

**Finding Law about Life:
A Cross-Cultural Study of Indigenous Legal Principles
in Nishnawbe Aski Nation**

by

**Meaghan Daniel
B.A., University of Western Ontario, 2005
LL.B., University of Manitoba, 2008**

**A Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of**

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ABSTRACT

This is a cross-cultural study of Indigenous legal traditions in Nishnawbe Aski Nation (NAN), a political territorial organization in northern Ontario. By analyzing NAN's resolutions (passed by NAN Chiefs-in-Assembly to direct NAN's mandate), I identify legal principles.

As law arises from worldviews, law's function is to protect the values of that worldview. This study discusses two values (creation and interdependence) as analytic tools, used to recognise legal principles. Context grounds the conclusions, as they relate to specific people and land.

Four legal principles are identified: earthbound need, sacred/natural supremacy, gifted responsibility and relational jurisdiction. These principles together reveal that law in NAN is focused on the protection of life.

Overarching the results is a broader purpose, to take up the educative work previously shouldered by NAN alone. The duty to learn is more than political obligation, but as I argue, is a matter of life itself.

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DEDICATION

This thesis is dedicated to a child. You bring deep joy, the sense of urgency I needed to finish, and a key insight I needed to do so with peace. You are a gift, and when you stir I type with renewed energy.

It is also dedicated to the people and leadership of Nishnawbe Aski Nation (NAN). You have welcomed me into your communities and homes, trusted me with your stories, fed and taught me, befriended and adopted me, and all without even asking if I had done the work required to fulfil my responsibilities in the relationship we share. I didn't deserve it. I hadn't. When you provided the material for this work, you opened the possibility that could become a better lawyer and Treaty partner. Miigwetch. Your generosity and patience is only matched by your kind and fierce humor.

All studies of Indigenous law take place within relationships that, in my experience, rarely stay within a professional box. Nor should they. Forming connections that live beyond the context of work or school, those of love and friendship, provoked the greatest shifts in understanding. Within the people and leadership of NAN and outside of it I have been helped by many hearts, including, with so much gratitude, my co-supervisors, John Borrows and Heidi Stark. John not only caused this work with his own, but supported me with a kindness that bordered on surreal, caring about my success far beyond that which was academic life. Heidi's gift, on the other hand, was to keep me real – to ensure that if a conclusion was complicated, I accounted for it honestly rather than neatly (which was my want). With these teachers building on the work of friends, former clients now friends, Elders and mentors, I have received far too much help over the past decade to be able to acknowledge it all.

I'm also grateful to my work, having been blessed to find a firm where I could practice in line with my politics, and where I was allowed the space to study and further those commitments. The opportunities I have had were made possible by others: friends working together to question what many lawyers take as given.

Finally, my family. Full of teasing, love, and acceptance, you are the people my life circles around.

Aaron, you were there at the first crisis of confidence on the second day of class, you were there when I walked to the edge of giving up on this and laid down, and you were there when I finished with your arms wide open. My generous classmate, constant friend, and now husband, you are an embarrassment of riches. I joke about being the foremost scholar on the "Mills theory", but in truth, your work is a refuge. And your love is like water.

CHAPTER ONE

I.I. OPENING

*Take care and don't think too hard, let your spirit seep in once in a while and things will be clearer.*¹

*Mulling over imperfect field notes, sorting through conflicting intuitions, and beset by a host of unanswered questions, the ethnographer must somehow fashion a written account that adequately conveys his or her understanding of other people's understandings.*²

Apparently, it is an “unwritten rule” that ethnographers include within their work a critical moment or turning point in their study, occasionally one of altering insight, more typically one of abject ignorance.³ What follows is not an ethnography, but it is a story of ignorance.

In my second year of law school, I was writing a paper about Indigenous land claims over sacred spaces and how they played out in Judeo-Christian courtrooms. So, I went to Behahmoytung, an Elder I had just met, and asked for a (pan-) Indigenous definition of the word “sacred”. He was welcoming and confusing; instead of a definition, he offered an invitation to a sweatlodge. I went, expecting that the explanation would be provided at the lodge, but to my ears, it didn't come. And repeating my question just led to further invitations-as-answers. After another lodge and another lodge and another lodge, I began to grasp the concept demonstrated, self-congratulation ensued, and I finished my paper.

And then, in my third year of law school, I was writing a paper about intellectual property rights as applied to traditional knowledge. So, I returned to Behahmoytung, now a friend, and asked for a (pan-) Indigenous definition of “traditional knowledge”. This time he had a story. He started by saying that critical to an understanding of traditional knowledge was an appreciation of the manner of transmission:⁴

“Let's use another example. Pretend you came to me, and asked me to teach you karate,” he said.

“Okay,” I said.

“I would start by telling you to paint my fence. And you would paint my fence and your arm would make a motion like this: up and down, up and down,” he demonstrated.

“Alright...” I said.

“When you were done, I would tell you to wax my car,” he continued.

“Dennis?” I attempted interruption.

“And you would wax my car, and your arm would make a motion like this.” He ignored me, waving his arm in an arc.

“Are you telling me the plot of The Karate Kid?” I asked.

“Yes, I am.”

¹ Email from Jerry Sawanas, friend and father figure to the author, (March 5, 2014).

² Keith H. Basso, *Wisdom Sits in Places: Landscape and Language Amongst the Western Apache* (Albuquerque: University of New Mexico Press, 1996) at 110.

³ Bryan D. Cummins, “*Only God Can Own the Land*”: *The Attawapiskat Cree*, Vol. 1, Canadian Ethnography Series (Toronto: Pearson Prentice Hall, 2004) at 7.

⁴ These are my words, not his. I do attempt to accurately recall the conversation that followed.

After some time dwelling on these experiences, I saw connected teachings looming behind specific lessons. During the time we spent together, Behahmoytung brought me to a lodge, sat with me, smoked with me, teased me near relentlessly, and gave me a name. We shared feasts, and he put me out to fast. These actions were answers. I asked Behahmoytung, *please define this concept for me*, and he answered, *it lives in our relationship*.

I.II. ONE CONCEPT: INDIGENOUS LEGAL PRINCIPLES

The concept that started this work was resistance. To be specific: Indigenous methods of resistance to ongoing colonialism. To be yet more narrow: those methods of resistance used by the land and people who together form the political territorial organization Nishnawbe Aski Nation (NAN). NAN represents 49 First Nations communities within Ontario, encompassing all of Treaty #9 and a portion of Treaty #5. Its territory covers the upper two-thirds of the province, with an approximate population of 45,000 people.⁵

My focus was not only on resistance. By examining direct action, I hoped to join the discussion of Indigenous law and agency by describing the ways Indigenous communities and leadership act and have acted, rather than being another one who only talks of the ways Indigenous people have been acted upon.⁶

And then, I developed a worried relationship with resistance. As I read of Indigenous actions and decisions on ancestral, Treaty, and/or traditional territory described as grassroots organizing, direct actions, movements or mobilizations, it came clear that the words undermined these actions by (consciously or otherwise) adopting a colonial standpoint.

Consider the dividing line often used to sort tactics: ‘direct action’ and ‘democratic action’. This binary proclaims that some strategies are legal and legitimate as compared to others. Then, it mumbles over the condition that we divide actions into categories using the norms of the Canadian political and legal system: the settler’s terms. We use these terms despite Indigenous peoples’ ongoing assertion that saying protestor instead of protector is colonizing.⁷ Leanne Simpson writes: “I worry that framing contestation or contention along with dissent and mobilization serves to further entrench a polarization between “winner” and “loser”, which is not only an artificial imposition on Indigenous theories of mobilization, but in turn it also reinforces the colonial order.”⁸ Simpson urges us to see sound political decision making within Indigenous legal frameworks rather than civil disobedience counternarratives. This is key to avoid accepting and supporting the legitimacy of Canadian law and the authority of the Canadian state. It is a discursive shift, but one with significant effect as self-

⁵ Nishnawbe Aski Nation, “About Us”, online at <<http://www.nan.on.ca/article/about-us-3.asp>>.

⁶ Shawn Wilson points out that studies conducted on Indigenous people, as opposed to by or with Indigenous people focus on negative aspects of life, as identified by outside researchers. While I am an outside researcher, and while in many ways, this is a study conducted on Indigenous people, it is not focussed on victimization. Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Canada: Fernwood Publishing, 2008) at 16-17. Further, see John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 9.

⁷ Consider alternative descriptions of events at Standing Rock, North Dakota, and the media take up of the term ‘protectors’ over ‘protestors’.

⁸ Leanne Simpson, *Dancing on Our Turtle’s Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring Publishing, 2011) at 86. As Simpson points out, “There exists very little in the academic literature conceptualizing and exploring resistance and resurgence from within Indigenous thought” (at 20).

determination is often controlled and repressed through the boundaries of legality and illegality – where moving outside of Canadian legal frameworks results in the justified criminalization of “dissent”.⁹

All of this comes to a single point. Instead of describing methods of resistance, I now ask what legal principles can I draw from a careful study of the actions of NAN?

There are assumptions and conclusions built into this question that I will return to, but first, a practical task. To move from abstract thought, to Indigenous legal principles, to an actual thesis, I needed some(thing) material. My data comes from an archive. Unlike most archives, this archive is not of the strict colonial sort. For the purpose of this study, NAN gifted to me their entire body of resolutions, an overwhelming transfer in more ways than one.¹⁰ These documents contain a richness of stories, as NAN Chiefs-in-Assembly have been passing resolutions to direct the broad mandate of NAN for almost 40 years. Confronted with approximately 3000 resolutions, I selected a subset: the 169 resolutions passed in the first five years of resolution making, 1979-1983.¹¹ The selection of a temporal slice of the resolutions was practical (extensive while remaining of Master’s thesis-manageable size) and arbitrary (a close reading of any subset would have done for my purposes – moving towards understanding of the legal framework governing in NAN by deriving legal principles evident to me in the resolutions).¹²

⁹ Anna Zalik, “Protest-as-Violence in Oilfields: The Contested Representation of Profiteering in Two Extractive Sites” in S. Feldman, C. Geisler and G. Menon, eds., *Accumulating Insecurity* (Athens, GA: University of Georgia Press, 2011) 215 at 264. Consider also the companion sentencing cases of *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 CanLII 11049 (ON SC), and *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534; 91 OR 3d 1.

¹⁰ The process of obtaining the resolutions began with informal conversations in the summer of 2013 with various NAN staff regarding my interest and the feasibility of the project. At the time, I did not know what I was asking for, or more importantly, how I should ask. Given my professional relationship with NAN, I was careful to ensure that any request was understood as a personal research request, which had nothing to do with our professional relationship. On July 19, 2013, I emailed then Deputy Grand Chief Fiddler, outlining that I was seeking the entire body of NAN’s resolutions for the purposes of a Master’s thesis on Indigenous legal traditions. I indicated that I would follow any information protocols put in place by NAN, and provided an early suggestion aimed at reciprocity, that I could organize the resolutions into a database if that would be helpful. This conversation continued through the fall and winter of 2013, as it was determined that the NAN Executive (the Grand Chief, and the three Deputy Grand Chiefs) would need to understand the project to provide approval. I wrote a formal request for the resolutions to the Executive on January 20, 2014, and again on February 6, 2014 with more detail. CEO Jeff Nelson informed me via email of March 5, 2014, that the Executive had approved my request. From there, I worked with the Communications Director and IT Manager for the eventual transfer. Prior to that transfer, on NAN’s request, I prepared a written document to outline the terms on which I was to receive the resolutions. Dated May 27, 2014, this document makes clear who may see resolutions (myself and my graduate supervisors); rules around reproduction, storage and retention; that my research will remain historically focussed so as to avoid writing about current or ongoing business; and that someone at NAN will be given the opportunity to vet the thesis for community approval.

¹¹ The numbers break down as follows. In 1979, 5 resolutions were passed. In 1980, 46 resolutions were passed. In 1981, 44 resolutions were passed. In 1982, 34 resolutions were passed. And, in 1983, 40 resolutions were passed.

¹² It has been raised in various reviewers’ comments that different subsets may have provided more depth to my study while still ensuring the project remained manageable. For instance, I could have chosen a representative year from every decade of NAN’s work (70s through 2010s), or a few years from the beginning and a few years from a more recent time. As further justification for my selection, I can offer two reasons for focussing on the first five years. First, in obtaining the resolutions from NAN, it was discussed and eventually agreed upon that my work would stay historical. This term in fact suited me, as it would allow my academic work a clear separation from my professional work. Second, these were the years that allowed me to best tell the story of the creation of NAN. Between 1979 and 1983, NAN was concentrating on forming its political identity; after 1983, approximately a decade passed before the issue of NAN’s constitution was revisited.

The rest of this introductory chapter outlines methodology and responsibility.¹³ I give the reasons why I focus on NAN, and why I decided to use the resolutions as an information base. I confront the key issues or potential criticisms arising from the selection of this archive and then explain how the material will be analysed. Then, I roadmap the rest of the chapters in this thesis. Finally, I consider

¹³ Writing in a narrative style has dispersed the elements of my research approach and methods across the whole of this chapter. For clarity, this information is provided a second time, collected into a single (lengthy) footnote.

My first decision was to select the resolutions as source material. As justification for the choice of a written source, the resolutions are a unique archive allowing for a meaningful study of legal traditions at the political territorial organization level. Amassed of many voices, the resolutions speak to the critical issues in their territory and legal expression about the same. Choosing to proceed from resolution or text alone was born of practicality. It is undoubtable that interviews and/or other sources of information would have supplemented and enriched my understanding. However, as will be further outlined, I already had a data set of unmanageable size, and I had to ensure the project remained scoped to my capabilities and the requirements of the LLM program.

The next step, collecting the data, was practically simple and ethically complex. It turned out the resolutions were stored in electronic format ready for transfer. The issue therefore became who to ask for access to the information and how to ask in a good way. I sought advice through casual conversations and learned that this request required the assent of the Executive. I therefore prepared memos outlining my request for information, the intended use of this information, and my desire for reciprocity. In retrospect, attending in person would have been a better choice.

The information request was approved, and (on request) I then outlined in writing the terms of the transfer – rules around issues such as reproduction or storage. Included in these terms I committed to give NAN the opportunity to vet the thesis for community approval, and to focus my research on the history of NAN to ensure I would avoid writing about a current controversy (or one of my own files). I mention these specific terms as examples only, it will be up to each researcher and information holder to discern what commitments properly underlie the sharing of information.

As above, I quickly learned I had obtained too much data to allow for rigorous engagement (3000 resolutions) so I selected a subset, the 169 resolutions passed in the first five years of resolution making. The decision of proceeding with only a subset was responsible, the identification of a particular subset felt arbitrary. In the end, I found that the years 1979-1983 suited me, as they allowed for a cohesive story of the creation of NAN, the formation of their political identity and formalization of their constitutional commitments.

Once I had a subset, I decided to use discourse analysis as a method to find legal principles, (specifically, critical discourse analysis as this approach identifies social political and/or historical context as critical to understanding text). Discourse analysis typically sees a researcher code data, and then analyse it. I proceeded in this way, by grouping the resolutions into two piles: first, those that created NAN; and second, those that negotiated relationships within NAN and between NAN and settler society. I created subcategories from patterns (repeated words, repeated issues, repeated sources of confusion) and then tried to find meaning from those patterns.

Two factors gave me the confidence to proceed with a cross-cultural study by discourse analysis. The first was the fact that I was not brand new to NAN's culture. Fourteen years of close relationships, (first with Anishinaabe friends and Elders, then as my work focussed on NAN territory, more NAN specific relationships) had provided some foundational understandings (for example, a grasp of the depth of my own ignorance). Where possible, I have written this life experience or professional experience into the narrative, an approach that has expanded the positionality and reflexivity statement to such a degree that this work may appear to be autoethnographic. It is not. Indeed, I reference the hallmarks of ethnography in my writing, as the typical features are useful beyond the method. But this was not an ethnographic study, it was discourse analysis transparently enriched by understandings gained in ongoing relationships.

The second factor is that discourse analysis is a particularly appropriate analytical method if the researcher's aim is to discern legal principles. Why? The first step of discourse analysis asks the researcher to categorize the data. Worldviews generate legal values. Those values generate legal principles. Therefore, rather than creating one's own categories, the researcher may simply categorize the data with identified values, as legal values will help identify and confirm the legal principles in the later stages of analysis.

Finally, a note about reciprocity and responsibility. Reciprocity is the ethical obligation of the researcher to give something back in acknowledgement for the wealth that has been shared. While I have provided updates on the researcher, both in person at NAN assemblies and in writing, formally and informally, at this time, I understand that the results of this research can be of use to NAN and the communities, and I have committed to working with NAN to ensure that interested parties can access this, and further the conversation. However, in addition to the obligation of reciprocity, I believe there is a responsibility that non-Indigenous researchers must take up, which is our own education. For far too long, NAN community members have provided my second legal education, a responsibility which was not theirs. And, as I argue in the fifth chapter, understanding Indigenous law isn't a matter of respect, it's a matter of life.

my personal position in this work, as a non-Indigenous person educated by a colonial system, benefiting from NAN's gifts, yet again.

No matter what comes next though, please remember my first mistakes. Though I've stopped asking for abstract definitions, there's so much more to learn and, as is evidenced above, I tend to be a slow learner. But, striving towards "anti, non, de, and un colonial thinking"¹⁴ is both fraught with the danger that I am doing exactly the opposite, and the only way forward.

I.III. FORTY-NINE COMMUNITIES: RELATIONSHIPS WITH AND WITHIN NISHNAWBE ASKI NATION

In 1977, NAN made a declaration of nationhood to the provincial cabinet in Ontario and to the Canadian public. Considered a turning point, it began, "once again, we want you to understand us"¹⁵ before stressing that as of that day, the relationship had to change, "on our terms, or not at all".¹⁶

In some ways and in some places things have changed, though not nearly enough. Assimilationist policies in areas such as education, housing, infrastructure, health, and social services, have resulted in endemic poverty, unjustifiable health disparities, record suicide rates and an addiction epidemic.¹⁷ As climate change erodes the already too short winter road season, these issues only compound.

I've been a lawyer for nine years now,¹⁸ and during this time have been part of a team representing NAN on several matters, including former Justice Iacobucci's review of First Nations representation on Ontario juries¹⁹; "Project Invite" – a pilot project regarding volunteer participation on Coroners Inquest juries for First Nations people living on reserve, and most recently the Inquest into the Deaths of Jethro Anderson, Curran Strang, Reggie Bushie, Paul Panacheese, Robyn Harper, Kyle Morriveau and Jordan Wabasse.²⁰ While representing NAN on these and other files, I travelled to several of NAN's 49 communities and formed ongoing relationships within them. Beginning in the winter of 2011, I have visited (sometimes once, sometimes multiple times) Cat Lake, Constance Lake, Eabametoong, Ginoogaming, Kasabonika Lake, Keewaywin, Mattagami, Mishkeegogamang, Moose Cree, Muskrat Dam, Sachigo, Sandy Lake, Pikangikum, Poplar Hill, Weagamow and Webequie. I have also been to Kitchenuhmaykoosib Inninuwug, which, at that time, was located within Treaty #9, but was not part of NAN, and Lac Seul, which affiliates with NAN though it is located in Treaty #3.

Previous to these trips, I had no conscious relationship with NAN or with anyone in NAN territory, though as a settler resident of southern Ontario, I'd long been benefitting from the exploitation of

¹⁴ Taiaiake Alfred, "Opening Words" in Leanne Simpson ed., *Lighting the Eighth Fire: The Liberation, Resurgence and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring Publishing, 2008) 9 at 10.

¹⁵ A Declaration of Nishnawbe Aski (The People and the Land), by the Ojibway-Cree Nation of Treaty #9 to the People of Canada, Delivered by the Chiefs of Grand Council Treaty #9 to Ontario Premier William Davis and his Cabinet in the City of Toronto, July 6, 1977, online at: <<http://www.nan.on.ca/article/a-declaration-of-nishnawbeaski-431.asp>>.

¹⁶ *Ibid.*

¹⁷ I do not intend to provide further documentation on these conditions. I do want to work towards ending them.

¹⁸ In dog years, which is how I like to count it, I've been in practice for 63 years!

¹⁹ First Nations Representation on Ontario Juries, Report of the Independent Review Conducted by the Honourable Frank Iacobucci (2013), online at:

<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html>.

²⁰ I am a lawyer working at the law firm Falconers LLP. If you are curious about particular details regarding these files, www.falconers.ca is a good source for further information.

Indigenous traditional territory in northern Ontario. It took these travels for me to make two critical connections, first with new friends that became dear friends, and then between my legal education and my inability to recognize Indigenous legal traditions.

When I am in the community, we are necessarily talking law. Around 2012, people started telling me stories of oppression by the Canadian justice system and about a desire to “return to our own law”. Uninformed but interested in Indigenous law, I asked for details. On my behest, “tell me about your legal system?” one man told me about a canoe, and later, a ladder. Another related something his grandma told him as a child about a plant. I nodded through these stories, expecting that we would soon return to the topic of law. Months later (though still travelling) I picked up John Borrows’ *Drawing Out Law* and learned that these conversations were entirely about law. As Borrows writes:

I hope that readers will see that Anishnawbek legal traditions are drawn from places other than courts, legislatures, lawyers’ briefs, or law professors’ lectures. Indigenous laws can be revealed in broader ways. They are nourished by a grandparent’s teachings, a law professor’s reflections, an animal’s behaviour, an engraved image, and a landscape’s contours...²¹

This was jarring. I was a practising lawyer, actually their lawyer, asking a simple and direct question about law and insensible to the answer.²² If journeys are the common metaphor for attaining knowledge, I suppose I was lost on my way to the trailhead.

By no means do I think this experience is unique, rather, my guess is it’s quite common. Non-Indigenous clients hire a lawyer versed in their legal system. Indigenous clients often hire settler lawyers ignorant to their legal traditions and worse, who doubt or deny their very existence. While my Indigenous clients have often responded to the challenge of educating me, this should not be left to them. And even with patient teachers who have much to share, and effort on the part of the listener, there are failures in understanding.

Just a word more. I would not want to leave you with the impression that my failure to understand was based on one misplaced rigid idea about legitimate legal sources. It was rather a whole education, legal and otherwise, built of assumptions, commitments and fictions about what law is and how it functions in Canada.²³

²¹ John Borrows, *Drawing Out Law, A Spirit’s Guide* (Toronto: University of Toronto Press, 2010) at xiii.

²² Keith Basso describes this inability to listen as follows:

My bewilderment stems not from the failure to understanding the linguistic meanings of the utterances comprising the interchange; indeed, their overt semantic content is simple and straightforward. What is perplexing is that the utterances arrive as total non sequiturs, as statements I cannot relate to anything that has previously been said or done. Verbal acts without apparent purpose or interactional design, they seem totally unconnected to the social context in which they are occurring, and whatever messages they are intended to convey elude me entirely.

Basso, *supra* note 2 at 113.

²³ Amongst the sources appropriate to cite here, I have chosen only three. Please see John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 1-22. See also Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 100-102, and Mary Ellen Turpel, who notes that the way law represents cultural difference is unique to legal analysis:

It is interesting to me that, in other disciplines, apart from law, cultural differences have been approached in a way that is contrary to current legal analyses. They have not been “interpreted” as gaps in one’s knowledge of a discipline or discourse, waiting to be filled with conceptual bridges and extensions, but rather as irreconcilable or irreducible elements of human relations....

I.IV. THREE CONTROVERSIES: WRITING ABOUT INDIGENEITY, AND ABOUT LAW, FROM ARCHIVES

With gratitude for having obtained the permission of NAN, its resolutions form the basis of this study. I assert in this thesis that NAN's resolutions are expressions of an Indigenous legal tradition, knowing that some will take issue with whether they are authentically Indigenous, others with whether they are part of a legal tradition, and still others with both labels. After, I briefly address the issues arising from conducting this study through archival research as opposed to other data sources, most particularly interviews or other conversations.

Indigenous Authenticity: The Indigeneity of NAN

In reviewing the literature on Indigenous governance, there is a contentious dichotomy between traditional and Western governance.²⁴ Traditional governance bodies, based on Indigenous political philosophies, are contrasted against Western structures, values, and styles of leadership. In these works, the line between traditional and Western governance structures is a bright one with violent effect: the forced imposition of Western structures causes profound harm to Indigenous peoples, and traditional leadership is held as a means to overcoming the resulting crisis.²⁵

Taiaiake Alfred, in *Peace, Power, and Righteousness*, writes of Indigenous governance as two paths forward leading to two very different places: "one that seeks to resurrect a form of indigenous nationhood (a traditional objective); and another that attempts to achieve partial recognition of a right of self-government within the legal and structural confines of the state (an assimilative goal)."²⁶ Most seem to be on the latter road, as those who work in state or state-sponsored institutions are said to be

The perception of cultural difference as an imperative that may loosen or shift the paradigm of knowledge, rather than a cognitive gap to be filled, is one that has not yet been taken seriously in legal analysis or interpretation vis-à-vis the cultural differences of Aboriginal peoples.

Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 C.H.R.Y.B. 3 at 13.

²⁴ Questions about language dominate my thoughts. I am not completely satisfied by Indigenous, traditional or Western but I am caving to these imperfect terms here.

²⁵ Taiaiake Alfred, *Peace, Power, and Righteousness: An Indigenous Manifesto* (United Kingdom: Oxford University Press, 2008) at xv, xxiii, 2 and 23. Alfred is far from alone in this. Patricia Monture-Angus pointed to the Native Women's Association of Canada and the Assembly of First Nations as Indigenous governance bodies modelled on the colonizer's political structures, limited in their ability to espouse traditional principles and move towards decolonization (see Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Canada: Fernwood Books Ltd., 2003) at 148). Further, Alfred drew on the work of Vine Deloria, Jr. and Clifford Lytle, to connect traditional governments with self-determination and Western political bodies with self-government (at 53-54). In *The Nations Within*, Deloria and Lytle similarly differentiate between self-determining and self-governing as follows:

When we distinguish between nationhood and self-government, we speak of two entirely different positions in the world. Nationhood implies a process of decision making that is free and uninhibited within the community, a community in fact that is almost completely insulated from external factors as it considers its possible options. Self-government, on the other hand, implies a recognition by the superior political power that some measure of local decision making is necessary but that this process must be monitored very carefully so that its products are compatible with the goals and policies of the larger political power.

Vine Deloria, Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1984) at 13-14.

²⁶ *Ibid.* at 99.

not part of the traditional leadership or working in furtherance of Indigenous interests²⁷ and “[i]n the Native context, all local governments, regional bodies, and national representative organizations are chartered and funded by the state.”²⁸ Alfred specifically asserts that governing bodies imposed through the *Indian Act*²⁹ are not traditional governments “at all”, but colonial institutions so close to the benefits of power, that they have been co-opted.³⁰ Taking issue with both the delegation of authority from the state, and the Western design, Alfred concludes that so long as Indigenous politics are practiced within and modeled after state structures, their parameters will be limited by the boundaries of state power and the colonial mentality will persist.³¹

There is much about the organization of NAN that could fall into the above criticisms. NAN is comprised of *Indian Act* (primarily male) Chiefs who come together in assembly (this assembly is where the resolutions are passed). It is an amalgamated body of Anishinaabe and Cree people, from 49 different communities, who speak at least four different languages and dialects, and who are now grouped and divided along complex histories of organization disrupted by colonialism. Yet, without dismissing the above points, I believe *Indigenous* legal principles can be drawn from NAN’s resolutions.

