if a trustee has met one's legal duty by accounting for ethical considerations.

While investment policies must be consistent with the standards of care and prudent investment required in law, even if the financial interests of the beneficiaries remains paramount, ethical or socially responsible investment is certainly permissible. There is nevertheless another issue at play for investment managers. When Indigenous communities deal with trustees and investment companies, trustees and investment managers also want to know that if they do take non-financial criterion into account it will not jeopardize their positions as trustees and investment managers. This is because historically the normative philosophy guiding market investments is to yield the highest return possible in the investment of assets, that is, the best interests of the beneficiary has been largely interpreted as interests that yield the highest fiscal returns possible.[38] In fact, many Indigenous communities have also historically chosen investment companies based upon these considerations. Regardless, to adapt to new circumstances, there is little doubt that a shift in trust law is occurring regarding the scope of a trustee's investment duties. A review of Indigenous law and values will inform how trusts can be adapted to embody Indigenous values.

2. Indigenous Ways of Knowing, Law and Investing

Two-eyed seeing is a principle that encourages the consideration of Indigenous ways of knowing. More recently, there has been a lot of discourse around the validity of Indigenous legal orders, customs and traditions in Canada. The long-standing erroneous fallacy that Indigenous societies are void of laws, when Indigenous customary law actually pre-dated European contact by thousands of years, has resulted in serious political and legal consequences for Indigenous Nations.[39] Notably, amongst various Nations in Canada, the *sui generis*

38. See *supra*, footnote 29.
39. Hadley Friedland, "Navigating Through Narratives of Despair: Making

Indigenous legal orders are considered the "ancient law of the land and they are embedded in [Indigenous] heritages, languages, and laws"; these customary laws are no less valid than the Eurocentric legal tradition.[40]

Customary law is defined in the following manner in *Black's Law Dictionary*:[41]

> [L]aw consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.

In fact, this definition could apply to laws and norms that govern any community; however, the question then turns upon whether laws are centralized and captured in written laws or decentralized and captured in a way that considers law as a way of being in the world.[42] The distinction is complex and not meant to be fully canvassed here other than to say that this distinction influences Indigenous peoples' decision-making processes and guide a Nation's legal and economic decisions. Further, Indigenous understandings of certain Euro-centric legal terms such as "fiduciary duty" may be influenced by their own perceptions of what it means to be in a "stewardship" relationship. I will return to this idea momentarily.

It is accepted in Canada that Indigenous legal orders are distinguished from the western legal system. Arguably, the fluid nature of most Indigenous legal traditions diverge from the entrenched Euro-centric legal system in Canada. Notwithstanding, federal courts, provincial courts and the Supreme Court of Canada have rendered decisions recognizing the validity of Indigenous customary laws.[43] For Indigenous com-

Space for the Cree Reasonable Person in the Canadian Justice System" (2016), 67 U.N.B.L.J. 269, at paras. 13-14.

40. Henderson, *supra*, footnote 1, at p. 16.
41. *Black's Law Dictionary*, 11th ed. (St. Paul, Minnesota: Thomson Reuters, 2019), "Customary law".
42. Valerie R. Napoleon, "Thinking About Indigenous Legal Orders", Ch. 11 in *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, 2009), at p. 235 [unpublished], online at <http://dspace.library.uvic.ca>; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), at p. 6.
43. Justice Favel recognizes the validity of Indigenous law as both traditional relationships with one another and others or the laws created by the Nation under contemporary by-laws in *Alexander v. Roseau River Anishinabe First Nation*, [2019] F.C.J. No. 168, 2019 FC 124 (F.C.), at para. 18; In *Pastion v. Dene Tha' First Nation*, 2018 FC 648 (F.C.), at para. 8, Grammond J. found

munities more generally, this form of customary law relates to land, community, culture, tradition, interconnectedness and belonging, wellbeing, and resurgence.[44] Caring about the wellbeing of others is a wide-ranging, guiding principle in the Indigenous traditional decision-making processes of many Nations; accountability for one's choices may also be a guiding principle.[45]

How does or should this relate to the issue of managing resources, and in this case trust investments? An entrenched history of managing wealth and resources in Indigenous economies and across Indigenous lands[46] — albeit Indigenous economics has evolved from traditional to more contemporary forms of engaging in economics[47] — demonstrates that regional methods of stewardship existed and still exists today.[48] Notably, for many Nations whose traditional values have been impacted by colonialism and assimilation, there has been a resurgence of traditional laws and cultural values in connection to land and resources. Because the survival of future Indigenous generations

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that "Indigenous legal traditions are among Canada's legal traditions ... [t]hey form part of the law of the land."; See also *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, 2001 SCC 33 (S.C.C.), at para. 10 where McLachlin C.J.C. (as she was then) found that "[A]boriginal interests and customary laws were presumed to survive the assertion of sovereignty." In *Alderville Indian Band v. R.*, [2014] F.C.J. No. 1377, 2014 FC 747 (F.C.), at para. 22, Mandamin J. found that Indigenous legal systems were the "rules by which Aboriginal people have organized themselves into distinctive societies with their own social, cultural, legal and political structures that predated contact with the Europeans in North America."

44. Napoleon, *supra*, footnote 42; Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016), 61 McGill L.J. 847; John Borrows, "Indigenous Legal Traditions in Canada" (2005), 19 Wash. U. J. L. & Pol'y 167; and Larry Chartrand, "Eagle Soaring on the Emergent Winds of Indigenous Legal Authority" (2013), 18 Rev. Constitutional Stud. 49.
45. For a more fulsome discussion see Priscilla Settee, "Indigenous Knowledge: Multiple Approaches" ch. 28 in George Jerry Sefa Dei (ed.), *Indigenous Philosophies and Critical Education: A Reader* (New York: Peter Lang Publishing, 2011), pp. 434-450.
46. See for example, *R. v. Gladstone* (1996), 137 D.L.R. (4th) 648, [1996] 2 S.C.R. 723 (S.C.C.); *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193, [1997] 3 S.C.R. 1010 (S.C.C.); *R. v. Sioui*, [1990] 1 S.C.R. 1025, [1990] S.C.J. No. 48 (S.C.C.); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.); and *R. v. Marshall*, [1999] 3 S.C.R. 456 (S.C.C.), reconsideration / rehearing refused 1999 CarswellNS 349 (S.C.C.).
47. Young, *supra*, footnote 2, at p. 1.
48. Rohan *et al.*, *supra*, footnote 11, at p. 9.

is crucial, environments that Nations depend upon, and the ways in which they can be sustained long-term, should be critically considered. The priority is to balance the short-term needs and the long-term sustainable use and stewardship of a Nation's resources.[49]

As such, a focus on purely market-based returns and certain kinds of diversification of investments may not be feasible for Indigenous Nations that seek to refrain from investing in industries that adversely impact Indigenous culture and land rights and jeopardize the inheritance of generations to come. That is, for some Nations, acting prudently means *not* investing in certain industries. Investing can have both positive and negative effects on Indigenous Nations whose trusts invest in shares of companies that operate in and around Indigenous territories.[50] The positive effects of owning such shares are that these companies may create jobs, training and business opportunities for the Nation; however, some companies could operate in manners that harm the traditional territory.[51]

Therefore, trustees should ensure that trust investments align with a Nation's customary practices and traditional values so that financial assets will be directed in ways that support the sustenance of both current and future generations. Advancing economic reconciliation means that trusts should be established with Indigenous investment values in mind. As it relates to land, culture and the economy, sustainability practices have long been adhered to by many Indigenous Nations. One example of this is in the Mi'kmaq culture in which the principle of *netukulimk*, which means "achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity, or productivity of our environment",[52] guides decisions within the community. The Tsilhqot'in also understand sustainability through the concept of *dechen ts'edilhtan*, which means killing [keeping] only what you need to carry you through.[53]

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49. Rohan *ibid*., at p. 9; Campbell and Sevestre, *supra*, footnote 7, at p. 3.
50. Campbell and Sevestre, *ibid*., at p. 3.
51. *Ibid*., at p. 3.
52. See "Netukulimk", Unama'ki Institute of Natural Resources, online: <www.uinr.ca/programs/netukulimk>.
53. Tsilhqot'in Nation Wildlife Law, s. 2 (enacted by the Xeni Gwet'in First Nations Government Chief and Council on July 16, 2019), online at: <https://www.tsilhqotin.ca/wp-content/uploads/2020/12/Law_2019_08_23_TsilhqotinNationNGDT-WildlifeLaw.pdf>; see also Alan Hanna, "Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective" (2015), 45 Ottawa L. Rev. 365, at p.

This concept of sustainability also applies to financial decisions around economic wellbeing. In the trust context, sustainability refers to making investment decisions with the *next seven generations in mind*.[54] Considering the next seven generations in decision-making is grounded in the teachings of the original laws passed down in many Indigenous communities. For example, in the Mi'kmaq culture ancestors have demonstrated that there is a "sacred responsibility of Indigenous people to be the caretakers of all that is on Mother Earth and, therefore, each generation is responsible to ensure the survival of the next seven generations . . . [t]he seventh generation are to keep in mind the plants, animals, mineral gifts when considering our survival."[55] As was also noted by Sxwpilemaat Siyam, the Hereditary Chief of the Squamish Nation:[56]

> [T]he decisions that I am making today, as a trustee of the Squamish Nation Trust, are going to affect my children's future; my grandchildren's future; my great grandchildren's future and many generations after that. Just as the decision my Dad, Sxwpilem Siyam (Chief Philip Joe), took to testify in court contributed to the agreement in 2000, which makes up the trust that I govern today. The existence of these trusts is a symbol of our resilience as Indigenous Peoples.

The concept of stewardship, which means being a diligent caretaker for the future generations to come,[57] ties in with sustainability. Stewards oversee those resources that are entrusted to them as thoughtful and conscientious custodians. Mark Sevestre, President of the National Aboriginal Trust Officers Association ("NATOA"), and Jason Campbell, Principal and CEO of Arete Development Group LLC, note that:

370, citing *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (B.C. S.C.), at para. 397.

54. Campbell and Sevestre, *supra*, footnote 7, at p. 7.
55. Ashley Julian, *Thinking Seven Generations Ahead: Mi'kmaq Language Resurgence in the Face of Settler Colonialism* (Masters of Education Thesis, University of New Brunswick, 2016) [unpublished], at p. 1; see also the Great Law of the Haudenosaunee (Iroquois) Confederacy, "What is the Seventh Generation Principle?" (Port Coquitlam, B.C.: Indigenous Corporate Training Inc., May 30, 2020), online: <https://www.ictinc.ca/blog/seventh-generation-principle>.
56. Sxwpilemaat Siyam (Hereditary Chief Leanne Joe), Squamish Nation, cited in Campbell and Sevestre, *supra*, footnote 7, at p. 7.
57. Campbell and Sevestre, *ibid.*, at p. 7.

> [O]ur Indigenous communities understand that we are simply caretakers for future generations. For our leaders, stewardship means having the willingness and passion to serve and to be responsible for outcomes that can affect others. One form of stewardship is selectively harvesting from the natural world, for spiritual practices, lodging, food, and transportation. In terms of investing, think of a fiduciary as a steward cloaked in a legal shawl.[58]

Accountability — the practice of being mindful and taking into account the impact of one's decisions on others — also aligns with many Nation's Indigenous cultural values.[59] This should be a part of the commitment that trustees make when they agree to oversee a trust and make critical decisions for the good of the beneficiaries. Not only must trustees hold technical knowledge, they must also operate in the spirit of seeking to do what is right for the beneficiaries. Notably, accountability is also an important aspect of reconciliation between Indigenous and non-Indigenous people because it beckons the parties who have inflicted harm to be accountable for that harm and to take steps to rebuild the broken relationships.[60]

Because trusts are grounded in the law of equity, the equity-seeking Indigenous investment principles in which some Nations adhere resemble the equitable trust principles. An Indigenous trustee views a fiduciary role as one where the focus should not be purely on financial gain for its own sake, rather, a fiduciary's responsibility is to consider all of the factors that will impact a Nation in the long-term. In seeking equity, Nations endeavour to balance what may sometimes seem to be competing interests, such as meeting short-term requirements versus respecting the long-term needs of the community.

Long-term needs (social, political, environmental, and fiscal) are important considerations for Nations because communities whose environments or socio-political structures have been destroyed or compromised cannot properly support the community members through their connection to land, community, culture and tradition. In spite of the broadening of the scope of trustee duties in trust law, Nations are still concerned that the Canadian common law and legislative interpretations of the trustees' fiduciary obligations will be narrowly interpreted.[61] As a result, trustees might feel pressured

58. *Ibid.*, at p. 7.
59. *Ibid.*, at p. 7.
60. *Ibid.*, at p. 7.
61. See NATOA, *supra*, footnote 5, "New research on Indigenous Perspectives

to focus exclusively on short-term financial returns with a view to disregard investment principles grounded in Indigenous legal orders.

Therefore, it is imperative that Nations incorporate Indigenous laws and traditions into investment practices that impact the stewardship of collective assets.[62] Setting out the revered values in Investment Policy Statements makes clear the intentions of the settlor of the trust. For example, the Mississaugas of the Credit First Nation Community Trust reads as follows:[63]

> The Mississaugas of the New Credit First Nation look to our Anishinaabe roots to guide our vision for the future as a strong, caring, connected membership who respects the Earth's gifts and protects the environment for future generations. Our identity includes our history, language, culture, beliefs and traditions which we strive to incorporate into the programs and services offered to our membership.

Additionally, Oneida Tribe of Indians of Wisconsin Trust Fund's Investment Policy Statement reads as follows:[64]

> The Oneida Trust Committee recognizes the responsibility to invest in a manner that does not enable harm to the environment or the spiritual and cultural values of Native Americans. The Trust Committee prefers to invest in companies that make positive contributions to alleviating the problems facing society and the environment.

More recent Indigenous investment initiatives are also a means to advance reconciliation through the practice of SRI, which focuses investment decisions on social and ethical considerations. SRI is a way to engage two-eyed seeing by respecting Indigenous ways of investing, while understanding the trustee's fiduciary obligation in investment decision-making. Reconciliation is also at the heart of the two-eyed seeing principle.

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on Fiduciary Duty", online at <https://natoa.ca/2020/06/09/new-research-on-indigenous-perspectives-on-fiduciary-duty/>.

62. NATOA, *supra*, footnote 5; See also Rohan *et al.*, *supra*, footnote 11, at p. 19.
63. Rohan *et al.*, *ibid.*, at p. 19.
64. *Ibid.*, at p. 19.

III. RECONCILIATION: SRI AS A MEANS TO RESPECT THE PRINCIPLE OF TWO-EYED SEEING

Given the impact of industrial development on the self-determination of Indigenous peoples, in trying to adhere to Indigenous laws and protect the communities that follow them, there is a reckoning going on between Indigenous peoples and the power of financial markets.[65] Arguably, purely focusing on the social conflicts and disputes that arise from developments that impact Indigenous lands without a focus on the financial markets is not enough.[66] Rather, the negative impact of development on Indigenous lands and rights could be lessened by engaging in SRI practices when considering investments that impact Indigenous Nations and their resources. The extended scope of trustee investment duties in law means that a trustee may be more prepared, at the request of the Nation, to consider SRI as a way to embrace Indigenous investment values in making investment decisions. Being willing to engage in SRI with and for Indigenous Nations demonstrates a willingness to respect the principle of two-eyed seeing by viewing trust investments through an Indigenous lens.

Terminology should be clarified here because SRI 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 SRI (often called impact investing) is investment that works to generate "measurable positive, societal and/or environmental impact and a level of financial return."[67] In developing an economic analysis, the law permits ESG integration to achieve financial goals,[68] while achieving SRI objectives is arguably more arbitrary and nuanced.

65. Benjamin J. Richardson, "Protecting Indigenous Peoples Rights Through Sustainable Investing" (2016), 6 Indigenous L.J. 205, at p. 206.
66. *Ibid.*, at p. 211.
67. Douglas M. Grim and Daniel B. Berkowitz, "ESG, SRI, and Impact Investing: A Primer for Decision-Making" (Valley Forge, Pennsylvania: Vanguard Research, 2018), at p. 4, online at <https://perma.cc/42T2-K35T>; see also Global Impact Investing Network, "About Impact Investing" (New York, N.Y.: 2020), online at <https://thegiin.org/> ("GIIN").
68. The United Nations Principles for Responsible Investment (PRI), and numerous practitioners and scholars (but certainly not all), have taken the

Some scholars distinguish the two by considering ESG as categories of benefits. For example, Max M. Schanzenbach and Robert H. Sitkoff argue that collateral benefits ESG involves "investing for moral or ethical reasons or to benefit a third party" (typically referred to as SRI or impact investing); on the contrary, risk-return ESG involves "investing for risk and return benefits-that is, to improve risk-adjusted returns."[69] Notably, the SRI principles that focus on moral and ethical reasons as a basis for decision making are the kind of principles that Indigenous societies have integrated into their community decision-making processes for hundreds of years in working to meet the needs of their communities. More recent awareness around SRI means that Indigenous traditional values are likely to be taken more seriously by some investors.

One aspect of SRI that could effect change going forward relates to accountability. Because industrial and infrastructure projects can have serious adverse impacts on Indigenous peoples and the environment, companies could be held to account financially for decisions that deleteriously impact Indigenous rights.[70] While historically banks, other financiers and pension funds have in some cases played a key role in subsidizing economic development that harmed the cultural and legal interests of Indigenous peoples, some financiers are now restricting the financing of these projects so as to promote sustainable environmental and social performance which in turn leads to better-quality financial, environmental and social outcomes.[71]

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position that fiduciary principles require a trustee to integrate ESG factors. See Rory Sullivan, Will Martindale, Elodie Feller, Margarita Pirovska and Rebecca Elliott, "Fiduciary Duty in the 21st Century: Final Report" (London, U.K.: Principles for Responsible Investment, 2020), at p. 8. Further, some jurisdictions in Canada provide education and reporting requirements in the event that companies decide to incorporate ESG factors. See the Financial Services Commission of Ontario at <http://www.fsco.gov.on.ca/>.

69. Schanzenbach and Sitkoff, "Reconciling Fiduciary Duty and Social Conscience", *supra*, footnote 29, at pp. 389-390. The authors note that while there is evidence that focusing on risk-return ESG may improve returns, there is no evidence that investing based upon collateral benefits ESG (SRI) alone improves returns.
70. Richardson, *supra*, footnote 65, at p. 208.
71. "Equator Principles" (The Equator Principles Association, July 2020), online: <www.equator-principles.com>, at p. 3. For instance, The Equator Principles Financial Institutions ("EPFIs"), comprised of 108 institutions, of which 7 are in Canada, have adopted the Equator Principles as a risk-

The SRI movement has more recently placed social issues such as human rights and sustainable development in the purview of these financiers.[72] In financing and advising on projects, institutions improve SRI performance by identifying, assessing and managing environmental risks and social impacts on an ongoing basis and in a structured manner.[73] This aspect of SRI is therefore a method of governing markets; that is, ethical financial institutions set social and environmental standards as a way to discipline companies requiring funds.[74]

The message is that economic shrewdness cannot be the only force that drives financial markets at the expense of other ethical considerations; the social, environmental and ethical ramifications of providing financial capital to certain companies is a larger consideration for some institutions.[75] Although seemingly aspirational, Benjamin Richardson imagines a new dynamic going forward: a bank refuses to finance a mining company because of its unacceptable environmental risks on Indigenous lands, a pension fund dissociates from agricultural businesses that misuse Indigenous land, or a mutual fund boycotts a lucrative pharmaceutical company that infringes on Indigenous medicinal knowledge.[76] Notably, two-eyed seeing would be respected here because this aspect of SRI promotes the principle of accountability that is also integral to Indigenous investment values.

Another way to use financial markets to effect change is by making investment decisions that create an impact socially and/or environmentally. SRI operates to provide checks and balances on investment activity, in that the trustee may avoid companies or industries identified as unethical or falling below a certain ESG threshold.[77] For example, a SRI investment

management framework used to determine, assess and manage environmental and social risk in projects. The framework is primarily intended to provide a minimum standard for due diligence and monitoring to support responsible risk decision-making.

72. Richardson, *supra*, footnote 65, at p. 211.
73. "Equator Principles", *supra*, footnote 71. In July the Equator Principles Framework was updated to include Free Prior and Informed Consent ("FPIC"), a principle that works to achieve the meaningful participation of Indigenous Peoples in decision-making (focuses on achieving agreement).
74. Richardson, *supra*, footnote 65, at p. 211.
75. *Ibid.*, at p. 211.
76. *Ibid.*, at p. 206.
77. Schanzenbach and Sitkoff, "Reconciling Fiduciary Duty and Social Conscience", *supra*, footnote 29, at p. 398. Screening is a way to accomplish SRI goals. "Negative screening" is a practice where investments, such as

strategy could involve a divestment from certain industries, such as fossil fuel, so as to achieve a collateral benefit such as reducing pollution; SRI can also involve shareholder voting or engagement that aims to persuade a company to change its practices.[78] Aside from simply increasing investor returns, positive social outcomes are able to be achieved.

While scholars, such as Brest, Gilson and Wolfson, argue that most investors have the distinct goal of earning the highest risk-adjusted financial returns, and may be reticent to accept a lower financial return from an investment that correspondingly produces social benefits,[79] there are some investors that are more willing to engage in SRI or impact investing. Impact investing is the term often used to describe the practice of only investing in certain companies, organizations, and funds in ways that intend to generate a measurable and beneficial social or environmental impact, in addition to a financial return.[80] Focusing on investing in financial markets in this manner may help achieve social justice by aligning investors with the broader objectives of society and holding them financially accountable for the social consequences of their decisions.[81]

Investors can create transparency and ensure accountability by measuring and reporting on the social and environmental performance and progress of underlying investments, thus making impact investing a way to address some of the most pressing challenges in the areas of sustainable agriculture, renewable energy, conservation, microfinance, and the provision of basic services including housing, healthcare, and education.[82] Accordingly, companies may also be assisted in generating sustainable and longer-term returns by better managing the environmental and social risks in certain investment decisions. Two-eyed seeing is also respected in this aspect of SRI because it promotes the principles of sustainability and stewardship that are integral to Indigenous investment values.

However, while the law may more aptly support SRI practices by evolving to expand the scope of trustee investment duties,

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weapons manufacturing, are excluded from portfolios. Alternatively, "positive screening" is a practice that includes certain investments, such as renewable energy, in portfolios. See Rohan *et al.*, *supra*, footnote 11, at p. 8.

78. Schanzenbach and Sitkoff, *ibid.*, at p. 398.
79. Brest *et al.*, *supra*, footnote 29, at p. 206.
80. Campbell and Sevestre, *supra*, footnote 7, at p. 4.
81. *Ibid.*, at p. 4. See also *Richardson*, *supra*, footnote 65, at p. 207.
82. GIIN, *supra*, footnote 67.

there is still the lack of eco-friendly or socially responsible companies or funds in which to invest. A key issue is that although there has been an increase in awareness of SRI in investment markets, this sector has only captured three to five percent of the investment market and therefore to date may only have a limited ability to influence.[83] The limited SRI market is likely in part because some critics argue that sustainable investing politicizes investment decisions and/or has deleterious impacts on fiscal returns.[84]

Given that many investors in public markets have continued to remain "socially-neutral" by not engaging social values in the investment decision making process, and absent the regulation of SRI in Canada, it remains to be seen the level of market saturation that SRI companies will have.[85] While SRI is becoming better recognized by some as an appropriate and influential approach to investment,[86] SRI practices still need to gain more credibility in investment markets to improve sustainability outcomes for Indigenous Nations. Because currently only twenty percent of Canadian investments stem from sustainable investing,[87] arguably there are not enough socially responsible companies from which Nations can invest.

Nonetheless, more recent notable investment policy developments could be particularly beneficial for Indigenous Nations that establish trusts in Canada. The RRII, a joint initiative between SHARE and NATOA, developed a mandate to improve working relationships between Indigenous Nations and investment companies by promoting responsible investment policies. The RRII engages both Indigenous and non-Indigenous investors in working to build investment markets that incorporate Indigenous values and ways of knowing. The impetus for this initiative is to support Indigenous Nations in their efforts to "invest in ways that reflect traditional and cultural values while meeting their communities' immediate and long-term needs."[88]

By partnering with Indigenous communities, companies can also use their wealth to assist in improving economic outcomes

83. Richardson, *supra*, footnote 65, at p. 211.
84. Benjamin J. Richardson, "Ethics and Socially Responsible Investment: A Philosophical Approach, by William Ransome and Charles Sampford" (2011), 49 Osgoode Hall L.J. 381, at p. 382.
85. Brest *et al*., *supra*, footnote 29, at p. 218.
86. Richardson, *supra*, footnote 84, at p. 382.
87. Richardson, *supra*, footnote 84, at p. 382.
88. Campbell and Sevestre, *supra*, footnote 7, at p. 7.

for Indigenous peoples through increased employment and support for Indigenous entrepreneurs.[89] Building these key partnerships with a view to developing policies that promote SRI is a way that Indigenous Nations are becoming key contributors in the financial economy. In support of the two-eyed seeing principle, as many Nations become key contributors in investment markets, awareness around the need to incorporate traditional values and culture in trust investments is key.

