

RECIPROCAL ACCOUNTABILITY AND FIDUCIARY DUTY: IMPLICATIONS FOR INDIGENOUS HEALTH IN CANADA, NEW ZEALAND AND AUSTRALIA

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I Introduction

There is growing interest among public servants, Indigenous organisations, and scholars in Canada, Australia, and New Zealand in the idea of shifting from classical New Public Management accountability models to models that reflect *mutual* or *reciprocal* accountability as a means of delivering more effective and responsive health care to Indigenous communities. However, little progress has been made with respect to developing and implementing workable reciprocal accountability models. In this paper, we argue that a consideration of Indigenous perspectives on reciprocity and accountability is an essential, yet mainly overlooked, component of the development of effective and appropriate accountability models between Indigenous peoples and state-based funders. Indeed, many Indigenous peoples have long histories of engaging in reciprocity-based relationships with each other and their environments. Drawing from Indigenous knowledge in this regard offers novel insights that can inform how models of reciprocity are constructed and understood. More specifically, we argue that consideration of Indigenous perspectives on treaties and treaty-making as a way to interpret the substance of mutual roles and responsibilities enables a shift to models of reciprocal accountability that are based on the mutual building of long-term, trust-based relationships, while also providing a frame that emphasises the maintenance of the sovereignty of the entities that are party to such relationships.

In what follows, we bring Indigenous knowledge and experience to bear on understandings of reciprocal accountability in health care delivery by bringing together two general bodies of literature that have, until now, developed along largely parallel paths—the literature addressing the need for a reciprocal accountability framework for

service delivery and the literature that examines Canada's fiduciary obligation to Indigenous peoples. We argue that understanding accountabilities in terms of the fiduciary obligations that arise from the fiduciary relationship between Indigenous peoples and Canada offers unique insights into the theory and practice of reciprocal accountability in two key ways: (i) by providing clarity on the nature of the entities involved in the accountability relationship—that is, Indigenous peoples in Canada have a unique status vis-à-vis other Canadians given their Constitutionally protected status as 'Aboriginal peoples' and the Constitutionally entrenched protections for 'Aboriginal and treaty rights';¹ and (ii) by shedding light on the unique processes and mechanisms of accountability that are implied by a federal fiduciary obligation. As we demonstrate below, an examination of the origins and content of the federal fiduciary obligation to Indigenous peoples creates space for the inclusion of Indigenous 'treaty philosophy' and Indigenous perspectives on reciprocity and appropriate relationships between Indigenous peoples and state-based entities.

We begin in Section II by providing some background on the ideal of reciprocal accountability in general and its relevance to the delivery of primary health care to Indigenous communities in particular. Section III offers a general description of the dominant interpretations of what is entailed by the concept of fiduciary obligations according to non-Indigenous scholarship and jurisprudence. Having laid the foundation for a general understanding of fiduciary obligations, we proceed in Section IV by explaining, first, what 'Aboriginal and treaty rights' are and how these Constitutionally entrenched rights relate to Indigenous health and, second, how the protection of these rights should be considered a fiduciary obligation. This prepares the way for the core argument in Section V where we draw

the connections between fiduciary obligations, reciprocal accountability, and Indigenous perspectives. Here we argue that Indigenous perspectives provide key insights regarding the importance of recognising Indigenous identities as distinct from other Canadians and the ways in which the inclusion of Indigenous 'treaty philosophy' can offer a more robust and appropriate rendering of reciprocity and reciprocal accountability. Finally, we conclude in Section VI by briefly identifying how this analysis might inform more effective strategies regarding the delivery and accountability of Indigenous health care systems. Thus, the analysis as a whole provides normative and legal/constitutional justifications for reciprocal accountability frameworks that are modelled on Indigenous accounts of reciprocity: normative in the sense that primary health care providers *ought* to maintain their obligations to Indigenous peoples; and legal/constitutional in the sense that the constitutional entrenchment of Aboriginal and treaty rights is of core relevance to the question of how these frameworks are constructed. Further, by considering Indigenous perspectives on how these relationships ought to function, we prepare the way for future practical modelling and implementations that are relevant to contexts, not only in Canada, but in Australia and New Zealand as well.

II Why Reciprocal Accountability?

Although the specific implementation strategies remain vague, reciprocal accountability is emerging as the general conceptual framework that is best suited to the challenge of providing effective, inclusive, and responsive primary health care to Indigenous communities in Canada, Australia, and New Zealand. In part, this is due to the recognition that typical New Public Management approaches that rely on classical contracting frameworks often undermine the goals of increasing Indigenous participation in primary health care delivery and providing effective and responsive care to these communities.² This recognition has precipitated a shift from *classical* to *relational* contractual arrangements (or some combination of the two) between funders and providers.³

Classical contracts are generally short term and focused on clearly defined outputs/deliverables which allows for closer and more efficient monitoring of performance by the funder.⁴ Such contractual arrangements are favoured by a New Public Management paradigm, because they allow funders more control over the transactions and the ability to demonstrate to their constituents a return on investment with respect to the dollars spent and the outputs delivered. Further, this

approach entrenches a one-sided accountability regime whereby providers must report to funders to demonstrate that they are producing value (measured in specific outputs) for the funders' dollars while the funders' obligations to the broader goals of better health and care are obscured. However, while classical contractual arrangements and their associated uni-directional accounting practices are broadly implemented in Canada, New Zealand and Australia, they also demonstrate marked failures with respect to providing adequate care and improving health status.⁵ They also bring high transaction costs, including the need for multiple contracts offering a patchwork of services, unreliable funding due to the need for constant contractual renewal, poor definition of services, heavy administrative costs/reporting burdens, lack of accountability to the members of Indigenous communities, barriers to recruitment/retention of staff, and poor health outcomes overall.⁶ In broader public administration the limitations of classical contracting, in what has become a complex network of providers, funders and regulators, are also broadly recognised.⁷

Relational contracts, on the other hand, are generally longer term and more flexible, allowing the primary health care provider some room to adapt their performance to their clients' needs over time. As the qualifier implies, relational contracts rely less on strict adherence to stipulated outputs and more on the parties' desire to maintain good relationships and ability to build trust and monitor their own performance.⁸ Of course, from the perspective of the funders, the drawback is that more involvement is required from senior managers to build these trust-based relationships. In addition, it is more difficult, in a strict accounting sense, to demonstrate that the funders are receiving an acceptable return on investment given that the measurable 'outputs' are less detailed and more difficult to itemise and monitor.⁹ From the perspective of the primary health care provider, there is also considerable risk involved, should it lose the contract, given that significant portions of its budget may hinge on a single, long-term relational agreement.¹⁰

However, the flexibility of relational contracts also contributes to stability by allowing providers the freedom to reallocate funds to meet needs as they arise.¹¹ In general, relational contracts are well suited for primary health care applications precisely because they offer a level of stability and responsiveness that is not attainable through classical arrangements. Moreover, Indigenous communities often demand traditional forms of care that may fall outside the

scope of classical 'output' stipulations,¹² and the providers themselves are often embedded within the communities and play a dual role of providing care and advocating for the communities.¹³ For these reasons, relational contracting is gaining recognition as especially well-suited to address the challenges accompanying the goals of increasing Indigenous participation in primary health care delivery and providing effective and responsive care to their communities.¹⁴

Of course, according to current practice, particular contractual environments most often fall somewhere along the continuum from classical to relational, with providers deriving their operating budget from an array of funding sources and contracts of different kinds.¹⁵ Nevertheless, despite this variation in funding models and significant interest in the benefits of relational contracting, there remains a general commitment in practice to the uni-directional/upward reporting accounting frameworks that typically accompany classical contracts.¹⁶

It is here that developing a reciprocal accountability framework can aid in furthering the relational contracting trend. Reciprocal accountability departs from the classical New Public Management accounting style 'to a more sociological understanding of an accountability environment within which a variety of actors move.' Through this lens, 'accountability is the activity of rendering an account within a group and between groups so that the actors negotiate their identity, obligations and commitments in relation to each other, producing an environment of reciprocal accountabilities.'¹⁷ Rather than a typical principal-agent relationship as in classical accounting frameworks, reciprocal accountability is based on a non-hierarchical arrangement that emphasises partnership and a 'reciprocal relationship among partners, in which everyone is simultaneously both an agent and a principal, holding each other accountable for achieving the missions for which the partnership is formed.'¹⁸ This approach is entirely consistent with the new public governance framework, in which accountability within networks of actors engaged in the delivery of services is necessarily shared and thus necessarily has elements of reciprocity.¹⁹ Contractual accountability is not absent, but the intention is that contracts are more relational and the governance of the contractual relationship is more flexible. The relational nature of reciprocal accountability represents a significant shift toward the relational contracting features of developing shared goals, mutual trust, and accountability for agreed upon outcomes rather than itemised outputs.