In addition to the work distinguishing between Indigenous nationhood and a right of self-government, there is a narrative which keeps these concepts in historical context asserting that they are both historical products.³² Averting to the many meanings of self-government or sovereignty, it starts with the premise that the historical record does not make up the background, but rather, the substance of the concepts.³³ Rather than placing Indigenous nationhood and self-government in opposition, (reserving legitimacy, cultural integrity and all hope for one) taking a historical view reveals the way in which both ‘types’ of governance have occurred together, detracted from each other and yet worked together, towards the goals of “emancipation, freedom and independence.”³⁴ Truly, all narratives about Canada’s colonial history should be far more than straight-forward stories of domination and resistance,³⁵ parsing authenticity from inauthenticity.³⁶

There are good reasons to be cautious about evaluating authenticity. Audra Simpson in *Mohawk Interruptus* specifically asks those who research Indigenous political orders to abandon ‘traditionality’ as a measure of legitimacy or “the authorizing text for action”.³⁷ Pointing out the state’s use of traditionality or cultural purity to distract and detract from sovereignty, (reminding us

²⁷ *Ibid.* at 30 and 33. Rare exceptions to this rule are admitted.

²⁸ *Ibid.* at 70.

²⁹ *Indian Act*, R.S.C. 1985, c. I-5.

³⁰ *Ibid.* at 3.

³¹ *Ibid.* at 4 and 70.

³² Vine Deloria, Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1984) at 15.

³³ *Ibid.*

³⁴ Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence* (Canada: Fernwood Books Ltd., 2003) at 148.

³⁵ Julie Cruikshank, *Do Glaciers Listen? Local Knowledge, Colonial Encounters, and Social Imagination* (Vancouver: UBC Press, 2005) at 181.

³⁶ Borrows, *Canada’s Indigenous Constitution*, *supra* note 23 at 60.

³⁷ Audra Simpson, *Mohawk Interruptus, Political Life Across Borders of Settler States* (United States: Duke University Press, 2014) at 148. It should be noted that Alfred specifically disavows a notion of culture which would be frozen, allowing for change and movement, where perfect adherence to every element of tradition is not demanded, but simply respect for the basic values and principles of traditional political philosophy (Alfred, *supra* note 25 at 4).

of *R v. Van Der Peet*³⁸) she points out that authenticity is a desire of researchers who have and are participating with the state in seeking to “authenticate (and then adjudicate) cultural forms rather than analyze them.”³⁹

To be clear, it is my belief that the Indigeneity of NAN is fully answered by the Indigeneity of NAN community members: NAN was born of their law and has continued to be how they choose to live together. I feel no need to investigate its Indigeneity further. It is my intention to simply acknowledge and exist alongside these differences of opinion. For my part, I will continue to assert that Indigenous legal traditions can be found within a body complicated by ongoing colonialism.

Law’s Legitimacy: The Resolutions as Expressions of Law

I believe NAN’s resolutions are expressions of law, though I do not believe all resolutions are so. The word “resolution” describes both moments of annual self-reflection and written motions adopted by the United Nations General Assembly.⁴⁰ Resolutions can be formal, informal, binding or simple statements of support.

When held up against the Canadian cultural concept of law, NAN’s resolutions carry some of the key components. They set the mandate of a political territorial organization, both directing and constraining its authority. They arise out of meetings of NAN’s Chiefs-in-Assembly, are supported, seconded, and occasionally rejected. They arise through formal, pre-determined processes, and are recorded for future reference.⁴¹

Of course, justifying the resolutions as law by evaluation against the Canadian cultural concept of law would be recognition run amuck. To further the argument, I needed to find a shared or Indigenous concept of law.

³⁸ *R v. Van Der Peet*, [1996] 2 SCR 507 at ¶ 46 where the Supreme Court laid out a test for Aboriginal rights, stating that an Aboriginal right was a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right.

³⁹ Simpson, *supra* note 37 at 104.

⁴⁰ Black’s Law Dictionary contains several definitions of “resolution” including a Parliamentary law: a main motion that formally expresses the sense, will or action of a deliberative assembly (esp. a legislative body), and a shareholder resolution. *Black’s Law Dictionary*, 8th ed., *sub verbo* “resolution”.

⁴¹ I could find no document outlining NAN’s resolution process from the time-period studied (1979-1983), though it is obvious from the uniformity of the resolution format that a consistent process was in place. Each resolution appears on NAN letterhead, bears a title and an identifying number, an indication of the meeting where it was passed and the location of that meeting, the name of the mover and the seconder, and the date it was passed. The vast majority of resolutions are drafted to have several preamble statements setting out an issue (Whereas, the Big Trout Lake Band urgently needs additional classroom space) concluding with a specific course of action (Therefore be it resolved that we... support the Big Trout Lake Band in demanding that the Department of Indian Affairs immediately construct the school addition...) (see Resolution 79/3, “Education”, passed March 1979). A few resolutions do not follow this format but take the format of transcripts of presentations given by Chiefs or Elders, though these still bear a title, identification number, meeting, meeting location, mover and seconder, and date. (see for example Resolution 80-15, “Presentation Made by Chief Aglaba on behalf of Magnus James, Elder, McDowell Lake”, passed January 17, 1980). Without conducting interviews, it remains unclear how the resolutions were brought forward, who brought them forward, whether all potential resolutions were heard, how many were passed relative to the number proposed, how they were drafted into final format, and how NAN was expected to deliver on the resolutions.

Truly, attempting to find an agreed upon definition of the term, failing, and then forming my own views about the same provoked a literary review and a soul search that descended to the existential. On my legal theory sojourn, I initially agreed with the critical legal theorist's premise that there is no distinction between law and politics: "'Law' to the true 'crit,' ... is simply 'politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society.'"⁴² But, I felt despair in legal nihilism, a loss of hope as there was no moving beyond critical legal theory to the creation of legal concepts, and I missed the law's potential for transformative social change.⁴³ Fortunately, in Victoria, there was a thoughtful group criticizing those legal theorists who would focus on judicial decisions and legal institutions to the exclusion of other sites of law: non-state legal orders. I was buoyed by legal pluralists writing about law as creative multi-sited phenomena and thus expanding the concept.⁴⁴

I loved that law was now practical and impermanent, rooted in historical struggle and thus shaped by context,⁴⁵ grounded in culture and in lived reality.⁴⁶ However, I was no closer to a definition as:

While [legal pluralists] agree on the initial proposition that there is a plurality of law in all social arenas, legal pluralists immediately diverge on what this assertion entails because there is no agreement on the underlying concept of law.... John Griffiths, one of the leading promoters of the concept of legal pluralism, defines law as 'the self-regulation of a "semi-autonomous social field"'; Galanter defines law in terms of the differentiation and reinstitutionalization of norms into primary and secondary rules...⁴⁷

What all of these definitions share is that they are functionalist and essentialist. According to Brian Tamanaha, legal theorists have tried to describe the concept of law by filling it in with variations of "institutionalized, function based abstraction[s]".⁴⁸ Rather than defining the phenomena that is law, all that is being accomplished is the demarcation of another function based category. He explains the entire "history of failed attempts" by reference to the fact that law is a cultural construct:

Law is whatever we attach the label law to, and we have attached it to a variety of multifaceted, multifunctional phenomena: natural law, international law, state law, religious law and customary law on the general level, and an almost infinite variety on the specific level...Despite the shared label 'law', these are diverse phenomena, not variations of a single phenomenon, and each one of these does many different things and/or is used to do many things. There is no 'law is...'; there are these kinds of law and those kinds of law; there are these phenomena called law and those phenomena called law; there are these manifestations of law and those manifestations of law.⁴⁹

⁴² Robert A. Williams, "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color" (1988) 5 *Law & Ineq.* 103 at 116- 117. Williams is quoting from Allan J. Hutchinson and Patrick Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought* (1984) 36 *Stan. L. Rev.* 199.

⁴³ Jabbari, David, "From Criticism to Construction in Modern Critical Theory" (Winter, 1992) 12:4 *Oxford Journal of Legal Studies* 507 at 508.

⁴⁴ Williams, *supra* note 42 at 118.

⁴⁵ Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 *Osgoode Hall Law Journal* 167 at 183.

⁴⁶ *Ibid.*

⁴⁷ Brian Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27 *Journal of Law and Society* 296 at 297.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at 313.

In the end, I was left with law as a cultural construct, entirely dependent upon worldview for its creation. It thus became obvious that I should leave Western legal theory behind.

In “Indigenous Legal Theory”, Gordon Christie argues for a diversity of worldviews under the heading “The Need for Indigenous Theorising about Law”. He points to the need for people with different experiences and cultural groundings to join the theoretical conversation as they will shed new light on dominant legal orders, and raise new theoretical issues.⁵⁰ He calls on Indigenous legal theorists to elucidate the colonial force of law and of legal theories, but to also demonstrate how Indigenous understandings of law might sit in contrast to these legal regimes.⁵¹

So here, to rest, I turn to James [Sákéj] Youngblood Henderson, in “Post-Colonial Legal Consciousness” as he beautifully sets out law:

At its core, law and its need to be just are not abstract. Behind its arcane theories, artificial reasoning and phrases, law is part of a world full of people who live and move and do things to other people. The law lodge has a rhythm of transformation toward justice, which is guided by an elusive human spirit. Law represents that quest. It is a consciousness that attempts to reason from assumptions and commitments to create imaginary purposes and practical results. It is more than a compendium of written text, called either a constitution or legislative statutes or posited rules. It is more than the underlying conceptions or values or customs expressed in text. It is more than a set of interpretations and justification of the text; more than its manifestations or reflections. Justice is a normative vision of the human spirit unfolding, a product of shared thoughts and consciousness. It is a product of a community’s beliefs and imagination. It is the shared consciousness that makes a person feel as if they belong to a community. It is the frontier line between power and imagination. Like all visions, it is subject to the evaluation of the community and to transformation.⁵²

Within this definition of law, the resolutions easily fit, as it is generous, falling more towards verb than noun, and largely set by culture and function. I understand Henderson to write that law is a means by which we decide how best to live together. This definition allows for law’s oppression and its aspirations, its life as both concept and an experience.

I know this definition includes all social and natural regulation; it is false to be any more focused. I hear the arguments to import more detail, necessary composite elements, but too often under the guise of filling out the concept, law is shaped to conform to one cultural perspective so ingrained it is mistaken for universal definition. Law, given that it lives, is necessarily a cultural construct and in performing its responsibilities, will take on forms as diverse as its creators.

⁵⁰ Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Benjamin Richardson, Shin Imai and Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009) 195 at 204-206.

⁵¹ *Ibid.*

⁵² James [Sákéj] Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) Volume 1: Spring, *Indigenous LJ* 1 at 26.

The Reliability of Archival Research

This needs a final note about the choice of source: a text based archive and the fact that I am working alone from this written word (though bringing a history of life experiences with me). Researchers must be careful when collecting data solely from documents particularly in cross-cultural studies. Descriptions based on text typically supplement participant observation, or other forms of research performed in the field. That is, usually researchers are expected to get up from their chair. That said, I will be sitting with a body of documents that will speak, and will sometimes be silent. My choice is not to be taken as a judgement of greater reliability placed in written words as opposed to oral or other means of obtaining and passing information. Text based studies certainly present issues of reliability, ones that my conclusions ought to be weighed against. Consider that, “First Nations jurisprudences are best studied in the context of Aboriginal languages, stories, methods of communication and styles of performance and discourse, all of which encode values and frame understanding.”⁵³

The decision to proceed from text alone is based on the scope of the study, the scope of the territory, and the unique voice that is the archive. These three things are linked. The scope of the study is a Master’s thesis, expected to last approximately 2 years, and 80-100 pages. It concerns law arising out of a vast territory, 210,000 square km, containing 49 separate communities. Of course, there was a savings of time and cost in proceeding from readily available texts. There was also the possibility of engaging with the whole of the territory in a meaningful way, a prospect not otherwise available within this timeframe without this archive. The resolutions combine countless voices into text: from the people, to the Chiefs, to the assembly, to the written word. Drafted in a formal setting, these resolutions were consciously planned, debated and edited to achieve a precision of meaning, intended to set the mandate on critical issues facing this territory. What an incredible gift it has been to spend time with these words.

I.V. TWO CENTRAL VALUES: INTERDEPENDENCE AND CREATION

Confronted with a pile of text, I needed a method of deriving meaning. Though the process I came to is quite simple, the path there was long and convoluted. I’m sharing it here, in brief, as there aren’t so many of these studies out there yet, and I wonder if it will be helpful to others in the process of cross-cultural examination of legal traditions.

It began with a literature review, in the hopes of finding a model. First, Keith Basso, a cultural and linguistic anthropologist who wrote a book called *Wisdom Sits in Places*. Basso set out to map Western Apache place names in the Cibecue region, as an ethnographic study of what people made of places. The answers he eventually came to required a detailed description of how geographic features can function as mnemonic devices, aiding the Western Apache peoples in remembering their moral teachings. Places in this community are the settings of instructional narratives, stories of people demonstrating sometimes foolish, sometimes responsible actions. The place names are thus reminders: referencing a place allows a person to invoke the lesson learned there. In this way, the landscape becomes, “a repository of distilled wisdom, a stern but benevolent keeper of tradition, and ever vigilant ally in the efforts of individuals and whole communities to maintain a set of standards

⁵³ James [Sákéj] Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 117.

for social living that is uniquely and distinctly their own.”⁵⁴ Basso summarized the goal of his work as follows: “I have attempted to show here, that Western Apache conceptions of land work in specific ways to influence Apaches’ conceptions of themselves, and vice versa, and that the two together work to influence patterns of social action.”⁵⁵

Then Julie Cruikshank discussed the same relationship, how places and people make meaning together in her book *Do Glaciers Listen?* She connected the natural geophysical changes of the Little Ice Age in the late 18th century, with the cultural changes brought by European colonial encounters and invasions. During this period, Cruikshank explored how Tlingit narratives understood the animacy of sentient glaciers, ice that was interacting with its surroundings, unifying natural and cultural worlds. In contrast, Western rationality was working on the premise of “a measurable natural world... pried from its cultural moorings.”⁵⁶ Cruikshank’s method revealed that ignoring the underlying tension between those who would separate and those who would unite natural and cultural worlds has consequences in the moment of explanation as this obscures that “neutral” language is “fundamentally contested.”⁵⁷

John Borrows provided another example in his work, explaining that places make law, as legal principles can be drawn from a study of the earth. With animals, birds, plants, or geographic features like lakes, forests, and mountains demonstrating patterns of right behaviour, with careful observation, humans might take direction from these laws “written on the earth”.⁵⁸ Learning by observation can be called *akinoomage*;⁵⁹ a method of analogizing from land that I am still learning about.

In all three works, one thing remained constant: for Indigenous peoples, relationships with land created meaning. It was thus apparent that I needed to put land at the first of my analysis as it would create meaning: understanding Indigenous relationships with land would be my way in to other understandings. To effect this realization, earlier drafts of this chapter contained a bare assertion that I would put land at the forefront of the analysis, followed by paragraphs describing select aspects of this relationship – most particularly, land’s importance to legal/political survival and to identity formation. From this reflection, these ideas were reduced to categories by which I organized the resolutions, and then I was off, looking for and writing about legal principles.

Pretty late in the day, it all fell apart. The whole of my work rested on the assertion *that* land made meaning. *How* the meaning making happened, and more particularly, how it would happen in a study of law - I had no idea. I had no ability to justify the categories chosen, or explain what work they did in furthering analysis or confirming results.⁶⁰ Here is what I understand now.

⁵⁴ Basso, *supra* note 2 at 63.

⁵⁵ *Ibid.* at 67.

⁵⁶ Cruikshank, *supra* note 35 at 245. Of interest on this point, Cruikshank refers to Bruno Latour’s work *We Have Never Been Modern*, which argues that while Western thought has attempted to convince itself that modernity distinguishes nature from culture, it has been unsuccessful.

⁵⁷ *Ibid.* at 11.

⁵⁸ Borrows, *Canada’s Indigenous Constitution*, *supra* note 23 at 29.

⁵⁹ John Borrows, Craddock lecture, Bloor Street United Church, January 12, 2014, online at: <<http://www.bloorstreetunited.org/sermons/14-01-12%20Craddock%20Lecture%20John%20Borrows%202014.pdf>>.

⁶⁰ See Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11:1 Indigenous LJ 1 for a discussion of other potential Indigenous law methodologies.

Law arises from particular worldviews.⁶¹ The word “worldview” describes how one sees, and thus what one believes about the world: its truths and ideals. The beliefs that make up one’s worldview are so comprehensive and foundational, the concept, for me, was disguised as reality.

A worldview contains not only beliefs but also values. For instance, the vast majority of Canadians believe in the ideology of liberalism, a worldview/philosophy that has common facets, or beliefs, ideas to be prized and valued. The purpose of Canadian law is thus to make rules that protect the beliefs and values of liberalism: individual freedoms and equality before the law.⁶² Another way of stating this: from a worldview comes ideas to be valued. In order to protect those specific values, legal principles, are formed.⁶³

It seems trite to say Indigenous legal systems function in the same way. Law must obviously arise from Indigenous worldviews, and its purpose and function is to protect the central values of that worldview. Therefore, if one is looking for law, identifying those values is an analytical starting point: “[i]n order to develop wider recognition and richer application of these laws, it is important to understand the central values in Indigenous legal traditions.”⁶⁴ Having these values solidly in my mind will aid me both in the moment of recognition or derivation of legal principles from the resolutions, and after, act as a litmus test of confirmation.

I don’t pretend to understand the fullness of any of the worldviews in play across NAN, but I’ve spent time listening, reading, and reflecting, and more importantly laughing, drinking coffee and talking. I

⁶¹ See for example Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847; Aimee Craft, *Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders June 20-23, 2013 at Roseau River, Manitoba*, (Spring 2014); Patricia Monture-Angus, “Now That the Door is Open: First Nations and the Law School Experience”, (1990) 15 Queens LJ 179; Mary Ellen Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-1990) 6 C.H.R.Y.B. 3.

⁶² Rachel Ariss with John Cutfeet, *Keeping the Land, Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Nova Scotia: Fernwood Publishing, 2012) at 41. Rachel Ariss explains this clearly and so helpfully:

Canadian law is based largely on a Euro-Canadian liberal paradigm; the two most important values of the Canadian legal system are individual autonomy and equality. Autonomy, from a liberal perspective, means that each person has a capacity to reason and make choices, and must be equally free from outside interference in order to pursue whatever he or she sees as the good life. These values lead to a specific role for law. Canadian law does not set out what “the good life” should be; rather, it sets rules that are meant to allow each person to freely pursue their own “good life,” as long as they do not harm another. Equality is found in the rules. The role of law is to make rules that protect individual freedom and shape a society within which freedom to pursue the good life can be exercised by reasoning individuals.

See also Brenda Gunn, “Protecting Indigenous Peoples’ Lands: Making Room for the Application of Indigenous Peoples’ Laws within the Canadian Legal System” (2007) 6:1 Indigenous LJ 31 at 42-43; Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2 Indigenous LJ 67 at 81; and Mary Ellen Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-1990) 6 C.H.R.Y.B. 3.

⁶³ See also Leroy Little Bear, “Jagged Worldviews Colliding” in Marie Battiste (ed.) *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77 at 79: “Aboriginal values flow from an Aboriginal worldview or “philosophy.” ... Aboriginal traditions, laws, and customs are the practical application of the philosophy and values of the group.”

⁶⁴ Rachel Ariss with John Cutfeet, *Keeping the Land, Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Nova Scotia: Fernwood Publishing, 2012) at 41. The method of beginning from values, and using these values to derive legal principles is also used by Robert Clifford, *W̱SÁNEĆ Law and the Fuel Spill at Goldstream* (LL.M Thesis, University of Victoria, Faculty of Law, 2014) [unpublished] at 34, who draws on the work of Raymond Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Government* (Minneapolis: University of Minnesota Press, 2009).

have tried to take in what a good life looks like from the standpoint of those in NAN. I believe the basic condition for a good life, for the peoples in NAN and other Indigenous peoples, is that it must move in the same rhythms as the rest of creation.⁶⁵

There may be a number of values underlying this view of a good life, I'm not sure. I have identified two though, which require some explanation: interdependence and creation.

Interdependence is easily and often reduced to inescapable connection, but it is an assertion of inevitable dependence. Though the concept 'dependence' carries a lot, as it is often invoked around addictions or other instances of destructive control, this is not about unhealthy relationships, but rather mutual responsibility, as our actions always affect our relations.

Consider the reintroduction of the grey wolf to Yellowstone National Park in 1995. Ecologists outlined the effect, a 'trophic cascade' as follows. The wolves hunted deer, reducing the deer's population some but also changing the deer's behaviour such that they avoided now dangerous places. Those places regenerated vegetation which had been grazed away, and when the tree canopy returned, the number of birds increased, as did the beavers. The beavers' dams provided new habitats for otters, muskrats, ducks, fish, reptiles and amphibians. In addition to the interspecies effects, which continued to radiate in all directions, the wolves created geological changes. With increased vegetation, there was less erosion, which stabilized the riverbanks, meaning the river bed narrowed and became more fixed in its path.⁶⁶

Which leads one to creation. According to Thomas King this trophic cascade is not evidence that our interactions are governed by nature, but evidence that nature is created by a series of cooperations. Contrasting the Christian and an Indigenous creation story that sees the world form where there was only water before,⁶⁷ King points out that in the Indigenous story, all of the characters work together to make the earth we know, rather than one spirit doing so in an individual act.⁶⁸ Aaron Mills relates his version of the Anishinaabe creation story of rebuilding the world and similarly concludes, "the genesis moment is dependent on the working relationships between beings for its possibility."⁶⁹

The Indigenous view that the elements of life cooperated (and cooperate) to enact (ongoing) creation is reflected in rich and repeated retellings of stories. In a collection of stories⁷⁰ told in northern Ontario, one legend is about the length of winter. Taking place shortly after the world reforms

⁶⁵ *Ibid.* at 42. In important reiteration of this point: "Indigenous legal scholars explain that the basic purpose of law is to maintain good relationships within and between communities, with all beings and with the land."

⁶⁶ The Guardian, "How Wolves Changed Rivers – video", (March 3, 2014) online at: <<http://www.theguardian.com/science/grrlscientist/2014/mar/03/how-wolves-change-rivers>>.

⁶⁷ Thomas King, *The Truth About Stories: A Native Narrative* (Canada: Dead Dog Café Productions Inc. and Canadian Broadcasting Corporation, 2003) at 10-20.

⁶⁸ *Ibid.* at 24.

⁶⁹ Aaron Mills, "Opichi: A Transformation Story, an Invitation to Anishinaabe (Ojibwe) Legal Order" For the Defence, Criminal Lawyers' Association Newsletter Vol. 34, No. 3 at 44. This analysis is also in Leanne Simpson, *Dancing on Our Turtle's Back*, *supra* note 8 at 68-70.

⁷⁰ Carl Ray and James R. Stevens, *Sacred Legends* (Ontario: Penumbra Press, 1995) rev. ed. This collection of stories was first published as *Sacred Legends of the Sandy Lake Cree* (Toronto: McClelland and Stewart, 1971). It is composed of stories shared by elders in Sandy Lake, Caribou Lake, North Spirit Lake, and Keewaywin.

following a flood, Wee-sa-kay-jac⁷¹ holds meeting with all of the animals to decide how long the snow should fall in the forest. A moose, and Amik (beaver) proffer ideas on winter's ideal length but their suggestions are rejected as they would create a season so long that it would be hard for some animals to survive it. Then Oma-ka-ki (frog) put forward the thought that the moons of winter should match the number of his toes. While at first the other animals reject this, eventually they come around to the reasonableness of Oma-ka-ki's suggestion, and winter is decided to last five months.⁷²

Winter was *decided* to last five months. After reading this, I got pretty romantic about a story to explain the length of winter as a cooperative exercise of choices made on earth. I was taken with the belief that we together have the power to decide the seasons. Then I remembered climate change.

Perhaps it goes without saying that interdependence does not just create the world around us but also creates us, our inner selves.⁷³ This would mean that I am, like the world around me, constituted through relationships. For some Indigenous peoples, these are not just the relationships between people, but also, "[t]he water, wind, sun and stars are part of this federation; the fish, birds, plants, and animals also share the same union."⁷⁴ Some would add those who are spoken of in songs, stories, teachings, and other truths. Finally, some would remember relations traversing time, linking what is currently around us with what has come before and what is yet to arrive.

In sum, interdependence is thus the creative force that is inevitable mutual responsibility. Creation is both the action and the result of living in relationships.

Creation and interdependence are explained further as they work through chapters three and four. These are the central values that organize this work, that aided me in the identification of legal principles, and that carried this work through to the end. More concretely, with the two values of creation and interdependence in mind, I read the selected group of resolutions and separated them two piles, first, those that created NAN, and second, those that negotiated relationships within NAN and between NAN and settler society. Once I had my two piles, I reviewed the resolutions again, creating subcategories, searching for patterns, repeated words or ideas, all aimed at deriving legal principles which further and protect these values.

As a map of the whole work, in chapter two, I provide context to aid later analysis: an overview of NAN territory, and some of the geography and history which led to the creation and current conditions in NAN. In chapter three, I review resolutions regarding the actual formation of NAN, those passed with regard to NAN's constitution, land/band/citizen recognition, Treaty interpretation (and often violation), and the Canadian constitution (specifically how outside law would affect internal governance). In chapter four, I review resolutions that outline the negotiation of relationships within NAN and between NAN and the federal or provincial government, a discussion which explores resource distribution, social welfare, public goods, and other basic services. In each of chapters three and four, two legal principles emerge. Finally, in chapter five, I situate this study in time, and in the legal profession.

⁷¹ Wee-sa-kay-jac is the third born to O-ma-ma-ma, the earth mother of the Crees. He is a 'supernatural Indian', with powers to change form. He creates the rest of the people. In addition to being powerful he is mischievous. He is described as representing all of the polarities in the world, creative, destructive, good, evil, etc. (*Ibid.* at 11 and 20).

⁷² *Ibid.* at 28.

⁷³ Mills, *supra* note 69 at 44.

⁷⁴ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 138.

With apologies to those who like a surprise ending, here is what I found. Each legal principle worked variations on a theme: law in NAN is a commonly held responsibility to act in furtherance of a shared aim, the protection of life. Law operates through a cooperative exercise of responsibility: all of the elements of creation hold law-making power, and are to use it to protect the gift of creation – the source of life. In NAN, law is made for life. Law is about life.

I.VI. INVITATIONS AND RESPONSIBILITIES

I have played with a few joking titles to this section. All of them were weak attempts to be light-hearted about deep worries.