According to RRII, this kind of financial system will not only protect Indigenous rights and title, but will empower Indigenous perspectives and recognize the role of community values in investment decisions.[90] By engaging with institutional partners in this manner, Indigenous stakeholders can have their traditional values and aspirations reflected and upheld in both the investment policies and key investment practices. Further, by building strategic relationships with investment advisors and asset managers, Indigenous investors and Indigenous-led organizations are able to mobilize institutional investors to become vocal proponents for Indigenous peoples. Inadvertently, these institutional investors are engaging in two-eyed seeing by being willing to respect Indigenous ways of investing.

IV. CONCLUSION

The concept of economic reconciliation, that is, equal economic opportunity for all, is a way for Nations to overcome the historical injustice related to policies that have negatively impacted Indigenous economies. Much thought should therefore be given to how to develop sustainable economies that work to increase Indigenous assets long term without sacrificing community values. Thus, advancing Indigenous economies involves a balancing of interests.

Increasing assets through the use of trust investments is a means to advance economic development in a manner that provides a pathway for Indigenous Nations to become self-sustaining. This article considered trust investments through the lens of two-eyed seeing (*Etuaptmumk)*, the Mi'kmaq principle of viewing a particular concept through two eyes. By applying this concept to trust investment principles, Indigenous ways of

89. See RRII, *supra*, footnote 4, "Our Vision".
90. *Ibid.*

investing and trust law that applies to investments were considered. It was demonstrated that, while critics argue that trustees should be mainly concerned with market-based results, trust law has evolved to expand the scope of trustee duties. As such, trustees are more able to take a wholistic approach to investment decision-making.

For Indigenous Nations, investing is not only about achieving market-based results, but also accounting for community values, community development objectives, and the larger ambitions of advancing economic reconciliation.[91] Two-eyed seeing is therefore respected when purposeful and strategic thought is put into how to establish trust investment policies that respect SRI practices. These practices respect the principles of sustainability, accountability and stewardship reflective of Indigenous investment values.

Although much improvement is to be had, the concept of SRI as a manner of investing is increasingly becoming a more credible approach to investing in Canada. Further, a shift of focus in investment markets for trusts is more generally occurring as investment managers seek to partner with Nations in developing SRI practices that respect Indigenous culture and traditions. The partnerships formed and the policies developed through RRII improve working relationships between Indigenous Nations and investment companies and work to support and promote unique Indigenous investment objectives in the long term. The impetus for this initiative is to support Nations in their efforts to invest in a manner that reflects traditional and cultural values while still meeting the communities' immediate and long-term needs. The principle of two-eyed seeing is respected when investment companies engage in SRI practices that support Indigenous culture and traditions in this manner.

91. Campbell and Sevestre, *supra*, footnote 7, at p. 3.

Indigenous Economic Development and Sustainability: Maintaining the Integrity of Indigenous Culture in Corporate Governance

Frankie Young*

Economic development provides a pathway for Indigenous peoples to become self-sustaining. Yet, constraints in current Canadian laws and legislation impact the ability of Indigenous Nations to create and develop sustainable economies on their own terms. Consequently, alleviating the poverty and economic disadvantage plaguing Indigenous communities in Canada, while preserving Indigenous culture, requires some creativity. One solution is to integrate Indigenous economies into the "mainstream economy." However, the Supreme Court of Canada has ruled that when Indigenous peoples participate in the mainstream economy, they do so on the same terms as non-Indigenous peoples. This approach results in the danger that an Indigenous Nation's cultural and traditional values — that which makes them a Nation — are at risk of being compromised in the course of doing "mainstream" business. While various contemporary forms of asset governance, including non-profit or corporate structures, may assist in advancing Indigenous economies, an unconventional hybrid structure may more closely align with the ambitions of Indigenous communities seeking to merge business enterprise with social purpose and the communal values inherent to many Indigenous cultures. This article first discusses the various corporate structures available to Bands in Canada then critiques the newly available hybrid structures for how they may or may not meet the sui generis needs of Indigenous Nations. I argue that ultimately these structures are not likely to assist in achieving the goal of economic reconciliation. Rather, Canada could take guidance from both the United States and Australia in establishing its own unique Indigenous-centric model.

Le développement économique offre aux peuples autochtones une voie qui leur permet de devenir autonomes. Cependant, les contraintes imposées par les lois et la législation du Canada ont des conséquences sur la capacité des nations autochtones à créer et à développer des économies durables à leurs propres conditions. Par conséquent, la réduction de la pauvreté et des désavantages économiques qui frappent les communautés autochtones du Canada, tout en préservant la culture autochtone, exige une certaine créativité. Une solution consiste à intégrer les économies autochtones dans l'"économie générale". Cependant, la Cour suprême du Canada a décidé que lorsque les peuples autochtones participent à l'économie dominante, ils le font dans les mêmes conditions que les peuples non autochtones. Cette approche présente le risque que les valeurs culturelles et traditionnelles d'une nation autochtone - ce qui en fait une nation - risquent d'être compromises dans le cadre de l'activité économique " générale". Alors que diverses formes contemporaines de gestion des actifs, notamment les structures à but non lucratif ou les structures d'entreprise, peuvent contribuer à faire progresser les économies autochtones, une structure hybride non conventionnelle peut correspondre plus étroitement aux ambitions des communautés autochtones qui cherchent à fusionner l'entreprise commerciale avec les objectifs sociaux et les valeurs communautaires inhérentes à de nombreuses cultures autochtones. Cet article examine tout d'abord les différentes structures d'entreprise disponibles pour les bandes au Canada, puis critique les nouvelles structures hybrides disponibles afin de déterminer comment elles peuvent ou ne peuvent pas répondre aux besoins sui generis des nations autochtones. Je soutiens que ces structures ne sont finalement pas susceptibles de contribuer à la réalisation de l'objectif de réconciliation économique. Le Canada pourrait plutôt s'inspirer des États-Unis et de l'Australie pour établir son propre modèle unique centré sur les autochtones.

Titre en francais : *Développement économique autochtone et durabilité : Maintenir l'intégrité de la culture indigène dans la gouvernance d'entreprise*

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> The reasonable man adapts himself to the world; the unreasonable one persists in trying to adapt the world to himself. Therefore, all progress depends upon the unreasonable man.[1]
>
> —George Bernard Shaw

1. INDIGENOUS ECONOMICS

From time immemorial, Indigenous Nations have been economically organized around self-sustaining systems of resource and community asset management, primarily through the gathering and dispersing of goods acquired through traditional economic activities.[2] These economic activities have been recognized under the Canadian common law system.[3] Because of the diversity among Indigenous nations, including First Nations, Métis, and Inuit, across what is now Canada, Indigenous economies or governance cannot be easily generalized, except to highlight that all Indigenous societies had (and have) distinct economies and governance systems.[4] For example, both historically and to present day, the cedar forest plays a central role in the economy and culture for the Haida people in British Columbia who constructed canoes, clothing, utensils and totem poles that guarded local lodges.[5] Alternatively, in Eastern Canada the Mi'kmaq engaged in trade through fishing, hunting and gathering activities.[6]

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1 George Bernard Shaw, *Man and Superman* (1903) at 238, online (pdf): *Archive* <ia800209.us.archive.org/31/items/mansupermancomed00shawrich/mansupermancomed00shawrich.pdf>.

2 Brenda L Gunn, "Exploring the International Character of Treaties 1–11 and the Legal Consequences" in Centre for International Governance Innovation*, Canada in International Law at 150 and Beyond*, Paper No 5 (January 2018) at 1 [International Character of Treaties]; John J Borrows and Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary,* 5th ed (Markham ON: Lexis Nexis Canada Inc, 2018) at 1, 183.

3 See e.g. *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *R v Sioui*, [1990] 1 SCR 1025, SCJ No 48*; Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]; and *R v Marshall*, [1999] 3 SCR 456, 179 DLR (4th) 193 [*Marshall*]. See also Frankie Young, "Indigenous Settlement Trusts: Recharacterizing the Nature of Taxation" (2019) 24 Appeal: Rev Current L & L Reform 3 at 3 [Young].

4 Alan Hanna, "Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective" (2015) 45:3 *Ottawa L Rev* 365 at 369 [Hanna, "Making the Round"].

5 *Haida*, *supra* note 3 at para 2.

6 *Marshall*, *supra* note 3.

Nonetheless, settler colonialism interrupted Indigenous production and resource governance systems. The result was that these resource governance systems, and the kinds of resources engaged, more generally evolved, out of necessity, over hundreds of years. However, Indigenous Nations' economic systems, while taking many different forms depending upon the Nation in question, is more generally distinguished from Eurocentric systems by their imperative to benefit and enrich the collective rather than individuals.[7] For those Nations that follow more traditional forms of governance, two core concepts are typically embedded in communal Indigenous governance and economic structures: "sharing and group recognition" and "social economic equity."[8] Typically, for these Bands, any decision-making structure that does not account for the opinions of community members is "antithetical to Indigenous ways of doing business."[9] That is not to say that individual Indigenous entrepreneurship that employs a market-based approach has not historically been a cornerstone of Indigenous economies. Indeed, Indigenous peoples globally were encouraged to engage in individual commerce and communities established laws to make trade and commerce possible for individual members.[10] Nonetheless, this paper is focused on Indigenous Nations' collective approach to economic development.

In section 2, I begin with an overview of the key arguments that resulted from the research herein. I follow in section 3 with a discussion of the advantages and disadvantages of two modes of asset governance—corporations and non-profits—by Indigenous communities. In section 4, the discussion focuses on the current hybrid model structures recognized in Canada in British Columbia and Nova Scotia. This section also distinguishes the advantages and disadvantages of each of these models as it relates to Bands.[11] In section 5, an overview of Indigenous corporate models in both the United States (US) and Australia is provided. This section discusses how Canada could be informed by these models and serves to highlight what is missing in the currently available corporate forms.

I conclude that due to the limited application of hybrid corporate law provisions in Canada to date, ongoing monitoring and research may be required.[12] Prima facie the unique nuances

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7 See *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 53; John A Curry, Han Donker & Paul Michel, "Social Entrepreneurship and Indigenous People" (2016) 4 J Co-operative Organization and Management 108 at 108 [Curry et al].

8 Curry et al, *supra* note 7 at 108–09.

9 Gail Henderson, "Indigenous Entrepreneurship and Social Entrepreneurship in Canada" (2018) 83 SCLR (2d) at 276 [Henderson, "Indigenous Entrepreneurship"]. Notably, Indigenous ways of doing business in Canada range in business approach and forms of governance. The connection to community ranges based upon the business endeavor engaged. See e.g., Aboriginal Economic Development Corporations at Canadian Council for Aboriginal Business, "National Perspectives on Indigenous Prosperity: Aboriginal Economic Development Corporation Capacity" (2020) at 4, online (pdf): *Canadian Council for Aboriginal Business* www.ccab.com/wp-content/uploads/2020/02/CCAB-Report-1-web.pdf

10 Adam Crepelle, "Decolonizing Reservation Economies: Returning to Private Enterprise and Trade," (2019) 12 J Bus Entrepreneurship & L 413 at 415.

11 While there are various Indigenous governance forms in Canada, the discourse focuses on First Nations' Bands that are recognized under the *Indian Act* and therefore experience particular legal constraints. *Indian Act*, RSC 1985, c I–5, s 2(1).

12 Bob Doherty, Helen Haugh & Fergus Lyon, "Social Enterprises as Hybrid Organizations: A Review and Research Agenda" (2014) 16 Intl J Management Rev 417 at 417. While scholars have previously only

of Indigenous economies—the desire to advance Indigenous profit while retaining custom and tradition—may align with the tensions inherent in hybrid business models. However, due to the limited Band autonomy in asset distribution, the lack of flexibility in reporting requirements and the potential restrictive definition of community purpose, I argue that these structures likely do not extend far enough to achieve the goal of economic reconciliation. Rather, Canada could take guidance from both the United States and Australia in establishing its own unique Indigenous-centric model.

2. OVERVIEW

The principle of sustainability guides many, if not most, Indigenous Nations. The prerequisite to take only as much as you need impacts how a community might conduct business and engage in economic development.[13] For example, the Mi'kmaq in eastern Canada are guided by *Netukulimk*, which means "achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity, or productivity of our environment."[14] The Tsilhqot'in also understand sustainability through the concept of *Nulh Ghah Dechen Ts'edilhtan,* which means killing only what you need to carry you through.[15] Consequently, the "larger emancipatory projects of self-governance and improved economic, social and cultural well-being"[16] of Indigenous Nations should take into consideration the unique and diverse Indigenous cultures involved.

Today, many Indigenous governments are working to gain greater political autonomy[17] with a view to attaining self-determination. As such, they are considering how to manage Indigenous assets and resources in ways that assert Indigenous cultures. Respecting Indigenous Nations' unique ways of engaging in economics grounds the principle of "economic reconciliation." Economic or business reconciliation refers to the practice of "actively promoting equal economic opportunity for *all Canadians*."[18] As such, promoting economic opportunity

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focused on relevant terms and frameworks related to socially minded enterprise, a shift has more recently occurred to the actual management and performance of social enterprises.

13 Robert Yalden et al., *Business Organizations: Practice, Theory and Emerging Challenges,* 2nd ed (Toronto: Emond Montgomery, 2018) at 240 [Yalden].

14 See Unama'ki Institute of Natural Resources, "Netukulimk" (last visited 15 December 2019), online: *Unama'ki Institute of Natural Resources* <www.uinr.ca/programs/netukulimk>.

15 *Tsilhqot'in Nation Wildlife Law*, s 2 (enacted by the Xeni Gwet'in First Nations Government Chief and Council on July 16, 2019), online at: www.tsilhqotin.ca/wp-content/uploads/2020/12/Law_2019_08_23_TsilhqotinNationNGDT-WildlifeLaw.pdf See also Hanna, "Making the Round", *supra* note 4 at 370 citing *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 397.

16 Henderson, "Indigenous Entrepreneurship", *supra* note 9 at 244.

17 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Canada Communication Group, 1996) at 7 [RCAP].

18 Canadian Council for Aboriginal Business, "Business Reconciliation in Canada Guidebook" (2019) at 9, online (pdf): *Canadian Council for Aboriginal Business* <www.ccab.com/research/ccab-collaboration series/business_reconciliation/> [CCAB Guidebook] [emphasis mine]; National Indigenous Economic Development Board, "Without Equal Economic Opportunities, There Can be No Reconciliation with Indigenous Canadians" (22 November 2016), online: <www.naedb-cndea.com/en/without-equal-economic-opportunities-no-reconciliation>; Indigenous Corporate Training "Why Canada Needs Indigenous Economic Reconciliation" (5 April 2017), online (blog): *Indigenous Corporate Training* <www.ictinc.ca/blog/why-canada-needs-indigenous-economic-reconciliation>.

for Indigenous peoples should be on par with the greater Canadian economy and should not compromise Indigenous customs and traditions. Therefore, if the principle of "economic reconciliation" is ultimately aimed at promoting economic equity for all Canadians, concrete action should be taken to actively promote business opportunities for Indigenous peoples in ways that support Indigenous cultures.

In 2015, the Truth and Reconciliation Commission of Canada (TRC) suggested that economic reconciliation should be a significant element in the larger reconciliatory framework that guides relations between Indigenous peoples and the greater Canadian society. In the Calls to Action Report, the Commission implored the Canadian corporate sector to adopt corporate policy and core operational activities involving Indigenous peoples and their lands and resources to ensure that Indigenous peoples are able to gain long-term sustainable benefits from economic development projects.[19] Sustainability for Indigenous peoples means engaging in not merely capitalist ventures, but economic endeavors that align with community culture, values and autonomy.[20] However, rather than disposing of the global capitalist approach to asset accumulation entirely, Indigenous communities should still be able to engage with a range of regional, national and global markets in ways that uphold Indigenous values while still generating revenues to benefit the community.[21]

There is a growing movement in "mainstream" economic development to advance "social enterprise-," a business model that addresses social needs.[22] Social enterprises are distinguished from corporations with corporate social responsibility (CSR) that could include a wider social purpose as a part of the corporate code.[23] Rather, for social enterprises the responsibilities of the social enterprise are embedded in the firm's constitution and governance model both procedurally and structurally.[24] Typically, a social enterprise's main objective is to make a social, cultural or environmental impact rather than simply return profits for its shareholders.[25]

This kind of economic engagement may closely align with Indigenous traditional values in that some social economists or entrepreneurs engage with markets through selling goods and providing services, but they typically do not pursue the generation of profit for its own sake (or for private gain); alternatively, they may pursue profit while contemporaneously pursuing a community benefit.[26] This "third sector" economy designed to use profit to address social needs may be conceptually problematic in that it may not fit neatly into existing models of capitalism

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19 *Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (Ottawa: Library and Archives Canada, 2015) at 306 (Call to Action 92).

20 Curry et al, *supra* note 7 at 109.

21 Henderson, "Indigenous Entrepreneurship", *supra* note 9 at 245.

22 Nina Boeger, "Beyond the Shareholder Corporation: Alternative Business Forms and the Contestation of Markets" (2018) 45:1 J L & Society 10 at 10; Yalden et al, *supra* note 13 at 516.

23 Arguably, the nature of a corporation is not changed in making a voluntary CSR commitment that is "linked to a business case for improving the company's performance." Boeger, *supra* note 22 at 11.

24 *Ibid* at 11.

25 *Ibid* at 12.

26 Mary Sue Schmaltz, Book Review of *The Power of Unreasonable People: How Social Entrepreneurs Create Markets that Change the World* by J. Elkington and P. Hartigan, (2010), 22:2 J of Nonprofit & Public Sector Marketing at 152.; JJ McMurtry, "Introducing the Social Economy in Theory and Practice" in JJ McMurtry, ed, *Living Economics: Canadian Perspectives on the Social Economy, Cooperatives, and*

in which social goals are separated from economic activity, nor does it fit into the idea of the welfare state being the primary mechanism to achieve social objectives.[27] However, this third sector economy could also be understood as not capitalism as usual, but instead where stakeholders "take back the economy."[28] Regardless, in relation to Indigenous communities that work to advance the community's profit objectives without compromising culture, the conceptual problem is more likely that social enterprise discourse (including issues of asset governance) has not considered Indigenous cultures and the ongoing effects of colonialism on Indigenous economies.

Notwithstanding, social enterprise discourse could take guidance from how Indigenous communities have sought to balance mission and profit over the years. That is, strategically aligning Indigenous community values (traditional and cultural) with market-based values is not a recent notion for many Indigenous communities that have tried to balance both objectives in economic development corporations. Despite the many inherent tensions between Indigenous cultures and the mainstream economy, or perhaps because of them, in present-day economic dealings, Indigenous communities more commonly use statutory forms of asset management, including non-profit or corporate structures.[29]

Non-profit and corporate structures each present advantages and disadvantages in shaping economic practices and values. For-profit corporations encourage asset accumulation and hold community purposes as a lower priority. While non-profit structures promote public benefits, opportunities to raise capital may be lacking. The challenge for Bands that rely upon current statute is that the distinction between the two forms may be somewhat ambiguous, particularly in aiming to specify what constitutes a community purpose or what constitutes the advancement of economic development.

For instance, in the case of the *Gull Bay Development Corporation v Canada,*[30] the Band set up a non-profit corporation and was denied tax-exempt status, pursuant to section 149(1)(l) of the *Income Tax Act*,[31] a provision that allows non-profit corporations pursuing special public purposes to be exempt from tax. The Minister of National Revenue argued that a logging operation set up by the Band to gain access to funds did not qualify as a non-profit enterprise

Community Economic Development (Toronto: Emond Montgomery Publications Ltd., 2010) at 4 cited in Henderson, "Indigenous Entrepreneurship", *supra* note 9 at 242.

27 *Ibid* at 242.

28 See generally JK Gibson-Graham, Jenny Cameron & Stephen Healy, *Take Back the Economy: An Ethical Guide for Transforming Our Communities* (Minnesota: University of Minnesota Press, 2013).

29 To name a few, Mushkegowuk Development Corporation; Mississaugas of the Credit Business Corporation; Six Nations of the Grand River Development Corporation; Gitga'at Development Corporation; Campbell River Indian Band Development Corporation; Tahltan Nation Development Corporation; Gull Bay Development Corporation; Fort McKay Group of Companies; Penticton Indian Band Development Corporation; and Membertou Economic Development Corporation.

30 See *Gull Bay Development Corp v R,* [1983] FCJ 1133, 84 DTC 6040 [*Gull Bay*]. Seventy-one employees of the corporation, 49 engaged in logging and 22 in other activities, were employed by The Gull Bay Development Corporation. The mandate was to carry out maintenance work on the recreational and administrative buildings and facilities and perform other social and charitable activities determined to be beneficial to the social and economic welfare of the members of the Reserve. The logging operations contributed to this end.

31 *Income Tax Act,* RSC 1985 c1 (5th supp) s 149(1)(l) [*Tax Act*].

according to the purposes of the *Tax Act*.[32] Although there was no doubt that commercial enterprise had been engaged, the purpose of accumulating corporate assets, from the Band's perspective, was for social welfare activities; that is, the profits were to be spent to clean up the community.[33] In essence, provided that a non-profit corporation's business activities are ancillary to its community purpose, and the corporation is not accumulating profit for shareholder gain, it will meet its mandate.[34] The Federal Court ruled in favour of the corporation, finding that the purpose of the corporation was to engage "worthy social and charitable activities required on the Reserve"[35] and the assets were used for that mission. As such, it was found that social and welfare activities of the corporation were not a cloak to avoid payment of tax on a commercial enterprise but were the real objectives of the corporation. This decision demonstrates that, as it relates to Bands and the application of non-profit corporate structures, whether an entity is conducting business that prioritizes mission could be challenged by third parties.

This article therefore addresses the ways in which a current shift in Canadian corporate law (as well as possible future changes) may align with and support the kinds of Indigenous objectives at the forefront of Indigenous community development discussions and initiatives for decades. The current shift in the law relates to new legal structures explicitly designed to facilitate social enterprise, a kind of enterprise that has traditionally been at the heart of Indigenous economies. These structures have been called hybrid corporate structures[36] and have garnered more recent, albeit limited, discussion in legal scholarship. A hybrid structure has been defined as a "corporate legal structure that blends traditional for-profit and non-profit legal characteristics that enable—and at times, require—businesses to pursue both economic and social mandates."[37]

To date in Canada, both British Columbia, in establishing the Community Contribution Company (CCC),[38] and Nova Scotia, in establishing the Community Interest Company (CIC),[39] have introduced provisions in corporate law statutes that promote this kind of unique asset management within a corporation. However, the requirement of locating hybrid provisions in Canadian corporate law has been questioned due to the more recent recognition that directors may consider other objectives in assessing the overall "best interests of the corporation." Historically, shareholder primacy, in which the interests of the corporate shareholders are prioritized, and maximizing profits have been recognized as wholly characteristic of the

32 See *Gull Bay*, *supra* note 30 at para 6.

33 *Ibid* at para 10.

34 *Ibid* at para 18.

35 *Ibid* at para 26.

36 See Gail E Henderson, "Could Community Contribution Companies Improve Access to Justice" (2016) 94:2 Can Bar Rev 209 [Henderson, CCC]; Carol Liao, "A Critical Canadian Perspective on the Benefit Corporation" (2017) 40:2 Seattle UL Rev 683 at 684 [Liao, Benefit Corp]; Lorne Sossin & Devon Kapoor, "Social Enterprise, Law & Legal Education" (2017) 54:4 Osgoode Hall LJ 997 [Sossin & Kapoor]; Henderson, "Indigenous Entrepreneurship", *supra* note 9 at 242; Carol Liao, "The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise" (2013) 9:1 MJSDL 56 [Liao, CSR].

37 See Liao, Benefit Corp, *supra* note 36 at 684.

38 *Business Corporations Act*, SBC 2002, c 57, Part 2.2 [*BCA BC*].

