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The Fiduciary Crown

The Private Duties of Public Actors in State–Indigenous Relationships

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1 Introduction

A line of Canadian jurisprudence beginning with *Guerin* v. *the Queen* [1984] 2 SCR 335 (*Guerin*) characterizes the relationship between Indigenous peoples and the state as a fiduciary relationship, in which certain duties arise, responsive to context, that are 'in the nature of private law dut[ies]'.[2] The Supreme Court of New Zealand recently followed the Canadian approach in *Proprietors of Wakatū* v. *Attorney General* [2017] 1 NZLR 423 ('*Wakatū*'), upholding the Crown's fiduciary duty with respect to the property interests in dispute while leaving open the question of whether the relationship between the Crown and Māori is 'generally' a fiduciary one.[3] These cases are part of a line of jurisprudence departing from earlier cases characterizing state–Indigenous relationships as non-justiciable 'political trusts', having a moral but not legal character.[4]

The approaches taken by courts in both countries raise broader normative, doctrinal and ontological questions about whether parties to state–Indigenous relationships, and the duties they owe, are best regarded as public or private. Our particular concern in this chapter is the use of state–Indigenous examples in two ongoing and interconnected debates: legal theories debating the coherence or content of 'public fiduciary

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[2] *Guerin* v. *the Queen* [1984] 2 SCR 335, 388–9 (*Guerin*).

[3] *Proprietors of Wakatū* v. *Attorney General* [2017] 1 NZLR 423 (*Wakatū*). In shifting from 'the Crown' to 'the state', we adopt the terminology preferred in fiduciary political theory, notwithstanding work theorizing the Crown and the state as conceptually separate entities. See especially Janet McLean, 'Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand' [2015] *NZL Rev.* 187. See also Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press 2012). These differences are immaterial to our arguments about the applicability of fiduciary theory to relationships between the state or Crown with its subjects or Indigenous peoples.

[4] See, e.g., *Tito* v. *Waddell (No. 2)* [1977] Ch 106.

law',[5] and political theories advancing or resisting a general fiduciary model of statehood.[6] In both debates, fiduciary accounts of public authority seek to show that states can (and in some cases should) bear fiduciary duties to individual subjects or to a notional 'public'. We argue in this chapter that assimilating state–Indigenous fiduciary relationships into either fiduciary political theory or an emerging public fiduciary law obscures the importance of the authority and distinctive private rights of Indigenous parties to those relationships that are protected by fiduciary duties. It may imperil Indigenous rights by stripping the relationship of its private law features. This could leave Indigenous interests to be weighed alongside those of third parties and the public using public law methods that have proven to be not only inhospitable to Indigenous rights but virtually incapable of securing Indigenous interests in the face of competing claims. The duties and rights at stake are distinct from those owed and held between subjects and authorities in public law, and the utility of the relationship for Indigenous peoples lies precisely in the fact that it is not generalizable.

We argue that, contrary to the positions expressed in much of the case law discussed in Section 2 of this chapter, and in academic commentary, the duties discussed are private and need not be described as 'analogous' to private duties, even given the public character of the parties. This characterization has doctrinal, analytical and normative implications. Doctrinally, it would preserve the usual protections for private rights against contending public or third-party interests, and enable recourse to the package of private law claims, remedies and defences that are not typically on offer for claimants relying on public law rights and obligations.[7] Analytically, the private characterization affirms that fiduciary duties owed to Indigenous peoples are not generalizable to non-Indigenous interest holders, third parties or 'the public'. Moreover, it positions such duties as structurally (and at times substantively) opposed to the more general relationship between state and subjects that underpins both liberal political theory and public law. The private characterization thus pushes back against efforts to use the state–Indigenous example to ground analytic theories of public fiduciary law or political theories of a fiduciary state.

We are of the view that state–Indigenous relationships are best characterized as having an inter-public or international character. Leaving open the prospect and promise of wholesale constitutional and conceptual renovations that would be required to give effect to an international model, we contend that that an 'inter-public' approach to state–Indigenous relations can be achieved by shifts in judicial reasoning. We further contend that understanding the state–Indigenous fiduciary relationship as one that entails private duties is a progressive step towards the

[5] For a concise explanation, see Evan Fox-Decent, 'Challenges to Public Fiduciary Theory: An Assessment' in D. Gordon Smith and Andrew S. Gold (eds.), *Research Handbook on Fiduciary Law* (Edward Elgar 2018).

[6] See, e.g., Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's LJ* 259, 265; Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press 2011); Evan J. Criddle and others (eds.), *Fiduciary Government* (Cambridge University Press 2018).

[7] See Nicole Roughan, 'Public/Private Distortions and State–Indigenous Fiduciary Relationships' (2019) *NZL Rev.* (forthcoming).

realization of such an inter-public approach. A private conception of state–Indigenous fiduciary relationships protects certain Indigenous interests without necessitating recourse to the problematic and limited mechanisms of the state's extant public law, and thus preserves the prospect of developing a genuine and effective *inter*-public law.

While we remain wary of the apparent paternalism and monism of fiduciary conceptions of state–Indigenous relationships,[8] we recognize that fiduciary doctrine provides Indigenous peoples with recourse to rights and remedies that are otherwise not available in public law (yet which, as private relationships, would be readily available in equity). As the cases below illustrate, fiduciary duties have produced concrete protections for some groups and are viewed by some commentators (Indigenous and non-Indigenous) as important legal toeholds for Indigenous peoples pursuing independent self-government.[9] In this chapter we take aim specifically at the conceptions of the duties entailed in the Indigenous–state relationship as 'analogous' to private law duties. We think there are doctrinal and normative reasons to conceive of and apply such duties within the forms of private law, without the kinds of qualification that are expressed in deference to the public statuses of the parties.

This chapter defends five claims. In Section 1 we argue (1) that a private duty is one owed directly between parties to a relationship and not to others outside that relationship, where the interest protected by the duty belongs or attaches only to its holder and is not generalizable to non-parties; (2) given that both Indigenous peoples and the state claim and exercise public authority vis-à-vis members of their polities, we argue that the tools of singular or monistic public law are ill-suited to upholding mutual relational duties in their inter-public relationship and (3) the specific duties owed in that relationship can include those arising from the creation, transfer, undertaking or injury of interests that are the objects of private duties according to the conception outlined in (1). In Section 2 we draw on the key cases of *Guerin*, *Wewaykum Indian Band* v. *Canada* [2002] 4 SCR 245 (*Wewaykum*) and *Wakatū* to argue (4) that the specific state–Indigenous fiduciary duties upheld by the courts in Canada and New Zealand are private duties. In Section 3 we explain that the duties identified in these cases require the state to protect Indigenous interests against the competing interests of non-Indigenous third parties and the public. In Section 4 we argue (5) that these features of judicially recognized state–Indigenous fiduciary relationships mean that they should not be used as exemplars in accounts of fiduciary political theory or public fiduciary law. Section 5 concludes.

2 Fiduciary Relationships in the Public, Private and Political Spheres

An emerging literature on public fiduciary duties draws upon fiduciary political theory to argue that public authorities (including the state, its agencies and representatives) owe fiduciary duties to those subject to their powers. While theoretical

[8] Ibid.

[9] See, e.g., Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Fernwood 2000) 44–5.

foundations differ between accounts,[10] their shared core is a supposed correlation of public authority and subjection on the one hand, with fiduciary discretion and the vulnerability of principals on the other. For our purposes, the key aspect of these accounts is their avowedly public character, by virtue of which whatever duties the state owes to its subjects are owed to all in the same way, and for the same reasons. Expressly, the duties are owed by public authorities to subjects because of their subjection.