You will find me very present in this work. I'm here because I have been influenced by the assumed subjectivity of feminists and other qualitative researchers,⁷⁵ and because I have been influenced by Indigenous research methodologies. Though the latter also concentrate on subjectivity, it is not for the primary purpose of assessing location and privilege, rather, it arises from a relational worldview: knowledge is constituted from, it lives in, and it is shared in relationships.⁷⁶

As is already obvious, I am non-Indigenous. On my father's side my Scottish, Welsh, Irish and English ancestors arrived in Canada around the 1830s, "settled" that which was already well in order, and here we remain. The small farm I grew up on has fed and sheltered five generations of the Daniel family and in that time, little has changed. Located in rural Ontario on the shores of Lake Huron, it had everything – a dark deep bush, a life bursting barn, climbing trees and surprise berry bushes, fields to wander, a cold lake, and a warm woodstove. When I was young it also sustained 75 or so cows, about 250 chickens, two brothers, and loving parents: a farmer and a teacher. I was soaked in the stories that took place in the kitchen, or on the stairway, or in the field, connected to my relatives by shared home. In this way, it was isolated but not lonely, and I was so firmly rooted that even thinking of it now makes me still.

On my mother's side, there was a different sort of immigration. My grandmother was born in the United States, her parents coming from Syria. My grandfather was born in Syria, eventually residing in the United States by illegally crossing a river, an act that would see him incarcerated over 30 years later. Gidu and Sittu raised their five children in Detroit because it had a large Arab community and jobs that did not require much in the way of English. Mom remained in the States and within a tight-knit community until she left to move to the farm and marry dad. None of my mother's siblings married out of the community. But, while we were geographically distanced from the American-Syrian community, we were connected as an extended family.

I wonder if it is common when you are young to feel that two cultures in one body work against each other like inverted sound waves, each cancelling the other out. I was teased about not being a real Syrian like the rest of my cousins, who seemed to know more of the language, more of the food, the dancing, the community, to be more sure-cultured. But even while I was diluted by whiteness, my

⁷⁵ Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009) at 32-34.

⁷⁶ *Ibid.* at 34. Kovach quotes Indigenous academic Gregory Cajete on this point, as he: "affirms the relational perspective of Indigenous knowledges: they are, he says, about 'honoring the primacy of direct experience, interconnectedness, relationship, holism, quality, and value'" [citations omitted].

Sittu came every summer to stay on the farm, and made it a mission to teach. I'm not sure I left her alone either, waking to walk straight to her bedroom, and she would teach me Arabic, knitting, cultural values, and really, ethnocentricity. As we remember her, we often joke about her intense pride which claimed Syria as the origin of all things, even 'civilization' itself. And she claimed me, as has my mother, as a Syrian woman, simply living out of place. I remember her remarking at a highland dance competition of my youth, "Do they know you are Arab?"

While I've long been caught in the cross-cultural differences within my family, I was unprepared for at the depth of the difference when trying to learn from Bebahmoytung.

The law school experiences that began this chapter occurred 10 years ago.⁷⁷ In the intervening time I continued relationships and made new ones, often, though not entirely while travelling in NAN territory. These conversations, shared stories, mishaps, cooking lessons, bingo nights, assemblies and ceremonies, have all been invitations to be in relationship. Syrians, famous for their hospitality, never refuse an invitation. When I look back now over the past decade, some of my dearest friends are Indigenous, most of my clients are Indigenous, and my partner in life and child are Indigenous. I have been given much within these relationships, I try always to share my own gifts, and I write of these connections because they drive and ground my work.

Despite all of this, the question remains as to the extent I can take up any other standpoint than the Western one. I don't want to be a non-Indigenous academic studying Indigenous peoples on Western terms, but I am well aware of the limits on my view. I can take on narrow questions; I cannot give the rich answers that rest within the worldview and the language. Further, I have been educated by a colonial system that has set Western rules in place so thoroughly that I often speak them unconsciously. To me, they are almost invisible.

I try because I have been invited to do so, both implicitly and with those very words. Others believe that this bridging is possible, and I trust them. One of these invitations came from my supervisor, who has long been working towards improving the accessibility of Indigenous legal traditions. In echoing his affirmation that it is critical to make Indigenous legal traditions accessible, I also heed his and others' cautions about assumptions and appropriation.⁷⁸

To be clear, an explicit invitation to do this specific work did not come from NAN, rather, I am responding to their Declaration asking for understanding and their invitation to change. When I approached the leadership, and asked for the resolutions for the purposes of this study, they considered and then granted the request. After this our engagements were limited to updates on my progress, that is, until completion. Once I was ready to submit my thesis for graduation, as per an

⁷⁷ Bebahmoytung is Dennis Morrison from Nigigoonsiminikaaning First Nation in Treaty #3 territory. I met him in Winnipeg in 2006, while attending law school at Robson Hall, University of Manitoba. The experiences described at the opening of this chapter took place in 2007 and 2008 and are described with his permission. His teachings (along with those of his brother Richard Morrison) during those law school years, and subsequently the influences of Darlene Morrison, Sam Achneepineskum and Jerry Sawanas, have echoed forward through my life and are present in this thesis. The particular (and profound) intellectual contributions each has made make it difficult to fulfill the expected ethical responsibility to attribute and credit knowledge to the knowledge keeper as I have benefited from long lasting relationships which have challenged, revealed and changed my ontological commitments.

⁷⁸ Borrows, *Canada's Indigenous Constitution*, *supra* note 23 at 142-149.

agreement with NAN, a copy was sent to Luke Hunter, Research Director of Land Rights and Treaty Research who reviewed and approved my work.⁷⁹

With regard to the ethical obligation of reciprocity, I can say only as follows.⁸⁰ As stated, I have provided informal updates, written updates, and gave one presentation at a NAN meeting regarding the progress of my research. I will be presenting the results of my research to the first meeting of the Chiefs-in-Assembly, following convocation from the University of Victoria. Luke has indicated following his review that my work can be of use to his work and to the communities, and it will be provided as is, or revised for use of the same. In short, there is interest in follow up, but no guarantees of what comes next.

I am anxious to ensure I am not the only one who benefits, that this not be extractive research. But in addition to this, I am anxious about shifting the burden of understanding. Margaret Kovach writes “[r]esearch is about collective responsibility.”⁸¹ This represents some of the educative work that, until now, NAN has shouldered alone. In the end, I’m not sure NAN tangibly benefits. Hopefully though, I stop failing them. It is time I take up my responsibilities.

⁷⁹ Luke Hunter is an incredibly kind and busy man, and I owe a huge debt of gratitude towards him for his review of this thesis. Following the completion of a degree from Confederation College and from Lakehead university, he took a position at NAN and has been the Research Director of the Land Rights and Treaty Research Unit since April 1992. Following a conversation with Luke, I made all suggested changes. These revisions were limited to the correction or addition of historical facts contained in the second chapter.

⁸⁰ In *Decolonizing Methodologies, Research is Ceremony, and Indigenous Methodologies*, Linda Tuhiwai Smith writes: It galls us that Western researchers and intellectuals can assume to know all that it is possible to know of us, on the basis of their brief encounters with some of us. It appals us that the West can desire, extract and claim ownership of our ways of knowing, our imagery, the things we create and produce, and then simultaneously reject the people who created and developed those ideas and seek to deny them further opportunities to be creators of their own culture and own nations.

Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous People*, 2d ed. (London and New York: Zed Books, 2012) at 1. While I can try to avoid what Tuhiwai Smith describes, I will still benefit from this research, and I am unsure that NAN will similarly benefit. In an attempt to provide some tangible service to NAN, I did organize the resolutions into a searchable database; something that they indicated would be useful to their ongoing work.

⁸¹ Kovach, *supra* note 75 at 36. See also Shawn Wilson, “What is an Indigenous Methodology?” (2001) 25:2 Canadian Journal of Native Education 175 on the role of relationship in research.

CHAPTER TWO

II.I. IMPRESSIONS OF NISHNAWBE ASKI NATION

*WHEREAS the Great Spirit gave the Nishnawbe-Aski Nation the land of Northern Ontario from which to survive.*¹

*And so we shall begin... first of all, I want to say, the stories about this subject only covers the area of the Omushkegowuk land and the Omushkegowuk themselves. We are not talking about other tribes. Not even Oji-Cree people. They have their own system. And so do other people west from the Hudson and James Bay and also the Native people that are to the east of James Bay and Hudson Bay.*²

Relating NAN territory puts me on a plane. Sometimes on a ‘sched’ but more often a chartered flight. Either way, the plane is a bit loud, a bit cold and seems to be too small. My headphones are usually on; talking is hard over the engine noise. In the beginning, the song on repeat was “Hide and Seek” by Imogen Heap. Playing it again for nostalgia’s sake, I have to smile as the lyrics begin: “Where are we? What the hell is going on?”

There are brief conversations but I often look out of the window, unintentionally enacting an ethnographer’s much-loved metaphor. NAN territory is rich in detail and I do not know it well. What follows are impressions formed through a small window from a great distance.

The land and water make patterns of white ice and black spruce, or intense blues and greens, depending on the season. It’s beautiful. The colours appear in equal measure below me; I dwell on discerning which serves to break up the other.³ Eventually, I think more about the water, because the pattern and shape of the lakes makes you remember that glaciers receded only moments ago; because travel and then trade and then treaties followed the rivers; because almost every community is named referencing the water; and because if this too-small plane runs into trouble, those long frozen lakes would make for a decent landing strip.

I can’t know the names of the thousands of lakes, but the five large rivers which dominate the landscape are the Severn, Winisk, Attawapiskat, Albany, and Moose/Abitibi.⁴ All drain northward and eastward into Hudson and James Bay, travelling in the same direction as the last glacial retreat.⁵ All have supported the sites of settlement for thousands of years.

NAN territory is actually made up of several geographic and cultural territories. There is the hard rock Precambrian (or Canadian) Shield in the center / west, the lower Hudson Bay shoreline to the north and the bog like James Bay lowlands in the east. In parts, the land surface is the shield, in places

¹ Resolution 80/31, “Treaty #9, All Chiefs’ Meeting Resolution 31”, passed July 28, 1980.

² Louis Bird, *Telling our Stories, Omushkego Legends and Histories from Hudson Bay* (Ontario: Broadview Press, 2005) at 91.

³ More than half of the area north of the 50th parallel is comprised of lakes, rivers and wetlands. Royal Commission on the Northern Environment, *Final Report and Recommendations* (Toronto: Ontario Ministry of the Attorney General, 1985) at 1-6 [RCNE].

⁴ I am sorry that for some I only know their colonial/zhaaganosh names.

⁵ Scott Hamilton, “A World Apart? Ontario’s Canadian Shield” in Marit K. Munson and Susan M. Jamieson, eds., *Before Ontario: The Archaeology of a Province* (Kingston: Queen’s –McGill University Press, 2013) 72 at 85.

covered only by a small amount of sand, gravel or a few plants; trees nonchalantly grow directly out of rock.⁶ This is said to be some of the oldest rock on earth, and all of these surface forms, the shield, the shoreline, and the lowlands region, come from the severe glaciation of the last Ice Age.⁷

Underneath the surface forms and before the last Ice Age, this territory was changed by a dramatic event, described excitingly here:

This uniqueness originates from the aftermath of a colossal violent incursion of shattering force into the North American land mass... the massive incursion produced a great, if not the greatest, visible depression into the earth's crust and therewith developed the tremendous Hudson Bay Basin with its drainage boundaries which is exemplified by the foremost rivers...flowing into the basin from all directions through the enveloping Precambrian Shield.⁸

The Hudson and James Bay do have a unique effect: these shorelines of Arctic waters reach down into NAN territory to create the southernmost subarctic environment while moderating the typical northern climate as compared to dryer parts of the Northwest Territories.⁹ This moderating effect is modest; it is still described by some as 'hostile' territory for anything that grows:

Beyond the shades of black spruce, there is the northern tundra: stunted vegetation—grass and shrubs—which seldom reaches more than a few centimetres, because it stands, shallowly rooted, on moist, heavy soil layered over permafrost. Moreover, the extreme cold kills off new growth easily. Any vegetation in this part of the world has resisted a hostile environment and when it grows in spite of the ever-present cold, it grows slowly.¹⁰

It's strange to me that cold can be regarded as hostile when the conversation in the communities is very different. Cold now has become critical to life. Melting ice, snow dripping water off of the roof is not a welcome sign of spring, but signals the end of the winter roads. And the winter roads determine the price of food and fuel, access to family and other social supports, care from service providers, or whether you get the building supplies for new housing or a longed-for community centre.

Other works, in describing this territory, draw out its abundance. They note a wide variety of plants present in the forest; the large animals, moose, deer, bear and wolves; the smaller animals, beaver, martin, fishers, and lynx; the fowl and the fish. In enumerating these elements, it is noted that the Elders explain that they are all connected, and that the interconnection ensures that the land remains healthy.¹¹

Perhaps I start in a plane or keep to an overview of the area because describing actual communities on the ground without dissolving into banal generalities is difficult. I don't want to reinforce the

⁶ Royal Commission on the Northern Environment, *Issues Papers*, (Toronto: Ontario Ministry of the Attorney General, 1978) Chapter 1 at 6.

⁷ *Ibid.*

⁸ RCNE, *supra* note 3 at 1-1.

⁹ *Ibid.* at 1-2.

¹⁰ *Ibid.* at 1-6.

¹¹ Rachel Ariss with John Cutfeet, *Keeping the Land, Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Nova Scotia: Fernwood Publishing, 2012) at 18.

impression that the land is empty of people – this is the exact opposite of my intentions. This variety is daunting though; while a common worldview is seen across the territory, no two of NAN’s communities are the same.¹² On-reserve population ranges from zero to over two thousand members.¹³ NAN community members belong to (at least) two different treaties, and seven different tribal councils (in addition to there being a number of independent nations and further complicated kinship and political affiliations)¹⁴. Some communities are connected by road; others are only accessible by winter road or air. The people speak Cree, Ojibway, Oji-Cree,¹⁵ Algonquin, English and/or French. Some have a high level of language saturation where most of life’s business is conducted in the language, in addition to instruction at public school.¹⁶ Some are still arguing to have a school.¹⁷

There are some useful generalizations. The people had and still have their own governance and economic systems. Although variations are inevitable in landscape, language and traditions, the Ojibway and Cree claim some common culture, as well as a common understanding of law and related value systems.¹⁸ There is shared history. I catch glimpses of this, but my experience is limited and I don’t always trust my understanding. I can only declare superficial details with the utmost confidence. There are incredible cooks, and I crave their fried fish. There is a Northern store with extremely expensive food but a community member sells dry goods and snacks if you know where to look. There are few jobs. Gravel roads with literal names (Resource Center Road) and forgotten stop signs guide slow moving trucks. Someone will always come to pick you up at the airport, even if they don’t know you, just because they heard a plane land. The laughter is so quick and the teasing so warm that you forget the grief that also lives there. The communities and their struggles are invisible to settlers of the south.

¹² See Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009) at 37: “As Indigenous people, we understand each other because we share a worldview that holds common enduring beliefs about the world. As Indigenous scholar Leroy Little Bear states, ‘there is enough similarity amount North American Indian philosophies to apply concepts generally.’”

¹³ John S. Long, *Treaty No. 9, Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal and Kingston: McGill Queen’s University Press, 2010) at 103-104. It should be noted that roughly two-thirds of NAN’s community members live off-reserve.

¹⁴ Treaty affiliations change as individual nations affiliate or separate from NAN. Regarding political affiliations within NAN, each community has its own story. See, for example the explanation of the grouping of communities related to the Big Trout Lake Band, including Wapekeka, Kingfisher Lake, Bearskin Lake, Kasabonika Lake, Weagamow, Wunnumin and Sachigo in Diane Hiebert and Marj Heinrichs with Kitchenuhmaykoosib Inninuwug, *We Are One With The Land: A History of Kitchenuhmaykoosib Inninuwug* (Canada: Library and Archives Canada, 2007) at 137-151. Another discussion of the social/ political organization in NAN territory near James Bay can be found in Bryan D. Cummins, “*Only God Can Own the Land*”: *The Attawapiskat Cree*, Vol. 1, Canadian Ethnography Series (Toronto: Pearson Prentice Hall, 2004).

¹⁵ The Oji-Cree people are the source of little writing. One new text is a dictionary published in 2015 by Jerry Sawanas. It contains a forward by Patricia Ningewance outlining that Oji-Cree is a colloquial term for the Severn Ojibwe, or the Anihshiniwag, people living in 25 communities in northern Ontario and northeastern Manitoba. Oji-Cree is considered a northern dialect of Ojibwe. Jerry Sawanas, *Pocket OjiCree: A Phrasebook for Nearly All Occasions* (Mazinaate Inc., 2015).

¹⁶ Regarding language retention and use in NAN communities see Long, *supra* note 13 at 311.

¹⁷ I am conscious of my description being inherently comparative to the south, but I don’t know how to avoid this apparently common issue. In an ethnographic study of the Attawapiskat Cree, the researchers write, “[i]t would be hard for southern Canadians to describe what Attawapiskat is like physically without explaining it in terms of what it lacks by their standards.” Bryan D. Cummins, “*Only God Can Own the Land*”: *The Attawapiskat Cree*, Vol. 1, Canadian Ethnography Series (Toronto: Pearson Education Canada Inc., 2004) at 11.

¹⁸ Nishnawbe Aski Nation, “As Long as the Rivers Flow” (2005), online at: <<http://community.matawa.on.ca/wp-content/uploads/2013/12/For-as-Long-as-the-River-Flows-NAN-Treaty-9.pdf>> at 7.

I spend my time moving, from airport, to hotel, to band office, to radio station, to school, to community hall. On reflection, certain moments stop motion. Hearing the story of the rolling head in a chilly radio station, while my translator/friend and I waited to go on the air.¹⁹ Getting a lesson on preparing moose meat for moose salad sandwiches and the warm teasing about my now-increased marriageability while we worked. The Anishinaabe-only speaking grandmother who held my hands as I spoke because she couldn't believe how cold they were.

It is difficult to now convey memories, but even during the travel I couldn't share the fullness of experience. When I returned south, friends and family had trouble picturing where I had been. They invariably turned to the cold, as though the degrees centigrade could be neatly substituted for the degree of latitude. Previous to travelling in NAN, I also had a large blank spot above Thunder Bay. This is common and colonial: “[f]or most Ontarians, the north is an afterthought – a vast and empty wilderness of lakes, muskeg, and forest... in fact, many Ontarians use “north” as a kind of shorthand for isolated and remote country.”²⁰ To put it bluntly, northern Ontario, NAN territory, is known as the ‘forgotten north’.²¹

It is not that we have forgotten about a vast amount of land, though it is vast. NAN territory is equal to 210,000 square miles; this is the top two-thirds of the province.²² We remember that there is land, that there are trees to cut, water for hydro projects, and we certainly remember that there are minerals. We just tend to forget that there are people, whole communities, and as I argue throughout, and as others have argued before me, this erasure is purposeful.

II.II. SOME HISTORY OF THE NISHNAWBE-ASKI

I am starting at the end of the last Ice Age, or perhaps earlier. For a long while, the prevailing notion was that large parts of NAN territory were unoccupied previous to the fur trade. Two archaeological discoveries since have challenged this, first, a group of 7,000-year-old human burials from Wapekeka, and second, bones discovered by a resident of Kitchenuhmaykoosib Inninuwug while on a walk along the beach.²³ After happening across this, Terry Childforever and the community decided to have the bones analyzed. Radiocarbon dating placed a foot bone at 5,000 years old.²⁴

My focus is not history of this type. Nevertheless, the misconception that people were not present previous to the fur trade is reiteration of an old narrative and a story that must be challenged. In *Before*

¹⁹ This story can be found in Thomas Fiddler and James Stevens, *Sacred Legends* (Ontario: Penumbra Press, 1995) at 47-52.

²⁰ Hamilton, *supra* note 5 at 77.

²¹ *Ibid.* It is also sometimes called ‘new Ontario’ reflecting its post-confederation addition to ‘old Ontario’, or southern Ontario.

²² As a handy comparator often used in NAN territory, NAN is roughly the size of France, the fourth biggest country in Europe.

²³ Dianne Hiebert and Marj Heinrichs, with Kitchenuhmaykoosib Inninuwug, *We Are One With The Land: A History of Kitchenuhmaykoosib Inninuwug* (Canada: Library and Archives Canada, 2007) at 19. As noted in Rachel Ariss and John Cutfeets’ work, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law*, a further skeletal discovery was made in 2009, which dated at approximately 4,6000 years old, on the southern shores of Big Trout Lake. See Ariss, *supra* note 11 at 18. See also Paul Driben, *Aroland is our Home: An Incomplete Victory in Applied Anthropology* (New York: AMS Press, 1986) at 23.

²⁴ Dianne Hiebert and Marj Heinrichs, with Kitchenuhmaykoosib Inninuwug, *We Are One With The Land: A History of Kitchenuhmaykoosib Inninuwug* (Canada: Library and Archives Canada, 2007) at 19.

Ontario, an anthology on the archaeology of the province (which mostly focuses on southern Ontario) Scott Hamilton writes:

[t]he difficult logistics and the vast area of northern Ontario have together resulted in a virtual void of cultural heritage information in many parts of the north. Our understanding of the region's past is relatively immature, and in some places we have only limited knowledge of even the basic physical geography...²⁵

...

The relative lack of publication on northern archaeology means that, to a certain extent, knowledge of northern culture history has lagged behind that of other areas. In fact, entire generations of archaeologists have been trained with the stereotype of the north as remote wilderness.²⁶

As a result, there has been a superficial and static portrayal of the pre-contact history of socio-economic or political organization, rather than an appreciation of the 'complexity, dynamism and surprises' occurring in NAN territory.²⁷ As Louis Bird put it:

In time past – nobody knows how long the time went – before the European ever show in the Hudson Bay, James Bay area, there were many events, many stories came upon and gone in that area. Then one day again, amongst the tribes in the Hudson Bay area, the Omushkego people had been visited by many tribes, many different kind; they had been ambushed and killed, and slaughtered, and they sometimes stand against the other tribes who came to attack them. There are many stories and there were other stories that were kinder and a bit more gentle.²⁸

Despite the wealth of stories, most accounts of the area often start with the fur trade, telling and retelling a story about the discovery of empty land.

²⁵ Hamilton, *supra* note 5 at 80.

²⁶ *Ibid.* at 81.

²⁷ *Ibid.* Though there are Indigenous authored and/or driven publications which would add the voices of public intellectuals from the communities, they often arise directly from the communities, are locally published, and require a bit of work to find. Concerning NAN territory, some of these publications include Dianne Hiebert and Marj Heinrichs, with Kitchenuhmaykoosib Inninuwug, *We Are One With The Land: A History of Kitchenuhmaykoosib Inninuwug* (Canada: Library and Archives Canada, 2007); Bryan D. Cummins, "Only God Can Own the Land" The Attawapiskat Cree Canadian Ethnography Series Vol. 1 (Toronto, Pearson Education Canada Inc., 2004); James Wesley, *Stories from the James Bay Coast* (Cobalt: Highway Book Shop, 1993); Sharon Monture and John McSweeney, *Fort Albany Reserve* (Ontario: Fitzhenry and Whiteside Ltd., 1976); Kathy Spence and Simon Frogg, *Nishnawbe Aski Nation, A History of the Cree and Ojibway of Northern Ontario* (Timmins: Ojibway and Cree Cultural Centre, 1986); Flora Beardy and Robert Coutts eds., *Voices from Hudson Bay, Cree Stories from York Factory* (Montreal & Kingston: McGill University Press, 1996); Louis Bird, *Telling our Stories, Omushkego Legends and Histories from Hudson Bay* (Ontario: Broadview Press, 2005); Thomas Fiddler and James Stevens, *Killing the Shamen* (Ontario: Penumbra Press, 1985); Thomas Fiddler and James Stevens, *Legends from the Forest* (Ontario: Penumbra Press, 1985); and Carl Ray and James Stevens, *Sacred Legends* (Ontario, Penumbra Press, 1995). See also Lisa Philips Valentine, *Making it Their Own: Severn Ojibwe Communicative Practices* (Canada: University of Toronto Press, 1994); Edward S. Rogers, *The Round Lake Ojibwa* (Toronto: University of Toronto, Art and Archaeology Division, 1962); and Paul Driben, *Aroland is our Home: An Incomplete Victory in Applied Anthropology* (New York: AMS Press, 1986).

²⁸ Bird, *supra* note 2 at 149.

So, it wasn't empty and it wasn't discovered, but it was subject to a series of political takings which bear outlining here.

In the early 1600s, settlers sailed into James and Hudson Bay. By the 1670s, there were trading posts along the Rupert, Albany, Moose and Severn river systems.²⁹

In 1670, a Royal Charter was granted by King Charles II, and the Hudson's Bay Company (HBC) was formed to oversee a large area, which included NAN territory.³⁰ This was not the beginning of trade, before settlers sailed into the Hudson Bay, the Huron, Nipissing and Odawa had long been trading with the Cree and Ojibway in NAN territory.³¹ But this was a significant moment in corporate / settler-state history.

Until 1869, according to the British and Canadian governments, the HBC had the rights to trade and to claim minerals, and also to govern.³² The King's cousin, Prince Rupert was the company's original head, so the area became known as Rupert's Land and Rupert became the largest corporate landowner in history.³³ Confederation happened in 1867, but the dominion government did not assume control over Rupert's Land until 1870. In return, the HBC received a cash settlement for the largest land purchase in Canadian history.

First Nations people continue to assert that the land never belonged to the HBC, but to them, as it had never been surrendered. The legality of their position was ironically recognized in the legislation that transferred this land from the HBC to Canada, including provisions in the *British North America Act, 1867*,³⁴ and the *Rupert's Land and North-Western Territory Order*, an Imperial Order in Council passed in 1870,³⁵ as well as during the negotiation of the treaties.

Specifically, the *BNA Act* set out that the admission of Rupert's Land into Canada would be on the terms and conditions laid out in addresses from the Houses of Parliament of Canada. The addresses, later adopted by parliament included the following condition:

...upon the transference of the territories in question to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be

²⁹ Kathy Spence and Simon Frogg, *Nishnawbe Aski Nation, A History of the Cree and Ojibway of Northern Ontario* (Timmins: Ojibway and Cree Cultural Centre, 1986) at 7.

³⁰ In 1783, free traders from the Northwest Company, the HBC's major rival, provided a trade alternative. This caused open conflict between the two companies and other rival traders until 1821 when the Northwest Company and the HBC merged. Long, *supra* note 13 at 20. According to Fiddler and Stevens, the decline of the beaver as a fur trade item was a factor in the merger of the Northwest Company and the HBC (see Thomas Fiddler and James Stevens, *Killing the Shamen* (Ontario: Penumbra Press, 1985) at 8).

³¹ Nishnawbe Aski Nation, *supra* note 29 at 10.

³² As Kent McNeil points out – doubts have been raised over the validity of this grant, even as between settlers. For a detailed discussion of the transfer and the disputes arising from Rupert's Land, see Kent McNeil, *Native Claims in Rupert's Land and the Northwest Territory: Canada's Constitutional Obligations* Studies in Aboriginal Rights, No. 5, (Saskatoon: University of Saskatchewan Native Law Centre, 1982) and Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

³³ Hiebert and Heinrichs, *supra* note 23 at 59.