39 See *Community Interest Companies Act*, SNS 2012, c 38 [*CICA*].

corporate structure.[40] Some scholars have argued that maximizing shareholder profits rather than meeting stakeholder concerns as the predominant purpose of a corporation has sustained beyond the evolving and contradictory theories of the purpose of corporation.[41]

Whether directors could contemplate other factors, aside from profit, has been addressed by the Supreme Court of Canada (Court) in several decisions over the last 15 years. The Court has found that the best interests of the corporation could also include other stakeholder interests.[42] The ongoing debate in legal scholarship relates to how these obligations intertwine. Existing competing arguments—maximizing shareholder profits versus prioritizing stakeholder interests—[43] seemingly continue to be debated however. The nuances are complex, and in fact, even in these Canadian legal decisions, contradictory views are espoused (discussed further in section 3.1). Therefore, a review of these legal decisions will highlight that the development of Indigenous-centric corporate models could assist in leaving no doubt as to the ability of directors to place other considerations above profit objectives in carrying out the corporate mandate.

The recent developments in British Columbia and Nova Scotia could inform how a hybrid approach might reconcile the dichotomy of interests at stake to benefit Indigenous communities. Because there is no official legal form attached to the term "social enterprise," there is ample opportunity for this form to be developed and an Indigenous business to subsequently classify itself in this manner.[44] Further, developing a hybrid-type corporation would still enable the raising of capital through equity financing,[45] as is possible with a general corporation. In contrast, non-profit structures that typically prioritize "social welfare, civic improvement, pleasure or recreation or for any other purpose except profit"[46] cannot issue shares and therefore distribute dividends to its members.[47] Finally, corporate law typically *mandates* that directors go beyond the profit objective by including a community purpose in the provisions of a hybrid corporation. Normally a statement is required in the corporation's notice of articles that identifies the community purpose of the corporation[48] such that, in issuing shares and distributing dividends, the corporation would be restricted by the kinds

40 Adolf Berle & Gardiner Means, *The Modern Corporation and Private Property*, Revised ed (New York: Harcourt, Brace and World, 1967); Adolf Berle, "Corporate Powers as Powers in Trust" (1931) 44:7 Harv L Rev 1049 [Berle]; Milton Friedman, "The Social Responsibility of Business is to Increase its Profits" *The New York Times Magazine* (13 September 1970).

41 See Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89:2 Geo LJ 439.

42 See *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 3 SCR 461 [*Peoples*]; *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at para 40 [*BCE*].

43 Christopher C. Nicholls, *Corporate Law* (Toronto: Emond, 2005) at 272.

44 Yalden et al, *supra* note 13 at 516.

45 *Ibid* at 574. Raising capital in general is an issue that has plagued Indigenous communities.

46 *Tax Act*, *supra* note 31, s 149(1)(l).

47 Yalden et al, *supra* note 13 at 534.

48 See *BCA BC*, *supra* note 39, s 51.91(1). Community purpose is defined as "a purpose beneficial to (a) society at large, or (b) a segment of society that is broader than the group of persons who are related to the community contribution company, and includes, without limitation, a purpose of providing health, social, environmental, cultural, educational or other services, but does not include any prescribed purpose"; See also *CICA, supra* note 38, s 9(1). The memorandum of association must state that the

of activities it can pursue and *to whom and to what extent it may distribute profits*.[49] Arguably, without these specific protections in place, for-profit corporate structures do not adequately protect the community purpose of a corporation because a short-term focus on shareholder profit and value could easily supplant a corporation's community purpose.[50]

As a solution in a larger reconciliatory framework, hybrid corporate models could be one way for Indigenous Nations to design Indigenous-centric economically sustainable business models.[51] I address some of the more pragmatic benefits and drawbacks of using hybrid models in this paper. Nonetheless, I argue that current Canadian hybrid forms may not actually extend far enough to advance the 92nd Call to Action, which calls upon the corporate sector to ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.[52] Economic reconciliation should effectively promote the unique complexities of Indigenous business ventures. For this reason, it may be more judicious to establish a specific Indigenous-centric corporate model by following other jurisdictions. In the next section, I begin this discourse with a discussion on the both the standard and non-profit corporations as applied to Bands.

3. CORPORATIONS AS FORMS OF INDIGENOUS ASSET MANAGEMENT

For Indigenous communities (Bands) whose activities are regulated under the *Indian Act*,[53] numerous constraints in advancing economic development initiatives exist due to the nature of a Band. Legally, a Band is not a natural person with legal standing and the rights, powers and privileges of a natural person.[54] Bands have limited legal capacity under the *Indian Act* to act in certain circumstances.[55] This is an impediment to economic growth because it prevents Bands from entering into certain kinds of agreements that would permit them to

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business is a NSCIC, has a community purpose and is restricted in its ability to pay dividends or distribute assets.

49 Yalden et al, *supra* note 13 at 575–576 [emphasis mine].

50 Henderson, "Indigenous Entrepreneurship", *supra* note 9 at 272.

51 Rick Colbourne, "Indigenous Entrepreneurship and Hybrid Ventures" in Andrew C. Corbett & Jerome A. Katz, eds, *Hybrid Ventures,* Advances in Entrepreneurship, Firm Emergence and Growth, vol 19 (Bingley, UK: Emerald Publishing Limited, 2017) 93 at 93.

52 Canada, Truth and Reconciliation Commission of Canada, *Calls to Action,* Catalogue No IR4–8/2015 (Ottawa: Truth and Reconciliation Comission, 2015) at 10, online (pdf): *National Centre for Truth and Reconciliation* <nctr.ca/reports.php>.

53 *Indian Act, supra* note 11.

54 The Courts have recognized the Band's legal capacity in limited situations. Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis, 2017) at 96–97, citing *West Moberly First Nations v British Columbia*, 2017 BCSC 1700 on the capacity to contract, employ, and sue and be sued. For examples of recognized legal capacity see also *Telecom Leasing Canada (TLC) Ltd. v Enoch Indian Band*, [1992] AJ No 845, [1994] 1 CNLR 206 (Alta QB) on the capacity to execute a contract of guarantee; *Heron Seismic Services Ltd. v Muscowpetung Indian Band*, [1990] SJ No 493 (SK QB), 1990 CanLII 7500 on the capacity to contract and enter into commercial agreements.

55 *Indian Act, supra* note 11, s 81(1), 83, 89(2), 81(1)(h) (capacity to create by-laws, collect taxes, enter conditional sales contracts, own buildings and personal property on reserve, or deal with financial institutions).

own fee simple lands, lease reserve lands, or enter into joint ventures or partnerships.[56] To work around *Indian Act* provisions, Bands must rely upon land claim agreements, recognized self-government agreements, or modern treaty agreements to remove the constraints of the *Indian Act* and designate the group a legal entity with capacity; otherwise, a Band could also establish a separate legal entity that is not subject to the *Indian Act* in the same way a Band is.[57] The corporate form is of considerable assistance here. Indigenous Nations in Canada use these kinds of legal structures to enable certain functions, including liability protection, separation of business and politics, tax advantages, access to finance and regulatory certainty.[58]

In its simplest form, for a Band the Canadian business corporation—formed by filing articles of incorporation,[59] a notice of the registered office of the corporation, a notice of directors, and paying the prescribed fee[60]—is a legal vehicle created to promote the economic interests for those who hold shares in the corporation.[61] Unless a corporation explicitly dictates otherwise, certain default rules regulate the workings of the business corporation.[62] There are numerous advantages of corporations for Bands. First, the corporation is considered at law to be a separate legal entity from the creator of the corporation; it carries on the business of the corporation, owns property, possesses rights and incurs liabilities related to carrying on the business.[63] This is of particular value to Bands due to their unique legal status. It is also a curious solution for Bands given that corporations are abstract concepts; in many respects a corporation is an artificial legal entity that can only be understood by "the effects it has on the world in which it operates."[64] Similarly, a Band, declared by the Governor in Council to be a Band for the purposes of the *Indian Act*, and described as a body of Indians for whose use and

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56 Hanna, *supra* note 54 at 103. For instance, a Band does not fit the definition of legal owner under provincial land regimes. See *Land Titles Act*, RSO 1990, c L–5, s 1. Further, in order to lease reserve lands the Crown must enter into a lease on behalf of the Band (unless the Band obtains authority under the *First Nations Land Management Act*, SC 1999, c 24).

57 Hanna, *supra* note 54 at 103.

58 Yalden et al, *supra* note 13 at 309; Because of the character of Bands and the aggregation of members in the community, the question arises as to who would be shareholders or directors in a corporation. Often the Band will have an internal arrangement for "nominating" individuals to be directors on behalf of the Band, such as Chief and Council. The Band itself may not directly hold shares in the corporation. Rather, it can create a trust and the trustees can hold shares with the Band members as beneficiaries. See Hanna, *supra* note 54 at 102–03.

59 Depending upon the jurisdiction, different requirements are necessary. For example, in NS, a memorandum of association is required (constating documents constitute a contract), in PEI, letters patent are necessary (granted to incorporators and govt. has power to issue letters patent), in BC, a notice of articles is necessary, and all remaining common law provinces and under federal jurisdiction, articles of incorporation are required (not contractual in nature but the statute governs shareholder and director roles). See Nicholls, *supra* note 43 at 40.

60 Yalden et al, *supra* note 13 at 144.

61 See PM Vasudev, "The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward" (2012) 41:2 Hofstra L Rev 399 at 399 [Vasudev, Stakeholder].

62 Yalden et al, *supra* note 13 at 135.

63 See J Anthony VanDuzer, *The Law of Partnerships and Corporations,* 4th ed (Toronto: Irwin Law Inc., 2018) at 14.

64 Nicholls, *supra* note 43 at 3.

benefit lands and moneys are set apart,[65] is also an abstract entity that can only be understood by the effects it has in the world in which it operates. Nonetheless, a Band does not have the same legally recognized status that a corporation does.

The long-standing authority confirming the nature of a corporation as a separate legal entity is *Salomon v Salomon & Co*.[66] In the facts of this case, Salomon transferred his business from a sole proprietorship to an incorporated company from which he and his family were the members.[67] The transfer met all of the necessary form requirements under the *Companies Act 1862*.[68] After such time as the business failed and was liquidated, the liquidator, seeking recourse for the unsecured creditors, sought to have the company declared a "sham corporation" arguing that Salomon was principally an agent and should be personally liable for the debt.[69] However, the House of Lords, overruling the lower court, found that if a company legally incorporates and follows all of the necessary form elements, the corporation is akin to any other independent person with independent rights and liabilities; further, the House of Lords found Salomon's motives in promoting the company were irrelevant in determining the corporation's relevant rights and liabilities.[70]

This decision is critical as it relates to the liability of shareholders because at law the corporation is considered a distinct person from the parties who created it, regardless of whether it precisely resembles a previous business or structure.[71] Shareholders, while having rights related to the business and their ownership of shares, do not in actuality own the business carried on by the corporation.[72] Because a corporation is a new legal person, it has its own rights analogous to the rights of a human person and the business's liabilities would be distinct from those of its shareholders, directors and employees. As such, other than what is provided for in the Act, the parties who created the corporation cannot be held liable for the decisions of the corporation.[73]

Accordingly, irrespective of whether a Band is the only shareholder or director in the company, when a Band establishes a corporation, it creates a separate legal entity regardless of how close the Band's identity is tied to the corporation. While this is a means to overcome the *Indian Act*, it also produces somewhat unreliable results for Bands. Given the traditional forms

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65 See *Indian Act, supra* note 11, s 2(1).

66 [1897] AC 22 9 HL at 42 [*Salomon*].

67 *Ibid* at 23.

68 25 & 26 Vict c 89.

69 *Salomon*, *supra* note 66 at 24.

70 *Ibid* at 30.

71 *Ibid* at 51.

72 See VanDuzer, *supra* note 63 at 13. The nature of a business corporation is that a nexus exists between the various of stakeholders and shareholders in the business.

73 See e.g. *Business Corporations Act*, RSO 1990, c B 16, ss 40, 92(1) [*OBCA*]. Employees and officers of corporations may only be found liable in certain distinct factual circumstances including where acts of fraud, deceit, dishonesty, or want of authority on the part of employees or officers are found. Further, the corporate veil may be pierced where the use of a corporate structure was a sham and officer, or employee actions, were themselves tortious. See *ScotiaMcleod Inc. v Peoples Jewellers Limited,* [1995] 26 OR (3d) 481 (CA) at 490–1 (leave to appeal refused), [1996] SCCA No 40 (SCC) [*ScotiaMcLeod*]; *Budd v Gentra Inc*., 1998 CanLII 5811 (ON CA), 111 OAC 288 [*Budd*].

of governance and social structure, the concept of a "corporation as a mirror" for an Indigenous community is nebulous at best; arguably, corporate law cannot possibly mirror traditions and legal practices that date back to hundreds of years prior to the creation of corporate law.[74]

Next, most corporate structures also provide shareholders with limited liability protection. Liability is limited to the amount of the shareholders' investment, which could include the expenditures associated with setting up and running a corporation such as a one-time set-up fee and legal fees for creating the corporation, in addition to certain ongoing costs for annual meetings and corporate tax return filings.[75] Essentially, other than the initial amount of the corporate contribution, any liabilities of the Band corporation would not accrue to the Band personally. This crucial characteristic of a corporation protects the Band if the corporation reports losses for the fiscal year. On the other hand, the benefit of corporate limited liability for shareholders may be unfavourable for creditors who might seek to counterbalance the risk by charging higher interest rates or providing other less favourable credit terms, including, in some cases, requiring personal guarantees from shareholders.[76]

The "stakeholder principle" in corporate law does demonstrate, however, that the promotion of corporate engagement by protecting the interests of non-shareholder groups is gaining some traction. In fact, the *Canada Business Corporations Act*[77] provides for some creditor protection via the oppression remedy and derivative actions for wrongs to a corporation.[78] Historically, these remedies were only available to shareholders. Nonetheless, as was found in *Peoples Department Stores Inc. (Trustee of) v Wise,*[79] the Court may also give deference to the director's exercise of the "business judgment rule" in protecting shareholders to the detriment of creditors.[80] As such, Bands may still be somewhat hindered by creditor reluctance to assume risks in Band corporate financing schemes.[81]

However, the ability to secure certain capital through more flexible options, a feature critical to this kind of business structure, is a distinguished benefit and better option than a Band seeking financing on its own. Due to *Indian Act* constraints around Indigenous lands

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74 Yalden et al, *supra* note 13 at 310.

75 See VanDuzer, *supra* note 63 at 100; Yalden et al, *supra* note 13 at 17.

76 See Paul L Davies & Sarah Worthington, *Principles of Modern Company Law,* 10th ed (Thomson Reuters: London, 2016) at 34.

77 RSC 1985, c C–45 [*CBCA*].

78 *Ibid,* ss 238–241. Further, section 122(1.1) of the *CBCA* explicitly states that directors may consider numerous stakeholder interests in determining the best interests of the corporation.

79 *Peoples*, *supra* note 42.

80 *Ibid* at para 65. For a further discussion on the stakeholder principle see PM Vasudev, "Corporate Stakeholders in Canada—An Overview and a Proposal" (2013) 45:1 Ottawa L Rev 137. Stakeholder conflicts are typically about competing interests, not necessarily well-defined rights in which the legal system is most familiar, and the adversarial nature of court proceedings and the technical rules of form, procedure, and evidence may bar stakeholders from successfully seeking remedies; see Vasudev, Stakeholder, *supra* note 61 at 423.

81 While it would circumvent the benefit of limited liability protection, if a Band wanted to improve creditor accessibility and demonstrate good intentions, it could take advantage of the unlimited liability corporation recognized in Alberta and Nova Scotia. See *Business Corporations Act*, RSA 2000, c B–9, s 15.2; *Companies Act*, RSNS 1989, c 81, s 9(c).

in which the Crown is found to hold underlying title, such property is not able to form the normative attachment required in secured property transactions for the purposes of accessing credit arrangements.[82] Therefore, Bands have historically grappled with finding creative ways to secure capital for community development purposes[83] because a Band's real or personal property may not be used as collateral in credit arrangements.

Essentially, the key mechanisms to secure corporate capital through debt and equity give Bands some flexibility. As it relates to debt financing, the corporation may secure assets by either entering into loan agreements with lenders, either through secured or unsecured means, or through issuing debt securities such as bonds, debentures or notes.[84] The debt incurred through this means is a claim on the corporation's assets.[85] On the other hand, a corporation might depend upon equity financing to raise money by issuing common, preferred, or other shares in its stock in exchange for money.[86] Equity, the shareholders' residual economic interest in the corporation's assets after all debts are satisfied, represents the financial claim created.[87]

Another advantage of establishing a corporation is that, due to extensive regulation under provincial statue or the *Canada Business Corporations Act* (CBCA),[88] standard form incorporating documents are easily accessible. To reduce costs, the Band can use the standard form contracts that contain certain default rules to govern the relationship between the corporation and its shareholders.[89] This decreases the transaction costs of setting up a corporation and could increase the returns to shareholders.[90] Further, some Bands that hold reserve lands that cross the border of two provinces could register under the *CBCA* to operate extra-provincially.[91] However, because a Band can register to conduct business in any province regardless of where they choose to operate, it is debateable whether the *CBCA* really offers an advantage in this regard.[92] While being able to use the corporate name across Canada is certainly a benefit of registering under the *CBCA*, incorporating under local statute is more common for most private incorporators.[93] Practically speaking, in determining a statute to

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82 *Indian Act, supra* note 11, s 89(1). See Anita Wandzura, "The Enforcement of Security Interests Against the Personal Property of First Nations Persons on a Reserve" (2008) 39:1 Ottawa L Rev 1 at 6–7; Shin Imai, *Annotated Aboriginal Law: The Constitution, Legislation and Treaties* (Toronto, ON: Thomson Reuters, 2020) at 327; Anna Lund, "Judgment Enforcement Law in Indigenous Communities—Reflections on the Indian Act and Crown Immunity from Execution" (2018) 83 SCLR (2d) at 279.

83 Hanna, *supra* note 54 at 102–04.

84 Christopher C Nicholls, *Corporate Finance and Canadian Law,* 2nd ed (Toronto: Thomson Reuters, 2013) at 11 [Nicholls, Corp Finance].

85 *Ibid*.

86 *Ibid* at 19.

87 *Ibid*.

88 *CBCA*, *supra* note 77.

89 See VanDuzer, *supra* note 63 at 126–7.

90 *Ibid* at 126.

91 Such as Onion Lake First Nation that is located in and around the borders of both Alberta and Saskatchewan.

92 Nicholls, *supra* note 43 at 43.

93 *Ibid*. Through mutually beneficial reciprocal arrangements, a Band can carry on business in any province nonetheless.

incorporate under Bands should consider the technical differences between the statutes.[94] These technical differences could be critical to a Band looking to meet its own strategic and practical objectives.

The perpetual nature of the corporate structure may also be particularly useful to Bands in so far as setting up a business where the primary focus is on increasing long-term wealth through, for example, resource development or procurement contracts. Given the more general Indigenous principle of making decisions with a view to the impact on the next seven generations of community members, the ability of a corporation to exist in perpetuity is appropriate. Coupled with this benefit, the relatively static nature of the management structure is also an advantage for Bands. The effect of the central role of the directors of the corporation is that a body of fluctuating shareholders delegate oversight of the company to a smaller group of committed directors (and subsequently appoint Officers to handle the day-to-day operations or delegate such responsibilities) and accountability is regulated through corporate legislation.[95]

This central management structure effectively compartmentalizes Band businesses and allocates business resources, in effect keeping the businesses separate from politics.[96] Further, while a change in the membership of a corporation allows for the transfer of existing shareholder's shares in property, the company property is otherwise left intact, and property and realization of assets are not required to be split up.[97] Both the central management structure and the perpetual nature of a corporation accommodate the nature of the shifting Band leadership, and could be a stabilizing benefit to Indigenous business development at risk of changing circumstances of a Band when a new Council is elected every two to three years.

Some Bands incorporate under a not-for-profit corporate structure to facilitate its purposes. Similar to a for-profit corporation, a non-profit corporation must be incorporated either federally[98] or provincially.[99] These corporations are subject to special legislation because they are not required to pay income tax.[100] In fact, one of the key benefits of a non-profit corporation is that it qualifies for tax exemption under section 149(1)(l) of the *Tax Act*. However, this may be irrelevant because the Canada Revenue Agency has interpreted Bands to be public bodies

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94 Nicholls, *supra* note 43 at 42. A complete discussion on these technicalities is beyond the scope of this paper but they might include peculiarities such as where meetings must be held, whether par value shares may be issued, or how onerous the director liability provisions are.

95 See Davies & Worthington, *supra* note 76 at 10; Yalden et al, *supra* note 13 at 18.

96 Hanna, *supra* note 54 at 102. See also Jim Bennett, "Indigenous Economic Development Corporations – The ABCs" (27 June 2016), online (blog): *Indigenous Corporate Training Inc*. <www.ictinc.ca/blog/indigenous-economic-development-corporations-the-abcs>. In theory, this is a benefit of a Band corporation but that is not to say that politics do not sometimes interfere with decision-making in economic development corporations.

97 See Davies & Worthington, *supra* note 76 at 35; Yalden et al, *supra* note 13 at 17.

98 See *Canada Not-for-Profit Corporations Act*, SC 2009, c 23.

99 See e.g. *Ontario Corporations Act*, RSO 1990, c 38 [*OCA*]. Note that the *OCA* will be replaced by Ontario's *Not-for-Profit Corporations Act,* SO 2010, c 15 [*ONCA*] as early as 2020. See <www.ontario.ca/page/guide-not-profit-corporations-act-2010> for commentary on the differences between the OCA and ONCA.

100 Yalden et al, *supra* note 13 at 533.

performing a function of government in Canada.[101] Therefore, a primary advantage of a Band corporation is that, provided Band income is not used for the profit of its members[102] and the Band owns 90% of the capital of the corporation and conducts at least 90% of its business within its reserve territory, it will qualify for tax exemption, pursuant to section 149(1)(d.5) of the *Tax Act*.[103] Rather, if a non-profit corporation engages in a business activity with the intention to yield profits beyond that which is merely ancillary or incidental or beyond simple cost recovery, the Canada Revenue Agency is likely to find that the corporation's net profits will no longer be tax exempt.[104] For instance, any surplus must not be used for purposes that are unrelated to the organization's special objectives.[105] Social enterprise activities are therefore restricted by the *Tax Act* in that non-profit corporations are not able to engage in revenue generating activities.[106]

Moreover, because a non-profit corporation is typically created to provide special benefits to the public or a segment of society, a special purpose is required to be included in the

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101 Canadian Revenue Agency, Interpretation Bulletin IT-064503117, "Comments on Indian Act Bands as 149(1)(c) Entities" (27 July 2016).

102 See *Tax Act*, *supra* note 31, s 149(1)(l). Further, a non-profit corporation created to further certain exclusively charitable objects may also qualify for tax-exemption as a registered charity. As a registered charity, contributors to the organization are eligible to receive tax benefits for such contributions. Accordingly, offering tax benefits to charitable organizations encourages support for activities which are of "special benefit to the community." See *News to You Canada v Canada (National Revenue),* 2011 FCA 192 at para 22; *Native Communications Society of British Columbia v Minister of National Review*, [1986] 3 FC 471 at para 5, 1986 CarswellNat 361; Sean Markey et al, *Social Enterprise Legal Structure: Options and Prospects for a 'Made in Canada' Solution*, (Burnaby: Centre for Sustainable Community Development, Faculty of the Environment, Simon Fraser University, 2011) at 12. A definition of charitable purpose is also found in Ontario's *Charities Accounting Act*, RSO 1990, c C10, s 7. See also Mark R Gillen & Faye Woodman, eds, *The Law of Trusts: A Contextual Approach,* 3rd ed (Toronto, Ontario: Emond Montgomery Publications, 2015) at 185–189 [Gillen & Woodman].

103 See *Tax Act*, *supra* note 31, s 149(1) (d.5). d.5 subject to subsections (1.2) and (1.3), a corporation, commission or association not less than 90% of the capital of which was owned by one or more entities each of which is a municipality in Canada, or a municipal or public body performing a function of government in Canada, if the income for the period of the corporation, commission or association from activities carried on outside the geographical boundaries of the entities does not exceed 10% of its income for the period.

104 Canada Revenue Agency, Interpretation Bulletin IT–496R, "Non-Profit Organizations" (2 August 2001) at para 9, referred to in Yalden et al, *supra* note 13 at 534. Factors that could determine whether a non-profit corporation has strayed from its not-for-profit purposes include: the organization's activities operate in a normal commercial manner; goods or services are more broadly available and not restricted to members and guests; operations are on a profit basis rather than a cost recovery basis; excesses are accumulated each year; or the organization's operations are in competition with taxable entities carrying on the same trade or business. See Donald J Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 3rd ed (Toronto, Ontario: LexisNexis, 2016) at 442 [Bourgeois].