In order to evaluate those accounts, we embark here on an outline of the anatomy of the public and private spheres within which state–Indigenous fiduciary relationships are situated. For our purposes it is crucial that the public and private spheres (in politics and in law) be understood in relation to each other, even if they cannot be fixed with a bright distinction. We understand that what is private is protected or carved out from public interest or interference, while what is public is thought to be of general application and importance, justifying the interventions of the collective notwithstanding private preferences. Others have offered demarcations emphasizing private law's core bilateral relational structure, where rights and interests are contested and protected 'between you and me', thereby situating other actors as third parties to our relationship.[11] That basic structural characterization is contested in private law theory, where trilateral relations challenge the primacy of bilateral relationality, or where sets of bilateral relations cannot, without distortion, be distinguished amidst complex networks of duties. Both of those tensions feed into our characterization of state–Indigenous duties as private duties but do not detract from the core structuring idea we offer here: that private duties are owed 'between you and me *and not others*', protecting interests that I hold *in distinction from others*. We will use this core idea to differentiate a set of directly relational state–Indigenous duties from duties the state owes to the wider public.[12]

A private conception of fiduciary duties offers a structural and not necessarily a substantive demarcation and protection of private rights and duties from public interference. As matters of both doctrine and justification, private rights are often

[10] For instance, a fiduciary conception of public authority may avoid the Kantian problem that one person's wielding of another's powers violates the universal principle of right. A civil condition empowering and burdening fiduciary officials can be supervised by a 'trustee' court. See Alec Stone Sweet and Eric Palmer, 'A Kantian System of Constitutional Justice: Rights, Trusteeship, Balancing' (2017) 6 *GlobCon* 377.

[11] Leading work includes Ernest J. Weinrib, *The Idea of Private Law* (rev. ed., Oxford University Press 2012), and concise engagement with conventional and critical conceptions of the private sphere appears in Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116 *Colum L. Rev.* 1395. This work explores relations between individual persons and relies heavily on accounts of individual autonomy. We mean to be provocative in adopting private law's relationality to treat the relation between state and Indigenous authorities as one between formally independent and equal parties. Compare Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016): 'To be entitled to act on behalf of everyone, the state must stand in the right relation to each citizen over whom it exercises power. This vertical relation is different in kind from the horizontal relations between private persons that are governed by the principle that no person is in charge of another.' Our argument is that the right relation of the state to Indigenous citizens is not one of sovereign–subject; rather, it shares the governing principle that Ripstein articulates for private relations.

[12] To the extent that equity displays greater sensitivity to the interests of third parties and the public, it may also display greater potential sensitivity to a pluralist conception of the public interest.

(and in some contexts routinely) overridden by matters of public interest, particularly in conditions of necessity or emergency. To characterize fiduciary duties as private duties is to acknowledge that doctrinal limits and conditions (including rules governing expropriation and compensation) accompany regimes of private rights. Our argument is not that Indigenous interests invariably either trump or outweigh contending 'public' interests within that structure; it is arguably more significant. Invocations of an overriding public interest depend for their justification on the singularity and inclusivity of the public whose interests are being asserted against members of *that* public. In the case of the settler states, however, the very idea and composition of the public is contested, and assumptions built on its underlying premise of popular sovereignty are precarious.[13] For a 'public interest' to justifiably limit or outweigh Indigenous private rights, it would need to be directly justified in accordance with the authority and independent interests of the relevant Indigenous public (including in its interaction with other publics). Our account therefore does not import the content of the existing doctrinal limits that public interest imposes on private rights; rather, it imports that structure while inviting greater plurality into its content.

A better model, then, situates settler societies as made up of more than one public, constituted by multiple peoples and containing multiple legal authorities and public interests.[14] These features together challenge the notion that Indigenous peoples are subjects of the state, or at least challenge the extent, degree and conditions of any subjection. Central to these settler state–Indigenous relationships is the core principle that unlike in standard relationships between state and subject in public law, these are relationships between public authorities and between the polities they represent. This in turn matters to any characterization of the state–Indigenous relationship as one regulated by public law, for it suggests instead that the relevant legal tools must be designed to regulate inter-public or inter-authority relationships. It also suggests that the 'public' in public interest is plural, and that this is relevant to the form and content of justifications given for interferences with private interests in 'the' public interest. Seen in light of these ideals, the standard models of 'public fiduciary' relationships seem insufficiently pluralist.

In light of this, and given the public statuses of Indigenous peoples and states, a better model of the relationships might be located in international law and relations;[15]

[13] See, e.g., Steven Curry, *Indigenous Sovereignty and the Democratic Project* (Ashgate Publishing 2004); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995); Ludvig Beckman, Kirsty Gover and Ulf Mörkenstam, 'Popular Sovereignty in Multi-people States: The Challenge from Indigenous Peoples to Conceptions of Popular Sovereignty as Democratic Participation' (manuscript on file with authors).

[14] See, e.g., Tully (n. 13); Duncan Ivison, 'Pluralising Political Legitimacy' (2017) 20 *Postcolonial Studies* 118; James [Sákéj] Youngblood Henderson, 'Empowering Treaty Federalism' (1994) 58 *Sask. L. Rev.* 241; Duncan Ivison, 'Justification Not Recognition' (2017) 8(24) *ILB* 12; P. Patton, 'The Limits of Decolonization and the Problem of Legitimacy' in David Boucher and Ayesha Omar (eds.), *Decolonisation: Evolution and Revolution* (Wits University Press 2019) (forthcoming); Nicole Roughan, 'Polities and Relative Authorities' (2018) 16 *ICON* 1215.

[15] Ivison, for example, refers to the Indigenous–state relationship as one entailing 'quasi-international relations'. Duncan Ivison, 'The Logic of Aboriginal Rights' (2003) 3 *Ethnicities* 321, 332.

Indigenous–state treaties and treaty-implementing agreements are, in any case, approached in settler state public law in a way that bears striking similarity to the treatment of international treaties.[16] In practice the judicial methods deployed to give effect to an inter-public model may also bear resemblance to those used in private international law, where choice-of-law decisions are to be made based on prior agreement or general jurisdictional principles.[17] Formally, however, settler states and their courts have emphatically rejected any proposition that Indigenous–state relations treaties, and disputes about treaties, should be governed by international law or addressed in international adjudicatory fora.[18] While state sovereignty continues to be framed doctrinally as an absolute, admitting of no contender, the (self-imposed) formal and doctrinal constraints operating on settler state institutions mean that the international law analogy can only be understood as an ideal, not within the practical reach of settler courts as currently mandated.

In its private conception of fiduciary duties, our account does not foreclose the prospect (indeed likelihood) of mutual influence between the public and the private spheres, or the entanglement of private and (plural) public interests. As the experiences of Indigenous polities attest, self-governance and lawmaking are intrinsically embedded in communal property rights, and recognition of these rights in settler law is a powerful tool for enabling and protecting Indigenous jurisdictional capacities. In this legally plural context, putatively private interests in property take on a decidedly public character as the basis for Indigenous authority. Moreover, communal property rights recognized in settler common law derive their content from the 'traditional laws and customs' that empower and obligate members of the property-holding community, and so include recognition (albeit tacit and limited) of the continuing import of Indigenous law in the settler states.

Furthermore, even within settler law, fiduciary duties in state–Indigenous relationships attach not only to Indigenous property interests (which may in appropriate cases be freighted with private fiduciary burdens in the forms of express, resulting and constructive trusts), but also, by default if not design, encompass interests in autonomy, authority, self-determination and forms of public ordering not confined within the rubric of property. Even while existing jurisprudence on the state–Indigenous fiduciary relationship and its attendant duties requires the identification of independent Indigenous *property* interests (whether pre-existing or substituted), there are lines of reasoning within this body of jurisprudence that identify broader procedural duties, including obligations to seek and receive instruction from Indigenous interest holders,[19] to accommodate Indigenous preferences[20] and to give effect to Indigenous

[16] See, e.g., Kirsty Gover, 'The Politics of Descent: Adoption, Discrimination and Legal Pluralism in the Treaty Claims Settlements Process' [2011] *NZL Rev.* 261, 286–93.

[17] For an overview of private international law as one example of variegated forms of legal pluralism, see Robert Wai, 'The Interlegality of Transnational Private Law' (2008) 71(3) *LCP* 107.

[18] The existing government-to-government relationships pertaining between recognized tribes and the federal US government is closer in substance and its historic conception to an international relations model than are the Indigenous–state relationships in the Commonwealth settler states.

[19] *Guerin* (n. 2); *Blueberry River Indian Band* v. *Canada* [1995] 4 SCR 344.