Indeed, while funders may acknowledge the benefits of relational contracting with respect to attaining the desired outcomes, the lack of an agreed-upon workable reciprocal accountability framework remains a barrier to its broad implementation. As a case in point, the most recent *Report of the Auditor General of Canada* regarding 'Access to Health Services for Remote First Nations Communities' restated (as it has in numerous previous reports) that '[w]orkable solutions are needed to improve accountability and ensure that individuals in remote First Nations communities have comparable access to health services.'²⁰ In short, the concept of reciprocal accountability appears to offer the general contours of an accountability framework that is suited to a more effective relational contracting paradigm, but more is needed to transform a general conceptual intention into workable policy.

While the above discussion speaks to the general need for a reciprocal accountability framework in the development of alternatives to classical contracting, there is another significant reason to consider moving forward with reciprocal accountability, one that is largely absent from the public administration literature. That is, the very communities that are the recipients and providers of care explicitly demand reciprocal accountability. In what follows, I focus on Indigenous communities, providers, and representatives in Canada.

There are two key justifications underlying Indigenous peoples' calls for reciprocal accountability relationships regarding the delivery of health care to their communities. The first is much like those canvassed above. According to the Native Women's Association of Canada ('NWAC'), the end goal is healthy communities, and an accountability model that is 'based on governments working in full partnership with First Nations, Métis and Inuit peoples of Canada' is the required means.²¹ Similarly, the Assembly of First Nations ('AFN') has stated that 'combining efforts to lead toward enhanced mutual accountability for the results of program spending and support development toward increased First Nations responsibility and control' is necessary in order to bring general funding and service delivery up to the standards enjoyed by members of the broader Canadian society.²² More specifically, the AFN has proposed *A First Nations Health Reporting Framework* ('FNHRF') as part of a 'transformative plan to close the gap in health outcomes between Canadian People and Aboriginal Peoples.' Reciprocal accountability is a core feature of this proposal:

The FNHRF is being built on the concept of Reciprocal Accountability, specifically recognising that there exists a severe imbalance of power between First Nations and the FPT [Federal, Provincial, and Territorial] governments. The FNHRF by way of taking control over the measurement of the performance of FPT governments in their success to meet their stated objectives will enable First Nations to use evidence to support future negotiations to ensure that First Nations interests are identified as priorities.²³

Finally, the British Columbia's First Nations Health Authority ('FNHA') considers that having reciprocal accountability with funding governments is essential to providing inclusive and responsive care to First Nations communities in British Columbia.²⁴ Indeed, the success of the FNHA is deemed to depend upon '[e]stablishing the principles and processes of reciprocal accountability for the success of this new health governance arrangement.'²⁵

These kinds of justifications for moving forward with a reciprocal accountability framework are not new. However, as the citations above indicate, the ideal of reciprocal accountability is not only supported by an analysis of the contractual environment, but is explicitly called for by the Indigenous communities and providers that are subject to these accountability models. While Indigenous support does, in part, follow the logic that is prevalent in the public administration literature—that is, that reciprocal accountability is desirable, because it promises to produce better outcomes—there is a second justification specific to, and prevalent within, Indigenous perspectives that is largely absent from the literature. That is, Indigenous peoples cite reciprocal accountability as following from the recognition of Indigenous sovereignty and the nation-to-nation relationship between Indigenous peoples and Canada.

This feature speaks to the broader political context within which primary health care delivery and accountability frameworks are theorised and implemented. In Canada, the ideal of a nation-to-nation relationship between Indigenous peoples and Canada that entails the recognition of prior and existing Indigenous sovereignty has long provided the foundations for a wealth of Indigenous legal theory and constitutional and political theory and practice. Most notably the *Royal Commission on Aboriginal Peoples* ('RCAP') recognises that the relationships between Indigenous peoples and the Crown were not based on conquest or assimilation

into common citizenship. Rather, these relationships are based on treaty-making between nations—practices that did not (and do not) entail the ceding of sovereignty.²⁶ Moreover, since 1982, Canada's Constitution explicitly entrenches and protects 'Aboriginal and treaty rights',²⁷ thus recognising the history of treaty-making between sovereign entities as expressions of Indigenous nationhood and, where treaties do not exist, an underlying *sui generis* Aboriginal right to self-determination,²⁸ and the maintenance of distinct Indigenous legal/political orders.²⁹ As such, Indigenous peoples' claims for alternative accountability relationships with funding governments are also *sui generis* in nature and should not be situated on par with other groups of Canadian citizens. A key distinction with regard to primary health care and appropriate accountability regimes should be noted:

Aboriginal Peoples in Canada have constitutional rights to health and health care that are not possessed by any other individual or group of Canadians. ... Treatment of Aboriginal Peoples as merely 'other peoples' ignores their constitutional rights and creates inequality of service for Aboriginal Peoples.³⁰

As previously mentioned, although this distinct constitutional relationship between Indigenous peoples and the Crown is largely absent from the literature on accountability in health care, Indigenous communities and representatives do, in fact, explicitly demand that their historical/constitutional status shape their relationships with their government funders. Since the entrenchment of Aboriginal and treaty rights in Canada's Constitution in 1982, it has become common practice for Indigenous health care providers to ensure that the preambles to their funding agreements explicitly acknowledge and do not interfere with Aboriginal and treaty rights. With respect to reciprocal accountability specifically, the AFN, for example, argues that reciprocal accountability arrangements should modify existing funding regimes such that '[p]ayments to First Nations governments are ... more like intergovernmental transfers than typical grants and contributions',³¹ and that '[t]he reinforcement of tribal sovereignty should be the central thrust of public policy.'³² Similarly, the FNHA lists seven key directives outlining the standards for a new health governance relationship based on reciprocal accountability. The sixth directive explicitly states that any agreements must '[n]ot impact Aboriginal Title and Rights or the treaty rights of First Nations ... [and] ... [n]ot impact on the *fiduciary duty* of the Crown'.³³ Although this kind of language is ubiquitous in funding agreements

and policy statements, it has yet to be meaningfully operationalised in accountability frameworks.

III Fiduciary Obligations

Despite the lack of implementation, the inclusion of this unique constitutional status and fiduciary nature of Indigenous-state relationships holds the potential to impact significantly on how we conceive of legitimate accountability frameworks. There are two key ways that an appreciation of this broader political context can contribute to attempts to implement reciprocal accountability. First, it makes a stronger case for reciprocal accountability. While the literature to date focuses largely on the practical benefits in terms of producing better health outcomes, taking account of the constitutional/historical context provides further justification—not only in normative terms (federal/provincial/territorial funders *ought* to meet their historical and constitutional obligations to respect Aboriginal and treaty rights), but also in legal terms (the entrenchment of Aboriginal and treaty rights in Canada’s Constitution enables a legal option whereby the fulfilment of fiduciary obligations may be enforceable in Canadian courts). Second, introducing the concept of fiduciary obligations enables the inclusion of historical and cultural contexts that may serve to clarify what a reciprocal accountability framework entails and how it ought to function in practice. In short, operationalising Aboriginal and treaty rights and the associated fiduciary obligation within theories of reciprocal accountability may both encourage its uptake *and* clarify its content. Nevertheless, more clarity is needed to operationalise these concepts. How, for example, does a constitutionally entrenched guarantee of Aboriginal and treaty rights trigger a fiduciary obligation for health care? And how might an understanding of this obligation enable more appropriate and practical theories of accountability?