105 See Bourgeois, *supra* note 104 at 443–4. In fact, Bourgeois notes that any surplus should be justified by demonstrating that "the excess was accumulated from non-commercial activities; the level of excess is reasonable given the nature of the organization and its activities; and the organization has a plan on how to use the excess."

106 See Robert B Hayhoe & Andrew Valentine, "Structural challenges for social enterprise in Canada" (2013) 19:6 Trusts & Trustees 519 at 522.

corporate constitution.[107] Special purposes include "social welfare, civic improvement, pleasure or recreation or for any other purpose *except profit*."[108] To this end, a non-profit structure might be used when a Band is particularly interested in furthering special social objectives such as health care, education, or cultural development. As in the case of a for-profit corporation, this kind of structure benefits from the same limited liability protection critical to organizations carrying financial risk.[109] Contrary to a for-profit corporation, however, a Band non-profit corporation is not able to raise equity capital because such organizations cannot issue shares or distribute dividends.[110] While some funding can be generated from corporate, governmental, and other donations, a further difficulty lies in the ability to grow the corporation after funding sources are exhausted.[111] This restriction on revenue generation and access to capital is therefore a considerable impediment for those Bands establishing non-profit corporations because source funding has historically been an issue for Bands.[112]

All factors combined, Bands typically require access to unique business models that will further their economic development and still maintain Indigenous cultural values.[113] Indigenous peoples' decision making is largely informed by Indigenous laws, and so it is critical that Indigenous communities make consistent and concerted efforts to "engage in economic development in accordance with their deeper teachings and traditions."[114] The next section will discuss how Bands might benefit from changes in Canadian corporate legislation that could enable both profit generation and social considerations that are relevant to Indigenous customs and traditions.

4. HYBRID CORPORATE MODELS

Bands that seek to advance their economies often find themselves thrust into a capitalist system that mainly flourishes under the participation of individuals or groups that are equipped

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107 See Davies & Worthington, *supra* note 76 at 7.

108 *Tax Act*, *supra* note 31, s 149(1)(l) [emphasis added].

109 See Davies & Worthington, *supra* note 76 at 7.

110 See *Gull Bay, supra* note 30 at para 17. However, as noted in the *Gull Bay* decision, a non-profit corporation is not barred from participating in ancillary business practices that unintentionally create profit. See also Yalden et al, *supra* note 13 at 534.

111 See Carol Liao, *For-Profit, Non-Profit, and Hybrid: The Global Emergence of Legally 'Good' Corporations and the Canadian Experiment* (PhD Thesis, University of British Columbia, 2016) [unpublished] at 4; Canadian Council for Aboriginal Business, "Promise and Prosperity: The 2016 Aboriginal Business Survey" (2016) at 8, online (pdf): *CCAB* <www.ccab.com/wp-content/uploads/2016/10/CCAB-PP-Report-V2-SQ-Pages.pdf> [CCAB].

112 Hanna, *supra* note 54 at 11.

113 Notably, only 27% of Indigenous businesses are incorporated in Canada, whether by Bands or individuals; although this profile is somewhat similar to non-Indigenous businesses, Indigenous businesses are less likely to be incorporated. Indigenous corporations also tend to be relatively small (less than 100 employees). Nonetheless, they have had some successes as longer-term, revenue-generating enterprises that are experiencing business growth. See CCAB, *supra* note 111 at 16.

114 John Borrows & Sarah Morales, "Challenge, Change and Development in Aboriginal Economies" in Joseph Eliot Magnet & Dwight A Dorey, eds, *Legal Aspects of Aboriginal Business Development* (Toronto, Ontario: LexisNexis, 2005) at 164 [Borrows & Morales].

to enter into commercial risk.[115] Property and asset accumulation for private gain can be a driving force under such a system. However, in the pursuit to maximize profits in business, other values or ethics may be compromised.[116] The motivation to purely attain profits may not align with the *sui generis* interests and the significant cultural considerations at stake for Indigenous peoples. In fact, it has been argued that focusing on the narrow objective of simply generating profits runs the risk of Indigenous corporations disconnecting from the broader influences economic development could have on language, the greater community, organizational change, and self-government.[117] Although Indigenous societies have been impacted by the effects of colonization, Indigenous asset accumulation remains largely communally driven. The impetus for holding communal values is to advance social impact from within the community and beyond. In fact, growing social impact is particularly relevant to Indigenous communities seeking economic reconciliation in Canada.

Notably, due to the longstanding and well-documented social issues, discrimination and flagrant inequality Indigenous peoples have endured, Indigenous businesses in many respects engage in a kind of social entrepreneurship where business is used to create social change and address social injustice issues.[118] While not unique to Indigenous peoples, social considerations drive the traditional and cultural values that underscore Indigenous business and innovation. A Band might be driven by social entrepreneur-like considerations where, in the end, business ventures are defined by activities and processes that are social reflections[119] of Indigenous culture and values. From a policy perspective, the concept of social enterprise is part of a growing movement in Canada. In fact, the Government of Ontario undertook a social enterprise strategy and found that:

> [s]ocial enterprises use business strategies to achieve a social or environmental impact. While generating revenues from the sale of goods and services, social enterprises also expressly intend to create positive outcomes, and they measure their results. As their business grows, the social impact grows.[120]

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115 Jennifer Lane Lee & Bryan Gladstone, "Ethics and Enterprise: The Role of the Company Director Disqualification Act" (1997) 4:3 Small Bus Enterprise Development 129 at 129.

116 See Henderson, CCC, *supra* note 36 at 211.

117 CCAB, *supra* note 111 at 14. In countering these impacts on economic development corporations organizations such as Transformation International: Social and Economic Development assist Indigenous communities, individuals, organizations and governments in increasing capacity while maintaining cultural values. Multi-disciplinary teams are developed to meet community, business, nation building, governance and organizational needs. Carol Anne Hilton, the CEO of Transformational International, is also the founder of the Indigenomics Institute, an Indigenous economic advisory for public governments, Indigenous communities and the private sector. See "Indigenomics Institute", online: *Indigenomics Institute* <www.indigenomicsinstitute.com>.

118 The concept of "social entrepreneurship" is discussed in Filipe Santos, "A Positive Theory of Social Entrepreneurship" (2012) 111:3 J Bus Ethics 335 at 335; Shaker Zahra et al, "A Typology of Social Entrepreneurs: Motives, Search Processes and Ethical Challenges" (2009) 24:5 J Bus Venturing 519; John Elkington & Pamela Hartigan, *The Power of Unreasonable People: How Social Entrepreneurs Create Markets That Change the World* (Boston: Harvard Business Press, 2008).

119 Zahra et al, *supra* note 118 at 519.

120 "Ontario's Social Enterprise Strategy 2016–2021" (21 June 2016, last modified 12 March 2019), online: *Government of Ontario* <www.ontario.ca/page/ontarios-social-enterprise-strategy-2016-2021>. See also Sossin & Kapoor, *supra* note 36 at 1003.

While corporations may provide benefits in enabling Indigenous communities to improve their fiscal positions, to be sustainable they must also respect the *sui generis* nature of Indigenous culture, systems, and laws and their relevance within the Canadian economic landscape. For that reason, Bands that seek to merge both fiscal and social considerations have typically had to be creative in developing business structures.

A corporate hybrid, defined as a "corporate legal structure that blends traditional for-profit and nonprofit legal characteristics that enable—and at times, require—businesses to pursue both economic and social mandates,"[121] may be a welcome alternative corporate structure. Hybrid corporate structures are new to business law in Canada and, as noted in section 2, to date such corporate provisions have only been established in British Columbia under the CCC, and in Nova Scotia under the CIC. However, some questions remain about whether localizing hybrid provisions within Canadian corporate law is even necessary given that the Court has ruled that, in assessing the overall "best interests of the corporation," directors may take all stakeholder interests into account.[122] This means that if a Band risks fiscal profit so the integrity of its environmental stewardship is maintained, and a stakeholder such as an equity investor were to challenge it, the Court could possibly rule in the Band's favour. However, the debate may not be as simple as it first appears. The next section will discuss some of the overarching issues related to the stakeholder debate.

4.1. The Stakeholder Debate

There is no doubt that both economic and socio-economic theories inform how the law and policy of business organizations are analyzed.[123] The purpose of the corporation is largely interpreted through these theories. Yet certain assumptions—that business is primarily for wealth maximization and rational choice theory can predict market behaviour—linger in the economic analysis of law.[124] Opposing views on corporate governance situate the overarching

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121 See Liao, Benefit Corp, *supra* note 36 at 684.

122 *Peoples, supra* note 42 at para 42.

123 For instance, on economic theories, see nexus of contracts theory in Frank E Easterbrook & Daniel R Fischel, "The Corporate Contract" (1989) 80:7 Colum LR 1416; Ian Ayres & Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99:1 Yale LJ 87; see transaction cost theory in Oliver Williamson, "The Economics of Organization: The Transaction Cost Approach" (1981) 87:3 Am J Sociology 548; and see agency cost theory in Michael J Jensen & William Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure" (1976) 3:4 Fin Econ 305. On socio-economic theories see the communitarians' approach in David Millon, "Communitarians, Contractarians, and the Crisis in Corporate Law" (1993) 50:4 Wash & Lee L Rev 1373; on corporate law as public law see Kent Greenfield, "Corporate Law as Public Law" in *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (Chicago and London: University of Chicago Press, 2006); on the nexus of contracts theory see Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85 Va L Rev 247; and on businesses as social institutions see Spencer Thompson, "Towards a Social Theory of the Firm: Worker Cooperatives Reconsidered" (2015) 3:1 J Co-operative Organization & Management 3. For a brief overview of each of these theories, see Yalden et al, *supra* note 13 at 590–617.

124 See Richard A Posner, "Wealth Maximization Revisited" (1980) 2 Notre Dame JL Ethics & Pub Pol'y 85; Thomas S Ulen, "Rational Choice Theory in Law and Economics" (2000) 1 Encyclopedia L & Econ 790. Although there are certainly opposing views on this normative assumption. See Yalden et al, *supra*

public policy issue of "for whom should the corporation be governed."[125] Whose interests should prevail when a collision of corporate interests occurs?

This issue was canvassed in two recent court decisions, *Peoples Department Stores Inc (Trustee of) v Wise*[126] and *BCE Inc. v 1976 Debentureholders*.[127] These decisions deal with the "specific substance" of the statutory duty owed under the *CBCA*[128] as to whom duties are owed within the corporation.[129] The Court grappled with the idea of the duties owed to both shareholders and other stakeholders within the corporation, particularly where competing interests could be at stake. In a thought-provoking debate, it has been argued that the shareholder primacy approach, wherein shareholder interests should be given deference, does not necessarily preclude other stakeholder interests from being considered. In fact, it has long been held that "considering non-shareholder stakeholder interests was an effective means of advancing shareholder wealth."[130] Indeed, in *Peoples*, the Court found that directors, in exercising discretion, may account for other factors that are more generally in the best interests of the corporation.[131]

While economically, the "best interests of the corporation" could relate solely to increasing profits,[132] the Court has now established that directors might consider, with impunity, other factors relevant to the best interests of the corporation, such as the interests of employees, suppliers, creditors, consumers, governments or the environment.[133] There is no doubt that

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note 13 at 591, citing Jules Coleman, "Efficiency, Utility, and Wealth Maximization" (1980) 8 Hofstra L Rev 509 and Richard Dworkin, "Is Wealth a Value?" (1980) 9 L Leg Stud 191.

125 Yalden et al, *supra* note 13 at 621.

126 *Peoples*, *supra* note 42.

127 *BCE*, *supra* note 42.

128 *CBCA*, *supra* note 77.

129 It has been argued that it is likely that the Court confused the statutory duty of loyalty and good faith with the common law duty (duty of care), hence the confusion as to whom duties are owed. See Ed Waitzer & Johnny Jaswal, "Peoples, BCE, and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439 at 442.

130 Yalden et al, *supra* note 13 at 622. Also see R Edward Freeman & John McVea, "A Stakeholder Approach to Strategic Management" in Michael A Hitt, R Edward Freeman & Jeffrey S Harrison, eds, *The Blackwell Handbook for Strategic Management* (Oxford: Blackwell, 2006).

131 *Peoples*, *supra* note 42 at para 42.

132 E. M. Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2004) 39:3 Can Bus LJ 398 at 400–01, cited in *Peoples*, *supra* note 42 at para 42.

133 *Ibid* at para 42. See also *Teck Corp v Millar*, 33 DLR (3d) 288 at 314, 1972 CarswellBC 284 (BCSC) [*Teck Corp*]; *BCE*, *supra* note 42. In June 2019, section 122 of the *CBCA*, *supra* note 77, was also amended to permit directors, in considering the best interest of the corporation, to also consider other key stakeholders and interests, albeit, this Act applies to federally incorporated companies:

> "122(1.1) When acting with a view to the best interests of the corporation under paragraph (1)(a), the directors and officers of the corporation may consider, but are not limited to, the following factors:
>
> (a) the interests of
>
> (i) shareholders,
>
> (ii) employees,

directors owe a statutory fiduciary duty to protect the best interests of the corporation.[134] The policy reasons for this duty stem from the fact that shareholders and creditors expect that, in transferring control of their interests to the corporation, the representative directors and officers will make reasonable business decisions that will be advantageous to the corporation.[135] That is, the "best interests of the corporation" should be at the forefront of the decision-making process of the managers of the company. While the best interests of the corporation have traditionally been interpreted as the best interests of the "collective shareholders," the court in *Peoples* and *BCE* rejected this well-recognized principle.[136]

Notably, one of the cases referred to in *Peoples* to support the Courts' position that the "best interests of the corporation" does not simply mean the best "interests of the shareholder"[137] was *Teck Corp. Ltd v Millar.*[138] Scholars have argued that *Teck* is actually more consistent with the director's duty to protect shareholders and not to deviate from the shareholder primacy principle. For instance, MacPherson argues that Berger, J., for the British Columbia Supreme Court (BCSC), is more likely grappling with the expansiveness of shareholder primacy as opposed to rejecting the principle outright.[139] He notes that Berger, J. indicated (albeit in obiter dicta) that the law should consider that the generation of wealth through the mobilization and development of resources as being key to defining the directors' fiduciary duties.[140] Berger, J. went on to indicate that if directors were to consider the consequences of potential company policies, and then rejected that policy, they might still be found to have considered the interests of the shareholders.[141] Macpherson argues that in discussing the concept of "fiduciary duty" Berger J. is focused on the interests of the shareholders, including how certain decisions might impact the community. MacPherson notes Berger, J.'s statement that a focus on other interests "lying beyond those of the company's shareholders in the *strict sense*" indicates that it is more

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(iii) retirees and pensioners,

(iv) creditors,

(v) consumers, and

(vi) governments;

(b) the environment; and

(c) the long-term interests of the corporation."

134 See *CBCA*, *supra* note 77, s 122(1); *OBCA*, *supra* note 73, s 134(1).

135 See *Peoples*, *supra* note 42 at para 34.

136 *Ibid* at para 42; *BCE*, *supra* note 42 at para 39.

137 *Peoples*, *supra* note 42 at para 42.

138 *Teck Corp*, *supra* note 133.

139 Darcy L MacPherson, "Supreme Court Restates Directors' Fiduciary Duty—A Comment on *Peoples Department Stores v Wise*" (2005) 43:2 Alta L Rev 383 at 390 [MacPherson]. For an opposing view, see Ian B Lee, "Peoples Department Stores v Wise and 'The Best Interests of the Corporation'" (2005) 41 Can Bus LJ 212 at 214. MacPherson notes (at 392) that Lee rejects the more expansive interpretation. Also see Claudio R Rojas, "An Indeterminate Theory of Canadian Corporate Law" (2014) 47:1 UBC L Rev 59 [Rojas] for a discussion of how the Supreme Court of Canada develops in *BCE* a theory of corporate law that aims to mitigate the power differential between shareholders and other stakeholders.

140 MacPherson, *supra* note 139 at 390 citing *Teck Corp*, *supra* note 133 at 314.

141 *Teck Corp*, *supra* note 133 at 314.

likely that the BCSC in *Teck* disagrees with the strict interpretation of the best interests of the shareholders and is merely searching for a more expansive view of shareholder primacy.[142]

Regardless of whether the Court's interpretation of *Teck* in the *Peoples* decision was accurate, the court went on in *BCE* to expand the approach it had already set out. It affirmed the *Peoples* analysis that directors and officers are required to consider the interests of all corporate stakeholders, including "shareholders, employees, suppliers, creditors, consumers, governments and the environment."[143] However, deference was given to the business judgment rule,[144] which evidently signified that directors could take advantage of the freedom to favour certain stakeholder' interests; as long as director decisions can be justified as "plausibly promoting the interests of the corporation and a minimum standard of fairness is observed in relation to all stakeholders," the directors could be considered as fulfilling their duty to the corporation.[145] As such, the Court found that where certain interests collide, the directors owe their duty to the corporation and not stakeholders:

> People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.[146]

The deviation from the "shareholder primacy" approach in *Peoples* and *BCE*, absent an appropriate and clear framework, is problematic.[147] In fact, in *BCE*, while the Court provided clear guidance on the framework for the application of the test for the oppression remedy under the *CBCA*, no guidance was provided as to the manner in which directors should deal with this more expansive view of the statutory fiduciary duty owed by them.[148] Since this departure represents a substantial change to the law, it is incumbent upon the Court to provide an explanation of how that which replaces the long held principle of shareholder primacy should be dealt with.[149] Absent comprehensive guidance on this new but incomplete recasting of corporate law principles regarding how corporate directors and officers should handle their

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142 MacPherson, *supra* note 139 at 391 [emphasis added].

143 *BCE*, *supra* note 42 at para 39 citing *Peoples*, *supra* note 42 at para 42.

144 *BCE*, *supra* note 42 at para 87.

145 See VanDuzer, *supra* note 63 at 207.

146 *BCE*, *supra* note 42 at para 66.

147 MacPherson, *supra* note 139 at 386; J Anthony Vanduzer, "*BCE v. 1976 Debentureholders*: The Supreme Court's Hits and Misses in Its Most Important Corporate Law Decision Since *Peoples*" (2010) 43:1 *UBC L Rev* 205 at 207 [Vanduzer, BCE]; Waitzer & Jaswal, *supra* note 130 at 442; See also Berle, *supra* note 40 and William W Bratton & Michael L Wachter, "Shareholder Primacy's Corporatist Origins: Adolf Berle and *The Modern Corporation*" (2008) 34:1 J of Corporation L 99.

148 MacPherson, *supra* note 139 at 387; Vanduzer, BCE, *supra* note 147 at 206–207.

149 MacPherson indicates that simply stating "directors are not to favour the interests of any one group of stakeholders and instead, they are to consider all relevant constituencies" does not provide enough guidance from the Court (MacPherson, *supra* note 139 at 386–387).

duties, they are left to their own means of interpreting what is required of them.[150] It could be argued then that a director "told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither. Faced with a demand from either group, the [director] can appeal to the interests of the other."[151]

These Court decisions signify that the Court has created more uncertainty than it had likely intended. Arguably, without further direction on how directors are to proceed it is likely that the open debate means that Bands cannot predict how a collision of business values might be dealt with in Canadian corporate law. Due to the ambiguous interpretation of the phrase "best interests of the corporation," Bands might benefit from its own corporate hybrid model to remove uncertainty in facilitating the dual pursuits of both commercial and community interests. In these structures, the amount shareholders receive is limited in exchange for the fulfillment of social objectives;[152] that is, the social purpose that drives the organization takes precedence over mere accumulation of profit.[153] In some ways, investors should be prepared to limit the profit motive for starting the business.[154] The time may be ripe for Bands because, with the growth of social entrepreneurship, a significant shift in the business landscape is occurring as social entrepreneurs seek to facilitate socially focused business ventures in fresh and innovative ways.[155] This ripeness could allow Bands to engage economically on their own terms. The next section discusses some of the pragmatic differences between the Nova Scotia CIC and the British Columbia CCC and how these differences in technicalities should be accounted for before Bands consider taking advantage of either structure.

4.2. Community Interest Companies Versus Community Contribution Companies

The *Community Interest Company Act* (*CICA*)[156] governs the establishment of a CIC in Nova Scotia, while the CCC in British Columbia is governed under the general *Business Corporations Act*.[157] The various nuances of these corporate structures are too many to comprehensively cover. However, some of the more notable ones will be discussed here, in particular how the provisions relate to Band structures.

150 Vanduzer, BCE, *supra* note 147 at 207.

151 Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge: Harvard University Press, 1991) at 38. It has been argued that it is likely that the Court mischaracterized the content of the statutory duty of loyalty and good faith and duty of care, hence the confusion as to the scope of duties owed. See Waitzer & Jaswal, *supra* note 130 at 444–53; Nicholls, *supra* note 43 at 298–9.

152 See Liao, CSR, *supra* note 36 at 75; Henderson, CCC, *supra* note 36 at 212.

153 Henderson, CCC, *supra* note 36 at 209.

154 *Ibid* at 217.

155 See Liao, Benefit Corp, *supra* note 36 at 684.

156 See *CICA*, *supra* note 39.

157 See *BCA BC*, *supra* note 38. Note that, as indicated at the beginning of the paper, Bands from any province can incorporate in these jurisdictions and still do business elsewhere so these models are available outside British Columbia and Nova Scotia (although it is preferable to incorporate in ones' own jurisdiction).

For a CIC, either at the time of incorporation or thereafter, a company must make an application to the Registrar of Community Interest Companies to be designated as a CIC.[158] The Registrar then determines if the company meets the requirements to be registered as such based upon the requirements set out in the *CICA*.[159] Several aspects of the CIC could present challenges for Bands. First, the memorandum of association *must* contain a statement of community purpose (and directors are required to act accordingly), including that the company has not been formed for a political purpose.[160]

While establishing a community purpose is not problematic on its own and is to be expected, the definition of "community purpose" could be problematic for Bands in that it is not entirely clear how this clause could be interpreted as a purpose that must benefit either society at large or a segment of society that is broader than the group of persons related to the company.[161] This could be an ambitious mandate for Bands that seek to impact their immediate communities. Indeed, social purposes for a Band may not extend to a broader "society at large" or even a segment of society that is broader than the group of persons associated with the company, as Bands typically create enterprise to benefit the community itself. Consequently, it has been argued that the definition of "community purpose" found in these structures is too restrictive for Bands.[162] As the entire commitment of these structures revolves around the ability of a social enterprise to advance a social mandate, the unique position of Bands within Canadian society should be considered.

However, while some disagreement exists on whether a Band's activities can fall within the narrow definition of "community purpose" found in either of these structures, the broader mandate of economic reconciliation should also be considered in interpreting a Band's "community purpose." Arguably, the benefits of these structures for Indigenous communities do extend to society at large. Removing the legal barriers that have historically constrained Indigenous economies, through the debilitating effects of a "welfare state," is a necessary step

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158 *CICA*, *supra* note 39, ss 5, 6. The Registrar must also approve the amalgamation of two or more companies seeking to become a designated CIC, pursuant to s 7(4), *CICA*.

159 For instance, the corporate name must end with either "Community Interest Company," "société d'intérêt Communautaire" or abbreviations such as CIC, C.I.C., SIC or S.I.C and have no fewer than three directors (*CICA, supra* note 39, ss 5(3), 5(4)(d), 6(4), 6(5)(d), 10(1), 11–12); Similar requirements exist for the CCC (*BCA BC*, *supra* note 38, ss 51.921, 51.93).

160 NS Reg 121/2016, s 3(2)(b) [Regulations].

161 See *CICA*, *supra* note 39, s 2(1)(c).

> 2(1)(c) "community purpose" means a purpose beneficial to
>
> (i) society at large, or
>
> (ii) a segment of society that is broader than the group of persons who are related to the community interest company,
>
> and includes, without limiting the generality of the foregoing, a purpose of providing health, social, environmental, cultural, educational or other services, but does not include a political purpose or a prescribed purpose.