[20] *Wewaykum Indian Band* v. *Canada* [2002] 4 SCR 245 (*Wewaykum*).

law and decision-making.[21] Conceptions of fiduciary duty appear most prominently in public law reasoning as part of the constitutional principle of the honour of the Crown, which finds purchase in Canadian judicial interpretations of s. 35 of the Constitution protecting Aboriginal and treaty rights,[22] and in judicial constructions in New Zealand of the 'partnership' and 'good faith' principles of the Treaty of Waitangi.[23] In this guise, fiduciary conceptions entail, among other duties, procedural obligations such as the duty to make informed decisions, including by consultation with Indigenous peoples on matters that affect their claimed or proven property interests.[24]

For now the connection between the Crown's property-based duties and more procedural and constitutional obligations is contested, and we leave the bulk of this conversation for consideration in a separate paper.[25] The question we ask is whether (and how) this combination of private and public duties can support an account of the state–Indigenous relationship as one that pertains between polities rather than between the state and its subjects. For the time being, the fiduciary classification may supplement, shape and support the interpretation of procedural duties in public law, but does not repair the inadequacies of public law's content, structure and reasoning. It certainly does not approach what is required to found a genuinely inter-public and inter-authority conception of the state–Indigenous relationship.

These procedural and constitutional duties appear in contradistinction to general settler public law, which operates in ways that are typically ahistorical and often punishingly distributive. These use more or less symmetrical models of equality and non-discrimination that take the settler state apparatus as their temporal and institutional baseline for measures of equality and distributive justice. In doing so they fail to properly recognize or accommodate the pre-existing and continuing interests of Indigenous peoples. In contrast, an account of the state as an actor owing private fiduciary duties, we think, requires the Crown to diligently perform its obligations as an interlocutor and (where necessary) act as a bulwark between Indigenous peoples and both third parties and the public. This distinctive role as intermediary, and the priority it can secure, is of crucial importance. Case law from Australia[26] and Canada[27] indicates that where resort to fiduciary duty or other constitutional

[21] *Tsilhqot'in Nation* v. *British Columbia* [2014] 2 SCR 256 (on management of aboriginal title and economic uses to which the land can be put).

[22] *R.* v. *Sparrow* [1990] 1 SCR 1075, at 1108 ('In our opinion, *Guerin*, [. . .] ground[s] a general guiding principle for s 35(1)'); and at 1109 ('There is no explicit language in [s. 35 of the Canadian constitution] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.').

[23] See, e.g., *Te Runanga o Wharekauri Rekohu Inc.* v. *Attorney-General* [1993] 2 NZLR 301, 304, 306 (Cooke P); *New Zealand Māori Council* v. *Attorney-General* [1987] 1 NZLR 641, 664. For the texts of the treaty, see Treaty of Waitangi Act 1975 (NZ).

[24] *Haida Nation* v. *British Columbia (Minister of Forests)* [2004] 3 SCR 511.

[25] Kirsty Gover and Nicole Roughan, 'The Authority of the Indigenous Principal: State–Indigenous Fiduciary Relationships in Constitutional Law' (manuscript on file with authors).

[26] *Gerhardy* v. *Brown* (1985) 159 CLR 70; *Maloney* v. *the Queen* (2013) 252 CLR 168.

[27] *R.* v. *Kapp* [2008] 2 SCR 483.

protections is not available, Indigenous claims are shoehorned into the narrow and inhospitable space provided by affirmative action or substantive equality measures in legislative or constitutional bills of rights.[28] If the claims and underlying interests cannot be protected as measures designed to further substantive equality, they remain vulnerable to the challenge that they are prohibited forms of racial discrimination. In the United States, for example, the landmark 1974 Supreme Court case of *Morton* v. *Mancari*[29] drew on the federal trust doctrine as a basis for deflecting equal protection claims aimed at 'preferences' for Indians, by casting the beneficiaries of those trust responsibilities as the members of recognized polities rather than members of a racial group.[30] Indigenous communities in the United States who are not similarly beneficiaries of federal trust duties are vulnerable to third-party challenges alleging racial preference in violation of the equal protection clause.[31]

The US example suggests that the designation of Indigenous communities as beneficiaries or principals of distinctive trust or fiduciary duties, rather than as racial groups, offers an important corrective to public law logics.[32] Nevertheless, and in addition to other criticisms made of that doctrine,[33] it is an inadequate protection that depends on state unilateralism in recognition practices. Where Indigenous peoples cannot be classified as beneficiaries of the state's fiduciary or trust duties because they, or the interests they assert, are not recognized in settler law, they likewise cannot be understood as political communities, appearing instead in settler public law as racial communities whose members cannot be preferred over those of other races.[34]

Alongside but apart from other critics of the 'fiduciary state', therefore, we worry that, to the extent that public fiduciary conceptions replicate the equality-based reasons that underpin administrative and constitutional law, they do not appropriately model

[28] See, e.g., Kirsty Gover, 'Indigenous–State Relationships and the Paradoxical Effects of Antidiscrimination Law: Lessons from the Australian High Court in *Maloney v the Queen*' in Jennifer Hendry and others (eds), *Indigenous Justice: New Tools, Approaches, and Spaces* (Palgrave Macmillan 2018) 27–52.

[29] *Morton* v. *Mancari*, 417 US 535 (1974).

[30] Ibid., finding that '[r]esolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognised tribes': at 550. 'As long as the special treatment can be tied rationally towards Congress' unique obligation towards the Indians, such legislative judgments will not be disturbed': at 554–5.

[31] *Rice* v. *Cayetano*, 528 US 495 (2000). Here the state of Hawaii had enacted legislation restricting voting for elections to the Office of Hawaiian Affairs to the descendants of pre-annexation residents and native Hawaiians, and sought to defend this preference by drawing an analogy with the federal trust responsibilities owed to recognized tribes by the US federal government. The majority rejected this analogy: 'To extend *Mancari* to this context would be to permit a State by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs. The fifteenth amendment forbids this result': at 522. For a recent and potentially transformative federal court decision, see *Brackeen* v. *Zinke,* 338 F. Supp. 3d 514 (ND Tex., 2018), issuing an order (based on the non-application of *Morton* v. *Mancari* (n. 29)) striking down the Indian Child Welfare Act as unconstitutional in its application to Indian children who were not members of federally recognized tribes (children eligible for membership are also included within the act's remit). These issues and cognates in other settler states are explored further in Gover and Roughan (n. 25).

[32] Gover and Roughan (n. 25).

[33] See, e.g., Seth Davis, 'The False Promise of Fiduciary Government' (2014) 89 *Notre Dame L. Rev.* 1145.

[34] *Rice* v. *Cayetano* (n. 31).

the state–Indigenous relationship. Most treacherously, it seems possible that the principles offered to guide a 'fiduciary state' when called on to resolve competing private and public claims will replicate the injustices wrought against Indigenous peoples by the 'balancing' and 'proportionality' methods used to effect equality principles in public law. Concepts such as 'fairness, even-handedness and impartiality',[35] premised on concepts of the inherent and equal dignity of individuals an understanding those persons as subject to common, singular authority,[36] do not supply what is crucially needed, which is a method to insulate Indigenous interests from competing public and third-party claims. This in turn requires recognition that distinctive Indigenous rights and interests are not premised on the entitlement of those peoples to a fair and equitable share of primary and public goods, but to the *particular* interests held by their predecessors, which in conditions of justice they would have inherited.[37] These interests may appear in Western taxonomies as both public (governance) and private (property), but in Indigenous legal traditions, these distinctions may have little significance or relevance.[38] In what follows we discuss the ways in which the distinctiveness of Indigenous interests has been accommodated via judicial applications of state–Indigenous fiduciary duties.

3 A Closer Look at the Key Cases: *Guerin*, *Wewaykum* and *Wakatū*

In the section that follows, we revisit some of the core cases on the Indigenous–state fiduciary relationship. Our aim here is to set out the foundational features of that relationship, as constructed by the peak appellate courts of Canada and New Zealand, in order to draw attention to those characteristics most relevant to the two arms of the argument presented here. Those arms are (1) that the duties described could usefully be understood as private ones, notwithstanding the public status of the parties, and that this would better support the justice-promoting aspects of the relationship (as a set of duties that differ in quality, enforceability and application from those found in public law) and (2) that where third-party and public interests have been at stake in disputes involving Indigenous claims based on fiduciary duties, the courts have not qualified the resulting duties by reference to third-party or public interests, but instead they have kept the justifications for those interests separate in their judicial analysis. Both arms of our argument are directed towards the aim of showing that moves towards a general political theory of public fiduciary duty, at best, do not advance Indigenous interests, and at worst undermine Indigenous claims to the distinctive

[35] See, e.g., Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (n. 6) 265.
[36] Ibid.
[37] Our commitment to a model of inter-public relationships does not sit easily with monistic distributive theories in which members of a community are similarly situated in respect of entitlement, vis-à-vis each other, in their relation to monistic public authority. It is not our aim here to offer a comprehensive theory in which the concerns of both distributive and corrective justice are worked out in the richly pluralist context of state–Indigenous authority and legal ordering.
[38] See, e.g., Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181, 192.

protections available to Indigenous peoples (and only to Indigenous peoples) by virtue of the Indigenous–state fiduciary relationship. Here we outline the salient aspects of the cases before turning our attention to the ways that the cases have been used (and possibly misused) in accounts of public fiduciary theory.