In recent decades, developments in Canadian scholarship provides overwhelming support for the claim that federal and provincial governments owe a fiduciary obligation to ensure that the interests of Aboriginal peoples are taken into account and are not undermined through federal/provincial legislation/policy.³⁴ However, if the concept of a fiduciary obligation is to offer some guidance regarding appropriate accountability relationships between Indigenous peoples and Canadian governments, further examination of what the obligation in general entails is required. This section begins, first, by examining the sources and nature of the general fiduciary obligation to Indigenous peoples as derived from

non-Indigenous scholarship and jurisprudence, thus laying the groundwork for an examination of the relationship to Aboriginal and treaty rights (Section IV) and enabling an examination of unique Indigenous perspectives on reciprocity and ‘treaty philosophy’ with respect to fiduciary relationships (Section V).

The fiduciary law concept itself has its origins in pre-contact British common law and the adjudication of domestic disputes over the transfers of land. The general principle, as applied by the Court of Chancery in the late fifteenth century, was that if a person (beneficiary) transferred land to a trustee, then the trustee was under the obligation to deal with that trust in such a way as to ensure that the beneficiary’s interests were given top priority.³⁵ As such, ‘[t]hese duties included such rules and obligations as: the trustee must act solely in the interests of the trust, he must avoid all conflict of interest and he is not to profit from the position entrusted.’³⁶ In the broadest of terms, then, the fiduciary obligation is seen to apply as a matter of fairness stemming from a condition of vulnerability stemming from the relationship of the parties. The theory and practice of fiduciary obligations has developed significantly since its emergence in fifteenth century England and, while today it remains a notoriously disputed concept, there are key features that remain entrenched. The general dynamics of the relationships that generate a fiduciary obligation, for example, are well-established:

A trustee owes a fiduciary obligation to his *cestui qui trust*, an executor to the beneficiary or an estate, a solicitor to his client, an agent to his principal, a director to his shareholders, and so forth. ... Once a fiduciary relationship is established, the general duty owed is to act in the best interests of the beneficiary.³⁷

While categories like those mentioned above—beneficiary, agent, etc—represent the most common contexts where fiduciary obligations are presumed to exist, current scholarship and practice remains unclear as to the scope of relevant fiduciary relationships. However, through an analysis of the history of jurisprudence regarding fiduciary obligations, Reynolds identifies several key elements summarised here as follows:

- (i) the fiduciary has some measure of *discretion or power* over the interests of the beneficiary
- (ii) the fiduciary has the ability to *unilaterally exercise* that power/discretion

- (iii) the beneficiary is particularly *vulnerable* to the fiduciary holding the discretion/power
- (iv) the fiduciary has taken on *responsibility* to look after the beneficiary's interests
- (v) the fiduciary obligation depends upon the *reasonable expectations* of both parties regarding respective interests and capacities and, therefore, is fundamentally reliant on *mutual trust*.³⁸

As this list of elements indicates, a fiduciary obligation does not simply follow from entrenched asymmetrical power relations. That is, the typical categories (principal/agent, child/parent, etc) seem to imply that fiduciary relationships are inherently asymmetrical—that wherever a power disparity exists, a fiduciary obligation ought to follow. But while ‘vulnerability’ and ‘power/discretion’ are key elements that may support this assumption, the features of ‘responsibility’, ‘reasonable expectations’, and ‘mutual trust’ reveal that ‘[i]t is the nature of the relationship, not the specific category of actor that gives rise to the fiduciary duty.’³⁹ Vulnerability is a feature of the fiduciary relationship, but the effects of vulnerability may be quickly attenuated if sanctions are available to the beneficiary to ensure that its interests are given priority.

A key feature that may be considered a sanction in this regard is the legally enforced ‘duty to consult’. In recent decades, the Supreme Court of Canada has underwritten the duty to consult with Indigenous peoples whenever federal actions/policies infringe upon Aboriginal rights.⁴⁰ Key features of this duty, as outlined by the Supreme Court, include ‘adequate’ and ‘meaningful’ consultations that ‘substantially address’ First Nations’ concerns, the Crown’s responsibility to become fully informed of the First Nations’ perspectives on the matter at hand, the Crown’s responsibility to ensure that the affected group is fully informed of the potential impact of the proposed legislation or decision, and a commitment to consultation beyond the signing of any agreement.⁴¹ As these examples indicate, the duty to consult is fundamentally about establishing and maintaining effective communication between the parties involved in the fiduciary relationship. Doing so holds the potential to reduce significantly the consequences of vulnerability.

Moreover, in situations like these where one party assumes responsibility for another, key features of the duty to consult also speak to the importance of instituting relational

frameworks that reinforce a commitment to improved communication and accommodation in the long term, thus building trust and ensuring that mutual expectations are reasonable. Nevertheless, the key point is that

[t]he vulnerability of beneficiaries that exists within any given fiduciary relationship does not create the fiduciary nature of a relationship but is an inevitable by-product of such forms of interaction. ... [As such,] relations of equal power—such as those between partners—may be as fiduciary as the inherently unequal relationship between parent and child.⁴²

It may seem counterintuitive to generalise the feature of mutual vulnerability to a context of Indigenous-Crown relationships that are, by and large, characterised by state domination and asymmetrical power relations. However, as we explain in Section V below, understanding the specific content of fiduciary obligations between Indigenous peoples and the Crown relies on an understanding of the historical context within which the relationship and the attendant obligations emerged. This is a context that saw colonial powers in a position of vulnerability vis-à-vis Indigenous peoples, requiring alliances and treaties with Indigenous nations for their very survival. Indeed, the recent history of Indigenous peoples’ resistance to state infringements on Indigenous rights—whether through court challenges, public demonstrations, protests, or blockades—directly challenges the dominant assumption of state *invulnerability* vis-à-vis Indigenous peoples.⁴³ Thus, when considering the fiduciary relationship between Indigenous peoples and the Crown, it is important to note that this relationship reflects the historical and ongoing relationship that has been defined by varying levels of mutual vulnerability.

In summary, the generalised concept of a fiduciary obligation is more complex than a simple obligation to protect those who are vulnerable. Rather, it is an obligation that arises within a relationship of responsibility and trust, and may involve *mutual vulnerability*. Fiduciary obligations pertain to those vulnerabilities that arise as a result of entering into a fiduciary relationship. These vulnerabilities are attenuated in two key ways—either through the threat of sanction (when this avenue is not blocked by the presence of power asymmetries) or through the development of trust and reasonable expectations through various forms of communication/relationship-building (whether power disparities exist or not). Through this lens, fiduciary

relationships can, and often do, work both ways—that is, they are fundamentally ‘rooted in notions of mutuality and reciprocity.’⁴⁴

IV Fiduciary Relationships and Aboriginal and Treaty Rights

This is an important perspective to draw from when shifting from an analysis of the general concept of fiduciary relationships to considering the particular case of fiduciary relationships between Indigenous peoples and the Crown. Not only does it reveal that a fiduciary relationship may be enforceable through sanction (eg, through Canadian courts), but it also emphasises the building of relationships based on mutual trust and reciprocity as important alternative means to maintaining the fiduciary relationship. Further, it is immediately apparent that these foundational aspects of fiduciary relationships resonate with the features of relational contracting and reciprocal accountability mentioned above in Section II. However, before examining how a consideration of fiduciary obligations contributes to the theory and practice of reciprocal accountability, it is necessary to draw the linkages between fiduciary obligations in general and Indigenous peoples and Indigenous health in particular.

The basic claim in this regard is that the Crown (federal and provincial governments) have a fiduciary obligation to respect/protect Aboriginal and treaty rights, including the right to health care. This is a significant claim that requires some unpacking. We first draw on existing literature to explain the general meaning of Aboriginal and treaty rights and how the right to health is included in this category and then explain how the Crown is bound by a fiduciary obligation to protect/respect Aboriginal and treaty Rights.