162 For a more fulsome discussion see Henderson, "Indigenous Entrepreneurship", *supra* note 9 at 273 [emphasis added].

to building stable, mutually beneficial relationships[163] and an inclusive economy based upon respect and understanding.[164]

Indeed, economic reconciliation encourages the development of reciprocal business relationships between Indigenous and non-Indigenous stakeholders, which, in turn, fosters "meaningful collaboration and mutual prosperity"[165] of *all* members of Canadian society. As such, a corporate community purpose related to Indigenous economies that promotes equity has far-reaching impacts upon the greater Canadian society and economy. In emphasizing that the recognition of Indigenous nationhood does not undermine the Canadian state, the Truth and Reconciliation Committee asserts that the Indigenous economy is critical to building a sustainable Canadian economy.[166]

Further, recall the broad interpretation the Court applied in the *Gull Bay* decision in determining whether certain economic activities could still fall within the benevolent purposes in which the non-profit corporation was created. While the commercial logging activities were found to yield some profit, the operation was found to fall within the purposes in which the non-profit organization was created because the profit was used to promote the economic and social welfare of the community.[167] In taking guidance from this decision, a court could also be likely to go beyond a more narrow interpretation to find that a community purpose extends to "society at large" in that it advances economic reconciliation throughout the greater Canadian society.[168] However, it is not entirely clear how the definition of "community purpose" could be interpreted given that the *Gull Bay* decision related to receiving a non-profit tax exemption under section 149(1)(l) of the *Tax Act,* which more broadly indicates that the charity must be organized and operated exclusively for "social welfare, civic improvement, pleasure or recreation or for any other purpose except profit".[169] As such, the definition of "community purpose" could still be restrictive as it relates to Bands.

Next, the CIC must also declare that the corporation is limited in its ability to pay dividends and distribute assets.[170] Understandably, the transfer of assets is restricted to those interests that align with the community purposes.[171] The declaration of dividends must first be approved by members through special resolution,[172] and be in accordance with the Community Interest

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163 For more on building mutually beneficial future relationships, see RCAP, *supra* note 17 at 656.

164 CCAB Guidebook, *supra* note 18 at 10.

165 *Ibid* at 10.

166 RCAP, *supra* note 17 at 654.

167 See *Gull Bay*, *supra* note 30 at para 26.

168 In fact, one could also just as easily argue that given the sovereign nature of Indigenous Nations, this definition should be applied in the context of "Indigenous society" at large rather than "Canadian society" at large. However, under Canadian jurisprudence, Indigenous nations have not been legally recognized as sovereign states (although history certainly demonstrates the existence of Indian sovereignty)

169 See *Tax Act*, *supra* note 31, s 149(1)(l).

170 Notably, a CIC may also be forced to dissolve if the Registrar is no longer satisfied that the company meets the criteria for eligibility. See *CICA*, *supra* note 39, s 26. See *CICA*, *supra* note 39, s 9(1).

171 *Ibid*, s 13(1)(c).

172 Regulations, *supra* note 160, s 5(2)(b).

Company Regulations made under section 28 of the *CICA*.[173] To this end, the regulations contain asset lock provisions that limit the dividends declared each year to no greater than the total of 40% of the corporation's profit for the fiscal year and the unused cumulative dividend amount from any previous financial year.[174]

On its face, the limited asset distributions do permit some financial flexibility. However, the inherent conflict between pursuing "profits" versus "community benefits," especially since the noted asset lock provisions are based on forecasts rather than actual results, ostensibly prevents more inclusive decision making for Bands.[175] Because Bands have historically faced numerous economic barriers, such as the restrictions around land use and development or the ability of Bands to access credit, restricting a Band's ability to exercise discretion in asset distribution further impedes their autonomy, which prevents economic reconciliation. The CIC also cannot acquire property through a joint tenancy with another individual or company.[176] This negatively impacts Bands seeking to meet the demands of specific projects or opportunities by entering into land development contracts with third parties.[177]

Finally, in addition to publishing the annual report (approved by the directors) to the shareholders before the annual general meeting, the CIC must file its Community Interest Report with the Registrar; this report should include a description of the ways in which the company benefited society or advanced the community purpose of the company.[178] Further to these additional requirements, a CIC Financial Report must also be provided to the Registrar that includes a summary of asset transfers as defined under section 2(1)(n),[179] as well as the purpose of those transfers.[180] Thus, incorporating under the *CICA* requires additional reporting requirements, which creates an unnecessary administrative burden for Bands that may already be dealing with capacity issues. Australia is dealing with this issue (discussed in the next section) so that smaller corporations have fewer reporting requirements than larger corporations.

The CCC, as distinguished from the CIC, is not required to apply for special status. Rather, a business automatically becomes a CCC if it adheres to the provisions of the *BC BCA*, most notably setting out a statement of community purpose in its notice of articles, and then conducting business as such. Similarly, the *BC BCA*'s definition of community purpose is also

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173 *CICA, supra* note 39, s 15(1)(a).

174 Regulations, *supra* note 160, ss 5(1), 5(2)(c), 5(4).

175 Henderson, "Indigenous Entrepreneurship", *supra* note 9 at 276.

176 See *CICA*, *supra* note 39, s 14(1).

177 For example, the Tahltan Nation Development Corporation ("TNDC'), in Northwestern BC, works to advance diverse growth strategies to strengthen capacity within the community by providing job and leadership prospects to community members. One of the ways they do this is by forming partnerships with operating companies within Tahltan Territory that provide Tahltan members with employment and leadership opportunities to control and manage TNDC operations (Tahltan Nation Development Corporation, "About TNDC" (last visited 26 October 2020), online: *TNDC* <www.tndc.ca/about>). For a more complete discussion see Hanna, *supra* note 54 at 15–23.

178 See *CICA*, *supra* note 39, s 21(1)(a).

179 *Ibid*, s 2(1)(n).

180 *Ibid*, s 21(1)(f).

restrictive; however, it is silent on whether a political purpose can be signified.[181] As indicated, Bands may not be able to meet the mandate of benefiting "society at large" due to the narrow scope of focus on "community."

Similar to the CIC, dividend and asset distribution restrictions are also integral to the CCC.[182] The CCC regulations contain asset lock dividend distribution provisions, which restrict a Band's autonomy.[183] Moreover, while Part 2.2 of the *BC BCA* on CCC's does not explicitly address whether the CCC can enter into a joint tenancy in purchasing property, holding joint property is implied through section 51.95(4), which states that, on the dissolution of the company, any asset held as a joint tenant immediately before the dissolution will be entrusted to the other joint tenants if they are qualified entities.[184]

The reporting requirements are less stringent for the CCC in that the filing of the Community Contribution Report follows the same requirements as the *BC BCA.* An annual report, approved by the directors, must only be published to shareholders before the annual general meeting. However, it too must contain an accurate account of its financial activities and the public benefit engaged.[185]

It appears that the impetus for either the CCC or the CIC is that these structures assist in advancing an entity's "community purpose" while maintaining some ability to distribute assets. Various provisions in the *CICA* and the *BC BCA* provide the means to work around the regular corporate form: directors and officers agree to conduct business with a view to conforming to the "community purpose" contained in the memorandum of association or the articles; directors are to adhere to the asset lock provisions that restrict the amount of possible shareholder distributions during operation and upon dissolution; and directors are required to provide annual reports demonstrating the noted benefit to society, the amount and use of assets transferred from the corporation, and the amount of dividends declared.[186] Nevertheless, these workarounds may not fit with the unique circumstances of Bands.

Though they are not ideal models, Indigenous-centric models in other jurisdictions could demonstrate that the Canadian hybrid examples (not specific to Bands) fall short of offering a corporate form open and inclusive of a mandate for "economic reconciliation." Canadian lawmakers in consultation with Indigenous communities could take guidance from Australia and the US to develop an Indigenous-centric corporate business model. Just as in Canada, the US and Australian models typically have the essential components of the corporate form:

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181 See *BCA BC*, *supra* note 38, s 51.911(1).

> 51.911 (1) A company is a community contribution company if its notice of articles contains the following statement:
>
> This company is a community contribution company, and, as such, has purposes beneficial to society. This company is restricted, in accordance with Part 2.2 of the *Business Corporations Act*, in its ability to pay dividends and to distribute its assets on dissolution or otherwise.

182 *Ibid*, ss 51.911, 51.92, 51.94 & 51.95.

183 BC Reg 63/2013, ss 4–8 [CCC Regulations].

184 See *BCA BC*, *supra* note 38, s 51.95(4).

185 *Ibid*, s 51.96.

186 Henderson, "Indigenous Entrepreneurship", *supra* note 9 at 273.

centralized management, limited liability, perpetuity, and the transferability of ownership interests.[187] Note, however, that the US model does permit the issuance of tax-exempt bonds, if the proceeds are used to finance essential government services, and shares, restricted to only members of the tribe.[188] Conversely, the Australian model does not permit the issuance of shares,[189] although it does allow for the distribution of profits to members. The differences between each of these corporations and how they might be applicable in Canada are covered in the following sections.

5. TAKING GUIDANCE FROM THE UNITED STATES AND AUSTRALIA

In the US, Indian tribes can be recognized under the *Indian Reorganization Act*, 1934[190] or independently under separate legislation in some cases.[191] Ostensibly they are considered sovereign tribes, albeit sovereignty is dubiously equated with "domestic dependent nations."[192] Although the *Reorganization Act* signified a shift in Indian policy to provide a means for tribes to attain autonomy, economically and politically,[193] the Act is not entirely dissimilar to the *Indian Act* in that the US Bureau of Indian Affairs has assumed the responsibility for the administration of Indian lands. Nonetheless, section 16 of the *Reorganization Act* codified the ability of tribes to organize their own tribal governments by establishing federally recognized constitutions that govern the tribal community.[194] Tribes are also legally empowered and encouraged to engage in economic development through their ability to establish their own federally chartered corporations under section 17 of the *Reorganization Act*,[195] discussed in the next section.

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187 Graham Safty, "Federal Diversity Jurisdiction and American Indian Tribal Corporations" (2012) 79:4 U Chicago L Rev 1593 at 1596; Karen J Atkinson & Kathleen M Nilles, "Tribal Business Structure Handbook IV–1" (2008), online: *Internal Revenue Agency* <www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf> at III–1 [Tribal Business Handbook].

188 US Department of the Interior, Assistant Secretary—Indian Affairs, Office of Indian Energy and Economic Development and Division of Economic Development, "Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure" (last visited 26 October 2020) at 9, online (pdf): *U.S. Department of the Interior Indian Affairs* <www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf> [US Indian Affairs].

189 Australian Government, *"The CATSI Act and the Corporations Act*—some differences" (June 2010), online (pdf): *Office of the Registrar of Indigenous Corporations* <www.oric.gov.au/s843.pdf> [Australian Government].

190 25 USC § 477 [*Reorganization Act*].

191 For instance, see Jason Hanna, "The Little Shell Tribe will be the newest Native American group recognized in the US" (December 18, 2019), online: *CNN* <www.cnn.com/2019/12/18/politics/montana-little-shell-tribe-recognition-trnd/index.html>.

192 See *Worcester v Georgia*, 31 US (6 Pet) 515 at 581–582 (1832) [*Worcester*]; Crepelle, *supra* note 10 at 426.

193 Crepelle, *supra* note 10 at 438.

194 *Reorganization Act*, *supra* note 190, s 16.

195 *Ibid*, s 17; *Petitioning procedures for tribes reorganized under federal statute and other organized tribes*, 25 CFR §82 (2012) [25 CFR §82]; Crepelle, *supra* note 10 at 438. First the tribe must draft a charter, which operates much like the Articles of Incorporation in that it contains the corporation's organizational framework, purpose and management details. If the tribal council approves the charter (this procedure is set by tribal law), the tribal council must submit the charter along with a petition expressing a desire to form a section 17 corporation to the Bureau of Indian Affairs. The Bureau reviews the charter to ensure it

5.1. United States: Section 17 Corporations

Because tribes possess sovereign immunity, their ability to participate in economic development could be impeded[196] when business partners choose not to assume such risks. Nevertheless, a tribe is enabled to waive its sovereign immunity under this corporate structure.[197] Certain features could be advantageous to informing Band corporate structures in Canada.

First, because the section 17 corporation is tribal in nature, its purposes mirror those of the tribe.[198] Unlike the statutory business regimes in Canada, the statute authorizing section 17 corporations does not contain a definition of "community purpose." Consequently, its purpose clause—usually more generally stating that the corporate mandate is to advance the economic development of the tribe—might be drafted more broadly to accommodate possible changes in the corporation's forthcoming business activities.[199] This differs from the requirement of a more narrowly constructed purpose by both the Nova Scotia CIC and the British Columbia CCC in that a Band's community purpose is required to fit within a more narrow organizational purpose. The Registrar in Nova Scotia could also potentially challenge an "evolving" CIC purpose that does not fit within the *CICA*'s definition of community purpose.

Next, tribes can issue shares to its members, albeit, only under certain conditions.[200] Notably, shares cannot be devised to the general public. Nonetheless, there are otherwise no restrictions on asset distribution that constrains the tribe's autonomy. The tribe may draft the charter of the corporation based upon its own unique circumstances provided that it is consistent with federal law. To this end, the corporate powers that may be conferred under its charter are set out in the *Reorganization Act,* with one notable exception applicable to the use of trust or reserve lands:

> Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease

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is consistent with federal law and, if approved, the tribal council must then ratify the charter prior to the section 17 corporation becoming operable. Tribes can also incorporate under state law just as any other corporation or establish tribally-chartered corporations under their own tribal codes (Tribal Business Handbook, *supra* note 187 at III–11, III–12; US Indian Affairs, *supra* note 188 at 5).

196 Tribal Business Handbook, *supra* note 187 at III–10.

197 25 U.S.C. §477; *American Vantage v Table Mountain Rancheria*, 292 F (3d) 1091 at 1098 (9th Cir 2002) [*American Vantage*].

198 Tribal Business Handbook, *supra* note 187 at III–16.

199 25 CFR §82, *supra* note 195; Tribal Business Handbook, *supra* note 187 at III–10–III–12.

200 25 USC §464. 464 Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation[…]. See also "Choosing a Tribal Business Structure", online (pdf): *US Dep't of the Interior- Indian Affairs* <www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf>.

> for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation.[201]

Otherwise, little direction is provided on managing and distributing assets, other than that the Bureau has provided a model section 17 charter that provides some guidance to tribes.[202] Similar to general corporations, the proposed charter should explicitly state the corporate powers and limitations, the purpose of the business, details on business management, when and how meetings will occur, and other details regarding operations and reporting.[203] To that end, reporting should be consistent with the reporting requirements set out in the charter when it was drafted. Bands might find that there is some merit to this kind of flexibility because the rules may be customized to suit each corporations' needs. This is similar to the *CATSI Act* corporation (discussed in the next section) whereby certain corporate form rules may be substituted for customized ones and reporting has flexible standards.

Nevertheless, the section 17 corporation does have certain shortcomings. As noted above, the powers established under the authority of 25 U.S.C. § 477, essentially one paragraph, provides little statutory guidance and no detailed requirements on establishing the corporate structure. Some tribes will have already created its own tribal code under section 16 of the *Reorganization Act*, which will provide guidance around establishing business structures. However, it is not necessary that a tribe establish itself under section 16 before it creates a section 17 corporation.[204] A lack of structure can be a double-edged sword:[205] it enables creativity and flexibility, but it could reduce the likelihood of business partners entering into contracts with the corporation.[206] Aside from this drawback, the section 17 corporation must also be solely owned by the Indian tribe. As such, equity ownership by outside parties is not permitted. Thus, if this feature were applicable in Canada, a Band would be limited in certain kinds of business development opportunities with third parties, similar to the effect of the *CICA* in Nova Scotia.

Regardless, Canada could possibly adopt some of the more notable features of the section 17 corporation. While it is unclear in the shorter term whether the *Indian Act* will be repealed, or how long that process could take, the *Indian Act* could be amended to permit the establishment of a model akin to a section 17 corporation. The provisions could provide for flexibility in the manner in which a Band corporation is established by providing a Band with the power to create its own Indigenous-centric corporation that aligns with Indigenous values. Arguably, there are drawbacks here because the *Indian Act* has a long history of being a contentious and paternalistic structure. One could argue that simply establishing additional asset governance

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201 25 USC § 477.

202 See "Federal Charter of Incorporation Issued By the United States of America" (last visited 15 November 2020) online: *Bureau of Indian Affairs* <www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc-001806.pdf> (retrieved online January 7, 2020). See also Tribal Business Handbook, *supra* note 187 at III–14.

203 US Indian Affairs, *supra* note 188 at 5.

204 Tribal Business Handbook, *supra* note 187 at III–11.

205 The one way the section 17 corporation is inflexible is that once ratified by the tribal council, tribes cannot independently amend the corporate charter without approval from the Secretary of the Interior or terminate a section 17 corporation except though an act of Congress (Tribal Business Handbook, *supra* note 187 at III–11, 16).

206 US Indian Affairs, *supra* note 188 at 4.

powers within the *Indian Act* is still more of the same in terms of the government regulation of Indigenous affairs.

Further, while the concept is forward thinking, there is an insufficient framework for Canada to adopt a section 17 corporate model in its current form. While the model contains certain noted features for Canadian lawmakers to take guidance from, this model may not extend far enough to meet the goals of economic reconciliation for Bands. Alternatively, the Australian Aboriginal corporate model, discussed in the next section, may also provide guidance to Canadian law-makers insofar as providing a framework for an Indigenous-centric model.

5.2. Australia: Corporations (Aboriginal and Torres Strait Islander) Act 2006

In Australia, while an Aboriginal community may incorporate under state or federal corporate laws, it may also incorporate under specific legislation established to suit the needs of Aboriginal and Torres Strait Islander communities, the *Corporations (Aboriginal and Torres Strait Islander) Act* (*CATSI Act*).[207] This framework was established to balance mainstream corporate law and Aboriginal-centric corporate structures, that is, to allow for flexibility in how Aboriginal communities create their business structures.[208] *CATSI Act* corporations were intended to strike a compromise in Aboriginal business development by respecting both Aboriginal laws and ways of doing business and the Western legal system and business culture.[209]

The *CATSI Act* was created out of the awareness that governments needed to be sensitive to "Indigenous cultural views and practices and their relevance to corporate governance."[210] Corporations established under this Act are considered a special measure for Aboriginal peoples and are regulated by an independent office holder, the Registrar of Indigenous Corporations, supported by the Office of the Registrar of Indigenous Corporations (ORIC).[211] The *CATSI Act*, designed to replace the *Aboriginal Councils and Associations Act 1976*,[212] is a means to provide a legally recognized business structure that bridges the gap between Indigenous culture and that of the broader Australian society in establishing contemporary Indigenous business models.[213]

In establishing the corporation, the *CATSI Act* contains form rules that could be adopted by an Aboriginal nation or a corporation may customize its own rules.[214] In this regard, there is some flexibility. More conspicuously, there is no restrictive definition of "community

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207 *Corporations (Aboriginal and Torres Strait Islander) Act*, 2006/24 [*CATSI Act*].

208 Ian Murray, Joe Fardin & James O'Hara, "Co-designing Benefits Management Structures" (2019) at 21, online (pdf): *Centre for Mining, Energy and Natural Resources Law, UWA Law School* <research-repository.uwa.edu.au/en/publications/co-designing-benefits-management-structures> [Murray at al].

209 *Ibid*.

210 *Ibid* at 22.

211 Australian Government, *supra* note 189.

212 *Aboriginal Councils and Associations Act 1976,* 1976/186.

213 Murray et al, *supra* note 208 at 22.

214 *CATSI Act*, *supra* note 207, s 57–1. For instance, the corporation's rulebook must contain certain information such as the name of the corporation and its objectives, the frequency of directors' meetings and the kind of processes to be engaged for resolving disputes.

purpose" in that the corporation is specifically established as a *CATSI Act* for-profit enterprise for the benefit of Aboriginal and Torres Strait Islanders in engaging business and economic development.

One of the key features of corporations created under the *CATSI Act* is that they have a lower administrative burden in that the reporting requirements are correlated with the size and nature of the relevant Indigenous corporation.[215] For example, a small corporation with less than $100,000 in revenue will have fewer reporting requirements than a large corporation.[216] Recognizing the unique situations of Indigenous corporations, the *CATSI Act* also permits the modification of rules related to a variety of corporate matters including meetings and inadequate members and officers.[217] Assistance and training is available from the ORIC on drafting these rules and establishing effective corporate governance.[218] Otherwise, in the event that an Indigenous corporation is in trouble, the ORIC may provide regulatory oversight, especially for those corporations providing essential services, maintaining infrastructure, or holding land.[219] This could be a critical no-cost service for Bands that establish corporations and need cost-effective guidance in corporate governance. On the other hand, Bands would also want to balance the inherent contradiction between accountability and autonomy found under this kind of Act.[220] One way to do this is to ensure that the regulatory body is composed of Indigenous members who are culturally sensitive to Indigenous processes. Currently, certain proposed amendments to the Act aspire to "increase accountability and transparency" while "simultaneously reducing the regulatory burden."[221] In effect, these amendments could enhance flexibility and autonomy for Indigenous Nations,[222] thus resolving at least some aspects of the accountability–autonomy dichotomy.

Last, the *CATSI Act* does not contain asset lock provisions that restrict the distribution of assets (as it is not a hybrid structure). Members could therefore include rules in the corporate rulebook related to how corporate profits will be distributed.[223] One of the major drawbacks of this kind of corporation, however, is that the *CATSI Act* does not permit the corporation to own or trade shares nor to issue debentures or other securities.[224] This inevitably prevents

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215 *Ibid*, Part 7–3. Ostensibly, the rigid corporate design, audit, reporting, and corporate governance standards (such as directors' duties and replaceable rules) was significantly more burdensome under the *ACA Act*. Additionally, these structures lacked protection for members and third parties, such as funding agencies. See Murray et al, *supra* note 208 at 22.

216 Australian Government, *supra* note 189.

217 See the list of replaceable rules at *CATSI Act*, *supra* note 207, s 57–5.

218 Australian Govt., *supra* note 189; Murray et al, *supra* note 208 at 22–23.

219 *CATSI Act*, *supra* note 207, s 490–1.

220 Murray et al, *supra* note 208 at 22.

221 Murray et al, *supra* note 208 at 23 citing Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (Cth) (lapsed due to proroguing of Parliament for the 2019 election) and ORIC, "Proposed Amendments to the CATSI Act" (2018), online (pdf): *ORIC* <www.oric.gov.au/sites/default/files/Proposed-amendments-CATSI-Act-discussion-paper_v1.1.pdf>.

222 *Ibid* at 24.

223 Australian Government, *supra* note 189.

224 *Ibid.*

the corporation from being able to access flexible corporate financing. This kind of restriction could be a detriment to Bands that are already constrained in accessing capital.

CATSI Act corporations, in the short term anyway, may not live up to their potential. This may be inevitable as it relates to Western legislative structures that regulate Indigenous business affairs. Nonetheless, as it stands currently, Australia does have a more comprehensive model that Canada might take guidance from. Adopting some of the attributes of the *CATSI Act* corporation including the flexible form and reporting requirements, the availability of a specific Indigenous friendly regulatory body to access governance support if required, the lack of the restrictive "community purpose" requirement, and the lack of asset lock provisions could assist in overcoming some of the issues in Canada.

Ostensibly, there are some notable advantages and disadvantages of the US, Australian, and Canadian models. While there is much to be worked out in all three jurisdictions, the Australian model demonstrates a more likely possibility of "economic reconciliation" vis-à-vis an Indigenous-centric corporate form in Canada. In fact, current shortcomings should not preclude Canada from considering an Indigenous-centric corporate model in that lessons learned from both Australia and the US could assist in mobilizing the legislature to, at the very least, initiate the process of creating relevant corporate models. To this end, one should not preclude the fact that establishing these kind of culturally appropriate corporate structures could also be a symbolic means of working toward reconciliation. I touch on this briefly in the next section.

5.3. The Expressive Function of Law

Aside from the corrective function of adopting either the US or Australian jurisdictional corporate models—that is, fixing possible defects in corporate law as an essential function of formal amendments[225] to suit Indigenous peoples' unique circumstances—the expressive function of law as a means of advancing economic reconciliation is worthy of consideration. Arguably, corporate law could serve an expressive function in that given the long history of Indigenous-Crown divide, and the need to obtain some middle ground when it comes to advancing Indigenous economies, the symbolism of Indigenous-centric corporations could serve as an important means to advance reconciliation.

For example, in constitutional law, it has been argued that while the formal amendment rules may provide a means to entrench certain defects in the written constitution, such rules might also function as a means of expressing constitutional values.[226] Similarly, scholars have also argued that law serves an expressive function in that it "matters for what it says in addition for what it does."[227] That is, there are material and expressive consequences because laws shape social norms through their effect.[228] Arguably, because the law expresses that which it values

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[225] Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59:2 McGill LJ 225 at 227.

[226] *Ibid* for a more fulsome discussion.

[227] Richard H McAdams, "An Attitudinal Theory of Expressive Law" (2000) 79 Or L Rev 339 at 373.