³⁴ *Constitution Act, 1867*, 30 & 31 Victoria, c. 3, section 146.

³⁵ R.S.C. 1970, App. II, No. 9.

considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.³⁶

Other parts of the agreement which effected the transfer included these terms and undertakings:

8. It is understood that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government, in communication with the Imperial Government, and that the company shall be relieved of all responsibility in respect of them.³⁷

...

[t]hat upon the transference of the territories in question to the Canadian government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer.³⁸

...

14. Any claims of Indians to compensation for lands required for purposes of settlement, shall be disposed of by the Canadian government in communication with the Imperial Government; and the company shall be relieved of its responsibility in respect of them.³⁹

Thus, the taking of Rupert's Land was political theft, and has been disputed with regard to the validity of the original *Charter*, the extent of the territory, and on the baseless assertion of British sovereignty. This stolen land was later transferred to Canada on the condition that Indigenous rights, including a surrender of land title, were to be resolved in the area prior to its occupation by settlers. Not surprisingly, this didn't happen.⁴⁰

The 1870s saw the passing of the *Indian Act* in 1876,⁴¹ in addition to a new type of treaty making.⁴² Between 1870 and 1875, Treaties #1-7 were negotiated and signed across most of Western Canada. Treaty #3 and Treaty #5 were signed in 1873 and 1875-76 respectively; these two being the closest, geographically, to NAN territory, with the Ontario part of Treaty #5 forming a part of NAN.

³⁶ *Rupert's Land Order* (Schedule A), R.S.C. 1970, App. II, No. 9 at 8.

³⁷ *Rupert's Land Order* (Schedule B), R.S.C. 1970, App. II, No. 9 at 11.

³⁸ *Ibid.* at 12.

³⁹ *Ibid.* at 6-7.

⁴⁰ This unfulfilled promise has been subject to legal challenge by Indigenous communities within NAN territory. Specifically, the Mushkegowuk Council launched a claim as against Ontario and Canada in 2003. This claim was put on hold in 2011 to consider a more comprehensive legal strategy after new evidence surfaced, the diary of Treaty commissioner Daniel George McMartin, Ontario's negotiator for Treaty #9. See, "New Book Could Strengthen Rupert's Land Case", Wawatay News Online (February 3, 2011) online at: < http://www.wawataynews.ca/archive/all/2011/2/3/new-book-could-strengthen-rupert-s-land-case_21017 >.

⁴¹ The legislation regarding Indigenous peoples began with comprehensively assimilationist provisions. The *Gradual Civilization Act* of 1857 and *Gradual Enfranchisement Act* of 1869 legislated on areas such as labour, property and religion. In 1876, these acts were consolidated into an even more comprehensive policy, the *Indian Act*. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Great Britain: University Press, Cambridge, 1995) at 90-91.

⁴² I have omitted in this review of history two critical events, important to an understanding of Crown-Indigenous relations generally, and specifically to the issue of treaty interpretation: the Royal Proclamation of 1763 and the subsequent Treaty of Niagara (1764). The historical context and legal significance of the same are outlined in John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self Government" in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch. (Vancouver: UBC Press, 1997). As Borrows argues, these events provide the foundational agreement governing the process and terms of subsequent treaty-making.

Treaty #5, immediately to the west of Treaty #9, was negotiated quickly, as Canada had certain designs on the territory, including its mineral potential, a steamship travel route, and some settlement. Proceeding on an urgent timetable, Treaty #5 has given rise to numerous disputes over its terms.⁴³

One of the last of the numbered treaties, Treaty #9 was not signed until 1905-1906, by the Canadian government, and the Cree and Anishinaabe nations. Ontario also heavily participated, by pre-negotiation of the terms with the federal government, and by the appointment of a Treaty commissioner, Daniel George McMartin, to accompany the federal commissioners and protect Ontario's interests. Ontario's involvement arose following the *St. Catherines Milling* case, a dispute between the federal government and Ontario which is largely remembered for its pronouncements on land title. However, the court also found that after the signing of Treaty #3, non-reserve land and natural resources had passed to Ontario, not to Canada.⁴⁴ Ontario continued to challenge Treaty #3 reserve lands within its boundaries until an agreement was reached in 1894, requiring Ontario's 'concurrence' in future treaties.⁴⁵

Treaty #9 at first covered 90,000 square miles, mostly south of the Albany River. In 1912, Ontario's northern boundary was extended from the Albany River to its present limit and another 128,320 square miles north of the Albany River was added through the adhesions to Treaty #9 signed in 1929 and 1930. Several communities signed at this time.

The settler governments knew little about this land. These figures are only retrospectively precise as the territory had not yet been surveyed.⁴⁶ In addition, little to no effort was made to understand the people of the territory:

Treaty Bands were created which bore no relationship to the socio-political realities of the small family bands which gathered at specific locations to enter into the Treaty. For example, the bands which gathered at the Hudson Bay Company's Fort Hope post for the purpose of signing Treaty #9 were those who traditionally gathered at Eabamet Lake in the summer as well as those who gathered at Attawapiskat and Winisk Lakes. Since the signing of the Treaty, all these bands have been known and dealt with as a single unit. However, in reality, these three separate groups of family bands had little, if anything to do with one another and after the signing of the Treaty, the Attawapiskat and Winisk groups returned to their own traditional territories where they still reside today – although technically they are squatters on Crown land, having no reserve of their own while the people of Fort Hope have a far larger reserve than warranted by the number of Eabamet Lake families in 1906 [emphasis in original].⁴⁷

⁴³ Long, *supra* note 13 at 32. Currently, the population breakdown as between Treaty #5 and Treaty #9 is roughly 20% in Treaty #5 and 80% in Treaty #9, although, as Long points out, that division is one created by Ottawa. *Ibid.* at 101.

⁴⁴ *St. Catherines Milling and Lumber Company v. The Queen*, [1888] UKPC 70; 14 App Cas 46.

⁴⁵ Long, *supra* note 13 at 49. As Long argues, relying on historian David Caverley, Ontario's self-interested participation has not been without historical effect. According to Caverley:

Ontario's victory in *St. Catherine's Milling* ... strengthened Ontario's control over natural resources, degraded the status of treaties and the rights therein in relation to provincial power, and stung the federal government to such an extent that it became reluctant to challenge Ontario's game laws.

Ibid. at 31.

⁴⁶ Limited surveys had been done into certain areas. For example, in 1900, ten survey parties were sent north of the railway line "to take stock of the various kinds of natural wealth which existed there." At the time this land was "practically a terra incognita" to provincial geologists. See Long, *supra* note 13 at 41.

⁴⁷ RCNE, *supra* note 3 at 4-9.

Details of the events which led up to the signing of Treaty #9 and full reproductions of the Treaty commissioner's diaries can be found in John Long's comprehensive history *Treaty No. 9, Making the Agreement to Share the Land in Far Northern Ontario in 1905*. At root, his research reveals that while the Indigenous people in NAN territory initiated Treaty making with Canada, (by seeking out the federal government's protection against settler incursions⁴⁸) as Indigenous people have long asserted, the result was that 'at least two' treaties were made:

One was hurriedly fixed on parchment, the result of negotiations between Ontario and Indian Affairs officials. The other was negotiated between the commissioners and the heads of families, who signed their names as *ogamug* and *okimaawuk*, sometimes in agreement and sometimes under duress, to what was orally interpreted and explained. Excepting, of course, those at English River and Cat Lake (and many at Attawapiskat), who were not shown that courtesy.⁴⁹

The discrepancy between the two Treaties is this: the Anishinaabe and Cree agreed to a Treaty that guaranteed they would be free to hunt and fish as they had before, and would not be limited to life on the reserve.⁵⁰ They were assured of this via the oral omission of details in the written Treaty and the positive addition of oral promises made but then only transcribed in one Treaty commissioner's diary, Daniel George McMartin (the other two commissioners being Samuel Stewart, and the senior official of the party, Duncan Campbell Scott). In NAN's words:

[e]ven through 100 years has passed since it was originally signed, there is very little agreement between the parties as to what the Treaty means today. The Cree and Ojibwa people firmly believed that they signed a Treaty that afforded them protection and assistance from a benevolent king as well as a land sharing and resource agreement. The NAN First Nations never understood that they gave up their land or their right to govern themselves.⁵¹

Unlike the people of NAN, this divide in understanding was not later discovered by the commissioners or state governments but known at the time of signing. In Duncan Campbell Scott's article, "The Last of the Indian Treaties," published in *Scribner's* in 1906, he wrote:

They were to make certain promises and we were to make certain promises, but our purpose and our reasons were alike unknowable. What could they grasp of the pronouncement of Indian tenure which had been delivered by the law lords of the Crown, what of the elaborate negotiations between a dominion and a province which had made the treaty possible, what of the sense of traditional policy which brooded over the whole? Nothing.⁵²

⁴⁸ It should be noted that these requests, in some cases, arose decades before there was any definitive response by the state. For further explanation of the motivations behind the requests see Long, *supra* note 13 at 36-47. Also see Charlie Angus, *Children of the Broken Treaty* (Regina: University of Regina Press, 2015) at 7.

⁴⁹ Long, *supra* note 13 at 99. Ontario's role in Treaty #9 has been described as "aggressive", causing a delay to the negotiations, as well as influencing the terms (*ibid.* at 35). For further history of the Treaty #9 negotiations which occurred between Ontario and Canada (without the involvement of the Indigenous peoples), see Long, *ibid.* at 48-67.

⁵⁰ For a succinct breakdown between the written Treaty and the one that was made with the Indigenous signatories, see Long, *ibid.* at 358.

⁵¹ Nishnawbe Aski Nation, *As Long as the River Flows*, *supra* note 18.

⁵² This article is reproduced in Long, *supra* note 13 at 289-298. It can also be found here: Duncan Campbell Scott, "The Last of the Indian Treaties" in Frank Opper ed., *Tales of the Canadian North* (United States: Castle Books, 1984) 499.

The story of Treaty making must necessarily continue from the point of signing. Treaties are ongoing agreements, though very little falls into the category of ‘agreement’.

While some of Ontario’s oldest colonial settlements are found in the north, most settlers typically stayed south.⁵³ The Canadian Pacific Railroad passed through NAN’s southern territory, such that communities in the south experienced the occupation of territory brought on by the railroad, and changes in the economy due to the resulting accessibility of resource extraction. They also experienced the environmental impact of these types of projects. While there was some mining in the more northern areas, the far north was comparatively autonomous.⁵⁴ The deception on the part of the state would be evidenced not by settlor encroachment, but by policies of neo-colonial control, as lands would be continually taken up for Ontario’s economic (resource) development.

This is not to say that the north was not disrupted by colonial-settler aims. Between 1780 and 1930, essential game, such as beaver, caribou, moose, fox and lynx had become scarce, moose disappearing entirely from the northern parts of NAN territory causing times of starvation.⁵⁵ Further social and political havoc was caused by European diseases spread via trade routes, warfare between settler and Indigenous as well as Indigenous and Indigenous communities, and the use of alcohol in trade.⁵⁶ However, in the early 1900s, people living in NAN territory were yet living as they had prior to contact, in small groups of family relations, out on the land. In the summer, larger groups would form for gathering, social and ceremonial purposes. It wasn’t until 1950 to 1960 that community members in the far north made a significant shift from a trapping and hunting economy to a wage earning economy and year-round residence in fixed communities.⁵⁷

I am describing general trends of course, not rules. Some families had already moved, and some families continued out on the land. But the general trend of moving into the community and staying for longer and longer periods was a significant change, with incredible impact on social and political life.⁵⁸ As a result, some ethnographers argue that ‘contact’ did not really occur in until the mid 19th century,⁵⁹ despite the 200 years of trade and the passage of the *Indian Act*, (also known as “a vast administrative dictatorship which governs every detail of Aboriginal life.”⁶⁰)

⁵³ Hamilton, *supra* note 5 at 79.

⁵⁴ Nishnawbe Aski Nation, *As Long as the River Flows*, *supra* note 18. See also, Hamilton, *supra* note 5.

⁵⁵ Nishnawbe Aski Nation, *A History of the Ojibway and Cree*, *supra* note 31 at 24. In John Long’s historical account, the period when big game practically vanished was 1821 – 90. See Long, *supra* note 13 at 21. Further, in *Killing the Shaman*, Fiddler and Stevens write of the same period of starvation:

The forests that Porcupine came into were poor grounds for survival. For Porcupine’s strange birth took place in lands and lakes depleted of creatures. Beaver, caribou, even groundhogs had been extravagantly and wantonly killed in over a century of hunting for the fur trade. Summer hunts and winter hunts left the lands almost empty in the days of Porcupine’s youth.

Thomas Fiddler and James Stevens, *Killing the Shaman* (Ontario: Penumbra Press, 1985) at 4.

⁵⁶ RCNE, *supra* note 3 at 4-6 to 4-7

⁵⁷ Cummins, *supra* note 17 at 5; see also, Hiebert and Heinrichs, *supra* note 23 at 132.

⁵⁸ Ariss, *supra* note 11 at 20.

⁵⁹ See Lisa Philips Valentine, *Making it Their Own: Severn Ojibwe Communicative Practices* (Canada: University of Toronto Press, 1994) at 24 who conducted a discourse analysis / ethnographic study of Lynx Lake, noted for a high rate of language saturation due to the isolation insulating it from heavy outside contact.

⁶⁰ Tully, *supra* note 41 at 90-91. The implementation of Treaty #9 first fell to J. George Ramsden, who was imbued with both the authority to pay annuities, and to enforce the *Indian Act*. His rule thus extended beyond the terms of the Treaty, to the whole of lives. Consider, “[h]is instructions called for him to investigate the “habits of the Indians as regards intemperance and immorality generally” and “report to the Department ... the best means ... to re-press such behaviours” (see Long, *supra* note 13 at 70).

The period between 1930 and 1950 was a period of extreme legislative control in Canada. Just after the First World War, the Allied Tribes of British Columbia decided to take a case for Aboriginal title to the Privy Council.⁶¹ This effort was intercepted by Canada, and Ottawa then enacted new provisions criminalizing the solicitation of funds for the purpose of pursuing land claims. Indigenous actions were further suppressed through a series of legislative restrictions on everything from the right of Indigenous people to assemble, to the right to spend more than two hours a day in a pool hall. Through these measures, the Indian Agent was transformed “from an irritation to a kind of overlord who controlled the minutiae of the people’s daily lives.”⁶² Controlling everything from band-expenditures, to the passing of laws, to schools, Indian Agents displaced traditional leadership suppressing Indigenous agency in nearly every area, including governance.⁶³

The period between 1930 and 1950 was also a significant period in the genocidal history of residential schools. In 1920, attendance at a residential or day school became mandatory under the *Indian Act* and in 1931, the government was funding eighty schools, the peak number of schools.⁶⁴

As stated, for those communities in the more northern parts of NAN territory, a significant period of change happened in the mid-1950s. Several explanations have been put forward for this. Travel patterns changed. The first airplane service in NAN territory opened in 1957, though many communities would not enjoy an airstrip, and more frequent service, for another 20 years.⁶⁵ There were significant economic changes. Following years of destitution and threat of starvation, Canada instituted universal family allowances in 1945 changing economic security. This, along with the centralization of services, forced families into communities in order to utilize any assistance. Education also played a role. In the mid-1950s, day schools were established in some of the NAN communities, and families, refusing to leave their children were resultantly tied to the reserve.⁶⁶ This transition was forced in part by the federal government, as it withheld family allowance cheques if children were not in school, forcing people to stay in the community most of the year instead of continuing out on the land.⁶⁷

These changes did not take effect simultaneously or universally. To use Attawapiskat as one example, a hospital was opened in 1951, Special Constables began working in 1976, the primary school opened that same year, television arrived in 1979 and direct dial phones in 1980.⁶⁸ To use Sandy Lake as another example, the nursing station was built in 1957, a year-round elementary school in 1961, and hydro in the 1980s.⁶⁹

⁶¹ Peter McFarlane, *Brotherhood to Nationhood: George Manuel and the Making of the Modern Indian Movement* (Toronto: Between the Lines, 1993).

⁶² Tully, *supra* note 41 at 90-91.

⁶³ John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 19.

⁶⁴ Truth and Reconciliation Commission of Canada, *They Came for the Children* (Winnipeg: Library and Archives Canada Catalogue, 2012) online at: <www.trc.ca> at 18.

⁶⁵ Cummins, *supra* note 17 at 13.

⁶⁶ Long, *supra* note 13 at 93. See also Lisa Philips Valentine, *Making it Their Own: Severn Ojibwe Communicative Practices* (Canada: University of Toronto Press, 1994) at 26.

⁶⁷ For a description of the religious disruption, including the effect of Christian missionaries (primarily Anglican and Catholic), see Nishnawbe Aski Nation, *supra* note 29 at 17-23. Further, disruptions were caused by employment relocation programs, which recruited people from the northern communities to move south and take up construction, tree planting or railroad jobs.

⁶⁸ *Ibid.*

⁶⁹ Carl Ray and James Stevens, *Sacred Legends* (Ontario, Penumbra Press, 1995) at 2.

Changes in political organizing happened around this time as well. Most studies root the beginning of the current movement for the recognition of Indigenous rights around this time.⁷⁰ In addition, it is often noted that the controls on Indigenous lives enforced through the provisions of the *Indian Act*, began to lessen, beginning with the end of the pass system, the end of government permission for legal assistance, and the granting of the vote to all Indigenous peoples.⁷¹ As Rachel Ariss writes:

These legal changes, as they lifted the most egregious limits on Aboriginal peoples' travel and activities, and granted basic civil participation rights to all Aboriginal people, opened some avenues for community and political organizing that would change the relationship between themselves and the Canadian government.⁷²

In Canada, the National Indian Council met for the first time in 1961.⁷³ This group later disbanded, and reformed as two new organizations: the Métis Council of Canada and the National Indian Brotherhood (NIB). At this time, Indigenous organizers were having conversations akin to the civil rights movement in the United States, with many searching to analogize between the two forms of oppression.⁷⁴

The alignment of these two movements happened in the minds of both Indigenous leadership and the state. In the 1960s and 1970s in the United States, Tribes were given the authority to administer poverty programs and education acts. While Tribal governments now had the control of funds and the administration of certain programs this change did not establish these governments as self-determining bodies, but rather as surrogates for the federal government.⁷⁵ Vine Deloria Jr. and Clifford Lytle note that the trade-off for the benefits of national social welfare legislation was 'enormous', as Indigenous people "had to pose as another American domestic racial minority."⁷⁶

In Canada, the White Paper was released in June 1969. Intended to abolish the *Indian Act* and disavow any legal relationship between Indigenous people and Canada, due to concentrated and critical Indigenous pushback, the White Paper was later abandoned. During this period, the NIB's mandate was expanded from coordinator of provincial and territorial bodies to include the role of "national spokesperson", specifically to put forward a philosophy of struggle towards self-government issues.⁷⁷

By 1970, NAN communities were attached to several governance organizations. In addition to the NIB, which later became the Assembly of First Nations, there was the Union of Ontario Indians, now known as the Anishnawbek Nation. This organization had formed in 1949, but traces its roots back to the Confederacy of Three Fires. Later, in 1975, the First Annual All Ontario Chiefs Conference was held, which created the joint First Nations Association Coordinating Committee, now known as the Chiefs of Ontario.

⁷⁰ Ariss, *supra* note 11 at 10.

⁷¹ *Ibid.* at 10-11

⁷² *Ibid.*

⁷³ McFarlane, *supra* note 61 at 60.

⁷⁴ *Ibid.* at 69.

⁷⁵ Vine Deloria, Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1984) at 196-198.

⁷⁶ *Ibid.* at 216.

⁷⁷ McFarlane, *supra* note 73 at 97-98 and 145.

It was in 1973 that the Chiefs of far northern Ontario broke away from the Union of Ontario Indians. Regarded as a southern or Toronto-based organization, NAN Chiefs felt that it did not understand the problems and issues facing northern First Nations. At a four-day Chiefs' meeting held in North Bay to discuss the issue, Grand Council Treaty #9 was formed on February 24, 1973.⁷⁸ At the time, NAN was composed of 42 communities, with a population of 20,000 people.⁷⁹ It had virtually no money, no office, and no constitution.

NAN was originally set up in Timmins, and its first Grand Chief was Andrew Rickard of Moose Factory. The decision to establish Grand Council Treaty #9 has been said to have been based on the following reasons: to ensure the physical presence and grassroots approach to the problems and aspirations of all the communities in the Treaty #9 area; to respond to the fact that the majority of bands and communities in NAN territory are isolated, and are confronted with different day to day problems and frustrations than in southern Ontario; and to recognize the linguistic, cultural and socio-economic common identity.⁸⁰

II.III. CONCLUSION

Beginning with a description of territory and relating some of the political history is an editorial decision that could easily be misread. Land is not the background of history, the scene of events, but forms them, interactive. In the same vein, I have not related history to give colour to my analysis, but context. This is not what came before, but how I understand what is now happening. As Audra Simpson wrote, in relation to her study of Iroquois peoples:

One field of inquiry – anthropology – has dealt almost exclusively with Indigenous peoples in an ahistorical and depoliticized sense, innocent or dismissive of the strains of colonization and then settler colonialism on their politics, looking instead for pure culture and then pure interlocutors of that culture.⁸¹

...we need to look at the history of this community within a larger matrix of relatedness (to territory, to other Iroquois peoples, to the politics that enframe them) and in making these more robust forms of inquiry, change the ways we study and write about Indigenous politics.⁸²

⁷⁸ Grand Council Treaty #9 eventually renamed itself Nishnawbe Aski Nation in 1983 (see Nishnawbe Aski Nation, "About Us", online at <<http://www.nan.on.ca/article/about-us-3.asp>>), though, Nishnawbe-Aski was in use from the time of the 1977 Declaration, if not before (see A Declaration of Nishnawbe Aski (The People and the Land), by the Ojibway-Cree Nation of Treaty #9 to the People of Canada, Delivered by the Chiefs of Grand Council Treaty #9 to Ontario Premier William Davis and his Cabinet in the City of Toronto, July 6, 1977, online at: <<http://www.nan.on.ca/article/a-declaration-of-nishnawbeaski-431.asp>>.) Within the Resolutions, as early as 1980 there are references to the Nishnawbe-Aski government (see Resolution 80/6, "Nishnawbe Aski Government", passed January 15, 1980), Nishnawbe Aski Nation (see Resolution 80/31, "Treaty #9 All Chiefs' Meeting Resolution 31", passed July 28, 1980) and the Nishnawbe-Aski (see for example Resolution 80/8, "Commission of Inquiry into Air Safety", passed January 15, 1980).

⁷⁹ The number of communities who came together to form NAN is a fact under debate. This figure comes from Nishnawbe Aski Nation, *A History of the Ojibway and Cree*, *supra* note 31 at 40.

⁸⁰ *Ibid.*

⁸¹ Audra Simpson, *Mohawk Interruptus: Political Life Across Border States* (Durham and London: Duke University Press, 2014) at 11.

⁸² *Ibid.* at 12.

Reviewing this history and geography allows for a critical engagement with the resolutions that is grounded in this territory.⁸³ To frame what comes next, the context, in summary, sees NAN as forming out of the north / south divide (or the far north/near north divide) in what is now known as Ontario. These northern lands were desired and then stolen by the state primarily for their resource potential; very much for settler use, though not necessarily for occupation by settler bodies. These colonial aims resulted in an ongoing isolation which creates unique struggles from those experienced by First Nations in the south.

The observations of the Royal Commission on the Northern Environment put it bluntly, though without a colonial consciousness: “The north serves and is dominated by Ontario’s more populated industrial south.”⁸⁴ Again:

It is wrong that the north and its residents are neglected when the exploitation of northern resources feeds the mouths and machines of populations elsewhere. It is morally and logically wrong since northerners are the custodians for all Ontario of a vast storehouse of water, clean air, wood and minerals on which the future of the province depends.⁸⁵

This declaration, though it forgets that this is Treaty territory, condemns the isolation, exploitation and neglect. Instead of the protection, annuities or aid sought from a Treaty relationship, NAN community members have been both actively controlled and neglectfully underserved by the state, while being largely forgotten by the settler population; isolated, yes but also politically erased from southern consciousness.

This is where the resolutions pick up. It’s 1979, NAN has been established, and is beginning formal resolution making as a means of setting its ongoing mandate. A young organization with deep history and shallow resources, it begins by creating itself, constitutional law. With this context for the early priorities – the establishment of basic services in the communities, land and band recognition, ongoing Treaty violations – and for the responses that emerged, the theory that follows in these next two chapters is now hopefully grounded in the people and the land.

⁸³ *Ibid.* at 177-178.

⁸⁴ RCNE, *supra* note 3 at 2-1.

⁸⁵ *Ibid.* at 2-2.

CHAPTER THREE

III.I. THE VALUE OF CREATION

Anishnawbek Elders are always saying that it begins with the creation stories. If you know your creation story you know yourself, because our creation stories tell of that creative process that went into dreaming this universe and then making this universe. Our creation stories are the story of that dream and the creative and artistic energy that went into creating everything we know.¹

Aboriginal people tend to regard their relationships to land in terms of an overarching collective responsibility to cherish and protect the earth as the giver of life.²

In the first chapter, an initial description of creation ended in a short summary: creation is both the action and the result of living in relationships. Insecure about my ability to explain these words, I began work on this chapter by looking for outside help, a story, artwork, poem, or song to relate. Searching for a perfect demonstration, I wanted something illuminating and clear, many layered containing all the complexity of the concept, and compelling in its beauty. An inability to find such an example caused a writing pause of many months.

And then, I was pregnant, and so incredibly tired. Furtively napping on my office floor or with my head down on my desk, I am physically stilled by an obvious act of creation. In the slow space opened by exhaustion, my thoughts slipped quietly from this clear moment of creation to the constant daily acts that make our world.

I have always been and we are all now creators. This is true of every action and inaction, but some choices wreak obvious changes bringing the rule into relief. Take for example, my farming family. Over generations we have created and recreated our home by turning that land from a field into an orchard, or this land from a forest into a field. Or, my long-distance husband. Last summer I bought an old gassy Chevy and we drove inordinate kilometers back and forth from Thunder Bay to Couchiching First Nation creating a climate changing carbon footprint inspired by love.

But creation is more than a series of actions in relationships – it is the Earth itself. The source of all survival, the life-giver, the Earth is alive and sacred, both a holistic entity and the sum of the relationships between all that the Creator made.

To understand the value of creation, one must unite these two thoughts: that for the Nishnawbe Aski the Earth is the source of all life, and that we recreate this gift together every day.³ Valuing creation

¹ Leanne Simpson, “Dancing on Our Turtle’s Back: Building Resurgence from Within” (Indigenous Governance Indigenous Speaker Series delivered at the First Peoples House, University of Victoria, February 13, 2013), online: YouTube < https://www.youtube.com/watch?v=28u7BOx0_9k>. In Simpson’s book, she expands on this idea, writing that creation stories set the theoretical, ontological and epistemological framework from which other information or experiences can be explored. See Leanne Simpson, *Dancing on Our Turtle’s Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence* (Winnipeg, Arbeiter Ring Publishing: 2011) at 33.

² Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Canada, University of Toronto Press: 2001) at 51.

³ This may describe the value of creation for other Indigenous legal orders. See, for example, Taiaiake Alfred, *Was*ase: Indigenous Pathways of Action and Freedom* (Toronto: Broadview, 2005) at 33:

means living in creation and living it, by keeping sacred the responsibilities that arise from each of us being co-creators of the conditions for life.⁴

As law arises from a particular worldview and the basic purpose and function is to protect the central values of that worldview, then one function and purpose of this law will be the protection of creation. As I have an inability to separate the two aspects of creation that I have identified (both the earth and its renewal) I will be treating them as one throughout this chapter.

As a brief outline, this chapter traces the path of NAN's creation, concentrating on the resolutions that formed the basic structure of the body politic. I began with the resolutions that addressed NAN's creation, in the hopes of deriving legal principles that would protect and further the value of creation. The resolutions reviewed in this part were passed regarding NAN's constitution, land/band/citizen recognition, Treaty interpretation (and often violation), and the Canadian constitution (specifically how outside law would affect internal governance).⁵ In these resolutions NAN began to define itself, and I saw patterns, repeated language or subject matter. After close reading of the resolutions, I attempted to move from the specific to the general, and derive legal principles from those patterns that further and protect the value of creation.

Before I begin, a caveat. I would hate to create the impression by discussing NAN's creation with a focus on the resolutions that NAN was simply spoken (or written) into existence. There was an incredible amount of work in addition to the intellectual sort, and this work was undertaken by people with few resources, as against a number of systemic barriers and outwardly hostile state forces. With reference to the Mohawks of Kahnawa:ke, Audra Simpson writes that maintaining their identity as nationals of a pre-contact Indigenous polity was labour "undertaken...to maintain themselves in the face of a force that is imperial, legislative, ideological, and territorial."⁶ It is with this labor that they hold onto a political identity or nationhood outside that of the colonial states', "they interrupt and fundamentally challenge stories that have been told about them and about others like them, as well as the structure of settlement that strangles their political form and tries to take their land and their selves from them."⁷ As was outlined in the previous chapter, NAN's creation arises out of communities experiencing deprivation amplified by isolation, with clear objectives, but without

Living as Onkwehonwe [as an indigenous person] means much more than applying a label to ourselves and saying that we are indigenous to the land. It means looking at the personal and political choices we make every day and applying an indigenous logic to those daily acts of creation. It means knowing and respecting Kanien'kehaka, Innu, and Wet'suwet'en teachings and thinking and behaving in a way that is consistent with the values passed down to us by our ancestors

⁴ See Leroy Little Bear, "Jagged Worldviews Colliding" in Marie Battiste (ed.) *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77 at 78, regarding human responsibility for the maintenance of creation. Also on this point see Marie Battiste and James [Sákéj] Youngblood Henderson who write: "Through language, ritual, prayer, and an intimate knowledge of their ecologies, Indigenous people assist the forces in maintaining these fragile harmonies. Only by respectful activities and sharing can Indigenous peoples sustain creation's forces." Marie Battiste and James [Sákéj] Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon, SK: Purich Publishing, 2000) at 10.

⁵ Relatively few studies of Canadian Indigenous legal traditions exist outside of anthropology. Of these, studies of political bodies engaged in contemporary law-making are even harder to find. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 9.

⁶ Audra Simpson, *Mohawk Interruptus: Political Life Across Border States* (Durham and London: Duke University Press, 2014) at 32 and 40.

⁷ *Ibid.*

material resources. NAN's creation was resistance against erasure, and this resistance continues even as I ignore the current body, and delve into the past.

Actually, I have one more detour to take before I begin with the resolutions, as before there were resolutions, there was a foundational declaration.

III.II. PRIOR LEGAL TRADITIONS

In 1979, NAN passed their first five resolutions and two refer to a constitution: Resolution 79/4 and 79/5. Resolution 79/4 is called "Constitutional Changes". It was passed to amend some other document that I cannot find.

As my clear beginning to NAN's creation story dissolved into a midpoint, and my hyper love of organization flared anxious, I brought this 'problem' to one of my supervisors and was quickly set back on the path. He pointed out that beginning in the middle is inevitable in constitutional analysis.⁸ Consider the following two stories.

In *Sacred Legends*, a community anthology of the Sandy Lake people, a story is told which begins when the world flooded. As the land slowly disappeared under water, Wee-sa-kay-jac (the supernatural Indian), the animals and the birds worked together to build a huge canoe, which they rode until the rain stopped and the waters were calm. Wee-sa-kay-jac knew that in order to remake the world he must start with a piece of the old earth, which was now deep underwater. So, he tied a vine to Kitchi-amik and asked him to dive for clay, but Kitchi-amik drowned in the attempt. Nin-gig suffered the same fate. But Wa-jusk made it to the bottom and retrieved the clay, though he also died. Fortunately, Wee-sa-kay-jac brought all three back to life.⁹

In *Reference re Secession of Quebec*,¹⁰ a decision of the Supreme Court of Canada, a story is told which begins when one province voted on separation. As the country reflected on what separation might mean, Jean Cr tien (the Prime Minister) asked the Supreme Court to determine whether unilateral separation would be permitted under Canadian constitutional law. The Court knew that in order to make a pronouncement, it had reach deep into constitutional history, past the court's previous decisions, past Parliament's constitutional conventions and past all the constitutional texts.¹¹ Pulling up four unstated constitutional principles underlying the text (federalism, democracy,

⁸ John Borrows drew my attention to the fact that NAN's constitutional expressions are undoubtedly informed by older constitutional traditions. See also Aaron Mills, "Opichi: A Transformation Story, an Invitation to Anishinaabe (Ojibwe) Legal Order" For the Defence, Criminal Lawyers' Association Newsletter Vol. 34, No. 3 at 44.

⁹ This version of the creation story is abbreviated from Thomas Fiddler and James Stevens, *Legends from the Forest* (Ontario: Penumbra Press, 1985).

¹⁰ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

¹¹ *Ibid.* at ¶ 49. It is arguable that the judges did not reach nearly far enough, as they only dug as deep as the beginnings of our colonial history:

Because this reference deals with question fundamental to the nature of Canada, it should not be surprising that it is necessary to review the context in which the Canadian union has evolved. To this end, we will briefly describe the legal evolution of the Constitution...

Confederation was an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada.

Ibid. at ¶ 34-35.

constitutionalism and the rule of law, and respect for minority rights) the court brought all four back to life.

Believing there to be an initiating document to NAN constitutional law, foolishly searching for the precise (and written) beginning to this contemporary legal story, I was discriminatorily erasing prior legal traditions in NAN. Beginning with an amendment forced to the fore that there is always something older.

It turned out that both of the first two resolutions that mention constitutionalism reference prior constitutional pronouncements. As stated above, Resolution 79/4 was passed to revise an earlier constitution to include a Board of Directors, composed of the Chiefs of communities within the territorial boundaries of Treaty #9 or the Ontario portion of Treaty #5, as well as any band resident or Chief outside of the territorial boundaries but still signatories of Treaty #9. It also established an Executive Council composed of an elected representative from each Tribal Council, and a Grand Chief, the latter position elected by the Board of Directors.¹²

Resolution 79/5, “Hunting, Fishing, Trapping Rights”,¹³ called out the encroachment by the Ministry of Natural Resources (MNR) on Indigenous rights, and reasserted the contents of the Declaration titled, “A Declaration of the Nishnawbe Aski (The People and the Land).” As this document was repeatedly adopted into the resolutions passed between 1979 and 1983, and because this foundational constitutional document is publicly available, I outline its contents and consider its implications here. Further, giving the Declaration analytical space in this chapter demonstrates a key connection between constitutionalism and creation. I now understand both as ongoing processes without clear beginning: there is always something older.

A Declaration of the Nishnawbe Aski (The People and the Land)

This title is easy to gloss over. When it is rephrased and repeated in the body of the document, my attention is drawn to its meaning: “We, the people and the land, declare our nationhood.”¹⁴ A dual declaration of interconnected independence, in this document, people and land both and together speak their nationhood.

The Declaration was delivered to Ontario Premier William Davis and his cabinet on July 6, 1977. While the Declaration was made as an announcement, delivered by the Chiefs of NAN to the provincial and federal government, it was explicitly stated to be a reminder rather than information at first instance. Independence, sovereignty or nationhood were facts already in existence. The failure on the part of the colonial governments to recognize the same had been a failure over 350 years in the making.

¹² Resolution 79/4, “Constitutional Changes”, passed March 1979. NAN later added two Deputy Grand Chiefs to assist the Grand Chief in representing NAN, with the Executive Council to assign responsibilities to the Deputy Grand Chiefs. See Resolution 81/6, “Treaty #9 All Chiefs’ Resolution #6”, passed November 29, 1981.

¹³ Resolution 79/5, “Hunting, Fishing, Trapping Rights”, passed July 30, 1979.

¹⁴ A Declaration of Nishnawbe Aski (The People and the Land), by the Ojibway-Cree Nation of Treaty #9 to the People of Canada, Delivered by the Chiefs of Grand Council Treaty #9 to Ontario Premier William Davis and his Cabinet in the City of Toronto, July 6, 1977, online at: <<http://www.nan.on.ca/article/a-declaration-of-nishnawbeaski-431.asp>> at 2.

Aimed at establishing understanding, the Declaration can be summarized as follows. NAN declared nationhood for the Anishinaabe (the Anishinaabemowin word for people) and the Aski (the Cree word for land). NAN asked settler governments to participate in NAN's return to self-governance. Then NAN outlined their views on legitimacy (a term discussed throughout this chapter that hopefully becomes clearer as I share NAN's words and my understanding).

The Declaration also called out the failure of the government to live up to the Treaty, and further, named the policies of 'cultural genocide'¹⁵ that had threatened NAN's survival: "you took most of our land, outlawed our religious beliefs and practices, destroyed much of our animal life and forest, restricted our movements, stopped us from using our languages, and tried to convince us that our music, dances, and art were barbaric."¹⁶ NAN declared that once re-established as a self governing nation, NAN would insist on the renegotiation of Treaty #9 to ensure the fulfillment of their sacred duty to protect the land.¹⁷

The Declaration ended by stating that NAN's nationhood was sacred and could not be negotiated, though the mechanics, the means of implementation and the processes of sovereignty, could use settler support.

Several beliefs about legitimacy are outlined in the Declaration and merit a few words more. First, it seems to be derived from a sacred source. As the Creator gave custodial rights to land to the Cree and Ojibway nations, legitimacy (in terms of law-making authority) is thus divinely bestowed in NAN. In addition to its source, the Declaration also provides hints of legitimacy's requirements, when it reveals that law-making power is sharply constrained. The Declaration states that the Creator "made us part of nature" and if the environment is destroyed "we will also be destroyed because we are part of nature."¹⁸ This divine authority is not absolute but rather, authority hard-bounded by nature's limits.¹⁹ Rather than democracy, this concept of legitimacy demands that law-making authority respects creation.

In another section of the Declaration, NAN states that a historic connection between people and land gives rise to legitimacy:

You are the only people who have ever questioned our sovereignty. Our rights and entitlements to this land were inherited from our forefathers. Unlike you we have no memory of an existence in other lands across the sea. We have prior rights to the custody of this land, which precede and supercede all of your claims.²⁰

While outlining its own legitimate authority, NAN openly challenges the state's sovereign assertions. NAN allows the current fact of Canada's nationhood, while questioning its historical basis. Pointing to the settler's historical connection to lands across the seas, the state's violations of the Treaty,²¹ and

¹⁵ *Ibid.* at 3.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 2-3.

¹⁸ *Ibid.* at 1.

¹⁹ As the Declaration states, "This custody must remain with us. It is our sacred duty to pass it on to our unborn children" (*ibid.* at 2). Further, "In your rush for materialistic gain, you are threatening nature's very limits. Now it is our sacred duty to slow you down before she is destroyed" (*ibid.* at 3).

²⁰ *Ibid.* at 1. Later, NAN puts this more directly: "We are not a new nation like you" (*ibid.* at 4).

²¹ NAN outlines the history of Treaty violations in particularly clear language:

“illegal seizures of our land”,²² NAN did not conclude in the Declaration whether there is any legitimacy remaining within Canadian sovereign assertions, but did insist that Canadian laws which infringe NAN’s sovereignty must now be re-examined.²³

As written above, NAN would recommit to the Declaration in several subsequent resolutions and with good reason.²⁴ The Declaration is resonant. It was both inward looking, an assertion of how NAN understood themselves, and confrontational. It was both historical, revising the narratives of the settler state that had denied this political order, and contemporary, as it regarded a nationhood still in existence. Indicative of its constitutional status, it established a framework for future action to be undertaken by NAN, and future interactions between NAN and the settler state.

With the basic elements of the Declaration set out, this chapter can now build from the prior constitutional history of NAN.²⁵ Not before one pressing criticism is addressed though.

Some academics have raised serious concerns regarding Indigenous demands for state recognition, especially those demands arising in this particular time period. In Glen Coulthard’s “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada”, he puts forward the argument that recognition based models of liberal pluralism (where Indigenous claims of self-

Your Government has refused to live up to the terms, and the spirit of the Treaty. This Treaty reads in part, that “His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the land.”

We agreed to share. We lived up to the terms of our agreement. We kept the peace, paid honour to the European Sovereign, allowed the white man to settle and live according to his laws, and permitted his religions and cultures to be introduced to our people.

You agreed to share. You said our rights would never be lost. You did not live up to the agreement. You took most of our land, outlawed our religious beliefs and practices, destroyed much of our animal life and forest, restricted our movements, stopped us from using our languages, and tried to convince us that our music, dances, and art were barbaric.

Ibid. at 2.

²² *Ibid.*

²³ *Ibid.* at 3. NAN specifically states that they will not recognize the fish and game laws that have eroded their way of life (*ibid.* at 5).

²⁴ See Resolution 80/6, “Nishnawbe-Aski Government”, passed January 15, 1980: “Whereas it is the unanimous decision of this General Assembly of Treaty #9 Chiefs to implement the principles of the Nishnawbe-Aski Declaration”; Resolution 80/8, “Treaty #9 All Chiefs’ Meeting Resolution 8”, passed July 23, 1980: “Whereas the Canadian legislation known as the Indian Act does not fully enhance our self-determination as expressed by our people in the document “The Declaration of the Nishnawbe-Aski”; Resolution 80/28, “Treaty #9 All Chiefs’ Meeting Resolution 28”, passed July 25, 1980: “Whereas the Ojibway-Cree of Northern Ontario have declared their sovereignty as a nation in the Declaration of Nishnawbe-Aski, submitted to the Ontario Government in July 1977”; Resolution 82/2, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-2”, passed March 11, 1982: “Be it further resolved that a new forum consisting of the Governments of Canada, Ontario and the Nishnawbe-Aski Nation be established to conduct bilateral and/or tripartite discussions on the Principles of the Nishnawbe-Aski Declaration”; Resolution 82/9, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-9”, passed March 11, 1982; and Resolution 83/16, “Nishnawbe-Aski Commission”, passed March 3, 1983, “Whereas, we the Nishnawbe-Aski Chiefs and Elders reconfirm our commitment to the Nishnawbe-Aski Declaration”.

²⁵ Other sources of prior constitutional history include the Rupert’s Land Promise, Treaty #9 and #5, stories, and oral histories.

determination will be somehow reconciled with Crown sovereignty in a new relationship) will simply reproduce existing colonial powers rather than resist them.²⁶

This argument is compelling. It is quite easy to read Coulthard's criticism and then fixate on certain alarming turns of phrase that beg the implications underlying NAN's Declaration. NAN began with a reiterated demand for understanding. NAN, in fact, pointed to a lack of 'recognition' to describe the state's ongoing political failure, and specifically sought a new relationship with Ontario and with Canada.²⁷ Most distressingly, NAN asked the Canadian state to participate in NAN's return to self-government, the 'implementation', and 'mechanics and processes' of sovereignty: "We are also here because we want your government to play a role, in our return to our form of self-government. We ask that you become involved in our right to develop our individual communities."²⁸

In addition to Coulthard's work, Audra Simpson puts forward a relevant criticism of analogous tactics. Pointing out the paradoxical position taken by the people of Kahnawa:ke, this passage could be directed at NAN with very little modification:

... we can see that this technique of governance is articulating a fear of disappearance through the very means that would disappear this nation: Canadian authorized governance. This is expressed in the values of individual rights over "collective rights" – the ahistorical and presumed even handedness or liberalism to determine and render justice, in part, through shared values of freedom, justice, equality, individualism, even distribution, and free trade. Yet these are the same values that Kahnawa:ke find intrusive and forcible.²⁹

And more questions arise. Why seek the re-negotiation of a Treaty which had been repeatedly violated? Why ask for state-involvement in self-determination or legislated support of local government? How does one begin by stating that you refuse to recognize Canada's fish and game laws, and end by vowing to "fill your courtrooms in our fight for Aboriginal rights"?³⁰

Like Simpson, I believe that any explanation requires this analysis of nationhood to remain located within a certain historical space. As she writes, "Indigenous politics require a deep historical accounting to contextualize the processes that appear anomalous, illiberal or illogical, and get conflated with pathology, economic desperation, and depredation... in the public eye."³¹ Interpretation of this sovereign assertion, that of a "strangled political order"³² takes place against the background of NAN as a break-away, four-year-old political organization, with little to no funding, administration, or infrastructure. NAN leaders were coming from reserve communities which faced isolation and crushing poverty, attended some of Canada's most notorious residential

²⁶ Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6 Contemporary Political Theory 437. Coulthard argues that recognition of Aboriginal rights has done nothing to change the structure of the colonial relationship, but simply protected limited cultural practices within the framework of legal precedent from Canadian courts.

²⁷ See NAN Declaration, *supra* note 14 at 1: "For over 350 years you have failed to recognize the unique life style of the Nishnawbe-Aski [emphasis added]". And see *ibid.* at 2: "We will regain our independence only through legislation that recognizes and supports our form of local government [emphasis added]."

²⁸ *Ibid.* at 1.

²⁹ Simpson, *supra* note 6 at 14.

³⁰ NAN Declaration, *supra* note 14 at 5.

³¹ Simpson, *supra* note 6 at 177-178.

³² *Ibid.* at 3.

schools, and were in the throes of the 60s scoop, a trauma that continued the devastation of residential school policy. From this position, in that moment, setting the terms and then seeking support on the ‘mechanics and processes’, the capacity building of sovereignty seems to me like sound political strategy.

And the terms were clear. This was not about gentle reform, but rather NAN called Canada into question. NAN was not seeking to negotiate their freedom in the form of state-bestowed rights, but rather was putting the state on notice that certain rights were regarded as inalienable.³³ Most broadly stated, “[o]ur nationhood itself is sacred and cannot be negotiated.”³⁴ NAN specifically declared that the only ruler they recognized was the Creator, and put into question the extent to which they could recognize the subordinate authority of Canadian state. NAN challenged the legitimacy of Canadian law, and then stated that “all laws, rules, regulations, orders-in-council and acts passed or enacted by you, and your federal, provincial and territorial governments” needed to be re-examined as against NAN sovereignty, as the right to make laws had to be returned to the people.³⁵ This position was not left behind, but reiterated in Resolution 82/2, where NAN resolved to stop participating in the current tripartite process existing between Canada, Ontario and Indigenous organizations, and further resolved to create a new forum established on the principles of the Nishnawbe-Aski Declaration.³⁶

This last point is key. The underlying threat of an Indigenous claim for state recognition is its limitations. Rather than politically struggling towards freedom, the colonized society wins only structurally limited recognition: collective rights and identities of Indigenous peoples insofar as they fit within the legal, political and economic framework of the colonial relationship. NAN confronted that limitation, outlining that in the event of a conflict of laws, their law would take supremacy.

III.III. GIFTED RESPONSIBILITY

The Urge towards Inclusivity

I turned to a certain group of resolutions first, as they were striking in number. Approximately 15 resolutions passed between 1979 and 1983 center on the question of band / land recognition.³⁷

³³ NAN Declaration, *supra* note 14. NAN provided an enumerated list of rights, which I will not reproduce here, but is listed at 5-6 of the Declaration.

³⁴ *Ibid.* at 6.

³⁵ *Ibid.* at 2.

³⁶ Resolution 82/2, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-2”, passed March 11, 1982.

³⁷ See Resolution 79/2, “Reallocation of Reserve Lands”, passed March 1979; Resolution 80/2, “Treaty #9 All Chiefs’ Meeting Resolution 2”, passed July 23, 1980; Resolution 80/9, “Treaty #9 All Chiefs’ Meeting Resolution 9”, passed July 23, 1980; Resolution 81/1, “Treaty #9 All Chiefs’ Meeting Resolution 1”, passed March 12, 1981; Resolution 81/2, “Treaty #9 All Chiefs’ Meeting Resolution 2”, passed March 12, 1981; Resolution 81/13, “Treaty #9 All Chiefs’ Meeting Resolution 13”, passed March 12, 1981; Resolution 81/6, “Treaty #9 All Chiefs’ Meeting Resolution #6”, passed August 18, 1981; Resolution 81/14, “Treaty #9 All Chiefs’ Meeting Resolution #14”, passed August 20, 1981; Resolution 81/19, “Treaty #9 All Chiefs’ Meeting Resolution #19”, passed August 21, 1981; Resolution 81/3, “Treaty #9 All Chiefs’ Meeting Resolution #3”, passed November 29, 1981; Resolution 82/10, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-10”, passed March 11, 1982; Resolution 82/15, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-15”, passed March 11, 1982; Resolution 83/3, “Official Recognition of Savant Lake Band”, passed March 2, 1983; and Resolution 83/5, “Slate Falls”, passed March 3, 1983. This represents just over 10% of the total number of resolutions.

The first of this set, Resolution 79/2 was the second resolution passed by NAN. Titled, “Reallocation of Reserve Lands,” Resolution 79/2 regarded the desire of the people of Abitibi #70 Reserve to re-establish a community on their reserve lands. It points out, as a part of a history of neglect, that the people have never received any of the resources that other Bands have as of their own right.³⁸

After seeking funds and homes on the traditional reserve lands for the people of Abitibi #70, NAN set out to resolve similar issues for a number of other communities, including administrative funding and the struggle for control of traditional territory for New Post;³⁹ recognition of Slate Falls, MacDowell Lake, Long Dog Lake for allocations of core, capital and other funds;⁴⁰ recognition of Beaver House as a community;⁴¹ recognition and allocation of reserve lands to the community of Aroland;⁴² and recognition and allocation of reserve lands to the communities of Webequie, Landsdowne House and Summer Beaver (a struggle noted to be ongoing for over 50 years).⁴³

The urge towards inclusivity was obvious in NAN, as the focus of the early resolutions repeated the issue of band / land recognition. Certainly, an important part of constitutional law is its intended reach – which people and what territory are to form together? However, due to the colonial disruptions and dispossessions, which people and what territory became a laborious question for NAN to resolve. Eventually, in 1983, a blanket resolution was passed regarding band status, establishing that NAN was made up of a number of communities though not all were recognized “as real Indian communities” by the Department of Indian Affairs. Resolution 83/11 resolved generally to continue to actively lobby the federal government to acquire *de facto* band status for all unrecognized communities within NAN.⁴⁴

In addition to continuing work on behalf of communities without status, NAN also resolved to support individuals without status. Resolution 82/9 began, “[w]hereas many of our people are non-status Indians; and, whereas many of these people that are classified as non-status Indians by the Governments are our brothers, sisters and relatives.”⁴⁵ Resolving to themselves recognize non-status Indians as part of NAN communities, NAN additionally committed to act to ensure the rights of non-status community members would be protected.⁴⁶

³⁸ Resolution 79/2, “Reallocation of Reserve Lands”, passed March 1979.

³⁹ Resolution 80/2, “Treaty #9 All Chiefs’ Meeting Resolution 2”, passed July 23, 1980; Resolution 81/2, “Treaty #9 All Chiefs’ Meeting Resolution 2”, passed March 12, 1981; and Resolution 82/15, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-15”, passed March 11, 1982.

⁴⁰ Resolution 80/9, “Treaty #9 All Chiefs’ Meeting Resolution 9”, passed July 23, 1980; and Resolution 81/13, “Treaty #9 All Chiefs’ Meeting Resolution 13”, passed on March 12, 1981.

⁴¹ Resolution 81/6, “Treaty #9 All Chiefs’ Meeting Resolution #6”, passed August 18, 1981.

⁴² Resolution 81/14, “Treaty #9 All Chiefs’ Meeting Resolution #14”, passed August 20, 1981; and Resolution 82/10, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-10”, passed March 11, 1982.

⁴³ Resolution 81/19, “Treaty #9 All Chiefs’ Meeting Resolution #19”, passed August 21, 1981.

⁴⁴ Resolution 83/11, “Band Status”, passed August 11, 1983.

⁴⁵ Resolution 82/9, “Recognizing Non-Status Indians”, passed August 25, 1982.

⁴⁶ Two further resolutions supporting the interests of non-status community members were passed in 1983. Resolution 83/4, “Task Force on Non-Status Indians”, passed March 3, 1983, noted that discussions had been held with non-status community members, and a report was presented to the Assembly of Chiefs outlining 8 items of concern. NAN resolved to appoint a task force that would study the issues with greater depth. Resolution 83/15, “Non-Status Indian”, passed March 3, 1983 reaffirmed that non-status Indians were brothers and sisters within the community, and resolved to make this position clear at all First Minister’s conferences. They also resolved to demand that the First Ministers recognize the restoration of rights which non-status Indians had been deprived.

As stated above regarding the Declaration, the resolutions seeking recognition / status from the federal government can be seen as problematic in that they give power away, and to the thief of power. But, even while NAN sought colonially-bestowed and constrained status, they were clear that these communities were recognized by NAN as a part of the political body, and that these individuals were relatives and thus members. This bears repeating. Despite the provisions of the *Indian Act* which “legally “made” and “unmade” Indians”⁴⁷, NAN made independent decisions regarding membership and thus the jurisdiction of the political body, a key component of constitutional legal expression, and an explicit correction of the colonial legal order.

In addition to the urge towards inclusivity – a focus on bringing land, bands and citizenry into NAN, these resolutions also highlight that NAN was formed as one sovereignty while constantly being complicated by another. As Audra Simpson writes in *Mohawk Interruptus*:

...sovereignty may exist within sovereignty. One does not entirely negate the other, but they necessarily stand in terrific tension and pose serious jurisdictional and normative challenges to each other...one challenges the very legitimacy of the other...like Indigenous bodies, Indigenous sovereignties and Indigenous political orders prevail within and apart from settler governance.⁴⁸

There is certainly complexity and fluidity in sovereign positioning as read from within the wording of these resolutions. The resolutions seeking recognition occasionally see NAN resolve to lobby the federal government on behalf of the community, occasionally see NAN recognize the community and resolve to support them in seeking federal recognition, and occasionally see NAN demand or simply direct the federal government to do the recognizing: “be it further resolved that D.I.A.N.D. recognize Aroland as a legitimate community with its own autonomy, and to give it recognition as a member of the Treaty #9 area.”⁴⁹ NAN’s sovereign expression is far from stable as nested within: it moves with the confusion created by an ongoing colonial relationship.⁵⁰

Supporting Participation

In addition to those resolutions passed to bring communities and cousins into NAN, several resolutions were passed to ensure their active participation.