Aboriginal and treaty rights are bundles of rights that are specific to Indigenous peoples (defined as ‘Aboriginal peoples’ in the Canadian Constitution) living within the boundaries of the Canadian state and are explicitly guaranteed by the 1982 *Constitution Act* which states: ‘The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed’,⁴⁵ and that the Canadian *Charter* ‘shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.’⁴⁶

While the precise content of Aboriginal and treaty rights remains a major point of contention, it is possible to outline

the general contours of what these rights represent. First, it is important to note that—although both sets of rights follow from the fact that prior to colonisation, Indigenous peoples existed on the land that is now claimed by Canada in robust societies governed by their own legal, political, and economic orders—‘Aboriginal rights’ and ‘treaty rights’ refer to two distinct categories. As explained in *R v Badger*:

There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in *Calder, supra*, at p. 328, they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature.⁴⁷

Put another way, while treaty rights derive their substance and force from their origins as ‘negotiated rights’ that follow from political negotiations between sovereign nations (ie, the Crown and Indigenous peoples), ‘Aboriginal rights are inherent and do not depend upon Crown recognition or affirmation, the Crown accepted them in their full form when it assumed its position of power in Canada.’⁴⁸ Thus, the constitutional entrenchment of Aboriginal and treaty rights should be seen as affirming Aboriginal rights for all Indigenous peoples and treaty rights as a second category of rights that apply to contexts where particular treaties were negotiated. Both categories, however, should be understood as recognising the fact that prior to colonisation, Indigenous peoples lived as distinct nations governed by their own societal orders—Aboriginal rights are an explicit recognition of Indigenous nations’ rights to continue to govern themselves as they did before contact with Europeans, and treaty rights rely on the recognition of negotiations between self-governing nations.

How, then, does a right to health fit within the Aboriginal and treaty rights framework? As one might expect, there are two avenues through which Indigenous health can be understood as a right that is guaranteed by the Constitution—as related to Aboriginal rights (or traditional Indigenous societal practices) and as negotiated treaty rights. As Yvonne Boyer explains in her recent work *Moving Aboriginal Health Forward: Discarding Canada’s Legal Barriers*, because Aboriginal rights reference the traditional practices of Indigenous societies, it is straightforward to observe that these practices also include

the various ways in which Indigenous societies maintained the health of their members, which, as historical accounts show, were robust and effective prior to the imposition of colonial control by the Crown. Because the imperatives to maintain healthy societies 'are core underpinnings of Aboriginal society ... they thus fulfil the requirements of the common law tests that the courts have set out to prove an Aboriginal right.'⁴⁹

Alternatively, many treaties negotiated between Indigenous nations and the Crown include specific provisions regarding the Crown's responsibilities to ensure the ongoing health and wellbeing of Indigenous nations in exchange for the Crown's access to Indigenous lands. Indeed, several of the numbered treaties covering much of central Canada explicitly refer to health, medicine, and medical care as a responsibility taken on by the Crown, but one that did not entail the relinquishment of jurisdiction by the signing Indigenous nation.⁵⁰ And while the specific entitlements following from such treaties remain a point of contention,⁵¹ the key point here is that, in addition to its status as an Aboriginal right, there are several cases for which it can be argued that Indigenous health is also a *treaty* right, which is also protected under the Canadian Constitution.

Thus, it is of the utmost importance to be clear on the political context within which Indigenous health policy and legislation are developed. Not only do Indigenous peoples have the right to health on par with other Canadian citizens, *as Canadian citizens* if they so choose, but, in addition, the guarantee of Aboriginal and treaty rights provide two additional layers of constitutionally entrenched protection of Indigenous health—as a *sui generis* Aboriginal right for all Indigenous peoples and as a treaty right where such treaties exist. It is a dark irony indeed, that Indigenous peoples have the legal right to these two additional protections regarding the health of their peoples, yet suffer from health conditions that are well below that of other Canadians. However, taking an acknowledgment of the distinctiveness of Aboriginal and treaty rights as a starting point may lead to an acknowledgment that Indigenous health issues have to be addressed from the vantage point of Aboriginal and treaty rights, which affirm the holistic perspective of health as a constitutional right, separate from the federal, territorial, and provincial statutory regimes.⁵²

There are two pivotal questions connecting Aboriginal and treaty rights (including health) and fiduciary obligations that

fundamentally impact the quest to conceive of legitimate modes of accountability between Indigenous peoples and the Canadian governments: (i) How is the protection of Aboriginal and treaty rights considered a fiduciary obligation? and (ii) How does the fiduciary frame, once established as legitimate, contribute to the development of practical accountability frameworks?

Once we understand the right to health as falling within the category of Aboriginal and treaty rights that are constitutionally guaranteed, the answer to (i) is relatively straightforward and can be read directly from the key features of the Canadian Constitution as a whole that demonstrate how the Crown has assumed responsibility for key Indigenous interests. The *Royal Proclamation* (1763), for example, demonstrates how the Crown interposed itself between Indigenous nations and European settlers, protecting Indigenous lands from settler acquisition in return for the maintenance of good economic/military relationships.⁵³ A century later, the *Constitution Act* (1867) made this responsibility more explicit, unilaterally assuming legislative authority over 'Indians, and Lands reserved for the Indians.'⁵⁴ The inclusion of the *Indian Act* a decade later in 1876 and, finally, the guarantee of Aboriginal and treaty rights in the *Constitution Act* (1982) all come together to demonstrate a robust responsibility for Indigenous wellbeing assumed by the Crown. The *sui generis* fiduciary obligations follow directly from this assumption of responsibility for Indigenous wellbeing. Moreover, in 1984, the landmark decision of the Supreme Court of Canada in *Guerin v The Queen* marked the first instance in Canadian jurisprudential history where it was recognised that the Crown owes legally enforceable fiduciary obligations to Aboriginal peoples in Canada—a principle that was subsequently applied by the Supreme Court of Canada to cases involving the infringement of Aboriginal rights.⁵⁵

V Fiduciary Obligations, Reciprocal Accountability and Indigenous Treaty Philosophy

Answering question (ii)—How does the fiduciary frame, once established as legitimate, contribute to the development of practical accountability frameworks?—is more complex. In the space that remains, we demonstrate that a consideration of fiduciary obligations can contribute to discourses surrounding accountability in general—and *reciprocal* accountability in particular—in at least two key

ways, both relating to how fiduciary obligations are, or can be, underwritten and, thus, given practicable force. Both approaches build from the arguments already presented above and follow from the idea that the vulnerabilities emerge from the development of a fiduciary relationship can be attenuated either through sanction or through the building of trust and reasonable expectations. On the one hand, as has been demonstrated, fiduciary obligations are legally enforceable obligations. On the other hand, however, as argued in Section III above, fiduciary obligations also emerge from relationships of mutual vulnerability and reciprocity. While both approaches are part of Canada's chequered history with Indigenous peoples, and support the recognition of fiduciary obligations, the first approach entrenches a classical, uni-directional accountability relationship, while the second is more amenable to relational contracts and the related calls for reciprocal accountability and offers a more appropriate way forward. We begin, first, with a discussion of fiduciary obligations as a legally enforceable right.

Understanding fiduciary obligations as a legally enforceable right entails the ability to enforce compliance through sanction and aligns well with the New Public Management principal-agent model of uni-directional accountability. This kind of basic accountability relationship is commonly defined as

a relationship in which one party, the holder of accountability (or *principal*), has the right to seek information about, to investigate and to scrutinise the actions of another party, the giver of accountability (or *agent*). In its fullest sense, accountability also implies the right to impose remedies and sanctions, though sometimes that function may belong to some other party.⁵⁶

It is immediately apparent that applying a legally enforceable conception of fiduciary obligations with respect to Indigenous health entails a radical reversal of the typical accountability regimes that characterise many Indigenous primary health care contractual environments. That is, funders make discretionary allocations to Indigenous primary health care providers as third-party contractors, thus constructing the providers as *agents*, or 'accountability givers'. As such, primary health care providers are required to fulfil generally onerous reporting obligations to the funders (the *principals*, or 'accountability holders') in order to ensure that the funders are receiving an acceptable value for their money and to justify further funder expenditures. However, if funding

for Indigenous health is considered a constitutionally guaranteed *obligation* rather than an *investment*, the direction of the accountability pulls are reversed.