Guerin marked the beginning of a line of jurisprudence in Canadian law that re-characterized relationship between Indigenous peoples and the Canadian Crown from a 'political trust' to one yielding legally enforceable fiduciary duties. We outline here the use made of the *Guerin* innovation in two further decisions: *Wewaykum* (Canadian Supreme Court, 2002) and *Wakatū* (New Zealand Supreme Court, 2017). Both include an elaboration of the Crown's duties to Indigenous people as duties that stand in contrast to its governmental duties to the public at large and to third parties.

A Guerin *(Canadian Supreme Court, 1984)*

In the facts giving rise to the Supreme Court's decision in *Guerin*, the Musqueam First Nation (formerly the Musqueam Band) had surrendered surplus reserve lands to the Crown so that they could be leased to a third party. The lease was subsequently concluded by the Crown in terms less favourable than those communicated to the First Nation prior to the surrender.[39] The Crown's powers were enabled by the legislative framework set out in the federal Indian Act, which provided a statutory confirmation of the discretion exercised by the executive branch over dispositions of land reserved to Indians.[40] The crucial factor in the reasoning of the majority judges, however, is that like the Aboriginal title on which they are based, First Nations' property interests in reserved lands do not derive from a Crown grant, from legislation or from treaty, and further, are inalienable except as surrenders to the Crown. Hence the relationship did not fall into the category of a 'political trust' in the way that earlier engagements had.[41] While the Indian Act obliged the Crown to exercise its discretions for the 'benefit of the Band',[42] the fiduciary obligation of the Crown did not arise from the relevant provisions of the Act, but instead '[had] its roots in the Aboriginal title of Canada's Indians',[43] and arose from the inalienability of that title. The long history of pre-emption in imperial and colonial law, guaranteeing to settler crowns a monopoly on acquisitions of aboriginal title rights, finally found purchase in *Guerin* as the source of a distinctive, legally enforceable set of fiduciary duties.

Critically, the majority judges held, these duties could not be classified usefully as public law obligations. Nor did they satisfy the requirements of trust law ('a highly-developed, specialised area of the law'[44]) that would enable the relationship to be described as an express trust (due to the lack of requisite certainties and the lack of a trust property following the surrender). Nor, in the absence of unjust enrichment on

[39] Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (n. 6) 265.
[40] Indian Act, RSC 1985, c I-5, s 18. See, e.g., *Guerin* (n. 2) 348–49 (Wilson J).
[41] *Guerin* (n. 2) 379 (Dickson J).
[42] Indian Act 1985, c. I-5, s. 18(1).
[43] *Guerin* (n. 2).
[44] Ibid., 386 (Dickson J, Beetz, Lamer, McIntyre and Couinard JJ concurring).

the part of the Crown, was this an appropriate case for a constructive trust;[45] and though the relationship bore 'a certain resemblance to agency', the Crown was not strictly an agent.[46] The court's ambivalence is usefully illustrated in Dickson J's judgment:

> [T]he Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.[47]

Elsewhere in the same judgment, Dickson J expressed the view that the Crown's obligation 'does not amount to a trust in the private law sense. It is rather a fiduciary duty',[48] albeit one that is 'trust-like in character'.[49] He thought, however, that the distinction was not determinative of remedies, noting that '[i]f [. . .] the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect'.[50] In *Guerin*, then, the Crown's fiduciary obligations derived from the particular vulnerability of Indigenous peoples and their property to the power exercised over them by the state.

In *Guerin*, it is the distinctive *source* of the Indigenous property rights in question that distinguishes the state–Indigenous fiduciary relationship from those regarded as 'political trusts'. The distinction is sufficiently important to be quoted here at some length:

> That principle [that the acquisition of sovereignty does not extinguish Aboriginal property rights] supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason *Kinloch v Secretary of State for India in Council; Tito v Waddell [No 2]* and the other 'political trust' decisions are inapplicable to the present case. The 'political trust' cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s 18(1) of the Indian Act, or by any other executive order or legislative provision.[51] [references omitted]

[45] Ibid.

[46] '[N]ot only does the Crown's authority to act on the Band's behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal': at ibid. Compare Estey J (concurring), who would have relied directly on the Crown's breach of its duties of agency: at 394.

[47] Ibid., 388–9 (Dickson J, Beetz, Lamer, McIntyre and Couinard JJ concurring).

[48] Ibid., 376.

[49] Ibid., 335, 386–7. Our purposes here do not include an evaluation of the majority's position on the availability of an express or resulting trust.

[50] Ibid., 376.

[51] Ibid., 378–9 (Dickson J). See also Wilson J's opinion: 'the "political trust" line of authorities is clearly distinguishable from the present case because Indian title has an existence apart altogether from s 18(1) of the Indian Act 1985, c. I-5. It would fly in the face of the clear wording of the section to treat that interest as terminable at will by the Crown without recourse by the Band': at 352.

Crucially, then, while the Supreme Court in *Guerin* confirmed that the Crown in its regulatory 'legislative or administrative' functions was not normally viewed as a fiduciary, the fact that the Indian property interests were 'independent legal interest[s]' and 'existing' interests that were 'not a creation of either the legislative or executive branches of government' meant that the relationship could be characterized as one entailing duties 'of a private nature'. The emphasis in *Guerin*, therefore, is on the necessity of protecting Aboriginal interests from the competing claims or interests of third parties, and the role of the Crown in protecting Indigenous peoples from exploitation by third parties (in this case prospective purchasers or lessees).

B Wewaykum *(Canadian Supreme Court, 2002)*

Wewaykum applies the *Guerin* principle in a situation where two First Nations held competing interests in reserve lands. The Cape Mudge Band (the Wewaikai) and the Campbell River Band (the Wewaykum) were each erroneously assigned reserve lands intended for the other, and so came to occupy reserve lands not allocated to them as a matter of law. They claimed equitable interests in each other's reserve lands or financial compensation for the lands occupied by the other. They further claimed that these remedies were owed because the Crown had breached its fiduciary duty to each of them by misallocating their respective reserve lands.

The process of creating reserves required a complex set of consultation and consent mechanisms to be deployed between officials of the provincial and federal governments. In the case in question, this process was more than fifty years in duration, reaching a final conclusion in 1938. In the view of the court, 'from at least 1907 onwards, the Department treated the reserves as having come into existence, which, in terms of actual occupation, they had',[52] so that fiduciary duties were owed from that date: 'It cannot reasonably be considered that the Crown owed no fiduciary duty during this period to bands which had not only gone into occupation of provisional reserves, but were also entirely dependent on the Crown to see the reserve-creation process through to completion.'[53]

In 1888, before the reserves had been surveyed and approved under the federal Indian Act, a dispute arose between one of the bands and their non-Indigenous neighbours. As the boundaries of the reserve were at that stage not settled, there was no 'identifiable' Indigenous property interest yet at stake. The court had this set of third-party interests in their sights when discussing the Crown's obligations to non-Indians, as discussed in detail below. As will become clear, questions about whether the idea of a state–Indigenous fiduciary relationship can maintain its integrity in the face of competing individual and public interests has given judges pause, and intrigued proponents of public fiduciary duties. The consequences of this pressure for theories of public fiduciaries are discussed below.

[52] *Wewaykum* (n. 20) 291.
[53] Ibid.