⁴⁷ Simpson, *supra* note 6 at 10.

⁴⁸ *Ibid.* at 10-11.

⁴⁹ Resolution 82/10 “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-10”, passed March 11, 1982.

⁵⁰ I tend to think this a common phenomenon, as backed by sources who note the same movement. In addition to Audra Simpson, *supra*, note 6 see, for example, Heidi Kiiwetinepinesik Stark, “Marked by Fire, Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada” (Spring 2012) *American Indian Quarterly*, Vol. 36, No. 2, 119 at 124:

Anishinaabe nationhood has never been static or fixed. Indeed, no nation can or has survived without undergoing constant change. The Anishinaabe, like the hare, would retain their preexisting political formations and practices yet would also be marked by their engagement with other nations, namely, the United States and Canada. The Anishinaabe have always engaged in the process of transformation, understanding what nationhood has meant for their people while carefully and strategically shifting what it would become, expressing who they were while envisioning what they would be.

A great deal of NAN constitutionalism is formed through deliberation. By this, like Borrows, I refer to law “formed through processes of persuasion, deliberation, council, and discussion”⁵¹; or law formed by community. As he points out, while other sources of law (for example sacred/natural law) inform the conversation, this is law developed between people.⁵²

Borrows points to band councils as most visible example of Indigenous law developed through deliberative processes.⁵³ Deliberation at the band level is certainly in play, as NAN’s 49 Band Council Chiefs discuss and propose resolutions. The Chiefs-in-Assembly then discuss, refine, vote and pass resolutions but not all decisions are made here. The Executive Council may also act, based on the mandate of the Chiefs.

Resolution 82/3, outlines that authority flows upwards, from the Chiefs to the Executive Council: “[w]hereas the Executive Council of the Nishnawbe Aski derives its authority from the Chiefs.” It then sets out those occasions where authority must remain at the level of the Chiefs-in-Assembly: inter-governmental agreements regarding the jurisdiction or rights affecting the entirety of NAN require the consent of the Bands involved.⁵⁴

In other words, where NAN is intending to enter an agreement of wide ranging impact on a critical issue, authority and power is decentralized and diffused from the executive to the larger governing body. Obtaining the consent of every Chief would require, at the least, discussion and persuasion as between those elected officials interested in the issue, albeit not necessarily every community member affected by the outcome.

On the foundational issue of constitutional creation, the power base becomes wider still with every community member envisioned to have a role in the process. In Resolution 80/6, NAN created a Commission on the Nishnawbe-Aski Constitution. Within the resolution, this Commission was given the mandate to determine the wishes of the Nishnawbe-Aski concerning the form of government. The Commission was also directed to develop an education process to ensure that the people could fully participate in constitutional development; hold hearings in every community and reserve; and to develop a draft constitution for consideration by the Elders, Chiefs, and people for consideration and ratification.⁵⁵ In Resolution 80/32, NAN acknowledged that the issue of Treaty violations was one that had come up over and over, and that there was a general agreement in principle that a concrete strategy to deal with this issue must be found. It then resolved that each Chief would take this issue back to their communities for further discussion and advice as to what direction to take and then come back together in special general assembly to agree on action.⁵⁶

⁵¹ Borrows, *Canada’s Indigenous Constitution*, *supra* note 5 at 23-58. Borrows expands beyond the limited and reductive perception of Indigenous legal traditions, as primarily customary, to explore a variety of sources of Indigenous law: sacred, natural, deliberative, positivistic and customary.

⁵² *Ibid.*

⁵³ *Ibid.* at 43. Though the constraint on law-making authority imposed by the *Indian Act* causes some to conclude that band councils are unable to administer Indigenous legal traditions, Borrows does not see things so starkly. The *Indian Act* certainly limits jurisdictional space, and Band Councils are acknowledged to be creations of the federal government, but this is not left as the whole of the matter: “while it is true that band councils may owe some of their life to the federal government, it must also be acknowledged that many continue to be recreated through community participation.”

⁵⁴ Resolution 82/3, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-3”, passed March 11, 1982.

⁵⁵ Resolution 80/6, “Nishnawbe Aski Government”, passed January 15, 1980.

⁵⁶ Resolution 80/32, “Treaty #9 All Chiefs’ Meeting Resolution 32”, passed July 28, 1980.

Emphasis seems to have been placed on certain citizens during the deliberative process. Resolution 83/6 points out that NAN community members look to Elders for advice and guidance. Practical steps are thus taken in order to preserve access to this advice as NAN resolved to make funds available in order to hold an Annual Elder's conference, and to enable an Elder to accompany a Chief to national meetings.⁵⁷ Strengthening the role of Elders beyond that of advisory only, NAN also resolved to appoint a person whose responsibilities were directed at accountability: "who will ensure that Elders' recommendations and requests are followed through to the satisfaction of the Elders."⁵⁸

In sum, the circle of participation appears to grow with a constant factor: the greater the effect of the law, the wider the consultation, discussion and deliberation that is required to legitimize law-making. And the worth of meaningful community participation in this process is evident in the requirement of educational programs directed to "ensure" the ability to contribute. Both informal and formal discussions would inevitably take place, with a variety of community and council meetings both having a place in the constitutional process. In this way, law is formed by the influence of the population, rather than a select few designated legislators.

Taking these two observations together, a repeated emphasis on inclusive and supported participation and the fact that greater impacts require greater inclusivity, I believe there is something to be learned here about authority and further about legitimacy.

Authority clearly moves in an upward direction, from community member, to Chief, to executive. But rather than a 'democratic' transfer of authority to a select few for a set term in office, citizens retain and exercise the same through direct personal involvement in decision making.⁵⁹ NAN does not turn to delegated authority as the means of finding a collective solution to a problem of wide impact. Rather, NAN community members retain that responsibility: the task of forming law, of finding a collective solution is a responsibility commonly held by those who will be impacted by the decision.

This observation is not necessarily unique to NAN territory, as Borrows writes:

...some of the great civilizations in early northern North America were built on a very generous notion of participation in the law-making functions of society. Many Indigenous societies today continue to encourage very broad participation across their citizenry and might be regarded as being radically egalitarian. Some societies are so generous and liberal in extending personal liberties to their members that every being has a legal right and practical opportunity to assist in the development of their laws.⁶⁰

Simultaneously convinced I was on the right track and confused by what I was reading, Borrows reassurance raised questions.

⁵⁷ Resolution 83/6 "Elders", passed August 11, 1983.

⁵⁸ *Ibid.*

⁵⁹ This is not to say NAN communities are free from the positivistic legal pronouncements. In addition, there are power struggles, and political maneuvers, issues of colonial violence and other abuses of authority within this territory. I am not trying to put forward an idyllic system of perfect, healthy participation, but rather, I am trying to describe a legal tradition with different cultural ideas of authority, legitimacy and law.

⁶⁰ Borrows, *Canada's Indigenous Constitution*, *supra* note 5 at 35.

Is this urge towards inclusive supported participation based on radical egalitarian principles, or a generous liberal view of personal liberties? Or does it arise out of entirely different concepts and commitments?

If so, what are those concepts and commitments? Why does authority remain in the citizenry? Does legitimacy arise from the cooperation of community members in creating law (as it seems in this selection of resolutions)? Or does legitimacy in NAN arise from the Creator's gift of creation (as it seemed in the Declaration)?

Even with these questions plaguing a neat conclusion, I can say this. Law-making in NAN is clearly a commonly held responsibility. It seems an obvious observation that I've now drawn out two common roles held amongst every member of NAN: each holds responsibility as a co-creator, and as a law-maker. I wonder if there is a distinction to be made between these roles, co-creator and law-maker? Understanding the overlap in responsibility may help answer many of the questions outlined above.

It turned out, I needed to review further resolutions to fill out that understanding, I'll outline them now, and then return to the definition of two interrelated legal principles after.

III.IV. SACRED NATURAL SUPREMACY

Gifts of Land and Law

Within Borrows' writing, natural and sacred sources of law are discussed in two separate sections. According to Borrows, sacred law includes law given from the Creator, creation stories, and other revered ancient teachings.⁶¹ He writes that given the source, sacred law is regarded with the highest respect. Consequently, it may be considered less flexible or more foundational to the operation of other laws.⁶² Natural law, which also may have a sacred source, is discussed as law that is developed from the operations of physical world around us.⁶³ Reading law from the land, as he puts it, requires intimate knowledge and careful observation.⁶⁴ It would include "conservation law" or environmental regulation, in the sense of governing human interactions with the natural environment, but extends far beyond this. Without a conceptual separation of humans from the rest of nature, natural law also governs over our obligations to one another.

Within the resolutions, the distinction dissolved. Natural or sacred, these concepts are synonyms: I believe that in NAN territory, natural law always has a sacred source.⁶⁵ Take for example, Resolution

⁶¹ *Ibid.* at 24.

⁶² *Ibid.* at 25.

⁶³ Borrows differentiates between Indigenous natural law and Western natural law theories. *Ibid.* at 29.

⁶⁴ *Ibid.* at 35.

⁶⁵ See this collapse occurring in other studies of Anishinaabe law: Aimee Craft, *Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders June 20-23, 2013 at Roseau River, Manitoba*, (Spring 2014) at 12: "Generally, the laws fell into four categories: sacred, natural, customary and deliberative. Sacred law was most referred to and other forms of law were said to flow from sacred law." However, see also, Indigenous theorists maintaining the divide:

There are different types of law in the Indigenous legal tradition, and they are related-natural law or the law of nature, law of the land, law of relationships, spiritual law-ultimately shaping, dictating, and setting the law and

83/5, “Land and Resources” which states, “Whereas, the Creator provided Land and Resources to the people of Nishnawbe-Aski Nation; and, Whereas, we the Nishnawbe-Aski have never relinquished our sovereignty over Lands and Resources”.⁶⁶ Here, land is provided and legal authority with it, both traceable to a spiritual source. This tenet appears again. In Resolution 80/6, “Nishnawbe-Aski Government” (the resolution which established the Nishnawbe-Aski Commission on the constitution) it is written, “Whereas it is the plan of the Creator that the lands where we live are Indian lands; and, Whereas the Indian way of life is in accord with the Natural laws of the Creator.”⁶⁷ It appears again in Resolution 80/31: “Whereas the Great Spirit gave the Nishnawbe-Aski Nation the right to self-determination; and, whereas, the Great Spirit gave the Nishnawbe-Aski Nation the land of Northern Ontario from which to survive; and, Whereas the Great Spirit gave the Nishnawbe-Aski Nation a lifestyle to follow”.⁶⁸ In all, land is provided and law with it, connected in spiritual source. And law is natural and spiritual at once, it is the Natural law of the Creator.⁶⁹

That the Creator provides land and law is one fact to take in; *how* the Creator provides these things is another. The word gift appears often in the resolutions. In Resolution 82/5, the rights to hunt, fish, trap and gather are named to be gifts to the Nishnawbe Aski from the Creator.⁷⁰ In Resolution 83/13 “land and the right to self government” are given by the Creator to the Nishnawbe Aski.⁷¹ The Creator is thus not a passive source of land and of law, but rather gifted these things, with intention. I believe the concept of the gift is at the root of sovereign assertions.

course of life for all. Man's law is meant to operate in balance with other laws. The law of nature and spiritual law will and do operate independently, in the same realm, and in their own realm regardless of whether man's law is in balance or opposition to them, because that is the power of these laws.

Christine Zuni Cruz, “Law of the Land – Recognition and Resurgence in Indigenous Law and Justice Systems” in Benjamin Richardson, Shin Imai and Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009) at 317.

⁶⁶ Resolution 83/5, “Lands and Resources”, passed August 11, 1983.

⁶⁷ Resolution 80/6, “Nishnawbe-Aski Government”, passed January 15, 1980.

⁶⁸ Resolution 80/31, “Treaty #9 All Chiefs’ Meeting Resolution 31”, passed July 28, 1980.

⁶⁹ The question of religion in NAN territory is one fraught with tensions between Christian and traditional, as it is elsewhere. I cannot delve into the nature of the Spirit spoken of in the resolutions as the information which would allow such an analysis is simply not there, and if it were, I am uncertain as to the utility of my making such pronouncements. This is, however, a large question of significant interest. Therefore, I will point you to two resources on this topic, though this should not be taken as an endorsement of their contents. In Lisa Philips Valentine, *Making it Their Own: Severn Ojibwe Communicative Practices* (Canada: University of Toronto Press, 1994) the argument is made that the religious situation amongst the Severn Ojibwe is unique from that of the south as historical differences in contact and missionization have created an indigenized Christianity. Pointing to the geographic isolation which prevented sustained settler contact and the fact that communities were often missionized by other Indigenous community members, she maintains that the Christian discourse was transformed from “A Euro-Canadian Anglicanism to a more indigenous Anglicanism... a more or less indigenized Christianity” (at 132). This version of Christianity, in her study, is a paradigm shift, but one that restructured rather than replaced a traditional worldview. A second study, referenced in Philips’ work is Edward S. Rogers, *The Round Lake Ojibwa* (Toronto: University of Toronto, Art and Archaeology Division, 1962). He too notes that traditional beliefs and Christian ones exist alongside one another, with the Christian doctrines having little influence, though Christian rituals (marriage, baptism, etc.) are commonly practiced (at D39). Finally, in Flora Beardy and Robert Coutts eds., *Voices from Hudson Bay, Cree Stories from York Factory* (Montreal & Kingston: McGill University Press, 1996) at 51-53, under the heading “Churches and Ministers” a passage from Richard Beardy is provided stating:

This religion we have today, [York Factory] is where it came from. This white man’s religion was brought to York Factory. Then it was taken to the other side of this big body of water. Then this religion was met halfway with another religion, the Indian religion. This is what we have today. A bit of both. They say this happened maybe 200 years ago.

⁷⁰ Resolution 82/5, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-5”, passed March 11, 1982.

⁷¹ Resolution 83/13, “Treaties”, passed March 3, 1983.

As above, NAN's authority to make law is gifted from the Creator, but that gift is constrained by responsibility, as law-making is part of a sacred duty to protect the land.⁷² This duty is often spoken of as one owed to generations coming, but according to Resolution 81/11, it is an obligation owed to Elders as well: "Whereas it has been promised to our Elders that those gifts of the Great Spirit – the fish, the animals, and the birds of the air – would be protected for the use of the Nishnawbe-Aski as long as the sun shines and the rivers flow".⁷³

Two resolutions on the topic of wild rice address this authority/responsibility as arising from a prior or historic connection to territory. Resolution 80/35 begins, "Whereas the Nishnawbe-Aski have harvested wild rice since time immemorial"⁷⁴, and then refutes the Ministry of Natural Resources' licencing process as it threatens the viability of traditional rice harvesting. The historic responsibility to protect wild rice is made more explicit in Resolution 81/7:

Whereas, the ancestors of the people of Osnaburgh planted and cared for the wild rice so that it would be available for the use of their future generation, and; Whereas, the people of Osnaburgh were managing the wild rice prior to the Ministry of Natural Resources, and never delegated this *responsibility* to the Ministry of Natural Resources; and, Whereas, the Ministry of Natural Resources has no authority to regulate the wild rice harvest of the Osnaburgh Band... [emphasis added]⁷⁵

This is a third source of legitimacy, the three sources now identified being inclusive and engaged participation in law-making, the gift of land and law from the Creator, and a historic connection. Indicating that the ongoing exercise of authority rooted in deep connection sustained over time is a key component of legitimacy, authority becomes something inherited, received in or by way of relationship.

Further, when land and law are gifted from the Creator, the authority to make law is both divinely bestowed and spiritually confined by the responsibility to protect these gifts. With fluid movement from authority to responsibility, words used interchangeably in the above resolution, one concept finally dissolved into the other. And without forgetting that land is gifted with law, land being the source of all life, the responsibility to protect creation as a co-creator dissolved into the responsibility to protect land as a law-maker. This is why the authority to make law remains vested in each community member. As we are all co-creators, so we are law-makers together, gifted with the land, and with the responsibilities that arise from recreating this gift with our decisions every day. Putting

⁷² The concept of responsibility arises often in studies of Indigenous legal traditions, though its role varies. See for example Aimee Craft, *supra* note 65 at 12 where she writes:

Responsibilities are at the heart of the Anishinaabe legal structure. Peter Atkinson reminded us: "We are responsible to each other and the land."

The law is the responsibility we have as Anishinaabe. This idea needs to be embedded into what we write about the law, rather than trying to capture the law as an idea. (Allan White)

See also Robert Clifford, *WSÁNEĆ Law and the Fuel Spill at Goldstream* (LL.M. Thesis, University of Victoria, Faculty of Law, 2014) [unpublished] at 14: "Islands within WSÁNEĆ territory were once our ancestors and were given to us by the Creator to maintain our way of life. With this gift came a reciprocal obligation to care for these islands."

⁷³ Resolution 81/11, "Treaty #9 All Chiefs' Meeting Resolution 11", passed March 12, 1981.

⁷⁴ Resolution 80/35, "Treaty #9 All Chiefs' Meeting Resolution 35", passed July 28, 1980.

⁷⁵ Resolution 81/7, "Treaty #9 All Chiefs' Meeting Resolution #7", passed August 19, 1981.

all of the components of legitimacy together, authority to make law arises from gifted responsibility, taken up from relationships.

Returning to the assertion that “Indian way of life” is lived in “accord with the Natural laws of the Creator”,⁷⁶ one more principle can be drawn outside of those relating to legal legitimacy. I believe that accordance with sacred natural law is, in NAN’s constitution, is the supremacy clause. The Natural laws of the Creator are the supreme law of the land.

I hesitate with my use of that term, as it denotes a concept of hierarchy that I may be falsely imputing from the Western legal tradition. Perhaps this is a place where my language and embedded viewpoint fails me. Or perhaps this concept is appropriate given the stakes, or the complicated, and colonially compromised histories I discuss.

Consider the following two resolutions passed in 1982. Resolution 82/9 declares NAN’s determination, “to honour and uphold the integrity of Nishnawbe-Aski and the spiritual laws of our Creator”.⁷⁷ Having established this, NAN asserts that these laws will supersede certain others: “the above principles are not to be compromised by the existing and future man-made laws of the Federal and Provincial Governments, especially where these laws will threaten the destruction of the spiritual, cultural, social and economic existence of Nishnawbe-Aski Nation.”⁷⁸ This resolution could be read to state NAN’s intention to protect sacred/natural law from the Creator from the interference of ‘man-made’ government laws, but I believe it says something more.

In Resolution 82/5, after outlining that the rights of hunting, fishing, trapping, and gathering are gifts from the Creator, NAN again prohibited interference, stating, “these rights cannot be denied, infringed upon, or regulated by the Government of Canada or the Government of Ontario” and added “the existence or nature of this right cannot be defined or negotiated with Governments.”⁷⁹ Rather than a challenge to authority, this is a statement of incapacity.⁸⁰

For NAN, land and law are connected in source. The Creator is not the only source of law, but sacred/natural law is a significant source, especially given its foundational importance. I believe that in NAN’s view, certain laws, those that arise from sacred/natural sources, “flow from the consequences of creation, or the ‘natural’ world or environment.”⁸¹ Borrows describes the process of deriving these principles as a personal process of observation, from the long experience of interaction.⁸² Observation has a double meaning here: that of the perception or interpretation of those laws, and the requirement to abide by them.

Once those principles are derived, those laws are established, conflicting laws must give way. The supremacy of natural/sacred law over other sources of law (man-made, be it settler or Indigenous)

⁷⁶ Resolution 80/6, “Nishnawbe-Aski Government”, passed January 15, 1980.

⁷⁷ Resolution 82/9, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-09”, passed March 11, 1982.

⁷⁸ *Ibid.*

⁷⁹ Resolution 82/5, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-5”, passed March 11, 1982.

⁸⁰ See also Fred Plain, “Rights of the Aboriginal Peoples of North America” in Menno Boldt and J. Anthony Long, eds., *The Question of Justice: Aboriginal Peoples and Aboriginal Rights*, (Toronto: University of Toronto Press, 1985) 31 at 32, “Nishnawbe-Aski means ‘the people and the land.’ Our links with the land are sacred links that no man can ever sever.”

⁸¹ Borrows, *Canada’s Indigenous Constitution*, *supra* note 5 at 28.

⁸² *Ibid.* at 32.

does not arise because NAN prefers to adhere to these laws, but because NAN community members live in accordance with the laws of nature in order to live. Remember, the Creator “made us part of nature” and if the environment is destroyed “we will also be destroyed because we are part of nature.”⁸³

In their attempt to convey this view clearly, NAN used different words stating that sacred/natural law is not for human definition, much less negotiation or regulation. However, despite NAN’s attempt at clarity, this is the point on which there is continuous conflict. Perhaps because this is the point on which there is incredible cultural divide.⁸⁴

III.v. IT ENDS IN COLONIAL CONFLICT

There really is no end to this creation story. In 1983, NAN was in the midst of constitutional renewal, an explicit act of recreation. And between 1979 and 1983, while NAN was actively discussing constitutional renewal, so was Canada.

Having already suffered the effects of the imposition of colonial laws, particularly constitutional ones, NAN was well aware of the coming impact of patriation. As stated in Resolution 80/6: “...the governing system that has been imposed upon our people by the British North America Act, the Indian Act, and the James Bay Treaty (Treaty #9) has eroded our natural laws and the Indian Government based on those laws.”⁸⁵ In Borrows’ words:

The process of Indigenous exclusion within North American democracies has been greatly assisted by the operation of law. Despite its potential to do otherwise, the law has both inadvertently ignored and purposely undermined Indigenous institutions and ideas, and thus weakened ancient connections to the environment.⁸⁶

The Canadian constitution was subject to a number of NAN’s resolutions, nearly all expressing alarm and suggesting action. In Resolution 80/8, it was noted that “the Chiefs of the Treaty #9 area have considered the impact of Canadian Constitutional renewal upon our life style”⁸⁷ and that NAN should be involved in Canadian constitutional renewal. Resolution 81/9 pointed out that “the Government of Canada is proposing to define Aboriginal and Treaty Rights after patriation [sic] of the Canadian Constitution” and that NAN recognized an immediate need to take up the task of defining rights and title.⁸⁸

The Canadian constitution was patriated on April 17, 1982. The month previous, NAN Chiefs had met in assembly and laid out their position on patriation in Resolutions 82/7 and 82/9 rather explicitly:

⁸³ NAN Declaration, *supra* note 14.

⁸⁴ As Sarah Morales observes, the political and legal disputes in Canada with Indigenous peoples are not only struggles over resources, but “deep conflicts of cultural values and understandings.” Sarah Morales, *Snuw’uyulh: Fostering an Understanding of the Hul’qumi’num Legal Tradition* (PhD Dissertation, University of Victoria, Faculty of Law, 2014) [unpublished] at 18.

⁸⁵ Resolution 80/6, “Nishnawbe-Aski Government”, passed January 15, 1980.

⁸⁶ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 30.

⁸⁷ Resolution 80/8, “Treaty #9 All Chiefs’ Meeting Resolution 8”, passed July 23, 1980.

⁸⁸ Resolution 81/9, “Treaty #9 All Chiefs’ Meeting Resolution #9”, passed November 30, 1981.

WHEREAS, we, the Chiefs of the Nishnawbe-Aski Nation know that we must pursue all avenues in the defence of our Aboriginal rights and the rights of our future generations; and,

Whereas, we, the Chiefs of the Nishnawbe-Aski Nation challenge the unilateral moves by the Federal Government to patriate the Constitution without the consent of the Aboriginal people of Canada.⁸⁹

Whereas, the Nishnawbe-Aski Nation is being threatened with cultural genocide which will directly destroy our spiritual, cultural, social and economic lifestyle; and,

Whereas, this genocide program of the Federal and Provincial Governments will be achieved through the Patriation and major amendments of the British North America Act.⁹⁰

The processes undertaken in these concurrent constitutional talks demonstrated the conflict in values. As NAN created a constitution from the grassroots, providing active support enabling all to take part in constitutional talks, Canada's constitution was imposed. Not only was the method of Canada's repatriation not in line with Indigenous legal logic arising out of creation, but the result was antithetical, a constitution of genocide, of destruction, rather than of life-giving force.

The Constitution Act of 1982, later amended in 1983, included a provision for the rights of Aboriginal peoples (section 35)⁹¹, as well as a provision outlining a process with the participation of Aboriginal peoples to identify and define those rights (section 37.1).⁹² Resolutions passed by NAN in 1983 reflected their determination to engage in these processes, constitutional conferences held in 1982, 1983, 1985 and 1987.⁹³

Resolution 83/12, one of the last in my subset on this topic, is titled, "Constitution". In its first clause, NAN recommits to the Declaration as a "clear and precise" map of Indian Nationhood, or in my words, an outline of constitutional principles. In its second clause, NAN references the Canadian Constitution Act of 1981 as a threat to these principles. Finally, NAN calls out the constitutional conference scheduled for March of 1983 as providing for limited participation for Aboriginal peoples to define Aboriginal and Treaty rights. Resolving that NAN's participation is mandatory to maintain and safeguard its rights and principles (rather than to negotiate or compromise about the same), NAN concludes that the Creator gave NAN rights and principles in whole, and they cannot allow the federal and provincial government to classify or divide them.⁹⁴

Understanding the Creator's role in law has been difficult. I'm not sure I have been successful, as I have read and reread and reread these resolutions. But I believe the colonial conflict is rooted here. As I have outlined above, according to my interpretation of these resolutions, NAN's law and land

⁸⁹ Resolution 82/7, "Nishnawbe-Aski Nation All Chiefs' Meeting Resolution #82-7", passed March 11, 1982.

⁹⁰ Resolution 82/9, "Nishnawbe-Aski Nation All Chiefs' Meeting Resolution #82-9", passed March 11, 1982.

⁹¹ Being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [Constitution Act 1982] at section 35.

⁹² *Ibid.* at section 37.1.

⁹³ See Resolution 83/12, "Constitution", passed March 3, 1983 and Resolution 83/23, "Constitutional Advisory Committee", passed August 11, 1983.

⁹⁴ Resolution 83/12, "Constitution", passed March 3, 1983.

are connected in source: the Creator. As a result, constitutional negotiations which were thought to be between the settler governments and NAN, bipartite if you will, were in fact tripartite or more accurately, multifaceted beyond the settler legal imagination. Borrows writes in relation to the Chippewas of Nawash, but he outlines my meaning here:

As citizens with this land we also feel the presence of our ancestors and strive with them to ensure that the relationships of our polity are respected. Our loyalties, allegiance and affection are related to the land. The water, wind, sun and stars are part of this federation; the fish, birds, plants, and animals share the same union.⁹⁵

The failure to take these relationships into account, and realize the principles that govern them arise from the responsibility to protect creation, will keep us in perpetual colonial conflict. For as NAN has often repeated, these principles cannot be negotiated. They are the means by which they live.