As we have already seen in the previous section, this understanding of health care expenditure as an obligation holds whether Indigenous health is understood as an Aboriginal right or a treaty right. When viewed from the perspective of Aboriginal rights, it is clear enough that the colonial relationship between Indigenous peoples and the Crown has resulted, in many cases, as a loss of Indigenous peoples' capacity to provide adequate care to their communities, thus ensuring their wellbeing. It follows, then, that the Crown has a fiduciary obligation to restore what has been taken away as a direct result of colonialism. With respect to treaties, on the other hand, a thorough appreciation of the history and nature of constitutionally protected treaty rights adds a measure of force to this accountability reversal, revealing that the obligation to respect Indigenous rights to health follows from the terms of treaties that gave the Crown access to Indigenous lands. From this perspective, many Indigenous peoples suggest that they have 'prepaid for services such as health and medical care',⁵⁷ and thus Indigenous peoples, as original funders, have a right to seek a return on their investment. Moreover, the fact that fiduciary obligations are enforceable in court clearly moves Indigenous peoples from the position of an *agent* to a *principal* that can 'impose remedies and sanctions' via 'some other party', namely, the courts.

Nevertheless, the theoretical coherence of this position does little to advance the prospects for practical application. Previous jurisprudence, for example, indicates that, although the courts have recently recognised the existence of a fiduciary duty, they are unlikely to put much effort toward holding the Crown accountable, which suggests that the Crown may be unlikely to honour its fiduciary obligations.⁵⁸ Moreover, pursuing litigation in order to prove the existence of the obligation or to force the Crown's compliance is a resource intensive undertaking, which puts Indigenous peoples at a disadvantage relative to the Crown and so an antagonistic attempt to impose sanctions through the courts may be financially infeasible or impractical.⁵⁹ On a more theoretical level, this approach entrenches 'simple relations of hierarchy' where the accountability flows are linear and uni-directional.⁶⁰ Thus, while there may be some space for optimism regarding the efficacy of a sanction-based approach to fiduciary obligations, focusing solely on the legal duty in

this way is not likely to be the most optimal strategic move. Further, it does little to address the core problem with typical New Public Management-style accountability regimes that fail to account for the complexity of accountability relationships beyond the linear 'upward reporting' frame. Finally, this also strains against the fundamental character of reciprocal accountability which emphasises building relationships based on trust and reciprocity.

A shift towards understanding fiduciary obligations as emerging from relationships of mutual vulnerability and reciprocity offers an important contribution to the goal of developing workable frameworks of reciprocal accountability, because it provides a frame that is theoretically consistent with the demands of relational contracting and reciprocal accountability and it enables an understanding of legitimate accountability relationships that is commensurable with many unique Indigenous worldviews. In the latter regard, it is important to note that, although much of the literature on fiduciary obligations relies on its Imperial pedigree, the establishment of fiduciary relationships between the Crown and Indigenous peoples was not characterised by any such unilateral imposition of British law. That is, as the courts and legal scholars alike have recognised, 'the basis of the fiduciary relationship between the Crown and Aboriginal peoples is rooted in their historical relationship.'⁶¹ An accurate rendering of the historical relationship is important here, because, contrary to the current context of entrenched hierarchy, Indigenous vulnerability, and state domination, the historical relationship was characterised by mutual vulnerability and reciprocity. Both sides had something to gain from the alliances that were established through treaty-making. As Slattery explains:

The Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands. This general fiduciary duty has its origins in the Crown's historical commitment to protect native peoples from the inroads of British settlers, in return for a native undertaking to renounce the use of force to defend themselves and to accept instead the protection of the Crown as its subjects. In offering its protection, the Crown was animated less by philanthropy or moral sentiment than by the need to establish peaceful relationships with peoples whose friendship was a source of military and economic advantage, and whose enmity was a threat to the security and prosperity of the colonies. The sources of the general fiduciary duty do not lie, then,

in a paternalistic concern to protect a 'weaker' or 'primitive' people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.⁶²

Vulnerability (in this context *mutual* vulnerability) is a *product* of a fiduciary relationship. The dynamics revealed by Slattery's description—whereby entering into a fiduciary relationship created vulnerabilities and obligations for both parties—were pervasive across a robust history of early Crown-Indigenous relations and are part of the historical record as evidenced in formal agreements and recognitions like the *Treaty of Albany* (1664), the Covenant Chain alliances (1664–late 18th Century), the *Royal Proclamation* (1763), and the *Treaty of Niagara* (1764).⁶³ These touchstones in Indigenous-Crown relations are valuable because they enable a more robust understanding of what this particular fiduciary relationship entails and the particular fiduciary obligations that follow. The *interdependence* of the parties involved is key, and it is this interdependence that precipitated conditions of mutual vulnerability and thus demanded that sustainable relationships were based on mutual trust and reciprocity.

Beyond providing us with a model of reciprocity-based relationship-building, this concept of fiduciary obligations enables sensitivity to Indigenous perspectives on legitimate accountability relationships. That is, a consideration of the historical sources of fiduciary obligations in Indigenous-Crown relations provides us with a picture of the nature of fiduciary relationships before Indigenous peoples came to be colonised and when Indigenous peoples' traditional diplomatic practices that reflected their own world views helped to shape the character of the fiduciary relationship.

Patricia Monture, for example, argues that the fiduciary obligation is part of a fiduciary relationship that follows from the practices and principles of treaty-making. By introducing the idea of 'Treaty philosophy' as a way to interpret the substance of the mutual roles and responsibilities implied by a fiduciary relationship, Monture explains that Indigenous peoples and settlers alike possess these kinds of rights and responsibilities, but that the current context of colonial domination has obscured this reciprocity-based foundation:

Newcomers also possess Treaty rights including the right to land, to peace, to their forms of governance, to their economic

and agricultural practices. Ironically, I suppose, the Treaty rights of the newcomers are not visible as these rights are as easily exercised as breathing. It is only First Nation citizens who must diligently and regularly fight for the recognition and exercise of their Treaty rights.⁶⁴

Moreover, from this perspective, the core emphasis is on the building of relationship rather than on the stipulated 'rights' that emerge. The value of the idea of a fiduciary relationship, then, is found more in the general guidelines for relationship building than in stipulated, legally enforceable 'rights'.⁶⁵ The kinds of things that 'rights' entail are better expressed as *responsibilities* or *duties* that emerge through respectful relationship building. As such, the Indigenous world view that Monture relies on here '*emphasises process as opposed to product*'.⁶⁶

In this sense, drawing from Indigenous perspectives on treaties and treaty-making draws our attention to how obligations arise and are underwritten through relationship-building rather than through sanction. Treaties, then, are much more than contracts that stipulate rights and responsibilities, but are viewed as 'sacred relationships between sovereign nations'.⁶⁷ The sacred character of these agreements is emphasised by the common understanding that treaties transformed strangers into family members in a literal—not figurative—way.⁶⁸ However, it is not as simple as signing an agreement. Treaties require a commitment to ongoing interaction and ceremony as a means to nurturing the relationships and to enable a sensitivity to the needs of each party such that responsibilities could become apparent and the relationship could be sustained for future generations.⁶⁹ As a result, practices of treaty-making between sovereign entities work to establish and maintain an 'ethical community, that is, [a] community within which promises are kept'.⁷⁰ This general ideal of treaty-making as reflecting the building and maintenance of relationships of mutual trust, reciprocity, and respect is ubiquitous in Indigenous scholarship on the topic.⁷¹ Indeed, understanding the fiduciary obligation in terms that are compatible with a classical accounting framework—that is, where a 'principal' has a legally enforceable right to demand some accountability action from her 'agent'—introduces adversarial relationships that are in tension with the core tenets of treaty-making as well as relational contracting and reciprocal accountability: 'Litigation under the rights rubric guarantees an adversarial approach where First

Nations are pitted against the Crown, an approach that is a fundamental violation of Treaty agreements.'⁷²

It is also essential to attend to the foundational understanding of treaty-making as establishing and maintaining relationships of reciprocity between *sovereign nations*. With respect to the relationship between Indigenous nations and Canada, the Two Row Wampum Treaty, or *Guswhenta*,⁷³ is widely held to reflect the notions of equality and respect for difference expressed in the ideal of a nation-to-nation relationship between sovereign entities. A thorough interpretation of all that the *Guswhenta* entails would be complex and beyond the scope of the point articulated here, however the commonly held principles underlying the nation-to-nation relationship are well established in the related literature. There are two key features of the wampum belt to which scholars often refer: First, two rows of purple beads represent two vessels (Haudenosaunee and the Dutch, English, French, or Americans) travelling the same river yet along parallel paths that never cross indicates that the Haudenosaunee and the settlers will coexist, but will never interfere each other's ability to maintain their own languages, laws, religious/cultural practices, and systems of governance. Second, these two purple rows are separated by (or linked by) three rows of white beads that represent peace, friendship, and respect as foundations for maintaining the autonomous coexistence represented by the two rows of purple beads.⁷⁴ Taken together, these two key features offer a relational framework for how sovereign entities might maintain their respective sovereignties while building relationships of reciprocity without resorting to sanctions to enforce their mutual obligations.