[228] Cass R Sunstein, "On the Expressive Function of Law" (1996) 144 U Pa L Rev 2021 at 2024–2025.

through that which it authorizes,[229] legislators could demonstrate an expressive desire to engage in economic reconciliation by establishing Indigenous-centric corporate structures. This could also send the message that Indigenous economics is here to stay.

Having said that, Canada could learn from both the best and worst characteristics of the US and Australian models, and the value of symbolism in advancing economic reconciliation. A Canadian model that suits the unique legal position of Bands could signal a willingness to push the limits of economic reconciliation by respecting the *sui generis* nature of Indigenous corporate governance in Canada.

6. CONCLUSION

Bands currently rely upon several corporate mainstream models—either for-profit or non-profit structures, depending on the Band's mandate and assets under management—to accomplish both social and fiscal goals. This paper argued that corporate forms shape the economic development opportunities Indigenous peoples can access on their path for economic sustainability. However, to also create cultural sustainability in business, constraints in corporate law as it relates to Bands, should be addressed. Historically, Indigenous cultures have been negatively impacted by governmental policies that sought to eradicate sovereign Indigenous societies through assimilation and legislation. As such, integrating Indigenous economies into the "mainstream economy" through mainstream corporate structures could undermine the significance of Indigenous culture and traditions. Blending non-profit and for-profit strategies could enable the generation of revenues, garnered from social enterprise, to advance significant social goals.[230] Social enterprises are certainly important options that could warrant further research for Bands.

However, while on the one hand, the unconventional hybrid structure, available in British Columbia and Nova Scotia, may prima facie appear to be a viable solution for merging business enterprise and profit with the preservation of Indigenous traditions and values, this could still leave Bands in the position of choosing between profit and community purpose. Consequently, I argued that such structures are unlikely to effusively assist in achieving the goal of economic reconciliation. I argued that Canada could learn much from Australia on this front. In spite of its shortcomings, the *CATSI Act* corporation contains a more structured, yet adaptable, framework. Nonetheless, guidance could be taken from both the US and Australian models in establishing an Indigenous-centric model that is adaptable to Bands in Canada.

This would signal a desire for Canada to advance economic reconciliation in a meaningful area, Indigenous corporate governance. Nonetheless, it is unlikely that section 17 corporations go far enough to advance economic reconciliation in Canada. Rather, the *CATSI Act* corporations are more comprehensive and align more closely with the TRC objectives in Canada, which call upon the corporate sector to make room for Indigenous ways of doing business. While there are certainly pragmatic aspects of the *CATSI Act* provisions that address the unique considerations of Indigenous peoples in Australia, cultural recognition is also a significant component for effecting meaningful economic reconciliation. As I have argued throughout,

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229 Richard H Pildes & Cass R Sunstein, "Reinventing the Regulatory State" (1995) 62:1 U Chicago L Rev 1 at 66.

230 See Sossin & Kapoor, *supra* note 36 at 1004.

establishing Indigenous economies through means that are consistent with Indigenous values and culture goes to the heart of "economic reconciliation." In fact:

> [S]ustainable reconciliation on the land involves realizing the economic potential of Indigenous communities in a fair, just and equitable manner that respects their right to self-determination. Economic reconciliation involves working in partnership with Indigenous peoples to ensure that lands and resources within their traditional territories are developed in *culturally respectful ways* that fully recognize Treaty and Aboriginal rights and title.[231]

[231] Yalden et al, *supra* note 13 at 254 [emphasis added].

The Implications of Sections 89 and 90 of the Indian Act in Using Trust Assets as Collateral in First Nations' Secured Personal Property Transactions

Frankie Young

Section 89(1) of the *Indian Act* prevents the seizure of First Nations property on reserve to ensure the preservation of property connected to reserve lands. This provision also constrains access to credit for First Nations persons or bands since creditors are reluctant to extend credit if they have no legal recourse for enforcement against First Nations assets located on reserve. This paper analyzes the key legal factors courts have taken into consideration, and which financiers should be aware of, in interpreting the application of section 89(1) to First Nations personal property. In particular, it examines the viability of using Indigenous trust assets—a form of intangible personal property—as collateral in secured property transactions. Using trust assets as collateral is possible for First Nations bands but these assets have unique features and nuances. Specifically, pursuant to section 90(1), because treaty or agreement property shall be *deemed* to be situated on reserve, the source of the trust funds is relevant to the analysis as well as the location of the funds for the purposes of section 89(1). In determining the credit worthiness of an Indigenous debtor seeking to enter into a secured personal property transaction, a creditor will need to engage a fact-specific analysis concerning the source of the trust assets—i.e., the kind of settlement agreement the trust assets result from—to determine whether a particular Indigenous trust asset can be used as collateral.

Key Words: banking, finance, Indian Act, secured property, personal property, Indigenous trusts.

1. INTRODUCTION

The Indian Act should be retained not because it is a good piece of legislation. It isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights.[1]

To understand how the provisions of the *Indian Act*[2] are problematic, one needs to understand the historical context. After newcomers arrived in Indigenous territory, conflict in land and property dealings arose largely due to the newcomers' motivation to acquire as much new territory (Indigenous lands) as possible. Through the *Royal Proclamation*,[3] and later through federal statutes such as the *Indian Act*, the Crown inserted itself as the intermediary in Indigenous land dealings and lands were rendered inalienable but for surrender to the Crown.[4] A complicated Indigenous-Crown relationship has resulted. The tensions that have plagued the historical Indigenous–Crown relationship continue to present day in part due to the implications of the *Indian Act*, which regulates every aspect of First Nations[5] livelihood and affects all First Nations and non-First Nations relationships, including those involved in lending.

[1] Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: MG Hurtig, 1969) at 140.
[2] R.S.C. 1970, c. I-6 [*Indian Act*].
[3] R.S.C. 1985, App II, No 1 [*Royal Proclamation*].
[4] *Guerin v The Queen*, [1985] 2 SCR 335 at 383 [*Guerin*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 113. For a more fulsome discussion see Senwung Luk, (2013) "Not So Many Hats: The Crown's Fiduciary Obligations to Aboriginal Communities Since Guerin" 76 *Sask L Rev* 1 at 5 [Luk].
[5] Although the term Indigenous includes diverse peoples, this article necessarily focuses on First Nations—rather than Inuit, Métis or non-status Indians—because the *Indian Act* only applies to First Nations on reserve. See *Indian Act, supra* note 2, s 2(1), 4(1).

Typically, legal regulation is meant to bring a relative degree of certainty to citizens subject to the law. However, the manner in which provisions of the *Indian Act* work to impact First Nations economies has created tension, ambiguity, and uncertainty. Participation in the commercial economy requires access to credit in many cases, however, as it relates to secured credit particular legal constraints exist for First Nations. This article discusses those constraints relative to secured personal property transactions that involve collateral in the form of personal property in Indigenous trust assets. In contemporary times, Indigenous peoples increasingly use trusts as a means to invest and manage assets connected with the resolution of Indigenous legal claims or, in some cases, monies derived from agreements with either government or industry. Further, some communities have begun to use trust assets as collateral to further their economic development goals. For this reason, especially as some communities seek to capitalize on settlement monies, potential creditors need to be able to determine if such trust assets are available as collateral.

Moreover, First Nations across Canada are assuming not only participation, but key leadership roles, in commercial ventures, representing a significant shift in Canada's commercial business culture. The impetus for this article is to therefore provide insight into the legal rules that apply to secured transactions for First Nations seeking to leverage personal property assets.[6] In reviewing the relevant case law, this article examines how the courts have interpreted the application of section 89(1) of the *Indian Act* to personal property.[7] In earlier versions of this provision, the

[6] On that note, this discourse is not intended to analyze the merits of using trust assets as collateral from an Indigenous ethical perspective. Many First Nations in Canada already use trust property as collateral (or are seeking to do so) and so it is prudent to analyze the technicalities in this regard.
[7] *Indian Act*, *supra* note 2, s 89(1).

> 89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

terms "*any* real or personal property" were included, signifiying that First Nations' property on reserve was meant to be more broadly exempted from seizure.[8] These broad exemptions allegedly flowed from a sense of trepidation that First Nations and their lands and property interests would be exploited by third parties. The Supreme Court of Canada (SCC) in *Mitchell v Peguis Indian Band* found the purpose of this exemption is to ensure First Nations' property situated on or connected to the reserve is not eroded.[9] Section 89(1) therefore sets critical constraints on how personal property connected to a reserve can be used in credit arrangements.

As such, the application of section 89(1) will be critical to the decision-making processes of creditors in determining the level of risk involved and assessing the credit worthiness of First Nations debtors. The definitive enforcement issue is that real or personal property found to be "situated on reserve" shall not be subject to seizure, and such property therefore cannot be used to satisfy a debt. Whether property is considered situated on reserve is critical to the application of section 89(1), and so this concept is discussed more fully in section 2.b). Section 89(1) may also be read together with section 90(1) to exempt property *deemed* "situated on reserve" from seizure by non-Indians.[10] This provision demonstrates that regardless of the trust situs under provincial law, if the trust assets result from treaty or agreement, this provision applies and connects the assets to the reserve. Under these

[8] *Indian Act*, S.C. 1876, c. 18, s 66; R.S. 1927, c 81, s 1, s 105.
[9] [1990] 2 SCR 85, 71 D.L.R. (4th) 193 [*Peguis*]; See also *Williams v Canada*, [1992] 1 SCR 877 [*Williams*] and *McDiarmid Lumber Ltd. v God's Lake First Nation*, 2006 SCC 58 [*McDiarmid*].
[10] *Indian Act, supra* note 2, s 90(1).

> 90(1) For the purposes of sections 87 and 89, personal property that was
> (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or
> (b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situated on a reserve.

circumstances, it may not be possible to use the assets as collateral against which a security interest can be enforced. As such, these provisions, when read together, demonstrate that a fact-specific analysis is required to determine the source of the assets at issue.

Notably, there are some exceptions for when sections 89(1) and 90(1) apply. When a First Nations person or band enters into agreements with another band or First Nations individual, or otherwise enters into a conditional sales contract, section 89(1) does not apply.[11] First Nations may also circumvent the effect of section 89(1) by establishing a corporation whose personal property is not subject to exemption. This is because a corporation is a legal person separate and apart from its shareholders.[12]

Another recourse for creditors and First Nations debtors is nonetheless available, albeit with its own limitations. Pursuant to section 90(2) of the *Indian Act*, a Band can seek ministerial consent to enter into transactions dealing with Indigenous property *deemed* situated on reserve.[13] In fact, in *McDiarmid v God's Lake First Nation*, the SCC affirmed that, pursuant to this provision, First Nations may waive protections under sections 89-90 for property *deemed* to be situated on

[11] *Indian Act*, *supra* note 2, s 89(1), (2). Various provincial courts have analyzed conditional sales contracts and whether resultant property may be seized. See e.g. *Benedict v. Ohwistha Capital Corporation*, [2014] 2 CNLR 1; *Gladue v Asset Recovery Management & Sales*, [1997] AJ No 1251; *R v Bernard*, [1992] 3 CNLR 33; *Wahpeton Dakota First Nation v Lajeunesse*, [2001] SJ No 631; and *J.E. Brooks & Associates Ltd. v Kingsclear Indian Band*, [1991] NBJ No 816 (NBCA) [*Kingsclear*]. See also Anita G. Wandzura, "The Enforcement of Security Interests Against the personal Property of First Nations Persons on a Reserve" (2007) 39:1 *Ottawa L Rev*.

[12] *Robertson v Canada*, [2017] ACF no 798 at para 56 [*Robertson*]; *Keewatin Tribal Council Inc. v Thompson (City)*, [1989] MJ No 295 (Man. Q.B.); *Kinookimaw Beach Assn. v Saskatchewan*, [1979] SJ No 255 (SKCA), leave to appeal refused (1979), 1 Sask R 179n (SCC); *Kostyshyn v West Region Tribal Council* Inc., [1992] FCJ No (Fed. T.D.). In these decisions, the courts confirmed that a Band corporation is a separate and distinct entity from the Band. For a more thorough discussion of the establishment of Indigenous corporations see: Frankie Young, "Indigenous Economic Development and Sustainability: Maintaining the Integrity of Indigenous Culture in Corporate Governance" (2021) vol 17:2 *MJSDL* 147.

[13] *Indian Act, supra* note 2, s 90(2).

reserve.[14] Ostensibly, explicitly waiving *Indian Act* protections is a way for First Nations to gain access to credit by counteracting the protective effects of the *Indian Act*.[15] However, for requiring short-term credit, seeking ministerial consent can be a lengthy, expensive, and inefficient process. Further, many First Nations may not want to involve the Crown in the details of its credit arrangements.

Courts in several provinces have also relied upon the *McDiarmid* decision to rule that First Nations bands and individuals can waive section 89(1) exemption.[16] These rulings should be carefully considered, however, because it is questionable whether Parliament would have intended that a band or First Nations person should be able to more broadly waive legislative protections without explicit authorization to do so. If this were the case, any legislation designed to protect persons could be waived, thus negating the purpose of such legislation to begin with. In a debtor–creditor relationship, the debtor almost always is in an inferior bargaining position and, as a result, would be forced to accept a contract containing a waiver of that person's statutory rights. Similarly, although it would certainly be favourable in many cases, if a band could waive section 89(1), the provision would become practically irrelevant because First Nations could simply enter into any secured property transaction with little regard given to the statutory effect of section 89(1). Finally, when Parliament intended First Nations could waive exemption they

[14] *McDiarmid, supra* note 9 at para 43-45, 148.
[15] Anna J Lund, Gail E Henderson, Clayton Bangsund, Freya Kodar, Carol Liao and Shanthi Elizabeth Senthe, "Reconciliation in the Corporate Commercial Classroom" (2016-17) 2:1 *Lakehead Law Journal* at 51.
[16] See e.g. *Kingsclear*, *supra* note 11; *Tribal Wi-Chi-Way-Win Capital Corp v Stevenson*, 2009 MBCA 72 [*Tribal-Wi-Chi-Way-Win*]; and *Martin (L.) (1984) Inc. v Shubenacadie Indian Band et al.*, 1995 144 NSR (2d) 241 (NSCA) [*Shubenacadie*]. They ruled this way without relying upon section 90(2), which is the authority for waivers.

explicitly provided for this in section 90(2), as it relates to property *deemed* situated on reserve. That is not the case in section 89(1).

This article provides crucial legal distinctions between when a certain kind of personal property—such as trust assets that result from settlement funds from governments, industry agreements or owned source revenues—may be used as collateral in First Nations secured personal property transactions, and when it may not. Section 2 discusses how section 89(1) is applicable in personal property secured transactions. This section also analyzes how section 89(1) has been interpreted to argue that whether property may be used as collateral rests on the location of the property. Section 3 provides the reader with an overview of the significance of trusts to First Nations in Canada and the consequences of using trust assets in secured property transactions. This section again considers the importance of location, which is key where access to secured credit for First Nations is concerned. Clearly, section 89(1) is not likely to apply to trust assets located in a mainstream trust account, such as at the offices of a corporate trustee off reserve. Last, section 4 discusses the implications of the source of trust assets. If there is a possibility that section 90(1) applies such that trust assets are found to originate from treaty or agreement, the assets will be *deemed* situated on reserve and are therefore not subject to attachment. Therefore, if a beneficiary or other stakeholder challenges the legality of a band using trust assets as collateral, a court is likely to engage a fact-specific analysis to determine whether trust assets indeed originate from treaty or agreement.

2. THE SIGNIFICANCE OF SECTION 89(1) IN FIRST NATIONS' SECURED PERSONAL PROPERTY TRANSACTIONS

Section 89(1) applies to both real and personal property. While briefly touching on real property, this article mainly focuses on First Nations' personal property, in particular, trust assets, and how they are likely to be dealt with under the *Indian Act*. Further, while the focus of this article is on secured credit, section 89(1) also applies to unsecured credit and enforcing money judgments arising out of unsecured loans or deferred payment arrangements. Judgment enforcement law—usually set out in provincial statutes that apply on reserve, but modified by the *Indian Act*—applies to unsecured transactions.[17]

More relevant to secured personal property interests are the provincial credit regimes that create and govern critically enforceable personal property rights for debtors and creditors; these regimes empower creditors to engage in risk assessments prudently while enabling debtors to leverage assets within the noted rules of credit.[18] Security in personal property in Ontario is governed under the *Personal Property Security Act*,[19] and each common law jurisdiction has equivalent legislation. An essential feature of secured personal property arrangements is the ability of a debtor to use collateral to secure financing. Pursuant to section 11 of the *PPSA*, a security interest comes into existence when value is provided, the debtor has rights in the collateral or the power to transfer those rights to a secured party, and the evidentiary elements have been met.[20] By providing a security interest, a borrower provides the lender the ability to seize and sell the collateral in the event of non-payment by the borrower.[21] Consequently, before entering into a security

[17] Anna Lund, "Judgment Enforcement Law in Indigenous Communities -- Reflections on the Indian Act and Crown Immunity from Execution" (2018) 83 *SCLR* (2d) 279-315 at 2 [Lund].
[18] *McDiarmid*, *supra* note 9 at para 40.
[19] R.S.O. 1990, Chapter P.10 [*PPSA*].
[20] See for example *PPSA*, *supra* note 19, s11 and Cuming, Ronald C.C. Catherine Walsh & Roderick J. Wood, *Personal Property Security Law*, 2nd ed. (Toronto: Irwin Law, 2012) at 241 [Cuming et al].
[21] *Cuming et al*, *supra* note 20 at 1; Louise Gullifer, ed, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th ed (London, UK: Sweet & Maxwell, 2017) at 1; Anthony Duggan, *Secured Transactions in Personal Property*, 7th ed. (Toronto, ON: Edmond Montgomery Publications Ltd., 2018) at 4.

agreement, a creditor will want to know that a proposed security interest can be enforced in the event a debtor does not adhere to the loan arrangement.

To be clear, provincial laws of general application apply to First Nations, except to the extent that they are inconsistent with the provisions of the *Indian Act*.[22] Even if First Nations debtors are able to meet the *PPSA* requirements of attachment of a personal property security interest, section 89(1) of the *Indian Act* may apply. The effect of section 89(1) is that the rights of the secured party under provincial law cannot be enforced. The result is that tension exists between whether property can be used to provide First Nations with the opportunity to participate in the economy on a basis equal to that of other Canadians and in recognizing and protecting First Nations' real and personal property (which is ultimately also connected to their cultural communal values).

(a) Real and Personal Property

While real property is not the main subject of discussion here, it is worth discussing briefly. Real property is not governed under the *PPSA* and so security in real property requires the debtor to grant a right in the debtor's property in favour of the creditor. A charge is registered against the title of the property as a means to legally enforce the debtor's real property interest if a default occurs on a loan obligation or other conditions are not fulfilled. For land, different systems of registration in the various jurisdictions of Canada govern real property interests. A creditor may enforce the credit obligation for failure to pay through either foreclosure or a power of sale.[23] For First Nations' reserves, in which the Crown has underlying title to the lands, a band is unable to provide reserve lands as a means of

[22] *Indian Act*, *supra* note 2, s 88.
[23] For example, *Land Titles Act*, R.S.O. 1990, c L 5.

security in a credit arrangement. However, First Nations can use reserve land to seek financing by entering into a leasehold agreement. The lessee can then get secured financing, such as a mortgage of the leasehold interest, on the security of the lease.[24]

First Nations personal property is distinguishable from real property. While the *Indian Act* does not provide a definition of personal property, it is described in the *PPSA* as "chattel paper, documents of title, goods, instruments, intangibles, money and investment property, and includes fixtures but does not include building materials that have been affixed to real property."[25] Trust property, the kind of property in question here, falls under the category of personal property. In determining whether First Nations personal property can be used as collateral or security under a security agreement, the location of the property is key. It is therefore necessary to consider the phrase "situated on reserve" under section 89(1) and how it has been analyzed in several key legal decisions.

(b) Interpretation of "Situated on Reserve"

A detailed discussion of the law around the court's interpretation of "situated on reserve" is necessary for determining whether certain personal property assets can be used as collateral for First Nations. The *McDiarmid* decision is the leading decision on the interpretation of section 89(1). In the facts of that case, McDiarmid Lumber Ltd., a creditor of the band, obtained a consent judgment and garnishment order for a debt owed by the band; they sought to seize the band's bank account funds located in Winnipeg, Manitoba. The issue was whether the account funds were "situated on reserve" and if so section 89(1) would apply to prevent seizure or garnishment of the funds. The analysis turned on whether "situated on reserve"

[24] *Indian Act*, *supra* note 2, s 89(1)(1.1).
[25] *PPSA*, *supra* note 19, s 1(1).

should be "given its plain meaning and subjected to the common law and statutory *situs* rules, or whether it has a more abstract meaning."[26] This would trigger rules that apply to choses in action law or intangible personal property, or rules that apply to tangible personal property.

Tangible property is property that has a physical existence, that is, it can be touched. Because funds in a bank account do not have physical existence, they are considered intangible property that in law is a debt owed by the bank to the depositor. A chose in action is the right of a party to take legal action to enforce a personal right of property. For debts, the ordinary rules of choses in actions law applies to determine where an account is located for judgment enforcement purposes.

The SCC was tasked with determining whether, when bank account funds are involved, the term "situated on reserve" should be interpreted under the common law and statutory *situs* rules as having a plain and ordinary meaning, or whether it was more appropriate to apply certain potential connecting factors to determine the location of the property.[27] McLachlin, C.J. concluded that for property in the form of bank account funds, the concrete common law approach should apply; the assets were therefore considered to be located off-reserve at the Winnipeg bank branch because that was where the debt was owed.[28] A review of the judicial history in this case will demonstrate how the lower courts grappled with the correct approach in

[26] *McDiarmid, supra* note 9 at para 11.
[27] *McDiarmid, supra* note 9 at para 11-12. The connecting factors were previously analyzed in *Williams v Canada* where Gonthier J. found that whether unemployment income is connected to the reserve and thus exempt should be analyzed based on the various situses involved—the situs of the debtor, situs of the creditor, situs where the payment is made, situs of the employment which created the qualification for the receipt of income, and the situs where the payment will be used. *Williams, supra* note 9 at 893.
[28] *McDiarmid, supra* note 9 at para 13 [emphasis added]. See also *Companies Act* S.C. 1991, c. 45, s 447(2) [*Companies Act*].

interpreting the term "situated on reserve" for the purposes of determining whether the funds were situated on or off the reserve and could be seized.

First, Senior Master Lee of the Court of Queen's Bench held that since the funds were for essential services on reserve they were "clearly in keeping with the public policy behind the development of the protection afforded pursuant to sections 89 and 90 of the *Indian Act*."[29] Here an approach was taken based upon good public policy. On appeal, Sinclair J. considered, but rejected, the common law situs approach, and instead ruled that the connecting factors test was most applicable; the account funds were found to be sufficiently connected to the reserve and exempt from seizure, pursuant to section 89(1).[30] Nevertheless, the Court of Appeal overturned Sinclair J.'s finding in favour of the common law situs approach, that is, the term "situated on reserve" should be given an ordinary and common sense meaning.[31] Bank account funds were to be considered located where the bank account debt is payable, which in this case was in Winnipeg. They were found not to be connected to the reserve and subject to seizure.

On appeal to the SCC, the band relied upon Sinclair J.'s analysis of the connecting factors test set out in the *Williams* decision where a more contextual connecting factors analysis was engaged to determine whether a nexus existed between the funds at issue and the reserve. Notably, Gonthier J. suggested in *Williams* that the connecting factors approach applied to seizures as well.[32] While the band argued that the *Williams* approach better reflected the broader purpose of these provisions to protect the assets of Indians *qua* Indians, the SCC found that all

[29] *McDiarmid, supra* note 9 at para 6.
[30] *McDiarmid, supra* note 9 at para 7.
[31] *McDiarmid, supra* note 9 at para 8.
[32] *Williams, supra* note 9 at 892.

of "principle, policy and jurisprudence stand against [such an interpretation]."[33] That is, context is not necessary when the concrete common law approach and the terms of the *Trust and Loan Companies Act*,[34] make it clear that the funds are located off reserve.[35] The *McDiarmid* decision was critical for developing the law on how the phrase "situated on reserve" in section 89(1) should be interpretated. This decision clarified that some situations require the common law situs approach and some require the contextual analysis approach.