III.VI. CONCLUSION

This chapter began by outlining the value of creation: the action and result of living in relationships, the source of all life, and a gift we recreate together every day. As outlined above, valuing creation means living in creation and living it, by keeping sacred the responsibilities that arise from each of us being co-creators of the conditions for life.

Turning to the resolutions that addressed NAN's creation, in the hopes of deriving legal principles that would protect and further the value of creation, similarities between constitutionalism and creation emerged along with three components of legal legitimacy. I first learned who has law-making authority in NAN – everyone, as it is a commonly held authority exercised by inclusive and supported participation. I also observed that legitimate exercises of authority are rooted in prior historical connection, inherited from prior relationships to territory.

This is no clean or familiar concept of authority, a clear right to exercise power, but one complicated and constrained by responsibilities arising from the third source of authority. I found that the authority to make law is gifted with land from the Creator, with the authority to make law coterminous with the responsibility to protect those gifts. These three ideas underlie the meaning of legitimacy in NAN: not a delegated right to exercise power, but a responsibility to protect the gift of land and life that inures in each of us. This same responsibility inures in us arising from our role as co-creators in the conditions for life. Law-making hold the same responsibilities as those held by each of us as co-creators. All of this to say, legitimacy arises from gifted responsibility taken up in relationships.

Finally, in those resolutions that address how outside (Canadian) constitutional law would affect internal (NAN) governance, I found that natural law gifted by the Creator must prevail over man-made laws that would violate nature's limits. All action must comply with sacred / natural law: this is the principle of sacred natural supremacy.

Legitimacy and supremacy, key components of any constitutional order, were here found to be elements required to ensure the process of ongoing creation.

⁹⁵ Borrows, *Recovering Canada*, *supra* note 86 at 138.

CHAPTER FOUR

IV.I. THE VALUE OF INTERDEPENDENCE

They were to make certain promises and we were to make certain promises, but our purpose and our reasons alike were unknowable. What could they grasp of the pronouncement of Indian tenure which had been delivered by the law lords of the Crown, what of the elaborate negotiations between a dominion and a province which had made the treaty possible, what of the sense of traditional policy which brooded over the whole? Nothing.¹

Once again, we want you to understand us. For over 350 years you have failed to recognize the unique lifestyle of the Nishnawbe Aski. It is so crucial that you understand today as tomorrow may be too late.²

There is a story from NAN territory about a fat boy and some giants without hearts. It begins with giant men destroying life for the people at Deer Lake.³ They would come in the winter, lay ruin the village, assault the women, and kill all those in their path, even the children. In the attempt to fight back, it was found that arrows had no effect on the giants, they could not be killed.

A meeting was held by the people after facing many years of this terror, and the discussion stalled between untenable options. They could move, but this would require a long hard journey, it would mean moving into another people's territory (people who might also be violent), and it would mean leaving their own territory. Or, they could stay and fight, but fighting was futile.

Then, the oldest man spoke. He acknowledged the belief that the giants could not be killed before recounting a dream where he saw the giants' hearts. He told the others that if the hearts were destroyed it would end the giants. The warriors didn't believe the old man's dream but a fat boy came forward and volunteered himself to try. Known as a weakling and a poor hunter, the boy was mocked, and left with shame to go prepare for his travels.

Though he walked constantly and ate nothing, though he had no idea where the giants were and saw no signs, he gained strength and power on his journey. When he found a platform, he guessed it was where the hearts were kept, climbed to the top, and shot an arrow into every single one, finishing the whole community. When he was done, he climbed down and put out their fires, a second extinguishment.

A story about a conflict that ends in the total annihilation of one's enemy may seem inappropriate to introduce interdependence. On my reading though, it raises and then refutes the idea of autonomy, replacing it with the inevitable truth of interdependence. It is about warfare with a race that *has no*

¹ Duncan Campbell Scott, "The Last of the Indian Treaties" in *Tales of the Canadian North* (United States: Castle, 1984) 499 at 500.

² Nishnawbe Aski Nation, "A Declaration of the Nishnawbe Aski (The People and the Land)", by the Ojibway-Cree Nation of Treaty #9 to the People of Canada, Delivered by the Chiefs of Grand Council Treaty #9 to Ontario Premier William Davis and his Cabinet in the City of Toronto, July 6, 1977, at 2, online at: <<http://www.nan.on.ca/article/a-declaration-of-nishnawbeaski-431.asp>>.

³ Carl Ray and James R. Stevens, *Sacred Legends* (Ontario: Penumbra Press, 1995) rev. ed. at 76. This collection of stories was first published as *Sacred Legends of the Sandy Lake Cree* (Toronto: McClelland and Stewart, 1971). It is composed of stories shared by Elders in Sandy Lake, Caribou Lake, North Spirit Lake, and Keewaywin.

heart for connection, a near paramount desire to remain connected to community and ancestral territory, and the idea that none of us are impervious or without agency: the strong are vulnerable and the weak have power.

My understanding of interdependence began with seeing an expanded consciousness of relationships. I could see how I was connected to other people, my family and community. I now know that for Indigenous people, the idea of interconnection is extended to include those relationships between the past and the present; between all of the elements of creation, the plants, water, fish, stars, and wind; and between the sacred and the secular. As Richard Wagamese put it, “‘All my relations’, means all”.⁴

Acknowledging expanded relations was only the preface. To be connected is a bare fact; that two things are linked says nothing of the quality of their relationship. In asking about the kind of connection shared between all beings, I found answers of harmony, oneness, wholeness, unity, holism, or explanations with reference to a circle or a wheel.⁵

I believe these concepts point to relationships of dependence. Not that the parts together add to the whole, but more: that the mutual agreement between the parts make possible the whole. Recall the first and third chapters as they outlined examples of creation stories and the conclusions drawn from the same: a worldview which sees cooperation as required to enact creation. The relationships between beings is thus one of dependence, each on the other, to participate in creating the conditions for life. Or perhaps, rather than dependence, mutual reliance. Dependence can have positive and negative connotations, it is reliance and control. In respecting the critical role of cooperation, I want to isolate only that positive side, relationships of trustful or confident dependence.⁶

Clearly, I am describing an ideal relationship within a general understanding that all beings are dependent on each other. As our shared and single giver of life binds us together in relationships which determine our continued existence: if, “the Earth is where the continuous and/or repetitive process of creation occurs,”⁷ then interdependence, as a value to live by, sees it as our responsibility to positively participate in this process. Another way of stating this, interdependence *warrants* the responsibility to cooperate with and for creation. It is the force that functions to maintain the relationships “that hold creation together.”⁸

As hopefully welcome repetition, my intended analytic path from the value of interdependence to legal principles in NAN goes as follows. Law arises from a particular worldview and its basic purpose and function is to protect the central values of that worldview. One function and purpose of this law

⁴ Richard Wagamese, “‘All my relations’ about respect”, Kamloops Daily News (June 11, 2013) online at: <<http://www.kamloopsnews.ca/opinion/columnists/wagamese-all-my-relations-about-respect-1.1237759>>.

⁵ See for example, Marie Battiste & James [Sákéj] Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing Ltd., 2000), James [Sákéj] Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” 1 Indigenous LJ 1 or Christine F. Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Rutledge, 2011).

⁶ As Heidi Stark put it, in reference to Treaty relationships, “[e]ach party has a responsibility to the other: the relationship is cooperative and predicated on trust. See Heidi Stark, “Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada” (2010) 34:2 American Indian Culture and Research Journal 145 at 147.

⁷ Leroy Little Bear, “Jagged Worldviews Colliding” in Marie Battiste (ed.) *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77 at 78.

⁸ *Ibid.* at 81.

will therefore be the protection of interdependence. As I read through the resolutions in this chapter, interdependence is the value that aids me in the identification and confirmation of legal principles.

This chapter reviews the resolutions which negotiated relationships within NAN, and between NAN and settler society. A broad subset, crossing topics such as resource distribution, social welfare, public goods, and other basic services, it includes roughly one-third of the total sum of resolutions (55 of the 169). During this period, NAN grappled with the provision of housing, education, policing, water, and health care, as well as transportation, fire services and communications. Additionally, issues of Treaty and conservation of resources arose. Often outlining significant deprivations, these resolutions are notable for the solutions and more so, for the assumptions underlying the same. NAN outlined responsibilities, and I saw patterns: repeated language or subject matter. After close reading, I attempted to move from the specific to the general, and derived two principles from those patterns which would further the value of interdependence: earthbound need and relational jurisdiction.

On review of my work, one of my supervisors asked me to share within the introduction, a personal reflection on interdependence. I had filled out what I had come to understand about the concept, but unlike the other chapters, there was little of how I had arrived at this understanding. It was suggested that a further paragraph or two would fill out the concept to aid the reader, and I agreed. But, I was blank. I had no ready story of that ah-ha moment, and as I excavated my memory I couldn't find one hiding behind the months of reading the resolutions.

It was then that I realized, I don't know interdependence in the same way that I hold other parts of this work. I picked up the concept of interdependence from books, and there in the abstract idea world I have it safely contained. Moving from head-knowledge to heart-knowledge, accepting interdependence in its context, relationships, requires a vulnerability that I hate and resist fiercely. Independence, my old friend, has long provided a sense of control and freedom, warding off the dangers of deep connection: disappointment and rejection.

Who would give this up, this power and protection, for vulnerability and responsibility?

How do you learn to be a giant-killer, both self-reliant and courageously connected to community?

IV.II. EARTHBOUND NEED

The Absence of Equality

As outlined above, 55 of the first 169 resolutions passed by NAN related to basic services. Not surprisingly, it turned out that slow study, parsing the words used or ideas underlying, wasn't the type of involvement that ended with a failure to see the forest. The overall picture remained, harsh in detail: communities without clean potable water or sewage systems,⁹ housing below national building

⁹ Resolution 80/14, "Treaty #9 All Chiefs' Meeting Resolution 14", passed July 24, 1980; Resolution 80/3, "Treaty #9 All Chiefs' Meeting Resolution 3", passed July 23, 1980; Resolution 80/5, "Treaty #9 All Chiefs' Meeting Resolution 5", passed July 23, 1980; Resolution 81/9, Treaty #9 All Chiefs' Meeting Resolution #9", passed August 19, 1981.

requirements,¹⁰ inadequate educational facilities and inadequate education,¹¹ health outcomes consistent with these conditions,¹² substance misuse issues,¹³ unsafe air travel leading to fatal crashes,¹⁴ and difficulties in communicating, supporting and organizing through radio, telephone, mail or television broadcast.¹⁵ Though I have tried to concentrate not on the problems in NAN, but on the solutions, I failed, and will fail again as I write through this analysis. It is impossible to read past the violence that allowed these conditions to form, and to persist.

So, with forced concentration on the task at hand, I can say that in the resolutions seeking the improvement of so many social conditions, one word appeared often enough to become conspicuous through repetition: adequacy. And, the word my eyes most expected, never appeared even once: equality.¹⁶

The word adequacy, and its close relations, sufficiency and need, were applied to disparate topics throughout the subset. Resolution 79/3 related to education, and an “urgent need” for additional

¹⁰ Resolution 80/7, “Treaty #9 All Chiefs’ Meeting Resolution 7”, passed July 23, 1980; Resolution 80/26, “Treaty #9 All Chiefs’ Meeting Resolution 26”, passed July 25, 1980; Resolution 83/2, “Housing (revised)”, passed March 3, 1983; Resolution 83/9, “Improvement of Services, Sioux Lookout District”, passed August 11, 1983.

¹¹ Resolution 79/3, “Education”, passed March 1979; Resolution 80/6, “Treaty #9 All Chiefs’ Meeting Resolution 6”, passed July 23, 1980; Resolution 81/9, “Treaty #9 All Chiefs’ Meeting Resolution 9”, passed March 12, 1981; Resolution 82/5, “Education and Kayahna Tribal Council”, passed August 25, 1982; Resolution 82/14, “Indian Education Policy Review”, passed August 26, 1982; Resolution 83/20, “Educational Assistance to Off-Reserve Indian Students – Elimination of Elementary and Secondary School Students”, passed March 3, 1983.

¹² Resolution 80/16, “Treaty #9 All Chiefs’ Meeting Resolution 16”, passed July 24, 1980; Resolution 80/19, “Treaty #9 All Chiefs’ Meeting Resolution 19”, passed July 25, 1980; Resolution 80/20, “Treaty #9 All Chiefs’ Meeting Resolution 20”, passed July 25, 1980; Resolution 80/25, “Treaty #9 All Chiefs’ Meeting Resolution 25”, passed July 25, 1980; Resolution 81/2, “Treaty #9 All Chiefs’ Meeting Resolution #2”, passed August 18, 1981; Resolution 81/8, “Treaty #9 All Chiefs’ Meeting Resolution 8”, passed March 12, 1981; Resolution 81/8, “Treaty #9 All Chiefs’ Meeting Resolution #8”, passed November 30, 1981; Resolution 81/20, “Treaty #9 All Chiefs’ Meeting Resolution #20”, passed August 21, 1981; Resolution 82/12, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-12”, passed March 11, 1982; Resolution 82/14, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-14”, passed March 11, 1982; Resolution 82/6, “Sandy Lake (Health Care)”, passed August 25, 1982; Resolution 82/7, “Ontario Regional Advisory Board”, passed August 25, 1982; Resolution 83/6, “Restructuring of the Health Liaison Program”, passed March 3, 1983; Resolution 83/7, “Native Nursing Program and Selection of Nurses”, passed March 3, 1983; Resolution 83/8, “Dental Care (Revised)”, passed March 3, 1983; Resolution 83/9, “Extension of Health Training Services”, passed March 3, 1983; Resolution 83/10, “Care for the Elderly and Handicapped”, passed March 3, 1983; Resolution 83/17, “Moose Factory Hospital”, passed August 10, 1983.

¹³ Resolution 81/3, “Treaty #9 All Chiefs’ Meeting Resolution 3”, passed March 12, 1983; Resolution 81/12, “Treaty #9 All Chiefs’ Meeting Resolution 12”, passed March 12, 1981; Resolution 81/17A, “Treaty #9 All Chiefs’ Meeting Resolution #17A”, passed August 21, 1981; Resolution 82/8, “Alcoholism Service Commission”, passed August 27, 1982; Resolution 83/18, “Extension on the Drug and Alcohol Treatment Programs”, passed March 3, 1983.

¹⁴ Resolution 80/7, “Austin Airways Application”, passed January 15, 1980; Resolution 80/8, “Commission of Inquiry into Air Safety”, passed January 15, 1980; Resolution 80/36, “Treaty #9 All Chiefs’ Meeting Resolution 36”, passed July 28, 1980; Resolution 81/6, “Treaty #9 All Chiefs’ Meeting Resolution 6”, passed March 12, 1981; Resolution 82/4, “Air Safety (Pikangikum)”, passed August 25, 1982; Resolution 82/13, “Air Cargo”, passed August 26, 1982; Resolution 82/15, “Air Services Treaty #9 Area”, passed August 27, 1982.

¹⁵ Resolution 80/30, “Treaty #9 All Chiefs’ Meeting Resolution 30”, passed July 28, 1980; Resolution 81/4, “Treaty #9 All Chiefs’ Meeting Resolution 4”, passed March 12, 1981; Resolution 80/9, “Wawatay Native Communications Society”, passed January 15, 1980; Resolution 82/11, “Nishnawbe Radio Network”, passed August 26, 1982; Resolution 82/12, “Central Mail Service”, passed August 26, 1982.

¹⁶ Rights based equality language only appears in three of the Resolutions. Resolution 80/14, “Treaty #9 All Chiefs’ Meeting Resolution 14”, passed July 24, 1980; Resolution 82/12, “Nishnawbe Aski Nation All Chiefs’ Meeting Resolution #82-12”, passed March 11, 1982; and Resolution 81/6, “Treaty #9 All Chiefs’ Meeting Resolution 6”, passed March 12, 1981. To be clear, the words equity, egalitarian or the like, also do not appear in the resolutions.

classroom space in Kitchenuhmaykoosib Inninuwug (or Big Trout Lake).¹⁷ Several resolutions passed in 1980 related to health, first, with Pikangikum promised a doctor and increased nursing staff with the opening of a new nursing station, but left without “adequate staff and equipment”, and the health services thus available, “still inadequate.”¹⁸ Resolution 80/16 states that six of the eight Windigo Tribal Council communities are receiving primary health care from Community Health Representatives, with these workers receiving “inadequate and insufficient support” from the Department of National Health and Welfare.¹⁹ In Resolution 80/20, it was resolved that the Department of National Health and Welfare provide NAN with “adequate financial and technical resources”, to develop and implement a full-scale and long term paraprofessional health care worker training program.²⁰

Not surprisingly by their next meeting in 1981, the provision of health care services to the people of NAN continued to be “woefully inadequate,” both in terms of the quantity and quality of staff.²¹ Also “woefully inadequate”, was funding that would allow for successful creative programming to combat increased substance misuse in Resolution 81/3, with a total lack of consultation “either on the inadequate level of funding available for projects, or on imposed arbitrary budget cuts for approved projects.”²² This resolution concluded with a demand for negotiations to ensure “that sufficient funds are available”.²³

In 1982 and 1983, resolutions were passed regarding the “inadequate nature of air safety in Northern Ontario,”²⁴ following a devastating and completely preventable crash in Pikangikum, the “provision of adequate funding for the expansion of Drug & Alcohol Treatment Programs,”²⁵ and, “the lack of adequate dental services,” with “inadequate community programs aimed at preventative dental care.”²⁶

I have cited from only a sample to demonstrate NAN’s repeated request for adequacy.²⁷ This phenomenon could have been analysed sooner

¹⁷ Resolution 79/3, “Education”, passed March 1979.

¹⁸ Resolution 80/25, “Treaty #9 All Chiefs’ Meeting Resolution 25”, passed July 25, 1980.

¹⁹ Resolution 80/16, “Treaty #9, All Chiefs’ Meeting Resolution 16”, passed July 24, 1980.

²⁰ Resolution 80/20, “Treaty #9, All Chiefs’ Meeting Resolution 20”, passed July 25, 1980.

²¹ Resolution 81/20, “Treaty #9 All Chiefs’ Meeting Resolution #20”, passed August 21, 1981.

²² Resolution 81/3, “Treaty #9 All Chiefs’ Meeting Resolution 3”, passed March 12, 1981.

²³ *Ibid.*

²⁴ Resolution 82/4, “Air Safety (Pikangikum)”, passed August 25, 1982.

²⁵ Resolution 83/18, “Extension of Drug and Alcohol Treatment Programs”, passed March 3, 1983.

²⁶ Resolution 83/8, “Dental Care (Revised)”, passed March 3, 1983.

²⁷ The full listing is here, divided by their reference to adequacy, sufficiency and need.

Adequacy: Resolution 80/6, “Treaty #9 All Chiefs’ Meeting Resolution 6”, passed July 23, 1980; Resolution 80/14,

“Treaty #9 All Chiefs’ Meeting Resolution 14”, passed July 24, 1980; Resolution 80/20, “Treaty #9 All Chiefs’

Meeting Resolution 20”, passed July 25, 1980; Resolution 80/25, “Treaty #9 All Chiefs’ Meeting Resolution 25”,

passed July 25, 1980; Resolution 80/29, “Treaty #9 All Chiefs’ Meeting Resolution 29”, passed July 25, 1980;

Resolution 82/12, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-12”, passed March 11, 1982;

Resolution 82/16, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-16”, passed March 11, 1982;

Resolution 82/5, “Education and Kayahna Tribal Council”, passed August 25, 1982; Resolution 83/8, “Dental Care

(Revised)”, passed March 3, 1983; Resolution 83/9, “Extension of Health Training Services”, passed March 3, 1983;

Resolution 83/18, “Extension of Drug and Alcohol Treatment Programs”, passed March 3, 1983.

Sufficiency: Resolution 80/14, “Treaty #9 All Chiefs’ Meeting Resolution 14”, passed July 24, 1980; Resolution 80/17,

“Treaty #9 All Chiefs’ Meeting Resolution 17”, passed July 25, 1980; Resolution 80/23, “Treaty #9 All Chiefs’

Meeting Resolution 23”, passed July 25, 1980; Resolution 80/22, “Treaty #9 All Chiefs’ Meeting Resolution 22”,

if I could have seen it as a possible principle by which to determine the socially just allocation of goods in NAN, but I continued to carry expectations, wasting time on an ongoing search for any mention of equality or equity, discrimination or racism. Perhaps equity was there, conceptually underlying the explicit demand for adequacy. Perhaps I just needed to look harder.

Two resolutions did mention human rights. The first, Resolution 80/14, was about access to water. Setting out that the 1200 residents of Sandy Lake depended upon the lake or four wells for their water supply, and that neither of these sources supplied potable water, the resolution declared “clean, potable drinking water is a fundamental human right”.²⁸ Resolution 82/12 stopped short of making a rights declaration, but rather outlined a deplorable state of health, set out that the health care of NAN people was subject to the availability of government funds, and then resolved that this raised “a question of violation of human rights in such conditions.”²⁹

This wasn’t enough to unbalance the domination of claims for adequate rather than equitable funding. But, four more resolutions drew out comparisons, explicit race-based discrepancies both as occurring within NAN communities, and observed as between NAN community conditions and Ontario generally.

In 1980, NAN passed Resolution 80/3, again on the topic of access to water. It started with the fact that most of the communities in Ontario north of the 50th parallel had no water supply or sewage system, leading to increased sickness among children and in some communities in the entire population. The entire Indigenous population that is, as in the resolution, “[g]overnment support staff based in these communities are provided with safe running water and sewage disposal systems.”³⁰

Resolution 80/30, compelling for the thorough racial separation it reveals, related to the “totally inadequate telephone system”, in Pikangikum, a switchboard system with the capacity to poorly service only a fraction of Indigenous homes. The resolution proposed that Indigenous homes benefit from aerial telephone lines, “such as those that serve the non-Indian houses in Pikangikum.”³¹

Resolution 80/20 was on the topic of health. It indicated an intention to take control of health services within the region, as the Department of Health was “seriously neglecting” the training and support of

passed July 25, 1980; Resolution 81/3, “Treaty #9 All Chiefs’ Meeting Resolution 3”, passed March 12, 1981; Resolution 82/11, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-11”, passed March 11, 1982. Need: Resolution 80/11, “Treaty #9 All Chiefs’ Meeting Resolution, Presentation by Chief Silas Wesley, Kashechewan”, passed January 16, 1980; Resolution 80/20, “Treaty #9 All Chiefs’ Meeting Resolution 20”, passed July 25, 1980; Resolution 80/26, “Treaty #9 All Chiefs’ Meeting Resolution 26”, passed July 25, 1980; Resolution 80/27, “Treaty #9 All Chiefs’ Meeting Resolution 27”, passed July 25, 1980; Resolution 81/13, “Treaty #9 All Chiefs’ Meeting Resolution 13”, passed March 12, 1981; Resolution 82/10, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-10”, passed March 11, 1982; Resolution 82/3, “Pikangikum Fishing”, passed August 25, 1982; Resolution 82/8, “Alcoholism Service Commission”, passed August 27, 1982; Resolution 83/3, “Official Recognition of Savant Lake Band”, passed March 2, 1983; Resolution 83/5, “Slate Falls”, passed March 3, 1983; Resolution 83/6, “Restructuring of the Health Liaison Program”, passed March 3, 1983; Resolution 83/7, “Native Nursing Program and Selection of Nurses”, March 3, 1983; Resolution 83/9, “Extension of Health Training Services”, passed March 3, 1983; Resolution 83/2, “Housing (Revised)” passed March 3, 1983; Resolution 83/5, “Lands and Resources”, passed August 11, 1983; Resolution 83/26, “Services to Ontario Indians”, passed August 11, 1983.

²⁸ Resolution 80/14, “Treaty #9 All Chiefs’ Meeting Resolution 14”, passed July 24, 1980.

²⁹ Resolution 82/12, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-12”, passed March 11, 1982.

³⁰ Resolution 80/3, “Treaty #9 All Chiefs’ Meeting Resolution 3”, passed July 23, 1980.

³¹ Resolution 80/30, “Treaty #9 All Chiefs’ Meeting Resolution 30”, passed July 28, 1980.

frontline health workers, despite requests for the provision of relevant professional training from NAN since 1973.³² Consequential to this neglect was a comparative lack of wellness: “whereas the health status of the Nishnawbe of Northern Ontario is significantly lower than that of Ontario residents generally.”³³

Finally, in Resolution 83/7, NAN laid bare the playbook of the settler government. Starting with the fact that each Band had a small population and was dealing individually with INAC and other governments, the resolution went on to call out the deprivation of services, “taken for granted by other Canadians and by Bands in areas other than Ontario, particularly in terms of sewage, roads, communications such as telephone, television reception, recreational facilities and education facilities of acceptable standards, and education of acceptable standards.”³⁴ At the same time, NAN pointed to INAC, Ontario and Thunder Bay’s senseless waste of money on administration, consultants, studies, charters, sub-standard installations, poor maintenance practice, unqualified and biased personnel, travel and unwarranted audits. Labelling these tactics as abusive and resulting in further deprivations, NAN resolved to administer their own programs through a district Band office.³⁵

After rereading the resolutions, I had to conclude that my search for indicia of an equality analysis resulted in scant material. It was time to consider whether adequacy was a distinct and unfamiliar legal principle by which to determine the socially just allocation of goods in NAN. But this didn’t mean leaving equality behind just yet.³⁶ It turned out its absence was like negative space, helping me to see the actual subject.

Defining Adequacy against Equality

Equality means ensuring sameness, either formally through sameness of treatment, or substantively through sameness of result. Valued for its constitutive contribution to other values (justice, self respect, non-discrimination), equality is said to be a “politically robust principle”,³⁷ at the foundation of the Canadian political order. In the words of one judge: “society rests in large part on the traditional liberal ideal of equal respect for the dignity and worth of each individual.”³⁸

Discussions of equality in law typically concentrate on differentiating formal from substantive equality and the analyses that flow from the distinction. In brief, formal equality is often described narrowly as procedural equality, equality of access, or equality of opportunity, and, as above, focuses on how we treat one another. In the Canadian legal system, formal equality analyses often arise in claims of direct discrimination, and result in a remedy against a law that is discriminatory ‘on its face’

³² Resolution 80/20, “Treaty #9 All Chiefs’ Meeting Resolution 20”, passed July 25, 1980.

³³ *Ibid.*

³⁴ Resolution 83/7, “Sioux Lookout District Band Office”, passed August 11, 1983.

³⁵ *Ibid.*

³⁶ It should be noted that some Indigenous theorists argue that equality is a value found across Indigenous societies. See for example, Leroy Little Bear, “Jagged Worldviews Colliding” in Marie Battiste (ed.) *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77 at 83-34.

³⁷ Jeremy Moss, *Reassessing Egalitarianism*, (England and New York: Palgrave MacMillan, 2014) at 40.

³⁸ *Dixon v. British Columbia (Attorney General)*, (1989) 59 DLR (4th) 247 (BCSC).