Thus, consideration of Indigenous perspectives on treaties and treaty-making as a way to interpret the substance of the mutual roles and responsibilities implied by the fiduciary relationship, enables a shift from adversarial, rights-based models to models based on the mutual building of long-term, trust-based relationships while also providing a frame that emphasises the maintenance of the sovereignty of the entities that are part of the fiduciary relationship.

In summary, recognising the fiduciary relationship between Indigenous peoples and the Crown has the potential to impact how we understand the nature of relational contracting and reciprocal accountability between Indigenous organisations and federal/provincial funders. Recall that reciprocal accountability entails 'a more sociological understanding

of an accountability environment within which a variety of actors move' and envisions accountability as 'the activity of rendering an account within a group and between groups so that the actors negotiate their identity, obligations and commitments in relation to each other, producing an environment of reciprocal accountabilities.'⁷⁵ As such, reciprocal accountability reflects a non-hierarchical arrangement that emphasises partnership and a 'reciprocal relationship among partners, in which everyone is simultaneously both an agent and a principal, holding each other accountable for achieving the missions for which the partnership is formed.'⁷⁶ In this sense, a consideration of fiduciary obligations reinforces some of the key insights from the literature on reciprocal accountability that identifies the need for a more equal and reciprocity-based kind of relationship that escapes the entrenched principal-agent hierarchies.

However, the substance of the fiduciary relationship between Indigenous peoples and the Crown is not simply a re-stating of the key tenets of reciprocal accountability. Indeed, as argued above, it offers a unique contribution to understanding reciprocal accountability frameworks between Indigenous peoples and the Crown. First, it offers a unique insight into the foundational question, 'Who is accountable to whom?' It is here that considering fiduciary obligations can build upon the advances already made with respect to theorising reciprocal accountability. As the selection by Sullivan quoted above notes, reciprocal accountability reflects a context where 'actors negotiate their identity, obligations and commitments in relation to each other'. However, as we have seen, Indigenous peoples come to the table with identities as sovereign nations holding Aboriginal and treaty rights, and are thus distinct from other Canadians. It is essential to attend to this largely unacknowledged and non-negotiable identity if legitimate and workable accountability frameworks are to be constructed. As we have also seen, if we espouse the legally enforceable notion of fiduciary obligations, this may simply invert our answers to 'who is accountable to whom?' if it leads us to reverse the accountability arrows and essentially leave the basic structure of the model intact. However, Indigenous identities and Aboriginal and treaty rights bring with them a commitment to building relationships of mutual respect and reciprocity. Thus, we have a more complex answer that not only acknowledges complex, reciprocity-based, and mutual relationships (as in existing reciprocal accountability frameworks), but that

also acknowledges the centrality of Aboriginal and treaty rights and the unique identity of Indigenous nations.

This unique identity brings to light another feature that is not yet adequately addressed in existing literature on reciprocal accountability and the provision of primary health care to Indigenous communities. That is, while existing accountability theory focuses on 'who is accountable to whom for what', the question of *how* reciprocal accountability relationships are developed and maintained is not clear. A consideration of *how* presses us to consider both *processes* and *mechanisms* for accountability that follow from fiduciary obligations. In this regard, the mechanisms are what most starkly distinguish the Crown-Indigenous accountability environment from the typical Crown-citizen framework. The constitutional entrenchment of Aboriginal and treaty rights indicates that accountability flows through the Constitution rather than Parliament. To be sure, like other Canadians, those Indigenous peoples who have accepted Canadian citizenship can hold their elected officials to account through Parliament in typical Westminster fashion. However, regardless of the status of their Canadian citizenship, Indigenous peoples in Canada *also* negotiate their relationships and relative responsibilities through the constitutionally protected practices of treaty-making.

Further, as we have seen with respect to the discussion of fiduciary relationships in light of 'Treaty philosophy', this mechanism already implies a process. And this process entails more than simply leveraging a right to demand that an agent give account—it is fundamentally about building relationships based on reciprocity and trust. Thus, while existing authors on reciprocal accountability are correct to note that partners negotiate identities, obligations, and commitments in relation to each other, the fiduciary frame provides an alternative starting point for these negotiations by acknowledging Indigenous nationhood and Aboriginal and treaty rights and the alternative mechanisms (constitutionally protected treaty-making between nations) and processes (relationship building rather than imposition of sanctions) that follow.

VI Conclusion

This paper has argued that a consideration of the fiduciary relationship between Indigenous peoples and the Crown provides unique insights into the actual identities of those who are presumed to be involved in reciprocal

accountability relationships as well as emphasising alternative mechanisms and processes for realising the reciprocal accountability ideal. Further, although we have not witnessed broad implementation of this ideal, attending to the unique constitutional status of Aboriginal and treaty rights along with the treaty-based foundations of reciprocal accountability, holds the potential to encourage significant mutual understanding and implementation in this area by both clarifying the concept of reciprocal accountability *and* by providing normative and legal/constitutional arguments in favour of implementation.

In addition, consideration of this perspective opens the door to a number of possible ways forward that can impact health care delivery, access and overall health outcomes for Indigenous peoples. First, conceiving of primary health care accountabilities in terms that are commensurate with the Crown's fiduciary obligations may provide clarity regarding jurisdictions and catchment areas, such that 'jurisdiction is based on the existing Aboriginal and treaty boundaries, rather than on provincial and territorial boundaries.'⁷⁷ Further, this way of defining jurisdiction and accountability in terms of a *federal duty* would offer solutions to provincial/territorial/federal jurisdictional haggling and support a unified national policy that can provide a more robust coverage for Indigenous Individuals and communities.

Second, a fiduciary frame reminds us that if we aim to develop reciprocal accountability frameworks that are effective, constitutionally legitimate, and that resonate with the Indigenous communities that they are meant to serve, we must emphasise the *processes* that underpin the development of relationships of mutual respect and reciprocity. Thus, an accountability model must not simply stipulate 'who is accountable to whom and for what', but must include forums for dialogue and input within which such relationships can be developed.

Finally, given the similar colonial and common law histories of Canada, Australia, and New Zealand, it is important to examine the generalisability of this analysis to these contexts. As mentioned at the outset of this paper, Australia and New Zealand face similar challenges regarding the health outcomes of Indigenous peoples and the imposition of classical contracting frameworks. In addition, the similarities between the colonial, constitutional, and jurisprudential histories of these countries suggest that there is good reason to consider the application of fiduciary principles here as

well. Indeed, the examination of the *Treaty of Waitangi* by New Zealand Courts and the Waitangi Tribunal have led to an acknowledgement that there is a fiduciary duty owed by the government of New Zealand to the Maori people that is similar to that established by the Supreme Court of Canada in *Guerin*.⁷⁸ Alternatively, in *Mabo (No.2)*,⁷⁹ the High Court of Australia decided that Australian common law recognised the existence of Aboriginal title. However, there remains no consensus as to whether this decision would have implications similar to those in Canada and New Zealand by grounding a fiduciary obligation.⁸⁰ Thus, the definition and application of the concept is still under development.⁸¹ We are, therefore, in a unique position to contribute to the understanding and application of fiduciary obligations with respect to relationships between Indigenous peoples, health care providers, and funding governments in Canada, Australia, and New Zealand. Nevertheless, if the existence of a fiduciary obligation can provide an effective constitutional, legal, and *relational* foundation for appropriate reciprocal accountability processes and mechanisms in these contexts moving forward, it is centrally important that we are guided by Indigenous perspectives on how to properly conceive relational frameworks that have such profound impacts on Indigenous wellbeing.