C Wakatū *(New Zealand Supreme Court, 2017)*

The New Zealand courts have long been acutely aware of the Canadian jurisprudence on state–Indigenous duties and the need to 'lean against any inference that in this democracy the rights of the Māori people are less respected than the rights of aboriginal peoples are in North America'.[54] The Treaty of Waitangi had been described in landmark Court of Appeal cases as offering 'major support' for a fiduciary duty,[55] and the relationship it established was held to entail 'responsibilities analogous to fiduciary duties',[56] in 'a relationship of a fiduciary nature akin to a partnership'.[57] Later cases, however, decided by the Court of Appeal after it became a lower court (the Supreme Court was established in 2004), also emphasized that the treaty relationship was fiduciary 'by analogy' rather than by direct application[58] and, in addition, invoked concerns about the possibility of conflicting duties:

> [W]e see difficulties in applying the duty of a fiduciary not to place itself in a position of conflict of interest to the Crown, which, in addition to its duty to Māori under the Treaty, has a duty to the population as a whole. The present case illustrates another aspect of this problem: the Crown may find itself in a position where its duty to one Māori claimant group conflicts with its duty to another. If [the lower court judge] was saying that the Crown has a fiduciary duty in a private law sense that is enforceable against the Crown in equity, we respectfully disagree.[59]

In 2014, the new Supreme Court clarified that an enforceable fiduciary duty *could* be found in an appropriate New Zealand case,[60] preparing the ground for its 2017 decision in *Wakatū*, where a four-to-one majority held that the Crown owed a fiduciary duty to the Māori claimants with respect to land it had promised but failed to reserve for their benefit.[61] The particular dispute concerned Māori customary land at Wakatū (including modern Nelson and surrounds), purportedly sold in 1839 to the New Zealand Company on the condition that one-tenth of the land be reserved for the benefit of the customary owners and that occupied lands be excluded from the sale. In 1840, the signing of the Treaty of Waitangi committed the Crown to leave 'undisturbed' Māori rights in property, and rendered suspect pre-treaty private land sales. By operation of the Land Claims Ordinance 1841, all prior land sales were rendered void until an independent commission had investigated their circumstances, after which title vested in the Crown and could be granted to private settlers. After some delay the commission approved the sale of the land at Wakatū, noting the

[54] *Te Runanga o Muriwhenua Inc.* v. *Attorney-General* [1990] 2 NZLR 641, 655. The view was endorsed by Elias CJ in *Paki* v. *Attorney General [No. 2]* [2015] 1 NZLR 67, 124 (*Paki [No. 2]*).
[55] *Te Runanga o Wharekauri Rekohu Inc* v. *Attorney-General* (n. 23) 306.
[56] *New Zealand Māori Council* v. *Attorney-General* (n. 23) 664.
[57] *Te Runanga o Wharekauri Rekohu Inc.* v. *Attorney-General* (n. 23) 304.
[58] *New Zealand Māori Council* v. *Attorney General* [2008] 1 NZLR 318, 338.
[59] Ibid. Compare *Wewaykum* (n. 20) 293–4.
[60] *Paki (No. 2)* (n. 55). In that case, the claimants were found to have failed to establish the ownership interest which they claimed had triggered a fiduciary breach.
[61] The full facts of the case receive lengthy treatment in the judgment of Elias CJ and engage matters of contention among legal historians. For a leading analysis of the legal regimes applying to pre-treaty land sales, see Richard Boast, *Buying the Land, Selling the Land* (Victoria University Press 2008).

conditions that the 'Tenth reserves' be given effect, and occupied lands excluded. Both conditions were replicated in the subsequent Crown grant to the New Zealand Company, and by agreement between the Crown and the company, reserve lands were to vest in the Crown. In practice, however, the reserve lands were never identified, and occupied lands were not adequately excluded. The claimants argued that a trust had been created over those lands and/or that the Crown's undertakings generated fiduciary obligations, which had been breached. In the Supreme Court, two of five judges would have found a trust (and breach of trust), and as noted, the majority upheld the claim for breach of fiduciary duty.[62]

4 Public Fiduciary Law or Private Fiduciary Obligations of Public Actors?

A Independent Legal Interests

Both *Guerin* and *Wakatū* make the key point that the 'independent legal interests'[63] protected by the state–Indigenous fiduciary relationship are declared by, but not constituted or granted by, settler law. More precisely, those rights are understood as determined by independent Indigenous law and by Indigenous historic use and occupation, and then selectively recognized as common law property rights encompassed within the doctrine of aboriginal title. The doctrine of aboriginal title shows that such recognition is possible, and the state–fiduciary relationships show how pre-existing governance structures and property of Indigenous peoples can be recognized and enforced by a legal order other than the one that generates them. We see within this logic the possibility that other independent Indigenous rights could form the object of recognition within the fiduciary relationships described in these cases, and that these could extend to inherent rights to exercise authority and self-governance alongside the institutions of the state.[64]

In *Wakatū*, where the claim did not depend on doctrines of Aboriginal title, the chief justice (approving *Guerin*) further endorsed the view that the legal interests at stake were 'proprietary and exclusive, including as against the Crown',[65] on the basis that they were 'pre-existing and independent property interests'[66] arising in Indigenous systems of property.

[62] The case was remitted back to the High Court for evidence as to the extent of the breach, and argument on defences and remedies.

[63] *Guerin* (n. 2) 385; *Wakatū* (n. 3) 391.

[64] Some nascent movement on this point is discernible in Canadian law, where judges of the supreme courts have acknowledged the 'pre-existing sovereignty' of Indigenous peoples (*Haida Nation* (n. 24) 524) and have tentatively considered the possibility that self-government could be one of the 'treaty and aboriginal title rights' protected by section 35 of the Constitution (*R.* v. *Pamajewon* [1996] 2 SCR 821). At least one judge left open the possibility that aboriginal peoples and Canadian governments exercise a 'merged' and 'shared sovereignty', in which Indigenous sovereignty in Canada was not 'lost', only 'impaired' (*Mitchell* v. *MNR* [2001] 1 SCR 911, 988 (Binnie J)). As a point of comparison, New Zealand courts continue to rule out arguments based on continuing sovereignty but have offered limited forms of recognition to tikanga Māori (Māori law) as part of the law of New Zealand. See Natalie Coates, 'The Recognition of Tikanga in the Common Law of New Zealand' [2015] *NZL Rev.* 1; Joseph Williams, 'Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law' (2013) 21 *Waikato L. Rev.* 1.

[65] *Wakatū* (n. 3) 390.

[66] Ibid., 391.

These invocations of pre-existing and independent Indigenous legal interests are notable for entailing a (limited) recognition of legal plurality. Quite unlike other interests to which state undertakings might apply, the Indigenous property interests protected in the state–Indigenous fiduciary relationship inhere in systems of Indigenous property and authority. While these recognitions of rights and interests are not fully realized endorsements of legal plurality (as discussed in Section 4 below), they are crucially central aspects of the *distinctive* justification for the private fiduciary duties arising in state–Indigenous relationships.

B Protection of Private Independent Interests, Distinct from Public and Third-Party Interests

The key departure from the 'political trust' cases has been to position specifically protected interests as legally enforceable rights, and not mere matters of political or moral obligation, nor precluded by obligations of public governance. Significantly, in cases where fiduciary duties are owed to an Indigenous community, by virtue of their identifiable interests, judges have not weighed these protections against the Crown's public interest obligations. The cases of *Guerin*, *Wewaykum* and *Wakatū* all contain important indications of the conceptual distinction between the Crown's public functions on the one hand, and its private duties to Indigenous peoples on the other. In this section we elaborate on these aspects of the cases, in order to show the importance of private fiduciary duties as a device to protect Indigenous interests from encroaching public and third-party claims.

The importance of the protection for private interests, distinct from governmental responsibilities, takes on most significance when there are interests of third parties (Indigenous or non-Indigenous) at stake, as they were in *Wewaykum*, or when private duties could be pressured by public interests, as in *Wakatū*. These issues collide whenever the presence of competing claims is used to argue that an overarching governmental responsibility or public interest preludes private fiduciary duties altogether.

The landmark case of *Wewaykum* addresses the duties owed by the Crown in circumstances where more than one Indigenous party asserts an interest in the land in question, and where a non-Indigenous third party also claims an interest in that land. Crucially, the third-party interests are treated as matters to which the Crown should 'have regard' in the exercise of its 'ordinary governmental powers', but those interests are not themselves couched as competing claims arising within a fiduciary relationship; nor is the public interest directly referenced as entailing fiduciary duties.[67]

Instead, the sequence of events in *Wewaykum* required the court to articulate two standards of fiduciary duty, one pertaining to the period before the reserves were created (when the bands' property interests did not exist), and one that came into force once those reserves had been allocated:

[67] *Wewaykum* (n. 20) 245.

