

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Great Plains Research: A Journal of Natural and
Social Sciences

Great Plains Studies, Center for

Fall 1998

Review of *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* by Leonard Ian Rotman

Russel Lawrence Barsh
University of Lethbridge

Follow this and additional works at: <https://digitalcommons.unl.edu/greatplainsresearch>



Part of the [Other International and Area Studies Commons](#)

Barsh, Russel Lawrence, "Review of *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* by Leonard Ian Rotman" (1998). *Great Plains Research: A Journal of Natural and Social Sciences*. 410.

<https://digitalcommons.unl.edu/greatplainsresearch/410>

This Article is brought to you for free and open access by the Great Plains Studies, Center for at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Great Plains Research: A Journal of Natural and Social Sciences by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada. Leonard Ian Rotman. Toronto: University of Toronto Press, 1996. xx+484 pp. Notes, references, and index. \$60.00 cloth (ISBN 0-8020-0821-6), \$24.95 paper (ISBN 0-8020-7813-3).

In 1984, Canada's Supreme Court stunned Ottawa by ordering the Department of Indian Affairs to compensate an Indian Reserve for the Department's mismanaging of a golf course development. Federal management of Indian lands under the *Indian Act* had previously been regarded as discretionary and unreviewable, but the Supreme Court threatened to hold Canada to a high standard of "fiduciary responsibility" in the exercise of its sweeping powers over Indian nations.

The implications of this landmark decision remain uncertain, however. Canadian courts are hesitant and inconsistent when they invoke the fiduciary principle, and Ottawa strenuously denies any application of fiduciary standards to the quality or quantity of Federal programs in areas such as education and health.

What has been missing, Leonard Rotman contends in *Parallel Paths*, is a coherent theory based on the origins and functions of the Crown's fiduciary responsibility to Indians. His attempt to fill this gap is flawed, regrettably, by historical fictions and internal contradictions, and does more to legitimize the Federal supervision of Indians than to validate its restriction.

Rotman characterizes Europeans' intrusion into the New World as a unilateral exercise of power, albeit frequently justified on the pretence of advancing civilization. He nevertheless contends that British promises to protect Indian nations from encroaching settlers were sincere, and without historical support substitutes the Supreme Court's concept of "fiduciary

responsibility” for the promises actually made. The Crown must keep its promises, Rotman concludes, because Indians believed them in the past and continue to rely on them today.

Rotman’s search for the origins of the fiduciary principle takes legal concepts out of historical context. The “protection” to which early British diplomats referred had a specific meaning in the Law of Nations: an exclusive defensive military alliance. The idea that civilized nations had a “sacred trust” to civilize savages was only formally adopted as a principle of international law at the 1885 Berlin Africa Conference. The Berlin Act may have encouraged Ottawa to disregard Indian treaties in pursuit of the higher goal of world civilization, but it had nothing to do with Georgian diplomacy on the Niagara frontier.

The Supreme Court itself inferred the Crown’s fiduciary duty from the Crown’s unilateral assertion of broad supervisory powers over Indians, which largely occurred after 1867. Rotman’s efforts to lend historical support to the Court’s decision not only conflict with the Court’s own analysis, but lays a trap for Indians, since his argument implies that Indians accepted British power in exchange for a “fiduciary relationship.” This contradicts his insistence that European empires imposed themselves on indigenous peoples for selfish reasons. Was the relationship built on trust and mutual benefit, or was it colonial in purpose and structure?

Sanitizing history in order to sell the fiduciary principle to the Canadian public is a cynical exercise in political optics. Calling Ottawa a “fiduciary” will not, moreover, make privilege, domination, abuses of power, or incompetent bureaucrats go away.

Although Rotman’s apparent aim is to devise new legal tools for First Nations to defend themselves against abuses of Ottawa’s power, he becomes an apologist for the persistence of that power. If Canadian Indians are seeking greater autonomy, they need to be liberated from legal theories legitimizing Federal supervision by making it seem less threatening and more manageable.

Parallel Paths does not ponder the absurdity of trusting the state to ensure the selflessness of its own actions. Here is the fatal defect in the legal imagination: thinking that laws somehow exist outside of the state that makes and applies them and can therefore be used to tame the state. Lawyers can be relied on to perpetuate state power, as de Tocqueville astutely observed in *Democracy in America*.

Parallel Paths recalls the debate among American Indians in the 1970s over the idea of Federal “trust responsibility,” which the U.S. Supreme Court

had enunciated in 1973 in a case involving the mismanagement of Indian forests. Many Indian leaders refused to endorse the idea of Federal trusteeship because they could not accept the legitimacy of Federal supervision. It is distressing to see Canadians once again following the footsteps of Americans into the quicksand of misguided policy. **Russel Lawrence Barsh**, *Department of Native American Studies, University of Lethbridge*.