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1 Occasionally we contrast 'Indigenous peoples' with 'other Canadians'. This should not be construed to imply that

- Indigenous peoples are *necessarily* Canadian. It is often assumed that Indigenous peoples living within the boundaries of the Canadian state are automatically Canadian citizens (albeit within some scheme of differentiated citizenship rights). However, the historical and constitutional record makes it clear that this is an unwarranted assumption. As legal scholar Sákéj Henderson argues, Canadian citizenship for Indigenous peoples is *available* given the Crown's explicit invitation, but is 'unnecessary, ambiguous, and problematic': Sákéj Henderson, 'Sui Generis and Treaty Citizenship' (2002) 6(4) *Citizenship Studies* 415, 416. See especially the discussion towards the end of Section V: Fiduciary Obligations, Reciprocal Accountability, and Indigenous Treaty Philosophy, where this distinction is discussed with respect to the constitutional protection of 'Aboriginal and Treaty Rights'.
- 2 Josée Lavoie, *Patches of Equity: Policy and Financing of Indigenous Primary Health Care Providers in Canada, Australia and New Zealand* (PhD Thesis, London School of Hygiene and Tropical Medicine, 2005).
- 3 Josée Lavoie, Amohia Boulton, Judith Dwyer, 'Analysing Contractual Environments: Lessons From Indigenous Health in Canada, Australia, and New Zealand' (2010) 88(3) *Public Administration* 665.
- 4 P. and T. Ashton Howden-Chapman, 'Shopping for Health: Purchasing Health Services Through Contracts' (1994) 29(1) *Health Policy* 61.
- 5 It should be noted that there have been recent movements toward establishing block funding for some First Nations in Canada in recent years. The most ambitious of these being the full transfer of federal and provincial funding to the First Nations Health Authority in British Columbia as discussed below at note 24 of this paper.
- 6 Auditor General of Canada, 'Chapter 1: Streamlining First Nation's Reporting to Federal Organisations' (2002); Judith Dwyer et al, 'Indigenous Peoples' Health Care: New Approaches to Contracting and Accountability at the Public Administration Frontier' (2014) 16(8) *Public Management Review* 1091; Josée Lavoie et al, *The National Evaluation of the Health Transfer Policy (Final Report)*, Winnipeg: Manitoba First Nations Centre for Aboriginal Health Research (2005); Tim Tenbensel, Judith Dwyer and Josée Lavoie, 'How Not to Kill the Golden Goose: Reconceptualising Accountability Environments of Third-sector Organisations' (2013) *Public Management Review* 1.
- 7 LM Salamon, 'New Governance and the Tools of Public Action: An Introduction' (2000) 28(5) *Fordham Urban Law Journal* 1611; Carolyn Touhy, 'Agency, contract and governance: shifting shapes of accountability in the health care arena' (2003) 28(2) *Journal of Health Policy Politics and Law* 267.
- 8 Jean Perrot, 'Different Approach to Contracting in Health System' (2006) 84(11) *Bulletin of the World Health Organisation* 859.
- 9 Natasha Palmer, 'The Use of Private-Sector Contracts for Primary Health Care: Theory, Evidence and Lessons for Low-Income and Middle-Income Countries' (2000) 78(6) *Bulletin of the World Health Organisation* 821.
- 10 Lavoie, above n 3.
- 11 Josée Lavoie et al, 'The National Evaluation of the First Nations and Inuit Health Transfer Policy. Final Report' (2005).
- 12 Amohia Boulton, 'Taking Account of Culture: The Contracting Experience of Maori Mental Health Providers' (2007) 3 *AlterNative* 124.
- 13 Patrick Sullivan, 'Reciprocal Accountability: Assessing the Accountability Environment in Australian Aboriginal Affairs Policy' (2009) 22(1) *International Journal of Public Sector Management* 57.
- 14 Judith Dwyer, Josée Lavoie, Kim O'Donnell, Uning Marlina, Patrick Sullivan, 'Contracting for Indigenous Health Care: Towards Mutual Accountability' (2011) 70(1) *Australian Journal of Public Administration* 34; Dwyer et al, above n 6; Lavoie, above n 3; Tenbensel, Dwyer and Lavoie, above n 6.
- 15 Lavoie, above n 3.
- 16 Dwyer et al, above n 6.
- 17 Sullivan, above n 13, 66.
- 18 Muhittin Acar, Chao Guo and Kaifeng Yang, 'Accountability When Hierarchy is Absent' (2008) 38(1) *American Review of Public Administration* 3, 15.
- 19 S.P Osborne, 'The New Public Governance?' (2007) 8(3) *Public Management Review* 377.
- 20 Auditor General of Canada, 'Report 4: Access to Health Services for Remote First Nations Communities' (2015) 23.
- 21 Native Women's Association of Canada, 'Accountability for Results from an Aboriginal Women's Perspective' (Discussion Paper, 2005) 14.
- 22 Assembly of First Nations, 'Delivering Fairness, Stability and Results: Transforming Fiscal and Accountability Relationships Between First Nation Governments and the Government of Canada' (Discussion Paper, 2011) 3.
- 23 Assembly of First Nations, 'The Development of a First Nations Health Reporting Framework' (Discussion Paper, 2006) 2.
- 24 The FNHA is an Indigenous-led health service delivery organisation responsible for planning, designing, managing, and funding the delivery of health programs and services for First Nations people living in British Columbia. The FNHA is the first of its kind in Canada and marks a significant development in health services delivery to Indigenous peoples. However, the specifics of the accountability relationship with funding governments remain a matter of debate. 'Reciprocal accountability' stands as a core commitment but is conceptually under-developed and practically