2. Prior to reserve creation, the Crown exercises a public law function under the Indian Act – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.[68]

The court was careful to note that the situation was not one involving the Crown's duty to conduct itself as a fiduciary when accepting a surrender of reserve lands for disposition to non-Indian purchasers; nor was the land subject to Aboriginal title or treaty rights (unlike the facts in *Guerin*).[69] The Crown was instead carrying out a number of mandated discretions enabled by federal legislation and confirmed in federal–provincial agreements. Accordingly, the court was of the view that

> [w]hen exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. [. . .] The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting. [. . .] In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were 'vulnerable' to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, *prior to reserve creation*, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians.[70] [emphasis in original]

The court then quoted from Dickson J's assessment in *Guerin* to affirm that '[p]ublic law duties, the performance of which requires the exercise of discretion, do not *typically* give rise to a fiduciary relationship'[71] (emphasis added by *Wewaykum* court), suggesting that in this phase of the dispute, before the reserves had been allocated, both public law and fiduciary duties existed alongside one another, and that the interests of all stakeholders were relevant considerations.

Considering the competing claims of the First Nations during the creation of the reserves, however, the court held that the Crown had a fiduciary duty arising from its

[68] Ibid., 290 (Binnie J). The nature of pre-reserve fiduciary obligations is of special significance in this case. Binnie J was careful to explain that the fiduciary relationship pertaining between the bands and the Crown did not yield fiduciaries' duties covering every aspect of that relationship, stating that 'even in the traditional trust context not all obligations existing between the parties to a well-recognized fiduciary relationship are themselves fiduciary in nature': at 291–2. See also *Haida Nation* (n. 24) 523: '"Fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples.'

[69] *Wewaykum* (n. 20) 291.

[70] *Wewaykum* (n. 20) 293–4 (emphasis in original).

[71] Ibid., quoting *Guerin* (n. 2) 385.

role as intermediary between the First Nations and others, including the province.[72] This duty required it to 'act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries'.[73] With respect to their competing interests in one another's formally assigned reserves, the Crown had a duty to be 'even-handed towards and among the various beneficiaries' of that duty.[74] This duty, the court held, had been fulfilled by the Crown in the course of action it took.

The presence of multiple beneficiaries of fiduciary duties does not reduce in scale the extent of the duties owed to those beneficiaries, nor rule them out on the basis of their conflict. The interest of one does not, and it appears, should not, qualify the interest of the other, unless that interest is already susceptible to inherent limits. In *Wewaykum*, for example, the allocation of interests between the two bands did not have a zero-sum character; their allocations were determined in ways designed to be comparable in scope, and even given the technical error, neither had acquired reserve land at the expense of the other. As the court acknowledged, this situation was not one in which First Nations made competing claims to exclusive and non-fungible title: '(In the case of rival bands asserting overlapping claims to s 35 aboriginal title over the same land, for example, the Crown is caught truly and unavoidably in the middle, but that is not the case here.)'[75]

Under the circumstances, the Crown was obliged to give full effect to the interest held by each band. The presence of more than one beneficiary did not reduce its obligation to either:

> [T]he trial judge and the Federal Court of Appeal adopted, with respect, too restricted a view of the content of the fiduciary duty owed by the Crown to the Indian bands with respect to their existing quasi-proprietary interest in their respective reserves. In their view, the Crown discharged its fiduciary duty with respect to existing reserves by balancing 'the interests of both the Cape Mudge Indians and the Campbell River Indians and to resolve their conflict regarding the use and occupation of the [. . .] reserves . . .

[72] *Wewaykum* (n. 20) 294.
[73] Ibid., 294.
[74] Ibid.
[75] Ibid., 292. It is difficult to imagine circumstances in which the exclusive possessory title could be found simultaneously to vest in two separate groups. There has been only one positive determination of Aboriginal title in Canada, the Supreme Court's decision in *Tsilhqot'in Nation* (n. 22), but this entailed no cross-claims. Note the different issues that arise where the interests are not held as Aboriginal *title* (which amounts to exclusive possession of land) but as Aboriginal rights to use land and waters in a way consistent with the groups' customary practices: see *R.* v. *Gladstone* [1996] 2 SCR 723, 769–70 ('Certainly the holders of such aboriginal rights must be given priority, along with all others holding aboriginal rights to the use of a particular resource; however, the potential existence of other aboriginal rights holders with an equal claim to priority in the exploitation of the resource, suggests that there must be some external limitation placed on the exercise of those aboriginal rights which lack internal limitation. Unless the possibility of such a limitation is recognized, it is difficult to see how the government will be able to make decisions of resource allocation amongst the various parties holding prioritized rights to participate in the fishery.').

> [without favouring] the interests of one band over the interest of the other' [. . .] . With respect, the role of honest referee does not exhaust the Crown's fiduciary obligation here. The Crown could not, merely by invoking competing interests, shirk its fiduciary duty.[76]

The interests of the third parties and the public affected by the transactions in *Guerin* and *Wewaykum* were not in those cases thought relevant to the fulfilment of the fiduciary duties owed to the Indigenous parties. A similar approach, separating the Crown's public governance duties from its private fiduciary ones, is evident in the reasoning of the majority in *Wakatū*. Importantly, that distinction arises even where a specific governance function itself already requires protection of Indigenous interests or special obligations not owed to the wider public. It was striking that the specific clause by which the Crown assumed the responsibility to reserve lands for the customary Māori owners explained that obligation as being additional to and distinctive from general governmental obligations the Crown owed to Māori in respect of land. As discussed by Arnold and O'Reagan JJ (in the majority):

> [T]he clause drew a clear distinction between:
>
> (a) the Government's role in ensuring that the Company's commitments to Māori in respect of the reservation and management of land were honoured; and
> (b) the Government's role in making arrangements in respect of other lands for the benefit of Māori in exercise of its general governmental responsibilities.[77]

There were thus two layers of protection in the relationship, the first arising as a consequence of the Māori landowners' general vulnerability and dependence on the Crown resulting from policies of Crown pre-emption, and the second arising from the specific undertakings to the customary landowners in respect of the specific transaction. The court divided over whether one or both (or for the dissenting judge neither) entailed fiduciary obligations enforceable in equity.

The chief justice, who with the majority found there were fiduciary duties, but was in a minority in further finding an express trust, thought that both the specific undertakings (regarding the lands at Wakatū) and the general undertakings (via Crown pre-emption) separately generated trust and fiduciary obligations. On the fiduciary duty analysis, it seemed to matter less whether a general protective relationship would have sufficed on its own, but her minority position that the Crown was a trustee two times over leaves open the more general proposition that both trust and fiduciary duties could arise from pre-emption doctrines and practices, even without the specific factual matrix of express land reservations:

> In addition to the trust that arose from the circumstances of the Crown's exclusive power to obtain surrender of the property of Indigenous peoples (grounded in the fiduciary obligations accepted in *Guerin*), I consider that the Crown in its dealings with the tenths reserves constituted itself a trustee by reason of its own assumption of responsibility in relation to the reserves.[78]

[76] *Wewaykum* (n. 20) 297–8. Some elisions in original.
[77] *Wakatū* (n. 3) 639.
[78] Ibid., 410.

Arnold and O'Reagan JJ considered that the Crown

> acted in two capacities. In its governmental capacity the Crown was concerned to ensure that pre-1840 purchases were fair. The Crown took it upon itself to provide the promised consideration. . . . In doing so, the Crown was not called upon to balance the interests of settlers and Māori or to take any decision of a political or governmental nature – it was simply performing, or ensuring the performance of, promises made to the original customary owners by the Company in the context of land sales.[79]

Glazebrook J, endorsing that approach, confirmed that the specific protection for the customary landowners was not touched by general governmental obligations nor complicated by competing loyalties, and that the specificity of the obligations did not depend on a more general state–Indigenous fiduciary duty:

> I do not accept that the Crown was unable to give its undivided loyalty to the customary owners because of its general governmental obligations including to the settlers. The Tenths reserves were to be held for the benefit of the customary owners and the settlers had no claim on those reserves. They were to be administered for the benefit of the customary owners and were thus not available for any general governmental purposes.[80]

5 The Use of Fiduciary Jurisprudence in Fiduciary Political Theory

A Assimilation of the State–Indigenous Example into Theories of the 'Fiduciary State'

The clearest and most express justificatory argument connecting the state–Indigenous fiduciary relationship with the projects advanced by fiduciary political theory is offered by Evan Fox-Decent. In his landmark work 'Sovereignty's Promise', Fox-Decent finds utility in the Canadian jurisprudence on the state–Indigenous fiduciary relationship in two ways: one indirect and generic, and the other drawing force from more precisely stated aspects of the doctrine articulated by courts.