To this end, the SCC in *McDiarmid* distinguished the *Williams* case on several grounds. First, the *Williams* decision involved an entirely different provision of the *Indian Act* altogether—that is, section 87—which deals with income tax exemption. Next, unemployment income was the kind of intangible personal property at issue in the *Williams* decision, which is distinct from bank account funds. Further, the SCC noted that the exemption was permitted in *Williams* because the benefits were located on reserve at the time of taxation.[36] Notwithstanding, where the existence of different situses are at issue, such as in earning income, analyzing the interplay of these situses to determine the correct location is required.[37]

As such, the SCC in *McDiarmid* found that the facts here were contrary to the facts of *Williams*. It adopted the reasoning from the Manitoba Court of Appeal to find that the place where a debt may be enforced is objectively determinable and has everything to do with the seizure of a debt.[38] Moreover, the SCC found that

[33] *McDiarmid, supra* note 9 at para 15.
[34] *Companies Act*, *supra* note 28.
[35] *McDiarmid, supra* note 9 at para 13 [emphasis added]. See also *Companies Act, supra* note 28, s 447(2).
[36] *McDiarmid, supra* note 9 at para 16 citing *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161 at para 12 [emphasis added] [*New Brunswick Indians*].
[37] *Williams, supra* note 9 at 891.
[38] *McDiarmid*, *supra* note 9 at para 17. See *McDiarmid Lumber Ltd. v God's Lake First Natio*n, (2005), 192 Man R (2d) 82, 2005 MBCA 22 at para 60.

where Parliament had intended to depart from the physically situated test for personal property, it did so expressly by statutory language in section 90(1), which provides that personal property resulting from treaty or agreement, or purchased by monies appropriated by Parliament for the benefit of Indians, shall be *deemed* always to be situated on a reserve.[39] Consequently, other provisions, such as section 89(1) that address location should not be interpreted according to the same contextual test.

In other legal decisions involving distinguishing facts, the courts previously grappled with the tension between when a contextual analysis applies and when the objectively determinable physical situs approach applies. For example, subsequent to the *Williams* decision, in *New Brunswick Indians v New Brunswick (Minister of Finance)*, the SCC considered whether First Nations should be taxed on property purchased off reserve but would be used on reserve.[40] This case was distinguished from *Williams* in that the taxation at issue was related to tangible goods. As such, the SCC found that the physical location at the point of sale is the relevant location that determines whether the goods should be tax exempt.[41] This decision clarifies that tax is payable when property is purchased off reserve because First Nations individuals are treated in the same manner as non-First Nations individuals when dealing in the mainstream economy. The SCC's interpretation in *New Bruswick Indians* suggests that the historical purpose was to only exempt First Nations property situated on reserve.

[39] *McDiarmid*, *supra* note 9 at para 20.
[40] *New Brunswick Indians*, *supra* note 36.
[41] *New Brunswick Indians*, *supra* note 36 at para 15.

The SCC also set out an exception to the physically situated approach in *New Brunswick Indians*. Where the property was "situated on reserve" but temporarily moves off reserve, the SCC will consider whether its "paramount location" is on the reserve.[42] This protects First Nations property normally situated on reserve from being taxed or seized while off-reserve. For instance, in *Leighton v British Columbia*, a situation arose where the province enacted provisions in tax legislation that imposed a provincial tax on otherwise tax-free First Nations tangible property that was being used off reserve.[43] Lambert J.A., for the British Columbia Court of Appeal, held that neither "tangible personal property or its Indian owner can be taxed with respect to the use of the property off the reserve if the paramount location of the property remains on the reserve."[44] While these cases are distinguishable in that they involve the taxation of tangible property, they provide insight as to how the courts are likely to analyze the term "situated on reserve" for the purposes of section 89(1). In fact, the SCC's finding in *McDiarmid* that the situs of intangible bank account funds is the location where the debt is paid, does not detract from the physical point of purchase analysis or the "paramount location" exception.

In *Alberta (Worker's Compensation Board) v Enoch Band*, the Alberta Court of Appeal (ABCA) also considered the situs of bank account funds to determine whether they could be seized.[45] It was found that the branch at which the First Nations monies were deposited and held was the situs of the funds. The ABCA found there was no reason to deviate from the longstanding decision in *R v Lovitt* where it was found that a "bank account is situated for legal purposes where it is

[42] *New Brunswick Indians*, *supra* note 36 at para 14.
[43] 57 DLR (4th) 657 (BCCA) at para 3 [*Leighton*].
[44] *Leighton*, *supra* note 43 at para 15.
[45] 1993 DLR (4th) 279 (ABCA) [*Enoch*].

payable. It is payable where in the ordinary course of business it would be paid and where the holder would seek payment, and that is the branch where he deals."[46] Similar findings were made in *Canadian Imperial Bank of Commerce v E. & S. Liquidators Limited*,[47] and *Ramsay Painting v St. Mary's Indian Band*,[48] where the Supreme Court of British Columbia held in both cases that the situs of a bank account is the actual branch where the deposit is payable to the account holder. This means that funds are not likely to be found exempt from seizure or attachment for First Nations whose financial institution is not located on reserve.

Despite both analogous and distinguishing facts between the numerous cases, a common theme has developed. The SCC has found it appropriate for a form of contextual analysis—which determines the location of property by its strongest connecting factors—be adopted in certain transactions, such as income taxation, particularly where it is difficult to objectively determine the location.[49] On the contrary, the term "situated on reserve" should be read in its ordinarily and common sense meaning as "physically on reserve" where the location of intangible assets that are more objectively determinable are involved.[50] Notably, one of the key findings in *McDiarmid*—that the direct common law understanding of the location of property should be applied when dealing with funds in a bank account—rejects the abstract suggestion posited by Senior Master Lee of the MB Court of Queen's Bench that funds held off reserve, but for the benefit of a band, are situated on reserve.

[46] [1912] AC 212 at 219-20 [*Lovitt*], also cited in *Enoch, supra* note 45.
[47] [1994] 1 CNLR 23 (BCSC) [*CIBC*].
[48] 2006 BCSC 976 [*Ramsay Painting*].
[49] *McDiarmid, supra* note 9 at para 18; See also *Horn v Canada (Minister of National Revenue — MNR)*, 2008 FCA 352; *Shilling v Canada (Minister of National Revenue)*, [2001] FCA 178.
[50] *McDiarmid, supra* note 9 at para 17-18; *R v Lewis*, [1996] 1 SCR 921 at para 80; *Brown v The Queen in right of British Columbia* (1979) 107 DLR (3d) 705 at para 19 (BCCA); and *Danes v The Queen in right of British Columbia* (1985) 18 DLR (4th) 253 at para 21 (BCCA).

As discussed, how the SCC has interpreted the application of section 89(1) to different kinds of property is relevant for determining whether trust assets can be used as collateral. The distinction between the common law situs rules versus the connecting factors is important for understanding where the location of trust assets is likely to be found, that is, at the place the trust assets are deposited and managed. Nonetheless, as addressed further on in section 4, there are other considerations involved related to whether trusts assets could be found to be "deemed" situated on reserve regardless of actual physical location. But first, the next section discusses the significance of trusts for First Nations in advancing economic development.

3. THE SIGNIFICANCE OF INDIGENOUS TRUSTS TO FIRST NATIONS COMMUNITIES

A trust—a legal relationship that "bind[s] a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries, or, in old cases, cestuis que trust)"—[51] is becoming a common form of asset management for many First Nation communities. Establishing a trust relationship means that special obligations are owed by the trustee to act in the best interests of the beneficiaries in dealing with trust assets.[52] Due to the large number of both settled and outstanding Indigenous legal claims or potential agreements with either the government or industry, lump sum assets may be available for First Nations to invest in trusts. As such, trusts can facilitate the receipt, control and ownership, as well as investment

[51] Albert H Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed (Toronto: Carswell, 2014) at 18 [Oosterhoff et al] [emphasis added].
[52] Oosterhoff et al, *supra* note 51 at 18 [emphasis in original]; Dennis Pavlich, *Trusts in Common-Law Canada*, 2nd ed (Toronto: LexisNexis, 2016) at 4; Donovan Waters, ed, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters, 2012) at 3; Eileen E. Gillese and Martha Milczynski, *The Law of Trusts*, 2nd ed (Toronto: Irwin Law, 2005) at 771.

of settlement funds awarded to Bands to compensate for past, present, and future adverse impacts upon their land rights caused by governments or third parties.[53]

The form of settlement assets depends upon the kind of legal claim asserted and to whom the claim is directed. In the case of non-Treaty claims, agreements may be the result of various arrangements, including Comprehensive Funding Agreements, or negotiations with the province or industry partners who compensate bands for taking up business on reserved lands. On the contrary, treaty claims are dealt with under the federal specific claims process, established to resolve treaty claims under $150,000,000 in a timely manner, with resolution of such claims providing capital that could be held in trust.[54] Depending on the community objectives, Bands may also use the trust to subsequently invest own-sourced revenues. Trust assets therefore could include assets from one or more of initial settlement monies from land or treaty claims, assets from impact benefit agreements, or assets from own-sourced revenues.

Because invested trust assets will benefit both current and future generations, trusts must be established with the unique needs of the community's particular objectives in mind. In fact, the terms of the trust are drafted to account for the community's precise needs and distinct circumstances.[55] Further, trusts are a fitting tool for some First Nations because they are a means to keep certain assets separate

[53] William H. Cooper, "The Essentials of First Nation Settlement Trusts" (Presentation delivered at the Aboriginal Financial Officers Association Annual General Meeting, Halifax, February 2014), [unpublished]. For further discussion on Settlement Trusts see Jason Campbell & Mark Sevestre, "Responsible Investment and Indigenous Trusts" National Aboriginal Trust Officers Association (March 2018) at 3; and Young, Frankie, "Indigenous Settlement Trusts: Recharacterizing the Nature of Taxation" (2019) 24 *Appeal: Rev Current L & L Reform* 3.

[54] To deal with treaty claims under $150,000,000, the federal specific claims process was established to resolve treaty claims in a timely manner. See the Tribunal online at: Specific Claims Tribunal Canada, http:www.sct-trp.ca [Tribunal].

[55] James I. Reynolds, "Trusts for First Nations" (2014) 34 *Est Tr & Pensions J* 95 at 97 [Reynolds].

from other kinds of First Nations assets, such as public service funds. They provide a contemporary means for First Nations to assume control over their economies. In many cases, accumulating trust assets leads to further economic development initiatives that have the potential to advance substantial community well-being outcomes for First Nations members.

To this end, while economic benefits are provided through the returns on the trust capital investment, the practice of using trust assets as a form of collateral in First Nations' secured property transactions has emerged as a way to drive Indigenous economic development. Albeit, for First Nations that oppose this kind of transaction, terms may be drafted into a trust to expressly prohibit the use of assets as collateral in loan transactions.[56]

4. TRUSTS AS COLLATERAL IN PERSONAL PROPERTY SECURED TRANSACTIONS

The *PPSA* in Ontario applies to every transaction that, in substance, creates a security interest.[57] In creating a security interest, the First Nation would have to extend a portion of the trust assets as security in loan arrangements. When a security interest is created, the property taken as collateral is encumbered by an interest granted in favour of the creditor for the purposes of securing the performance of the debtor's obligation.[58] However, while offering assets as security could normally create a security agreement, it may not be as straightforward to create a security interest in First Nations trust assets.

Of particular relevance is property that results from treaty claims, which generally assert that the Crown did not honour certain terms of a treaty entered into

[56] *Reynolds*, *supra* note 55 at 101.
[57] *PPSA*, *supra* note 19, s 2.
[58] *Duggan*, *supra* note 21.

with the relevant signatories to the treaty. Because property resulting from treaty or agreement is *deemed* situated on reserve, pursuant to section 90(1) of the *Indian Act*—regardless of whether property is situated off reserve—the issue arises as to whether a security interest can be enforced against the property.

(a) Security Interests

There are several ways that trust assets or income may be offered as a means to seek loan arrangements that advance Indigenous economic development. The first is by using the income earned from the investment of trust assets. From the annual income, loans may be provided to First Nations entrepreneurs for the purchase of inventory in First Nations' businesses. In such cases, because the income is paid out of the trust to First Nations annually, the trust would not have a security interest in the inventory purchased in the First Nations' business. Rather, First Nations, in agreeing to use the income to advance loans to First Nations members, could obtain a security interest in the inventory. In such cases, sections 89(1) of the *Indian Act* would not apply to these kind of transactions and the security interest would be valid.

Alternatively, another way to advance economic development is to create a security interest in the trust assets such that, at the direction of the First Nation, the trustee may provide a commercial lender a security interest in a portion of the assets held in trust. These assets will only be used as a guarantee provided by the trustee for commercial loans made to the First Nation, or a First Nation business, by a lending institution. The trust earnings (annual income) of the invested assets could then be used to service the debt. In granting the security interest, the trust places limits on the portion of the trust assets that may be used as collateral as a means to preserve and protect the long-term investment of trust assets. Typically, when the trust is established, the extent to which assets may be used as collateral are drafted into the trust document, including limits on the amount of assets that can be used and the terms of the loan repayment. An example of a relevant trust clause is as follows:

Upon receipt of all or any portion of the Compensation in the Trust and subject to the provisions of this Article, the Trustee is authorized to:

(a) grant a security interest in the Trust Property as collateral with respect to an Authorized Loan, including granting a mortgage, pledge, security interest or charge against all or any portion of the Trust Property; and

(b) make Authorized Loan Payments for and on behalf of the First Nation.

-and-

(e) the Trustee shall not permit, in any Fiscal Year, the total amount of all outstanding Authorized Loans to exceed, in aggregate, an amount equal to twenty-five percent (25%) of the market value of the Trust Property as of the Compensation Date (including the value of any Compensation owing by Canada to the Trust), and for every year thereafter the market value of the Trust Property as of December 31 of the preceding Fiscal Year, but, for greater certainty, once an Authorized Loan is approved, the Authorized Loan shall remain in effect, notwithstanding that the amount of all existing Authorized Loans may, in aggregate, exceed twenty-five percent (25%) of the market value of the Trust Property in any Fiscal Year after the Authorized Loan was approved.[59]

An example of a clause stipulating the terms of the loan repayment is as follows:

[T]he amount of all Authorized Loan Payments, in aggregate in any Fiscal Year, shall not, at the time of entering into any Authorized Loan, exceed eighty percent (80%) of the Annual Payment for the previous Fiscal Year (except in the initial Fiscal Year where the Trustee shall assume the Annual Payment is not prorated for the purposes of this calculation) but, for greater certainty, once the Trustee has commenced making any Authorized Loan Payments, the Trustee shall continue to make such payments, notwithstanding that the amount of all Authorized Loan Payments may, in aggregate, exceed eighty percent (80%) of the amount of the Annual Payment after any Authorized Loan Payments are made.[60]

When personal property owned by the trust is used as a security interest to secure a loan, from a functional perspective the trustee granting the security interest

[59] Redacted source of Trust clauses filed with author.
[60] Redacted source of Trust clause filed with author.

entitles the creditor to take both priority of payment and control of the collateral.[61] However, even if the trustee provides the trust assets as security, the likelihood the trust assets are connected to the reserve means the provisions of the *PPSA* and the *Indian Act* may conflict. Therefore, further analysis may be required before authorizing such trust assets as collateral under a security agreement.

An argument could be made however that including these clauses in the trust agreement constitutes a waiver of the *Indian Act* exemptions.[62] In fact, to date some creditors have taken the position that if the trust has terms included that permit the assets to be used as security, the creditor views this as the trust having the authority to offer the assets as collateral. However, creditors need to be aware of the possible implications if a concerned beneficiary or other stakeholder challenged the legality of using trusts assets *deemed* situated on reserve as collateral. In that instance, it should not be assumed that a court would take the above cited clauses at face value because they do not account for the *source* of the trust assets. This means that depending upon the source, a creditor’s risk may not be covered. As such, an analysis of the source of the trust funds would be necessary such that the circumstances surrounding an agreement from which settlements result in the creation of a trust would be analyzed to determine whether section 90(1) applies.

(b) Interpretation of “Treaty” or “Agreement” in Section 90(1)

For those situations that apply, section 90(1) is read together with section 89(1). Even if personal property is not physically situated on reserve, section 90(1) could still apply to *deem* the property situated on reserve, making it not subject to

[61] *Duggan*, *supra* note 21 at 24.
[62] Although the only power to authorize a waiver of protection is found under section 90(2) of the *Indian Act*, which requires ministerial approval.

the enforcement of a security interest. This is because treaties—as recognized in section 35 of the *Constitution Act*[63]—are given special status in Canada. Treaty property is therefore impervious to erosion. As such, for strong policy reasons, personal property that results from treaty or agreement is *deemed* to be situated on reserve and meant to be protected. Any analysis will thus depend upon whether the courts are likely to interpret the property in question to be a result of treaty or agreement. This is critical because if trust assets are *deemed* situated on reserve, they will not attach as security in a security agreement.

The case law has evolved over the years regarding the interpretation of treaty or agreement property for the purposes of section 90(1). In 1991, the Manitoba Court of Queen's Bench (MBQB) dealt with this issue in *Webtech Controls Inc. v Cross Lake Band of Indians and Peace Hills Trust Company*.[64] In that case, a Northern Flood Agreement (Agreement) between the provincial and federal Crowns and a group of bands was entered into to provide compensation for First Nations whose treaty rights were impacted through the loss of reserve land. Webtech Controls Inc. sought to garnish funds from an account located at Peace Hills Trust Company in Winnipeg where the monies payable pursuant to the Agreement were located. The MBQB found it was clear from the terms of the Agreement that the impact on the First Nations' treaty rights was the basis of the settlement, and monies payable pursuant to the Agreement were to compensate the bands for the impact on those treaty rights. As such, the MBQB held that, pursuant to sections 89 and 90 of the

[63] 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11, s 35.
[64] 1991 M.J. No 126 [*Webtech*].

Indian Act, and for good public policy reasons, the subject funds should be exempt from execution.[65]

A similar issue arose in *Nathanson, Schachter & Thompson v Sarcee Indian Band*, where the British Columbia Court of Appeal (BCCA) examined a settlement agreement only to find that treaty obligations were not central to the matter at hand.[66] In that case, with the First Nations' consent, the Crown had bought back land from the band in 1951 that had been previously surrendered in 1913 under a treaty agreement. The chambers judge first found that the settlement agreement between the Crown and the band was designed to discharge treaty obligations owed by the Crown, within the meaning of section 90(1)(b).[67] On appeal, the BCCA found that the agreement was only meant to atone for the Crown's fraudulent conduct and exercise of its powers in 1951 and 1952 when it bought back the land surrendered by the First Nation in 1913.[68] The BCCA held that the Crown breached its duties owed to the band by wrongfully alleging the purchase and sale of these lands was authorized by the 1913 surrender. In analyzing the settlement agreement, the BCCA found the agreement was in the nature of a *commercial bargain* between litigants and was not related to the treaty obligations.[69]

More recently, the *McDiarmid* decision has become the authoritative decision on the interpretation of section 90(1). There, a Comprehensive Funding Agreement (CFA) was analyzed to determine if funds from the CFA, and situated in a bank account in Winnipeg, could be found to result from treaty or agreement.

[65] *Webtech*, *supra* note 64.
[66] [1994] BCJ No 690 [*Sarcee Indian Band*].
[67] *Sarcee Indian Band*, *supra* note 66 at para 12.
[68] *Sarcee Indian Band*, *supra* note 66 at para 17.
[69] *Sarcee Indian Band*, *supra* note 66 at para 32.

The difficulty was that the bank account in question was the result of a pool of money—provided to enhance the self-sufficiency and living standards of the band in a wide range of socioeconomic areas—and so the SCC could not easily characterize the nature of the various purposes of the funds.[70]

The SCC's analysis turned on whether the terms "treaty" and "agreement" in section 90(1)(b) should take colour from one another such that only assets provided through agreements *ancillary to treaty commitments* are *deemed* situated on reserve and exempt from seizure under section 89(1).[71] Otherwise, assets from simply *any* agreement, similar to a CFA, could be *deemed* situated on reserve. The SCC considered the principle of associated meaning where the scope of the broader term is limited to that of the narrower term. By linking the terms, the scope of possible meanings is narrowed.[72] If these terms do take colour from one another then "agreements" would *only include* those that "flesh out commitments of the Crown to First Nations" under a treaty.[73]

The SCC found that the word "agreement" in section 90(1)(b) should not be interpreted so broadly that it would largely extend to any agreement between Parliament and First Nations that confers different kinds of benefits, such as public sector services.[74] Rather, Parliament intended a narrow interpretation of "agreement" which is ostensibly consistent with both the history of section 90(1)(b) and the promotion of Indigenous entrepreneurship. That is, exempting property broadly would deprive First Nations of the ability to use property to secure credit, a

[70] *McDiarmid*, *supra* note 9 at para 72.
[71] *McDiarmid*, *supra* note 9 at para 30.
[72] *McDiarmid*, *supra* note 9 at para 31.
[73] *McDiarmid*, *supra* note 9 at para 26.
[74] *McDiarmid*, *supra* note 9 at para 35.

cornerstone of economic development.[75] While eliminating all exemptions could run the risk of exploitation, McLachlin, C.J. (as she was then), writing for the majority, claimed the re-emergence of Indigenous traditional values meant that narrowing the scope of exemptions was necessary to promote Indian self-government and entrepreneurship.[76] McLachlin, C.J. held that the SCC's previous decision in *Peguis*, where it was found that section 90(1) should be narrowly interpreted based upon both the rules of statutory interpretation and the history of section 90(1), was still binding.[77]

This reasoning was subsequently applied in other decisions. For example, in *Pavage Levesque Paving Ltd. v Eel River First Nation*, the Eel River First Nation secured funding from the Department of Indian Affairs to complete a subdivision on reserve.[78] A contracting company sought to seize upon a debt incurred by the band, however, the band claimed that the subject funds were a result of treaty or related agreements. The motion judge first found that the Comprehensive Funding Agreement (CFA) at issue fell within the meaning of agreement under section 90(1)(b) because the monies provided consisted of "monies which the Crown provided Indians because of the [cession] by them of their native lands."[79]

Notwithstanding, the New Brunswick Court of Appeal (NBCA) found there was no evidence that the funds in the band's accounts were provided under the CFA by treaty or otherwise. In analyzing the CFA, the NBCA found that it "requires the production of evidence that places before the court at least the substance of the treaty

[75] *McDiarmid, supra* note 9 at para 55.
[76] *McDiarmid, supra* note 9 at para 51.
[77] *McDiarmid, supra* note 9 at para 26.
[78] *Pavage Levesque Paving Ltd. v Eel River First Nation*, 2007 NBCA 31 [*Eel River First Nation*].
[79] *Eel River First Nation, supra* note 78 at para 21.

and/or agreement terms relied upon."[80] Nonetheless, there was no presentation of evidence of an existing treaty nor any evidence of certain wording or the substance of treaty terms under which the monies in the band bank accounts were allegedly paid. In affirming the *McDiarmid* decision, the NBCA found that section 90(1) was inapplicable because the funds at issue were not pursuant to treaty or agreement.[81] These rulings demonstrate that only property found to be related to treaty obligations will be *deemed* to be situated on reserve and subject to exemptions.

Under this interpretation, any or all funding provided by the Crown would not *prima facie* attract the application of subsection 90(1)(b), unless funds are related to treaty commitments. Based upon the reasoning of these numerous decisions, to determine whether trust assets could be proffered as security, it must be found that the parties established a certain kind of settlement agreement. This can be achieved by examining the terms of settlement agreements from which monies were paid in trust. For instance, the recitals in the settlement agreement may stipulate that monies are paid pursuant to a settlement of a claim arising out of a surrender of reserve lands. An agreement may also specify in its terms that Canada breached its lawful obligations to the First Nation because an illegal surrender of land occurred or treaty promises were not kept. Circumstances could also exist where government decisions have negatively impacted treaty rights in a particular region and settlements are reached to compensate the First Nations for these negative impacts. Further, settlement agreements could result from a surrender of land through treaties that are found to be an exploitative bargain for the Crown.

[80] *Eel River First Nation*, *supra* note 78 at para 22.
[81] *Eel River First Nation*, *supra* note 78 at para 25.

In examining settlement terms and the surrounding circumstances of interactions between the Crown and a First Nation, it is critical to find any indications of treaty dealings. Because the SCC in *McDiarmid* (and affirmed in other courts) has set the standard that section 90(1) is to be narrowly interpreted, if a Band seeks to use trust assets as security, a creditor would have to be satisfied that the assets do not result from treaty or agreement. Otherwise, section 90(1) could apply to connect the assets to the reserve. Given that trust assets could also result from a combination of assets in initial settlement monies from treaty claims, monies from land or impact and benefit agreements, or monies from own-sourced revenues, creditors will also want to ascertain whether diverse trust assets can be used as security in a security agreement.