- under-implemented. For more information see: First Nations Health Authority, *First Nations Health Authority: Healing Through Wellness* <<http://www.fnha.ca/>>.
- 25 First Nations Health Authority, 'British Columbia First Nation Perspectives on a New Health Governance Arrangement' (Consensus Paper, 2011) 6.
- 26 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996).
- 27 *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK) 1982, c 11, s 35.
- 28 *Sui generis* is a Latin term meaning 'of its own kind', 'unique or peculiar' [*Black's Law Dictionary, 7th Edition*, (West Group, 1999)]. Rights that are *sui generis* do not fit into categories of French or English law (*Guerin v R* (1984) 335, cited in J Woodward, *Native Law* (Carswell, 2002), [5-7]).
- 29 Sákéj Henderson, 'Sui Generis and Treaty Citizenship' (2002) 6(4) *Citizenship Studies* 415.
- 30 Yvonne Boyer, 'Aboriginal Health—A Constitutional Rights Analysis' (Aboriginal Health: Legal Issues Discussion Paper No 1, National Aboriginal Health Organisation, 2003) 7.
- 31 Assembly of First Nations, 'Delivering Fairness, Stability and Results', above n 22, 3.
- 32 Stephen Cornell and Joseph Kalt, 'Sovereignty and Nation-Building: The Development Challenge in Indian Country Today' (2002-2003) *Joint Occasional Papers on Native Affairs*, cited in Assembly of First Nations, 'The Development of a First Nations Health Reporting Framework', above n 23, 2.
- 33 First Nations Health Authority, 'British Columbia First Nation Perspectives on a New Health Governance Arrangement', above n 25, 11.
- 34 Law Commission of Canada and Association of Iroquois and Allied Indians (ed), *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, 2002); J. Timothy S McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (LexisNexis Canada, 2008); Kent McNeil, 'The Crown's Fiduciary Responsibility in an Era of Aboriginal Self-Government' (2009) 88(1) *Canadian Bar Review* 1; James Reynolds, *A Breach of Duty* (Purich Publishing Ltd, 2005); Senwung Luk, 'Not So Many Hats' (2013) 76 *Saskatchewan Law Review* 1.
- 35 Reynolds, above n 34.
- 36 M Gautreau, 'Demystifying the Fiduciary Mystique' (1989) 68(1) *Canadian Bar Review* 1, 1-2.
- 37 Mark Stevenson and Albert Peeling, 'Probing the Parameters of Canada's Crown- Aboriginal Fiduciary Relationship' in Law Commission of Canada and Association of Iroquois and Allied Indians (ed), *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, 2002) 7, 8.
- 38 Reynolds, above n 34, 133-137. While an exhaustive review of the literature on the jurisprudence relating to fiduciary relationships is beyond the scope of this particular section, Reynolds's work provides a thorough account of much of the relevant legal history. As such only a summary of his key findings is presented here.
- 39 *R v Guerin* [1984] 2 SCR 335.
- 40 Yvonne Boyer, *First Nations, Metis, and Inuit Health and the Law: A Framework for the Future* (LLD Thesis, University of Ottawa, 2011) 348-360.
- 41 Ibid.
- 42 Leonard Rotman, 'Conceptualising Crown-Aboriginal Fiduciary Relationships' in Law Commission of Canada and Association of Iroquois and Allied Indians (ed), *In Whom We Trust: A Forum on Fiduciary Relationships* (University of Toronto Press, 2002) 25, 50.
- 43 Examples of recent and ongoing Indigenous resistance that have elicited political/legal/military responses on the part of Canada abound. For an abridged inventory of such Indigenous protests and occupations see John Borrows, 'Crown and Aboriginal Occupations of Land: A History & Comparison', (Research Paper, Ipperwash Inquiry, 15 October 2005).
- 44 Rotman, above n 42, 56.
- 45 *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK) 1982, c 11, s 35.
- 46 Ibid s 25.
- 47 *R v Badger* [1996] 1 SCR 771.
- 48 Leonard Rotman, 'Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test' (1997) 36 *Alberta Law Review* 149, 163-164.
- 49 Yvonne Boyer, *Moving Aboriginal Health Forward: Discarding Canada's Legal Barriers* (Purich Publishing Ltd, 2014) 127-128.
- 50 Ibid 143.
- 51 See, eg, the debates/court cases surrounding the 'Medicine Chest clause' in Treaty 6 stating '[t]hat a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent'. Judicial interpretation of this clause has ranged from a Crown responsibility to provide a 'first aid kit' free of charge, to a Crown responsibility to provide 'all medicines, drugs, and medical supplies': Boyer, 'Aboriginal Health—A Constitutional Rights Analysis', above n 30, 20-24.
- 52 Sákéj Henderson, *First Nations Conceptual Frameworks and Applied Models on Ethics, Privacy, and Consent in Health Research and Information* (2006) 11.
- 53 Reynolds, above n 34; Rotman, 'Conceptualising Crown-Aboriginal Fiduciary Relationships', above n 42; Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 *Canadian Bar Review* 727.
- 54 *Constitution Act, 1867* (UK), 30 & 31 Vict, c3, reprinted in RSC 1985, App II, No 5 1867, s 91(24).

- 55 *Delgamuukw v British Columbia* (1997) 1010; *R v Badger* (1996); *R v Sparrow* (1990).
- 56 Richard Mulgan, 'Accountability Issues in the New Model of Governance' (2002) 3.
- 57 Henderson, *First Nations Conceptual Frameworks and Applied Models on Ethics, Privacy, and Consent in Health Research and Information* (2006), 40. See also: Yvonne Boyer, 'Aboriginal Health —The Crown's Fiduciary Obligations' (2004) *Discussion Paper Series #2*; E.R et al Rhoades, 'Health on the Reservations', *1994 Medical and Health Annual* (Encyclopaedia Britannica Inc, 1994) 96-119.
- 58 Andree Lajoie, 'With Friends Like These ... Two Perspectives on Fiduciary Relationships' in Law Commission of Canada and Association of Iroquois and Allied Indians (ed), *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, 2002) 57-79.
- 59 Gurston Dacks, 'Commentary' in Law Commission of Canada and Association of Iroquois and Allied Indians (ed), *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, 2002) 113-122.
- 60 Patrick Sullivan, 'Bureaucratic Process as Morris Dance: An Ethnographic Approach to the Culture of Bureaucracy in Australian Aboriginal Affairs Administration' (2008) 4(2/3) *Critical Perspectives on International Business* 127, 137.
- 61 Reynolds, above n 34, 2; Rotman, 'Conceptualising Crown-Aboriginal Fiduciary Relationships', above n 42; Slattery, above n 53; Stevenson and Peeling, above n 37.
- 62 Slattery, above n 53, 753.
- 63 See, eg, Rotman, 'Conceptualising Crown-Aboriginal Fiduciary Relationships', above n 42, 28-48.
- 64 Patricia Monture, 'The Experience of Fiduciary Relationships: Canada's First Nations and the Crown' in Law Commission of Canada and Association of Iroquois and Allied Indians (ed), *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, 2002) 151-182, 178.
- 65 Ibid; Rotman, 'Conceptualising Crown-Aboriginal Fiduciary Relationships', above n 42.
- 66 Leroy Little Bear, 'Jagged Worldviews Colliding' in Marie Battiste (ed), *Reclaiming Indigenous Voice and Vision* (UBC Press, 2000), cited in Monture, above n 64.
- 67 Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Arbeiter Ring Publishing, 2011) 109.
- 68 Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (University of Toronto Press, 2014); Harold Johnson, *Two Families: Treaties and Government* (Purich Publishing, 2007).
- 69 Leroy Little Bear, 'Aboriginal Paradigms: Implications for Relationships to Land and Treaty Making' in Kerry Wilkins (ed), *Advancing Aboriginal Claims: Visions/Strategies/Directions*. (Purich Publishing Ltd, 2004) 26-38; J. R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (University of Toronto Press, 2009); Simpson, above n 67.
- 70 Asch, above n 68.
- 71 See also, eg, Taiaiake Alfred, *Peace, Power, and Righteousness: An Indigenous Manifesto, 2nd Edition* (Oxford University Press, 2009); John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, 2010); Sákéj Henderson, 'Ayukpachi: Empowering Aboriginal Thought' in Marie Battiste (ed), *Reclaiming Indigenous Voice and Vision* (UBC Press, 2000); Miller, above n 69.
- 72 Monture, above n 64, 6.
- 73 The *Guswhenta* is a wampum belt constructed from coloured shells understood to represent the principles of separate treaty agreements negotiated between the Haudenosaunee and the Dutch, English, French, and Americans in the 17th and 18th centuries.
- 74 See, eg, Alfred, above n 71, 137-138; Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (University of Toronto Press, 2009); Borrows, *Canada's Indigenous Constitution*, above n 71, 75-76; Patricia Monture, *Journeying Forward: Dreaming First Nations' Independence* (Fernwood Publishing, 1999), 37; Dale Turner, *This Is Not a Peace Pipe* (University of Toronto Press, 2006) 54-55.
- 75 Sullivan, 'Reciprocal Accountability: Assessing the Accountability Environment in Australian Aboriginal Affairs Policy', above n 13, 66.
- 76 Acar, Guo and Yang, above n 18, 15.
- 77 Sákéj Henderson, 'First Nations Conceptual Frameworks and Applied Models on Ethics, Privacy, and Consent in Health Research and Information' (Final Report, First Nations Centre, National Aboriginal Health Organisation, 2006).
- 78 Reynolds, above n 34.
- 79 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.
- 80 Ibid.
- 81 See also, eg, R Bartlett, 'Fiduciary Obligation, Traditional Lands, and Aboriginal Title in Australia' in Law Commission of Canada and Association of Iroquois and Allied Indians (ed), *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, 2002) 183-210; L Behrendt, 'Lacking Good Faith: Australia, Fiduciary Duties, and the Lonely Place of Indigenous Rights' in In Law Commission of Canada and Association of Iroquois and Allied Indians (ed), *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, 2002) 247-268; R Cross, 'The Future of International Indigenous Trust and Fiduciary Law: A Comparative Analysis' in Law Commission

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