The first strand of connection identified by Fox-Decent lies in what he understands to be a core hurdle for political theory: the deficits of accounts that source the state's legitimacy in the consent of its subjects. Fox-Decent draws a parallel between the difficulty of showing the consent of those subject to the unilateral power of the state, and the lack of consent in the unilateral assertion of sovereignty over the sovereign peoples in occupation of what is now Canada. In his words: '[t]he justification of Crown sovereignty over First Nations just makes explicit the fiduciary requirements of the ordinary justification of sovereign authority.'[81] More directly, Fox-Decent draws on Canadian jurisprudence to bolster his argument that a comprehensive public fiduciary relationship between a state and its subject is feasible and desirable '[b]ecause the Crown exercises the same kinds of powers over all its subjects, the Crown-Native case supplies a rich precedent from which to extend the idea of the

[79] Ibid., 785.
[80] Ibid., 582. References omitted.
[81] Fox-Decent, *Sovereignty's Promise* (n. 6) 78.

state as fiduciary to every person subject to state power'.[82] Fox-Decent acknowledges the strands in Canadian jurisprudence that emphasize the 'independence' of the pre-existing Indigenous legal rights at stake, but goes on to suggest that in accounts of the state–Indigenous fiduciary relationship, 'prior occupation and pre-existence are incidental rather than necessary to the fiduciary relationship. What really does the work for the court is the unilateral manner in which the Crown has asserted sovereignty over First Nations.'[83] This enables him to conclude that 'the special content of those duties does not undermine the broader idea that the state is a fiduciary of every person subject to its power'.[84]

Significantly, Fox-Decent suggests that the consideration of third-party claims in cases involving the state–Indigenous fiduciary relationship provides evidence in support of his fiduciary state model. These claims, he argues, show that the state–subject fiduciary duty is not rendered normatively or doctrinally incoherent by dint only of the pressure these claims put on orthodox concepts of fiduciary loyalty. He first makes the point that 'from the standpoint of fiduciary doctrine, it is not immediately apparent that the state can be said to be a fiduciary of both the individual and the general public, because the duties owed to each may conflict'.[85] But, he goes on to say:

> [J]urisprudence on First Nations may supply a counter-example to this objection to public fiduciary duties, since the Supreme Court has long recognised that a fiduciary relationship exists between the Crown and Canada's First Nations... The leading judgments are [*Guerin*] and [*Sparrow*]. These cases, I believe demonstrate that public fiduciary duties are possible. Indeed, the Court has recently said that the Crown's fiduciary duty remains intact even when the duty is owed to aboriginal groups with competing claims against one another.[86]

In these circumstances, 'where there are multiple beneficiaries with conflicting interests'[87], he argues that 'the fiduciary duty of loyalty may assume the content of public law duties of fairness and reasonableness'.[88]

The crucial problem with this analysis, insofar as it is premised on doctrine drawn from the court's approach in *Wewaykum*, is revealed in the analysis above. The only *beneficiaries* in the fiduciary relationship in that case were Indigenous.[89] There is no

[82] Ibid., 85.
[83] Ibid., 81.
[84] Ibid.
[85] Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (n. 6) 264.
[86] Ibid., n. 5. See also Fox-Decent, *Sovereignty's Promise* (n. 6) 75: 'A further objection relates not to the desirability of deploying the fiduciary principle in this context, but to the question of whether the Crown can act as a loyal fiduciary of First Nations at all, since in some cases the interests of distinct First Nations are bound to conflict (to say nothing of First Nations' interests vis-a`-vis the interests of non-Aboriginals).'
[87] Fox-Decent, *Sovereignty's Promise* (n. 6) 75.
[88] Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (n. 6) 261 and 265.
[89] Imprecise terminology employed to characterize both parties may further obscure the cases and commentaries. The more technical terminology distinguishing fiduciary–principal from trustee–beneficiary relationships may ameliorate some of the paternalism of the fiduciary category, as well as highlighting distinctions between trust and fiduciary duties: See Nicole Roughan, 'Public/Private Distortions' (n. 7).

suggestion in the court's reasoning that the non-Indigenous third parties, let alone the public at large, were similarly entitled to draw on fiduciary principles to advance their claims to the lands in question. In any case, as between the First Nation beneficiaries, the court was of the view that 'even-handedness', in the sense of impartiality, would not suffice to satisfy the performance of the Crown's fiduciary duties to the First Nation parties. Fox-Decent sees in *Wewaykum*'s reference to 'even-handedness' a fiduciary duty to the non-aboriginal stakeholders who had an interest in the Crown's decision about reserve allocations. He concludes from the court's reference to multiple and third-party interest holders that fiduciary duties can plausibly be owed to a diverse public without running afoul of loyalty commitments. In our view, as is outlined above, the case supports a conception of the Crown's fiduciary duty as one primarily concerned with securing the priority of Indigenous interests when these are under threat from competing claims.[90]

The point we make above is not confined to competing interpretations of *Wewaykum*, but has normative implications for the place of state–Indigenous exemplars in fiduciary political theory and for the justificatory force of that theory. The risk we see is that if the basis for the fiduciary *relationship* is identical for Indigenous peoples and for the public at large, there is no secure premise for a claim that the *duties* generated by these relationships differ, let alone a claim that in a conflict of duties, Indigenous interests should be accorded a degree of priority. If everyone has fiduciary protection, then perhaps no one has it.

Could requisite differentiation be supplied by a principle of 'fairness and reasonableness'? In Fox-Decent's account, he draws on Kantian principles familiar to those deployed in justifications of human rights,[91] arguing that 'the fiduciary principle can be understood to authorize the use of fiduciary power only to the extent that such power may be exercised in a manner consistent with each person's equal dignity'.[92] Otherwise, he suggests, arbitrariness enters the relationship, so that the fiduciary's mandate could be unilaterally altered to the prejudice of others who are 'similarly situated'. The key constraint operating on states faced with conflicting interests, according to Fox-Decent, is to ensure that the law 'does not and cannot, discriminate between legal persons conceived of as free and self-determining agents equally capable of have rights and acquiring obligations'. He concedes, in a footnote, the following:

> There may be some cases in which a fiduciary has a reason to treat distinct classes of beneficiaries differentially (eg a trustee may be required by the terms of the trust to project the interest of an infant beneficiary above all others). But these are not problem cases because the presence of a reason implies that the differential treatment is not arbitrary.[93]

[90] It is thus consistent with a fairly orthodox account of loyalty, notwithstanding sophisticated variants of the doctrine or dismissals of its significance. For a survey and analysis, see Andrew S. Gold, 'The Loyalties of Fiduciary Law' in Andrew S. Gold and Paul B. Miller (eds.), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014).

[91] Fox-Decent draws elsewhere on other foundations in political theory. A sketch of the difficulties surrounding these other engagements is offered in Nicole Roughan, 'Public/Private Distortions' (n. 7).

[92] Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (n. 6) 265.

[93] Ibid., n. 8.

Part of the puzzle of the reasoning presented above is that Fox-Decent seems to suggest (albeit obliquely) that the question of equal treatment between Indigenous and other individuals or legal persons can be deftly dealt with by invoking a reason that supports the need for differential treatment. Further, he may argue, there is nothing in his account that would prevent a settler state from assuming distinctive obligations to Indigenous peoples as differently situated groups of persons. The problem is that in public law and political reasoning, these reasons are far and few between. Much more prevalent in public law reasoning (especially that of Canada and Australia, but also the United States) is the idea that differential treatment of Indigenous peoples is suspect precisely because it appears as a form of impermissible preferential treatment, offered to groups on the basis of their race or ethnicity. Unfortunately for Indigenous peoples, in settler jurisprudence there is no shortage of examples in which the principles they have invoked to show that they are differently situated, and to justify their right to historic property and independent lawmaking authority, have been rejected by settler governments and courts.