To this end, tracing property is a practice recognized under the *PPSA* and the rules of equity. Parties claiming the exemption would therefore need to demonstrate how the assets are segregated to trace the portion of exempt assets from the non-exempt assets.[82] That said, there are limits on the ability to trace; where money from various sources have been combined, only if monies are clearly identifiable is tracing possible.[83] In this instance, where pooled assets are concerned, if the funds that relate to treaty obligations have not been segregated by the band, the ability to delineate the extent of the portion of funds that flow directly from the Crown's treaty obligations may not be easily discernible.[84] Creditors should therefore be cognizant of whether the record is able to clearly demonstrate this delineation of trust assets

[82] *McDiarmid, supra* note 9.
[83] Mark R. Gillen and Faye Woodman, *The Law of Trusts: A Contextual Approach, 3rd (ed)* (Toronto: Emond Montgomery Publications Ltd., 2015) at 603.
[84] *McDiarmid, supra* note 9 at para 73.

because in the event of a dispute, the courts will undertake an analysis of the relationship, if any, between treaty obligations and the pool of assets in question.

(c) Potential Solutions in the Absence of a Repeal of the *Indian Act*

If the *Indian Act* is not going to be repealed in the near future, which appears to be the case, other options should be considered.[85] The issue under study leads some lawyers and scholars to argue, and I concur, that it would be in First Nations persons and bands best interests to have their own *Personal Property Security Act* that deals with the localized realities on reserve so that First Nations debtors can work around the constraints of the *Indian Act*.[86] The effect of these constraints in the absence of a First Nations secured transaction law, is that First Nations property is rendered less valuable than non-First Nations property because the assets cannot be capitalized on for future Indigenous economic development. Creating an Indigenous-centric security transactions law that enables creditors to be more secure

[85] To be clear, Canada has a dark history of employing the *Indian Act* to assimilate First Nations. Even during amendment consultations, First Nations leaders input was often not taken seriously. See Frankie Young, "A Trojan Horse: Can Self-Government be Promoted Within the Indian Act?" (2019) 97:3 *Canadian Bar Review* 697. As such, this paternalistic Act cannot and should not be accepted as a long-term effective way to advance Indigenous self-determination. However, as Naiomi Metallic rightly notes, the vast majority of First Nations are currently not self-governed with no prospect of self-government for years to come; however, there is a dire need for First Nations to take control of iniatives that can advance their communities in the short term. See Naiomi Metallic, "Indian Act By-Laws: A Viabl Means for First Nations to (Re)Assert Control Over Local Matters Now and Not Later" (2016) vol 67 *UNBLJ* 211. As such, any work-arounds of the constraints of the *Indian Act* should be considered in the short term with the input of First Nations.

[86] Roderick A. Macdonald & Shauna Troniak, "Do Indigenous Peoples Need a "Tailor-Made Secured Transactions Law" in Roderick A. Macdonald & Véronique Fortin, editors, *Autonomie Économique Autochtone* (Montréal, Q.C.: Les Editions Thémis, 2015); See also the United States context: H. Kunesh & Benjamin D. Horowitz, "Access to Credit in Indian Country: The Promise of Secured Transaction Systems in Creating Strong Economies", in Robert J. Miller, Miriam Jorgensen & Daniel Stewart, eds., *Creating Private Sector Economies in Native America*: *Sustainable Development Through Entrepreneurship* (New York: Cambridge University Press, 2019); Assistant Secretary—Indian Affairs Office of Indian Energy and Economic Development, "Why Tribes Should Adopt a Secured Transactions Code" (2019) Tribal Economic Development Principles at a Glance Series, retrieved online August 17, 2021:https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/pdf/Why%20Tribes%20Should%20Adopt%20a%20Secured%20Transactions%20Code%204.8.19.pdf.

in extending credit would certainly be a viable solution as a work around.[87] However, in establishing an Indigenous-centric accurate, reliable and publicly accessible enforcement mechanism, the law should be created with First Nations for the benefit of First Nations and creditors.[88]

Another option is to amend the constricting provisions. Indeed, the SCC in *McDiarmid*, in analyzing these restrictions, emphasized that while the courts role is to facilitate certainty and predictabilty in the law, it is open to Parliament to make the changes necessary to lift these constraints.[89] Again, it should be stressed that if an amendment is proposed it should be led by First Nations for the benefit of First Nations so that parties affected on the front lines are leading the process. One proposed amendment option could include simply abolishing section 89 so creditors are incentivized to extend credit to First Nations on reserve.[90] However, this is problematic for those First Nations individuals and bands who see the provision as a way to ensure property on reserve remains protected from erosion.[91] Moreover, repealing this provision could create the risk of exposing such property to judgment

[87] Similar to how the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 was created to deal with First Nation family law matters. This Act was created to address certain family law matters on reserve because the relevant provincial and territorial laws do not apply on reserve and the *Indian Act* does not address such matters. It was up to each First Nation to determine if they chose to adopt the law.
[88] Models developed in the United States include the National Conference of Commissioners on Uniform State Laws, *Model Tribal Secured Transactions Act* (2006) and the National Conference of Commissioners of Uniform State Laws, *Revised Model Tribal Secured Transactions Act* (2017). The details of how particular secured transactions laws could be developed and applied to First Nations property on reserve will be the subject of analysis in a future article.
[89] *McDiarmid, supra* note 9 at para 41.
[90] Adrian Pel, "Reforming Section 89 of the Indian Act: Tinker, Waiver, Soldier (On), Sigh?" (2020) 4:1 *Lakehead Law Journal* at 69 [Pel].
[91] Canada, Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, Vol 1 (Ottawa: RCAP, 1996) at 248, 256; See also *Williams, supra* note 9 at 885.

creditors and not simply to secured creditors in which First Nations persons and bands have consented.[92]

It has therefore been argued that section 89(1) could be amended such that First Nations are able to waive this exemption, in the same way section 90(2) permits First Nations to waive exemption for property *deemed* to be situated on reserve.[93] Absent a First Nations secured transactions law, this seems to be a reasonable solution that allows the issue to be addressed on a case-by-case basis. Authorizing a First Nations party to waive section 89(1) by following certain formalties explicitly set out in the provision, is distinguished from the issue raised in section 1 where, without drawing upon any legislative authority, some lower courts ruled that parties could waive exemption with little regard given to the statutory effect of section 89(1). Just as section 90(2) authorizes parties to enter into agreements in relation to property *deemed* situated on reserve provided certain formalities are met, section 89(1) could be similarly positioned.

An amendment in this regard will augment commercial and financial certainty for both First Nations and creditors seeking to do business with them, while removing the way in which section 89 favours form over substance.[94] In fact, allowing First Nations debtors to adapt security to the needs of their particular transaction is more aligned with the purpose of modern secured transactions law.[95]

[92] *Pel, supra* note 90 at 70.
[93] See section 1 for a discussion of waivers *not* explicitly authorized under section 90(2).
[94] James I. Reynolds, "Taking and Enforcing Security Under the Indian Act and Self-Government Legislation" (2002) 18 *BFLR* 37 at 54 [Reynolds, Security]; *Wandzura, supra* note 11 at 9-10. The formalities of what makes the waiver valid would need to be included in the amendment.
[95] *Reynolds Security, supra* note 94 at 54; *Wandzura, supra* note 11 at 9-10. To this end, secured transactions law is intended to provide the necessary protections for debtor, creditor or third parties, not to direct the manner in which transactions should be structured.

In the meantime, until either of these options are available, First Nations individuals and bands and creditors should be aware of the possible credit and enforcement issues that could arise.

5. CONCLUSION

Having access to credit is clearly critical to advancing Indigenous economies. Historically, *Indian Act* exemptions, including sections 89 and 90, were instrumental in ensuring the preservation of First Nations property on reserve lands. However, First Nations' access to credit is also restricted by the application of these provisions because they set critical constraints on how personal property, including trust assets, can be used. This article analyzed the key factors the courts have taken into consideration in interpreting the application of section 89(1) to First Nations personal property.

It is trite law that where intangible personal property is at issue, including bank account funds that are objectively determinable as located where the debt is payable, the SCC will apply the common law situs test to determine its location. As such, trust assets will be considered located where the debt is payable. This is critical to the decision-making processes of creditors in determining the level of risk involved and assessing the credit worthiness of First Nations debtors. The definitive enforcement issue is that personal property found to be situated on reserve shall not be subject to seizure; consequently, such property cannot be used to enforce a debt. A creditor is unlikely to grant credit if the debtor cannot provide an enforceable security interest.

Moreover, pursuant to section 90(1), because treaty or agreement property is *deemed* situated on reserve, the source of the trust assets is relevant to the analysis as well as the location of the funds for the purposes of section 89(1). Regardless of the trust situs under provincial law, if the trust assets result from treaty or agreement, section 90(1) could apply to connect the assets to the reserve. This adds an important layer of due diligence for any creditor who considers making a secured loan to a First Nations debtor.

That is not to say that certain Indigenous trust assets may not be able to be used as collateral against which a security interest can be enforced. However, if the use of trust assets as collateral is challenged pursuant to section 90(1), a court will apply an entirely fact-specific analysis to determine the kind of settlement agreement from which monies were paid in trust. Whether trust assets can be used to enforce a debt is dependent upon whether treaty or agreement assets are at issue, given that such property is not subject to attachment. Further, pursuant to section 90(2) of the *Indian Act*, while Bands can seek ministerial consent to enter into transactions dealing with Indigenous property *deemed* situated on reserve, it can be a lengthy process.

All factors combined, one option could be to amend the *Indian Act* to explicitly permit First Nations persons or bands to waive exemption under section 89(1). This waiver would be subject to meeting certain formalities set out in the provision. Alternatively, a First Nations secured transactions law could be established to provide a work-around to the constraints of the *Indian Act*. In the meantime, it is incumbent upon both creditors and First Nations debtors to understand how the law impacts these kinds of personal property secured transactions prior to entering into credit arrangements.

Chapter 6. Conclusion

1. The Influence of Law on Indigenous Economic Development and Self-Determination

> *The justice system has been unjust. Certainly, for people like me, and I know there's many of you out there like me. But we need to create a better tomorrow for our children, our grandchildren.*[1]

The portfolio of articles in the previous chapters addresses the broader inquiry around the role law plays in the development of sustainable Indigenous economies. We are at a critical time in Canada for advancing reconciliation, and in this task, the recognition of Indigenous peoples as valuable contributors to the greater Canadian economy is paramount. The law can either work to protect Indigenous interests or constrain the advancement of Indigenous interests, as has been the historical reality. In the *Report of the Royal Commission on Aboriginal Peoples*, the Truth and Reconciliation Commission denounced the impact mainstream economic development has historically had on Indigenous economies. The report notes that Indigenous peoples' ties to ancestral lands has been substantially disrupted, devastating Indigenous economies and the ability of communities to be self-sustaining.[2] Because Indigenous peoples' laws are inextricably linked to culture, tradition, history and language, all grounded in attachment to place, land, resources or traditional territories, these impacts significantly weaken Indigenous sovereignty and wellbeing, overall. Including the principles of Indigenous laws in economic development processes to develop sustainable Indigenous economies can assist in overcoming historical injustice.

The portfolio addresses some of the important legal, business, and policy related issues that constrain Indigenous economic development, posits potentially viable solutions, and reveals ways

[1] Barbara Dumont-Hill, elder from Kitigan Zibi Anishinabeg First Nation. See "Exploring Indigenous Justice Systems in Canada and Around the World" (May 2019, Gatineau QC) at 3. Retrieved on August 10, 2021 online at: https://www.justice.gc.ca/eng/rp-pr/aj-ja/eijs-esja/rep-rap.pdf.

[2] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 at 7 (Ottawa: Communication Group, 1996) [RCAP].

in which legal pluralism and diverse business models may be shaped to promote economic inclusion in Canada. I argue that norms and values in law, along with systems devised for economic development, have distinct implications depending upon a given community's members in question. On this premise, I challenge the normative approaches to business and law in an effort to expand understanding of legal rules and approaches to business from the legal norms and value systems of Indigenous peoples. In that Indigenous laws have norms they may be different than those enshrined in the Canadian common and civil law traditions.

While reconciliation involves building positive relationships between Indigenous and non-Indigenous people, economic reconciliation requires a commitment to shared accountability and the willingness to recognize different perspectives in the greater Canadian legal and economic systems. Certainly, there has been some progress in bringing awareness to jurists, lawyers, scholars and governments around the role Indigenous legal traditions can (and does) play in strengthening Canada's multi-juridical legal system. Governments, judges, lawyers and Indigenous leaders have publicly called for education on Indigenous laws.[3] It is therefore timely that concerted efforts be made to support Indigenous communities in the resurgence of Indigenous legal traditions,[4] and particularly in economic development initiatives.

[3] For example, the TRC Call to Action # 50 calls upon governments to collaborate with Indigenous leaders to fund the revitalization of Indigenous laws. See Truth and Reconciliation Commission of Canada, Truth and Reconciliation (*Commission of Canada: Calls to Action*, 2015) < http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>, No 50 (accessed August 9, 2021); Minister of Justice and Attorney General of Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" (2018) https://www.justice.gc.ca/eng/csj-sjc/principles.pdf, Principle 4 (accessed August 10, 2021); Report on the Conference Hosted by the Department of Justice Canada, "Exploring Indigenous Justice Systems in Canada and Around the World" (May 2019, Gatineau QC) Retrieved on August 10, 2021 online at: https://www.justice.gc.ca/eng/rp-pr/aj-ja/eijs-esja/rep-rap.pdf; Damian Ali, "Addressing Reconciliation Through Canada's Legal System", the Federation of Law Societies of Canada statement of commitment to Reconciliation (The Registrar, Issue 1, 2021), online at: https://issuu.com/theregistrar/docs/issue_1__winter_2021_edition__the_registrar_maga/s/11824394.

[4] In this regard see important announcements made by the Justice Minister David Lametti on the support provided for the revitalization of Indigenous laws: https://www.youtube.com/watch?v=P3maKESNYsg and https://www.youtube.com/watch?v=BX5gD7nMgzc.

Notably, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) acknowledges the critical connection between economic development and self-determination. Article three of UNDRIP recognizes the right of Indigenous peoples to freely determine their political status and pursue economic, social and cultural development.[5] UNDRIP also recognizes Indigenous peoples "right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[6] Maintaining and strengthening these institutions is undoubtedly connected to law. As law directly impacts the way that Indigenous self-determination can be realized, Indigenous legal traditions, principles and processes deserve the same deference in the greater Canadian legal system as the common law and civil law traditions.

2. Summary of Portfolio Articles

Indigenous resistance and resurgence are fertile.[7]

With increasingly greater understanding of the historical impact of colonial laws, Indigenous peoples are now better equipped for robust participation in the global economy.[8] This participation is not without challenges. In addressing the gap in scholarship on how Indigenous legal orders and principles can contribute to improve economic outcomes and reaffirm the sovereignty of Indigenous peoples, I have analyzed, in detail, the competing interests and legal realities that perpetuate disparate subpar outcomes for Indigenous peoples. In examining how law

[5] United Nations Declaration on the Rights of Indigenous Peoples, UNGA Resolution 61/295 (13 September 2007) UN Doc A/RES/61/295, Article 3 [UNDRIP]. Online at: http://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.
[6] *UNDRIP, supra* note 5, Article 5.
[7] Clifford Gordon Atleo "Aboriginal Capitalism: Is Resistance Futile or Fertile?" (2015) Vol 9:2 *The Journal of Aboriginal Economic Development* 41 at 51.
[8] See more generally, W. Wuttunee, *Living Rhythms: Lessons in Aboriginal Economic Resilience and Vision* (Vol. 37) (Montreal: McGill- Queen's Press, 2004).

in Canada can be more inclusive, the role of Indigenous law and economic development as a means to shape more positive trajectories for Indigenous peoples was explored.

As set out in article one, devising economic development initiatives that include Indigenous peoples' legal traditions and values is an important way to advance self-determination. It is argued that the evidence is clear—if Indigenous legal traditions and cultural values are not incorporated into economic development processes, the common law, civil law traditions and legislative provisions that have historically applied to Indigenous legal and economic interests are limited in what they can achieve. To date, Eurocentric laws on their own have been unsuccessful in resolving the economic inequity thrust upon Indigenous peoples over many generations. Indeed, Eurocentric laws *have been* the cause of economic disparity. Arguably, using the same Eurocentric legal system to resolve issues created by that legal system is a "strawman" approach. That stated, it must be recognized that how common law can be reconciled with Indigenous legal perspectives is still a project in its infancy.[9] As a way forward, I argue, applying the principles of Two-Eyed Seeing may assist in reconciling diverse laws in specific economic development initiatives and processes.

Articles two and five provide examples of how laws, in this case the *Indian Act*—created and interpreted from a Eurocentric perspective—impact First Nations' economic interests. The articles analyzed the specific constraints around section 89 and 90 of the *Indian Act* to demonstrate how these provisions are not responsive to First Nations' economic realities. As I pointed out, Eurocentric interpretations of the *Indian Act* are also problematic because they negate First Nations' sovereignty, constrain their economic autonomy, and perpetuate the *status quo*. To enable

[9] *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264 at para 139.

First Nations' self-determination, the law-making process should involve the participation of the Nation whose legal interests are impacted.

Notably, in dealing with similar provisions of the *Indian Act*, there is a nuanced tension between articles two and five. While article two takes issue with the Supreme Court of Canada's *policy* argument in *McDiarmid Lumber Ltd. v God's Lake First Nation* (that section 90(2) should be narrowly interpreted to promote First Nations' self-government and autonomy), article five provides a contextual/critical analysis of numerous *technical* interpretations of section 89 and 90 by courts and how these interpretations inform decision-making processes in credit transactions.

The tension between the two articles lies in taking issue with the ways *policy* has been interpreted on the one hand (article two),[10] and on the other hand, the more technical ways that these provisions constrain First Nations economic development (article five). While some tension exists, the two articles do not necessarily conflict with each other. Rather, they simply argue two different facets of a larger issue around how First Nations autonomy and economic development is constrained by the *Indian Act* and the way its provisions are interpreted. In recognizing the tension between the different lines of interpretation, it is necessary to also appreciate the possibly unintended outcome—namely, constraining First Nations' access to credit to fund economic development initiatives. For a piece of legislation that has been decried and held up as inescapable, there is no reason at this point to try to 'square the circle.'

In contemporary times, Indigenous governments are gaining greater political consciousness[11] with a view to attaining autonomy. Reflecting the trends, I argue in articles three and four that increasing Indigenous assets and resources in ways that assert Indigenous legal

[10] On this note, arguably courts are not only responsible for seeking predictability and consistency in the law, as was noted in *McDiarmid*, but also providing an accurate account of the facts and history.
[11] *RCAP, supra* note 2.

traditions is a way to promote equal economic opportunity. That many Indigenous communities are establishing statutory governance structures, including trusts and corporations, has been addressed. It is clear Indigenous legal traditions and values must inform these structures for Indigenous economic development to progress "in a good way." While Indigenous economic well-being is not only measured by market-based production, Indigenous peoples can still benefit from engaging in certain market-based business activities such as corporate development structures or trust investments. Articles three and four address concerns scholars, community leaders and members may have around what are generally understood as "capitalistic" ventures, such as business or investment activities, especially as (Western) capitalism has had devastating impacts on Indigenous economic interests. These articles posit that sustainable Indigenous economic development is possible if Indigenous legal traditions and values are centered in the creation and management of corporations and / or trusts.

Overall, the articles emphasize that Indigenous well-being is not only measured by the wellness of the present community, but also by how future generations will be sustained. From an Indigenous perspective, well-being is measured by more than present-day economic and social development. Rather, well-being is maintained in the connection between land and community, culture, tradition, interconnectedness and belonging, and resurgence for many generations to come.[12] Therefore, decisions must be made with both present and future generations in mind. This

[12] Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016), 61 *McGill LJ* 847; John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 *Wash UJL & Pol'y* 167; Larry Chartrand, "Eagle Soaring on the Emergent Winds of Indigenous Legal Authority" (2013), 18 *Rev Constitutional Stud* 49; Valerie R. Napoleon, "Thinking About Indigenous Legal Orders" Ch 11 in René Provost & Colleen Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2012). Notably, the government of Canada's Community Well-being Index (CWB) captures only economic and social development, including per capita community income, an education index, a labour-force participation index, and a housing index. See online at: https://www.sac-isc.gc.ca/eng/1100100016579/1557319653695.

must, normatively, inform the way assets are managed: in the main, by incorporating Indigenous laws and principles into corporate governance and trust investment policies to promote Indigenous well-being.

In addressing the collective issues in the portfolio of articles, I offered the principle of Two-Eyed Seeing as a way to reconcile the numerous legal interests at stake. To remind, Elder Marshall considers Two-Eyed Seeing to be contextual in nature, and stresses it will require a reimagining of how two different worldviews can work together to resolve issues. To advance Indigenous economic development "in a good way", it is important communities do not depend solely upon one legal tradition or another. Rather, a blend of legal perspectives may achieve for Indigenous peoples what either one on its own may not. This will require engaging the principle of Two-Eyed Seeing in a *focused and contextual manner* to assist communities in reconciling the distinct laws and values in economic development.

While Two-Eyed Seeing is not explicitly discussed in every article, the principles of Two-Eyed Seeing are reflected in the overall series of articles. The following three themes emerging from the research are either explicitly stated or more contextually represented in the articles: Eurocentric laws have had and continue to have a devastating impact on Indigenous peoples' legal rights and economies; Indigenous peoples' positionality and perspectives must be respected if a pathway is to be built for Indigenous laws and perspectives to be meaningfully and purposively included in economic development initiatives; and Indigenous ways of knowing exist as living sources of knowledge. As Elder Marshall asserts, engaging with Two-Eyed Seeing is more than simple willingness to *hear* from and/or about another perspective. Rather, it is about willingness to "see" a particular perspective from one eye, even as the other eye engages with a diverse perspective.

Balancing Indigenous laws and economic approaches with Eurocentric laws and economic methods can benefit Indigenous peoples by more equitably increasing Indigenous prosperity. While it is clear that Indigenous and Eurocentric laws will undoubtedly remain distinct, they can presumably influence one another. Just as the civil law has been heavily influenced by the common law but preserves its distinct legal authority, the same deference ought to be given Indigenous legal traditions in the greater Canadian legal system. The future prosperity of Indigenous peoples will increase when Indigenous legal traditions are represented in economic development initiatives and processes.

In summation, engaging Indigenous law to decolonize economic development is a complex, multi-faceted undertaking that will no doubt require a firm commitment and willingness to act from government, stakeholders and Indigenous leaders and peoples. Statutes and common law principles that constrain Indigenous communities and individuals must be transformed to limit their historical and present-day detrimental impacts. To lessen the impact colonial legacies, further contextualizing Indigenous legal frameworks within economic development initiatives is necessary.

To be clear, numerous projects and initiatives are currently underway to assist specific communities to revitalize their Indigenous legal traditions.[13] Focused Indigenous legal reform can and will result in measurable and positive economic outcomes for Indigenous peoples. Including Indigenous laws and ways of engaging in economics would offer a grounding to the principle of economic reconciliation and help realize the objective of promoting economic equity for all Canadians.[14] While this portfolio analyzes some theoretical and pragmatic issues affecting

[13] See note 4.
[14] Canadian Council for Aboriginal Business, *Business Reconciliation in Canada Guidebook*, September 6, 2019, online at: https://www.ccab.com/research/ccab-collaboration_series/business_reconciliation/ at 9 (Retrieved on

Indigenous development, the way Indigenous legal and economic issues can and will be reconciled within the pan-Canadian order will require thoughtful deliberation and examination for many years to come. Meaningful Two-Eyed Seeing engagement require weaving back and forth between diverse perspectives to promote legal and economic inclusion for all. To this end, the words of the late Mi'kmaq Chief, Spiritual Elder, and Healer, Charlie Labrador, can inspire us: "Go into a forest, you see the birch, maple, pine. Look underground and all those trees are holding hands. We as people must do the same."

December 8, 2019) [CCAB Guidebook] [emphasis added]; The National Indigenous Economic Development Board, *Without Equal Economic Opportunities There Can Be No Reconciliation with Indigenous Canadians*, November 22, 2016, online at: http://www.naedb-cndea.com/en/without-equal-economic-opportunities-no-reconciliation/ (Retrieved on November 15, 2019) [NAEDB]; Indigenous Corporate Training, *Why Canada Needs Indigenous Economic Reconciliation*, April 5, 2017, online at: https://www.ictinc.ca/blog/why-canada-needs-indigenous-economic-reconciliation (Retrieved on November 15, 2019) [ICT].