What Indigenous peoples have secured through the narrow wedge of rights protected by fiduciary obligations is not simply a measure of loyalty, but a measure of priority. The relationship serves as a justification for much-needed differential treatment, necessary precisely because public law has failed to convincingly provide one, and as case law shows, the distinctive interests of Indigenous peoples remain imperilled by this failure. In this context, if the aim of fiduciary political theory, as Fox-Decent has explained, 'is not to affix new labels to familiar public law doctrines, but rather to offer an explanation of those doctrines that is attractive in its own right and responsive to criticism of the explanations that have come before',[94] then the explanations on offer are not any more attractive than the (unattractive) approaches currently available in public law. We suspect that as the law now stands, the only people who stand to lose anything in models of a comprehensively public fiduciary state are Indigenous peoples.

Notwithstanding the elasticity (and perhaps redundancy) of the 'fairness and reasonableness' standard, fiduciary political theory is sometimes presented as a way to accommodate settler state political and legal pluralists. Fox-Decent, for example, suggests that fiduciary duties can be calibrated to the scale of the interest held (or lost):

> As in the Canadian case, fiduciary concepts can help explain why Indigenous peoples benefit from such a duty while non-Indigenous citizens do not: the sovereignty of Indigenous people alone is threatened by and vulnerable to the sovereignty asserted by the formal state. The legal and political model suggested by these reflections is legal pluralism in which the pluralist fiduciary state has a duty to recognize, in some form or another, the right to self-determination of Indigenous peoples.[95]

[94] Fox-Decent, 'Challenges to Public Fiduciary Theory' (n. 5) 7. See also at 10: 'The second objection is more sweeping, and potentially devastating: if the results of the fiduciary theory are not pernicious, this is because the theory merely restates non-fiduciary doctrine that is already on the books, and therefore, at the level of doctrine and practice, the theory is superfluous.'

[95] Ibid., 11–12.

The question we pose in response, however, is not whether the approach proposed by Fox-Decent is plausible as a way to condition the exercise or legitimacy of state authority, but whether it would yield results for Indigenous peoples that are *more* just than the various public law avenues currently available to them. These include substantive equality or affirmative action measures, protections for members of minorities, treaties and, most importantly for this present project, private legal relationships that yield remedies in some cases, including of course the state–Indigenous fiduciary relationship.

We suspect the answer to our question is no. Consequently, Fox-Decent's approach seems to offer no more than extant public law mechanisms, which have not so far adequately accounted for the interests of Indigenous peoples. Further, by reconfiguring the private Indigenous–state relationship as one that can be extended wholesale to all relations between subjects and the state, Fox-Decent's characterization threatens to undermine the (modest) advantage that the relationship currently accords to Indigenous peoples. As it stands, it is the private nature of the relationship (analogous or otherwise) that serves to secure its benefits for Indigenous peoples against competing public or third-party claims. It is the non-generalizable nature of the relationship that positions it as an *augmentation* of general public law. It is among the very few legal mechanisms that have been drawn on to protect distinctive Indigenous interests (the others being treaties and other Indigenous-specific constitutional guarantees).

We further suspect that a public fiduciary theory, like public law more generally, could undermine the utility of the existing private law avenues by bringing Indigenous interests into direct conflict with third-party and public interests. The competition between these interests would thereby be resolved within the same body of law and principle, without (in the model proposed) a compelling account of Indigenous difference supporting their distinctive rights. Indigenous peoples are not similarly situated to settler populations, and settler state officials and settler state law have so far struggled to embrace a theory that could justify what would otherwise be impermissible preferential treatment of Indigenous peoples as racial communities. State–Indigenous fiduciary duties are a crack in door, very helpfully premised ultimately on inherited property rights (and so safe from the most difficult distributive elements of liberal democratic justice) but also capable of providing a model for duties that could attach to other cognizably inherent interests held by Indigenous peoples – that is, any interest that derives from their own authority as sovereign peoples.

For completeness, we note that our critique of the way that fiduciary political theory seeks to enlist the state–Indigenous fiduciary in its justificatory project differs to that offered in Seth Davis's important body of work. Davis includes reference to the Indigenous–state fiduciary relationship as part of his broader critique of fiduciary political theory and fiduciary theories of the state. As we understand Davis's complaint, the Indigenous–state example (illustrated in his work by reference to the US federal government's trust obligations to tribal nations) has enabled types of coercion and neglect that run counter to the doctrine's purported aims. He further argues that even if that relationship is given effect in compliance with its own aims and premises, it carries with it a justificatory frame for violence, paternalism and

settler supremacy.[96] We agree with Davis that the concept of a fiduciary state responsible in that capacity to all members of the public could have pernicious effects. Our focus in this chapter, however, is narrower. We are concerned that Indigenous peoples could lose the ground they have gained by virtue of the fiduciary duties owed to them by states, were the same duties to be extended to all. This comparative 'advantage' is in any case meagre at best when viewed against the scale of the injustices on which it is premised, which include the continuing lack of legal avenues through which to pursue the redress for those injustices.

Davis may allow that we three agree on at least one central point: fiduciary and trust conceptions on offer are by no means the optimal model of state–Indigenous relations in the settler states.[97] However, as Davis notes, in the United States the trust doctrine nonetheless supplies some constraints on governmental interference with tribal self-governance and property, albeit inconsistently applied and often overlooked. In his words: 'It remains an open question whether Indian tribes would be better off without the trust doctrine than with it, but not because fiduciary government can fulfil the promises made in its name.'[98]

Here we are left with the uncertainty generated by the unavailable counterfactual, as well as persistent tensions between principle and pragmatism, incrementalism and wholesale change, about which we as co-authors have elsewhere differed.[99] Yet we have suggested that the existence of the federal trust doctrine, in part at least, protects the federal–tribal relationship from equal protection challenges. It does so by taking fiduciary responsibility away from public law, rather than embedding it in. Where that responsibility does not apply, as in the case of the native Hawaiian community served by the Office of Hawaiian Affairs, in *Rice* v. *Cayetano*, laws giving effect to independent Indigenous interests in collectively held property and self-governance could be struck down for non-compliance with the Constitution's equal protection clause. Given the range of federal and state laws recognizing Indigenous interests in the United States, the stakes are very high indeed.

6 Conclusion

Through the imprecision and ambivalence of jurisprudence on the state–Indigenous fiduciary duty, it is possible to discern a primary emphasis on the priority of Indigenous interests as against those of non-Indigenous third parties and the public.[100] It may

[96] 'Fiduciary theorists respond to this potential embarrassment by distinguishing that use of fiduciary government as rhetorical and racist. But postcolonial scholarship has charted the ways in which the fiduciary idea was productive of a racist colonial project and not simply reflective of it': see Davis (n. 33) 1187.

[97] Fox-Decent, *Sovereignty's Promise* (n. 6) 78.

[98] Davis (n. 33) 1188. Compare Fox-Decent: 'the relatively recent recognition of fiduciary duties owed by the Crown to Canada's First Nations was an achievement that has lent a measure of protection that was not available before'. See also Fox-Decent, 'Challenges to Public Fiduciary Theory' (n. 5) 11, and Monture-Angus (n. 9) 44–5.

[99] Roughan, 'Public Private Distortions' (n. 7); Kirsty Gover, 'The Honour of the Crowns: State–Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38 *Syd. LR* 339.

[100] Compare Fox-Decent, *Sovereignty's Promise* (n. 6) 62–3.

be possible to evolve a theory of 'even-handedness' and 'fairness' that accommodates this priority, but it does not seem to us that such a theory has satisfactorily been provided from within fiduciary political theory, and so far has not been plausibly advanced in statist public fiduciary law.

Instead, though, as the cases have made less than clear, the burden upon the state as a private fiduciary owing duties to Indigenous people *that it does not owe to others* ensures that actions that would constitute a private person a fiduciary will bear consequences even where that person is the state. For the time being, this remains possible because of the distinctive place of Indigenous peoples in the settler states, as pre-state polities holding continuing rights to property and authority that are not held by others. The state as fiduciary is accordingly responsible for securing those interests against the competing claims of third parties, the public and itself.