(for example, barring Indigenous peoples from voting until 1960).³⁹ Substantive equality carries a broader concern, and prohibits law discriminatory in its effect or application.⁴⁰

As above, NAN's focus in this subset of resolutions is not on equality, but to the extent that one of the above equality concepts aids understanding through contrast, it is the concept of substantive equality. NAN resolved to demand the improvement of social and health conditions to an adequate level, a similar focus of substantive equality as it attempts to achieve a sameness of result or condition.⁴¹

While they may have a shared focus on achieving a certain condition, adequacy and equality part company on the means of measure. When we search for equality of conditions in Canadian law we are searching for equalization to a comparative standard. For example, in the fight for substantive equality for First Nations child welfare, the Canadian Human Rights Tribunal found, "[s]ubstantive equality and Canada's international obligations require that First Nations children on-reserve be provided child and family services of comparable quality and accessibility as those provided to all Canadians off-reserve."⁴²

As a critical difference, adequacy is not concerned with comparison;⁴³ disparity is not present in the concept. Rather, adequacy asks only whether a person has enough, a sufficient amount according to the features of a particular situation.⁴⁴

With this short delineation, I understand adequacy as an individual determination of sufficiency, or having enough. But who gets to make this determination? And what is enough?⁴⁵

³⁹ Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007), loose-leaf 5th ed. Supplemented, vol. 2 at 55.11(a).

⁴⁰ *Ibid.*

⁴¹ For further clarification, this type of equality relates to "how people's lives actually go: whether they are equal to others in terms of key determinants, such as health, education and respect," (see Moss, *supra* note 37 at 2).

⁴² *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2016 CHRT 2 at ¶ 455; see also Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 C.H.R.Y.B. 3 at 27 where she writes that any theory of equality to be found acceptable by the courts will always be comparative.

⁴³ It should be noted that out of the presence of comparison arises two points. First, comparison allows for an external measure, as we may all participate in a judgment of consistency across two or more subjects. And second, comparison leads to abstraction, or perhaps, an arbitrariness in the concept as it addresses distribution: "[a] pursuit of equality suggests that we ignore what is really good for us as unique individuals and instead enjoins us to be satisfied with goods whose nature and numbers are determined by what others have," Moss, *supra* note 37 at 26.

⁴⁴ Helpful in thinking through adequacy was Harry Frankfurt's article, "Equality as a Moral Ideal" (1997) 98:1 *Ethics*, 21, wherein he outlines as an alternative to egalitarianism, the "doctrine of sufficiency".

⁴⁵ There is an "adequacy movement" primarily found in American litigation of fairness in school finance systems. In 1989, the Kentucky Supreme Court declared the state system of education unconstitutional for failing to provide all children an adequate education (see *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 198 (Ky. 1989)). With a growing number of court decisions referring to adequacy instead of equity, in these cases, the concept refers to all students reaching an absolute standard, rather than examining the relative performance as between students. But to the extent that inadequacy in these cases is founded on some idea of inequity, and inequities become evidence of inadequacy, I agree with critics that the language of adequacy is not a neat analytical shift from substantive equality, though it is a notable change in terminology. On this point, please see Richard Briffault, "Adding Adequacy to Equity: The Evolving Legal Theory of School Finance Reform" (May 12, 2006) Columbia Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 06-111, 2006; Princeton Law and Public Affairs Working Paper No. 06-013, online at <<https://ssrn.com/abstract=906145> or <http://dx.doi.org/10.2139/ssrn.906145>>.

Adequacy as Determined by Need

In the resolutions, adequacy or sufficiency is repeatedly determined by need. A somewhat repetitive declaration, yes, but not quite as empty as it sounds.

Resolution 81/6 was one purposefully left out of my short review of resolutions using rights-based language, as the right it invokes is not one of equality, but rather, of self determination. Concerning the approval of the Air Transport Committee licencing procedures, and specifically introducing a requirement for the consent of Tribal or Band Councils in licencing, this resolution declared that, "...every community has the right to control the development of its community; and... each community has the right to determine its own needs..."⁴⁶

Emphasizing the point that determining need ought to be an internal affair are repeated resolutions referring implicitly and explicitly to the unique needs faced by the north, the Nishnawbe, and by communities. Resolution 83/9, passed on the topic of training community health workers, noted a "lack of adequate training for their special needs..." and proposed "appropriate curriculum in their Basic Training Course to address the unique needs of the north."⁴⁷ Resolution 80/20 already referenced above, also on the topic of training health workers, concluded with a direction to the Department of Health and Welfare to provide adequate financial and technical resources to develop and implement a health care working training program, "adapted to the needs of the Nishnawbe."⁴⁸ Resolution 82/6, on the topic of police services, discussed moving towards the implementation of unique policing structures, and established a Nishnawbe Aski Police Commission to determine the wishes of the people in terms of policing.⁴⁹

Needs are noted to be unique as a function of geography (including remoteness) but also as a function of culture. In Resolution 83/7, regarding the Native Nursing program and the selection of nurses, a general shortage of nurses in NAN communities was noted, before the observation was made that "most of the ones we do get are from another culture and are not sensitive to our needs."⁵⁰

Determining community need ought to be an community-level affair because knowledge of specific need is at the root of sound policy making. Resolution 82/8 identifies the Board of Directors of the Drug and Alcohol programs in NAN as those "...in the best position to know the needs of our communities" and resolved that an Alcoholism Service Commission be formed consisting of those directors.⁵¹ Similarly, Resolution 80/26 proposed a Pehtabun Housing Authority, with the belief that this would "more efficiently answer the needs of the Pehtabun Area Bands for more and better housing."⁵² Both resolutions imply and state that those with direct experience will have actual or practical knowledge of needs and know how best to answer them.

⁴⁶ Resolution 81/6, "Treaty #9 All Chiefs' Meeting Resolution 6", passed March 12, 1981.

⁴⁷ Resolution 83/9, "Extension of Health Training Services", passed March 3, 1983

⁴⁸ Resolution 80/20, "Treaty #9 All Chiefs' Meeting Resolution 20", passed July 25, 1980. See also Resolution 83/6 regarding the restructuring of the Health Liaison Program, "with new objectives to meet our community needs", Resolution 83/6, "Restructuring of the Health Liaison Program", passed March 3, 1983.

⁴⁹ Resolution 82/6, "Nishnawbe-Aski Nation All Chiefs' Meeting Resolution #82-6", passed March 11, 1982.

⁵⁰ Resolution 83/7, "Native Nursing Program and Selection of Nurses", passed March 3, 1983.

⁵¹ Resolution 82/8, "Alcohol Service Commission", passed August 27, 1982.

⁵² Resolution 80/26, "Treaty #9 All Chiefs' Meeting Resolution 26," passed July 25, 1980.

Therefore, need is unique to place, culture, and community. Further, knowledge of need and the capacity to identify the same is also bound by these three things. To determine what is enough, direct experience, or knowledge arising from familiarity with at least these three factors is required.⁵³ As a result of this, NAN rarely speaks of centralizing services, but rather, is in constant creation of local infrastructure and responses. This is evidenced by the presence of both NAN-wide and community specific resolutions, passed on the same topic, often in the same year.

As an example, recall Resolution 80/3, on the topic of access to water. It outlined that most of the communities in Ontario north of the 50th parallel had no water supply or sewage system.⁵⁴ Further, it proposed a NAN-wide solution ensuring water and sewage systems to all homes in Treaty #9 communities. That same year, Resolution 80/5 outlined the same water and waste problem in Kitchenuhmaykoosib Inninuwug (Big Trout Lake), with infants suffering serious infectious or parasitic disease, traditional waters becoming polluted, and fishing becoming less productive., Resolution 80/5 proposed that the Band of Big Trout Lake (with technical assistance from INAC, and the International Development Research Center), prepare and implement a community-wide water and waste solution.⁵⁵ Resolution 80/9, also passed that year, saw Fort Severn proposing to carry out a feasibility study on a water system for their community, and the Chiefs gave full support to the Fort Severn Band to exercise local control.

Another example of general and local solutions is found in the resolutions regarding education. Resolution 81/9 spoke generally to the financial restrictions imbedded in policy and preventing young people in NAN from being educated and trained for careers.⁵⁶ Instances of harms caused by underfunding had already been outlined in Resolution 79/3 seeking sufficient classroom space in Kitchenuhmaykoosib Inninuwug,⁵⁷ and in Resolution 80/6 seeking the replacement of incompetent staff and a school superintendent (as technical and repair deficiencies had caused the closure of over half of the schools in the Sioux Lookout District communities, and the children of Bearskin Lake had lost an entire school year.⁵⁸)

Around this time, the federal government (amongst others) was conducting studies on the development of quality education for Indigenous peoples. One of these, the “Indian Education Policy Review – Phase I” was met with frustration and welcome by NAN. Resolution 82/14 expressed both: “whereas Indian people have long known of the inadequate nature of educational services as provided by the Federal government; and...the nature of this review process is critical for present and future generations.”⁵⁹ In response, NAN resolved that communities should take the time to come to a consensus position on the policies and strategies outlined in the review, and that the federal government should halt further work until consensus was reached within NAN.

⁵³ I’m cognizant that other factors may be in play when determining who could access resources and how much, but limited by the conclusions I can draw from the resolutions. For further on this point, see Heidi Stark “Marked by Fire, Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada” (2012) 36:2 American Indian Quarterly 119 at 127-128 regarding the importance of clan and other kinship relations in resource distribution.

⁵⁴ Resolution 80/3, “Treaty #9 All Chiefs’ Meeting Resolution 3”, passed July 23, 1980.

⁵⁵ Resolution 80/5, “Treaty #9 All Chiefs’ Meeting Resolution 5”, passed July 23, 1980.

⁵⁶ Resolution 81/9, “Treaty #9 All Chiefs’ Meeting Resolution 9”, passed March 12, 1981.

⁵⁷ Resolution 79/3, “Education”, passed March 1979.

⁵⁸ Resolution 80/6, “Treaty #9 All Chiefs’ Meeting Resolution 6”, passed July 23, 1980.

⁵⁹ Resolution 82/14, “Indian Education Policy Review”, passed August 26, 1982.

During the same meeting, NAN also resolved to support the Kayahna Tribal Council in its individual effort to participate effectively in the Indian Education Review Process.⁶⁰ In order to do so, the Tribal Council was requesting funding from INAC to conduct local community meetings on education development, as “community awareness of and subsequent participation in the education process is necessary for local development in years to come.”⁶¹

These resolutions taken together see NAN settling the question of service provision or resource distribution through a system of adequacy. In this method, what is adequate or sufficient is defined by existing unmet needs. These unmet needs are, in turn, defined by those with direct experience as they are unique to place, community and culture: without this knowledge one can neither know need nor determine how best to answer it. With these premises in place, one can see through the resolutions a strong belief in policy best formed at the local level, even with regard to and alongside NAN-wide concerns and solutions.

Despite this summary, I’m cognizant of remaining questions. In particular, the threshold of meeting need is far from clear at this point. I suspect resolved need will bring a community past the level of survival to some greater level of satisfaction, but when is need met?

Need Bound by Nature’s Limits

My next task was to determine the boundary line between met and unmet need, and the justification for the same.

In his work, Harry Frankfurt puts forward a ‘doctrine of sufficiency’ as a criticism of equality, arguing that morality demands not that people have the same, but that everyone have enough.⁶² Determining ‘enough’ is apparently a common catching point as: “[c]alculating the size of an equal share is plainly much easier than determining how much a person needs in order to have enough...it is far from self evident, needless to say, what the doctrine of sufficiency means and what applying it entails.”⁶³ Not letting this daunt him, in defining enough or sufficient, Frankfurt outlines a subjective standard of personal contentment.⁶⁴

Reading Frankfurt’s work pointed me towards an important clarification. Was I looking for a threshold for need that would operate as a standard to be met, or a limit not to be crossed?

⁶⁰ Resolution 82/5, “Education and Kayahna Tribal Council”, passed August 25, 1982.

⁶¹ *Ibid.* See also Resolution 83/2, “Housing (Revised)”, passed March 3, 1983, where to resolve the issue of housing below minimum standards in the National Building Code, NAN resolved to pressure the government to develop local infrastructure (emphasis added); Resolution 81/8, “Treaty #9 All Chiefs Meeting Resolution 8”, passed March 12, 1981, where following a report on the inadequate state of health care services in the Pehtabun area, NAN resolved to support the concept of establishing local Health Committees and a Pehtabun Health Council; or Resolution 82/6, “Sandy Lake (Health Care)”, passed August 25, 1982, where Sandy Lake, tired of “medical inadequacies,” a major concern in all communities, created their own proposal for training potential aides to ease medical staffing, in the Sandy Lake Nursing Station.

⁶² Frankfurt, *supra* note 44.

⁶³ *Ibid.* at 23-24.

⁶⁴ *Ibid.* at 37-41.

Returning to the resolutions, I turned to those regarding hunting, fishing, gathering and trapping, as they outlined a view of the permitted use of resources and might hold a clue as between a standard or limit. What I found was the expected permitted use, the gifts of the land for sustenance, but also reference to commercial uses. Resolution 80/10 contemplates the use of resources for food and other income: “[w]hen we signed the treaty, we received promises granting us eternal rights to fish, trap and hunt in the manner in which we lived before. These promises, we believe, include our full use of the land and water resources for both food and for sale.”⁶⁵ And later: “[f]ishing, hunting, and trapping have been in the past, and are today, important food and cash sources for Sandy Lake people.”⁶⁶ Resolution 80/15 speaks of “commercial fishing” and “fishing for a living as well as for food”.⁶⁷ But simply allowing the use of resources to earn other income did not clearly support an accepted standard of subsistence, or to use the Supreme Court’s words, whether earning a “moderate livelihood” might be a standard to be met.⁶⁸

In the Declaration, there is a quote from Chief Nakogee supporting employment and providing an interpretive pointer towards a limit: “I am not against employment, it is a good thing. But, the most important thing we must take into consideration is the land around us. It is also our income and we must not destroy it.”⁶⁹ Similarly, in Resolution 80/10, ongoing use of the land presents itself as a paramount concern, or as a limit on employment: “[i]ncome from some jobs can never replace our use of the land.”⁷⁰

If use of land is set against employment or income, perhaps sustainable use is the limit on need. In the Declaration it is stated, “[i]n your rush for materialistic gain, you are threatening nature’s very limits.”⁷¹ The threshold of need defined by nature’s limits would be earthbound, and determined by the ongoing-ness of what remains.

Resolutions which speak to traditional conservation methods refer to ‘natural laws’ ensuring the protection of the resources gifted by the Creator.⁷² Protecting these resources is another way of respecting nature’s limits. Or, in Chief Andrew Kakepetum’s words:

⁶⁵ Resolution 80/10, “Presentation by Chief Andrew Kakepetum, Sandy Lake, Fishing, Hunting and Trapping Rights”, passed January 16, 1980.

⁶⁶ *Ibid.*

⁶⁷ Resolution 80/15, “Presentation made by Chief Aglaba James on behalf of Magnus James, Elder, McDowell Lake”, passed January 17, 1980”

⁶⁸ In *Marshall No.1*, [1999] 3 SCR 456 and *Marshall No.2*, [1999] 3 SCR 533 the Supreme Court confirmed a treaty right to a “moderate livelihood” in fishing. This, according to the court, would include small scale commercial activity, but not large capital accumulation. Or, “[i]f at some point, the appellant’s trade and related fishing activities were to extend beyond what is reasonably required for necessities, as hereinafter defined, he would be outside treaty protection...” at ¶ 8. For criticism of the decision and the ambiguous standard it imposed, see Russel Lawrence Barsh and James [Sákéj] Youngblood Henderson, “*Marshalling the Rule of Law in Canada: of Eels and Honour*” *Constitutional Forum*, 09/1999, Volume 11, Issue 1.

⁶⁹ NAN Declaration, *supra* note 2.

⁷⁰ Resolution 80/10, “Presentation by Chief Andrew Kakepetum, Sandy Lake, Fishing, Hunting and Trapping Rights”, passed January 16, 1980.

⁷¹ NAN Declaration, *supra* note 2.

⁷² See Resolution 81/4, “Treaty #9 Chiefs’ Meeting Resolution #4”, passed November 30, 1981 and Resolution 82/5, “Nishnawbe Aski Nation All Chiefs’ Meeting Resolution #82-5”, passed March 11, 1982.

Our people know how to practice true conservation laws, by ensuring there is enough left over and by giving thanks for what we receive. *When we practice these laws, the land replenishes itself.*⁷³

Learning nature's limits was a part of growing up on a farm, our dependence resting directly on the soil outside our door. I remember once, when planting the garden, dad saw me with new herbs and offered unsolicited advice. It sticks out in memory since, despite being a 75-year-old farmer, dad rarely intervenes. He is more of an I'll-let-her-think-her-organic-methods-are-working-and-spray-pesticides-in-the-night kind of dad. But he stopped me from planting mint directly in the ground, and told me to plant it in a bucket. He explained that mint roots are strong, and can take over the garden killing the other plants. This was the first I had heard of an invasive species.

Taken from the Invasive Species Definition Clarification and Guidance *White Paper*, published by the National Invasive Species Council in the United States, the following criteria are used to identify invasive species:

First, a geographical barrier must be overcome, which often occurs as a mountain range, ocean, or similar physical barrier to movement of seeds and other reproductive plant parts...

The second set of obstacles that a non-native plant must overcome is barriers to germination and survival in its new location. These typically are environmental barriers ... nutrient availability, or competition for resources from neighboring plants.

⁷³ Resolution 80/10, "Presentation by Chief Andrew Kakepetum, Sandy Lake, Fishing, Hunting and Trapping Rights", passed January 16, 1980. Within this resolution there is this oblique reference to "true" conservation laws, as set against false conservation laws proclaimed by others but also direct comments condemning the actions of the Ministry of Natural Resources (MNR). As read through the total subset of Resolutions, the MNR shines as a relentless treaty violator, beginning with Resolution 79/5, "Hunting, Fishing, Trapping Rights", passed July 30, 1979: "Whereas the Chiefs of Grand Council Treaty #9 desire to stop further encroachments by the Ministry of Natural Resources on the rights of the Indian people to hunt, fish and trap," and continuing without end. See also: Resolution 80/10, "Presentation by Chief Andrew Kakepetum, Sandy Lake, Fishing, Hunting and Trapping Rights", passed January 16, 1980: "...the Ministry of Natural Resources (MNR) is interfering with this treaty right of hunting and commercial fishing and is arresting Indians who fish and hunt 'out of season'"; Resolution 80/33, "Treaty #9 All Chiefs' Meeting Resolution 33", passed July 28, 1980: "Whereas, the Ministry of Natural Resources, in direct violation of treaty rights, is harassing Pikangikum hunters by the application of Ontario fish and game regulations, such as the seizing of guns which are loaded during travel on traplines"; Resolution 80/35, "Treaty #9 All Chiefs' Meeting Resolution 35", passed July 28, 1980, "Whereas the Ministry of Natural Resources through its licencing has begun to threaten traditional rice harvesting activities and is actively encouraging non-native harvesting"; Resolution 81/7, "Treaty #9 All Chiefs' Meeting Resolution #7", passed August 19, 1981: "...we the Chiefs of Grand Council Treaty #9, hereby support the Osnaburgh Band in their refusal to obtain wild rice harvesting licences from the Ministry of Natural Resources"; Resolution 81/11, "Treaty #9, All Chiefs' Meeting Resolution #11", passed August 19, 1981: "Whereas, the Ministry of Natural Resources in direct violation of these [treaty] rights, is harassing members of the Pikangikum Indian Reserve..."; Resolution 82/5, "Nishnawbe-Aski Nation All Chiefs' Meeting Resolution #82-5", passed March 11, 1982: "A Ministry of Natural Resources scheme to legitimize the Indian food fishery by a system of permits or similar system is unacceptable"; Resolution 83/11, "New Provincial Trapping Regulations", passed March 3, 1983: "Whereas, the Ministry of Natural Resources has imposed new regulations concerning "humane trapping methods and traps" (Ontario Regulation 673/82) which will adversely affect the trapping rights of Native people in the Pehtabun area"; and Resolution 83/21, "Ministry of Natural Resources Harassment", passed August 11, 1983: "Whereas, our people who hunt, trap and fish, have suffered continual harassment at the hands of the Ministry of Natural Resources."

The third obstacle that a non-native plant must overcome to be considered an invasive weed, is to form a population that is self-sustaining and does not need re-introduction to maintain a population base...

Established non-native plants must overcome barriers to dispersal and spread from their site of establishment to be considered invasive plants. Additionally, the rate of spread must be relatively fast...

Finally, a plant is deemed to be invasive if it causes negative environmental, economic, or human health effects, which outweigh any beneficial effects.⁷⁴

Invasive species destroy environments because they have no natural controls or limits. Taking, to the point of damaging the environment, invasive species teach us about the restraint critical to continuation.

The principle of resource distribution through earthbound need, taking what you need while respecting nature's limits, is thus an expression of interdependence. Mutual reliance requires us to avail ourselves of the gifts of creation, but never to threaten the viability of the same. We are always responsible for the conditions for life, weak and powerful, interdependent beings.

IV.III. RELATIONAL JURISDICTION

Resolution 80/3 outlined a need for clean water, starting with the general fact that most of the communities in Ontario north of the 50th parallel had no water supply or sewage system, and ending with a very specific solution.⁷⁵ NAN resolved that i) the Department of Indian Affairs and Northern Development undertake to provide clean potable running water in all homes in Treaty #9; ii) these systems be designed to meet northern conditions and be environmentally appropriate; and, iii) the Department of National Health and Welfare regularly monitor water quality in Treaty #9.⁷⁶ In summary, to resolve the water issue, NAN passed a resolution setting a detailed mandate for the federal government.

This phenomenon – NAN directing federal departments – is repeated throughout the subset of resolutions. These directives are not generic pleas to undertake action, resolutions filled with rhetoric devices urging the federal government in dramatic language, *do something*. Rather, NAN gives specific itemized instructions. Resolution 80/19 resolved that “the Department of National Health and Welfare ensure that the community of Winisk receive a visit from a medical doctor from the Moose Factory Zone Hospital at no less than regular two week intervals”. Resolution 80/27 outlined a problem in federal funding delivery as it prevented long term development planning, and directed the Minister of Indian Affairs to instruct his staff to negotiate a comprehensive block funding agreement. And not just any comprehensive block funding agreement, but one along the lines of the

⁷⁴ Definitions Subcommittee of the Invasive Species Advisory Committee, The National Invasive Species Council, *Invasive Species Definition Clarification and Guidance White Paper*, April 27, 2006 online at: <http://www.invasivespeciesinfo.gov/docs/council/isacdef.pdf>.

⁷⁵ Resolution 80/3, “Treaty #9 All Chiefs’ Meeting Resolution 3”, passed July 23, 1980.

⁷⁶ *Ibid.*

“Proposal for a Comprehensive Block Funding between the Government of Canada and Grand Council Treaty #9”, that had previously been submitted by Grand Council Treaty #9.⁷⁷

NAN often issued directives to federal government departments, most often to the Department of Indian Affairs and Northern Development and the Department of National Health and Welfare. Then I noticed NAN giving orders to the provincial government on certain matters. In response to the ongoing persecution of hunters in the Pikangikum area, NAN resolved that the Ministry of Natural Resources would “immediately cease such harassment” in Resolution 80/33.⁷⁸ In response to the imposition of tax in violation of Treaty promises, NAN resolved that “the Federal Government and Provincial government immediately stop imposing taxes.”⁷⁹

And then, I noticed NAN ordering actions to be taken by a Crown corporation and other businesses. Resolution 80/18 addressed potential electricity generating schemes in northern Ontario. Though the resolution states that then Premier Davis has made repeated assurances that no electric projects were to be undertaken, NAN yet resolved to deal directly with Ontario Hydro, directing the Corporation that “Ontario Hydro and other involved energy developers enter into a contract with Grand Council Treaty #9 to inform the people of Treaty #9 of Ontario Hydro’s plans...”⁸⁰.

While often NAN issued orders to act, it can also be seen that it ordered these same entities to refrain from acting, and to provide the space and/or sometimes the means to allow NAN to act. Resolution 82/14, regarding the potential amalgamation of two hospitals in Sioux Lookout, resolved that “no decision be made on the status of these hospitals by the government”; and “that National Health and Welfare provide funds to Treaty #9 and the affected Bands to undertake a detailed analysis of the alternatives available to us, including the provision of consultation funds to address the issue with our people.” In Resolution 83/7 addressing nursing shortages as well as the qualifications of the nurses that were hired, NAN resolved that “community leadership be involved in the hiring of all personnel being considered in our area by Medical Services Branch National Health and Welfare.”⁸¹

Reading these resolutions provoked lawyerly anxiety about jurisdiction. As a brief review of the concept, jurisdiction places limits or boundaries around law-making power. One conventional Western limit is that around governments. As I dutifully learned in Canadian constitutional law, areas of jurisdiction were enumerated clearly (if not comprehensively) in the *British North America Act, 1867* (later the *Constitution Act, 1867*).⁸² This separation of powers created an enormous body of case law based on decades of disputes between the two levels of governments, rooted in ideas of exclusive jurisdiction and giving rise to continuing difficulty with federal-provincial delegation or cooperation.⁸³ In short, Canadian law takes jurisdictional limits very seriously.

⁷⁷ Resolution 80/27, “Treaty #9 All Chiefs’ Meeting Resolution 27”, passed July 25, 1980.

⁷⁸ Resolution 80/33, “Treaty #9 All Chiefs’ Meeting Resolution 33”, passed July 28, 1980.

⁷⁹ Resolution 80/34, “Treaty #9 All Chiefs’ Meeting Resolution 34”, passed July 28, 1980.

⁸⁰ Resolution 80/18, “Treaty #9 All Chiefs’ Meeting Resolution 18”, passed July 25, 1980.

⁸¹ Resolution 83/7, “Native Nursing Program & Selection of Nurses”, passed March 3, 1983.

⁸² *Constitution Act, 1867*, 30 & 31 Victoria, c. 3, section 146.

⁸³ Though legal doctrines have softened the exclusivity of jurisdiction inherent in the constitution, and moved Canadian federalism towards flexibility in the recognition of overlapping powers, overlapping jurisdiction does not result in one government gaining the authority to direct the other. See *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] AC 326 (PC), at 354:

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed and if in the exercise of her new functions derived from her new

With these rules fixed in mind, NAN's actions in issuing directives, extending the scope of its authority over another government (even when that other government was acting on NAN territory) seemed, at best, a very unfamiliar expression of jurisdictional boundaries. Or perhaps an abandonment of the concept altogether.

Kent McNeil gives a helpful overview of jurisdiction in his paper, "The Jurisdiction of Inherent Right Aboriginal Governments," explaining that jurisdiction is a measure of the extent of legal authority exercised over a specific geographic space, over a certain group of people, over a certain subject matter, or over any combination of the above.⁸⁴ He also writes that jurisdiction needs a source – a provision within legislation, an inherent right, some place to point to when arguing that this body has the authority to make that law or decision. Finally, McNeil outlines that jurisdiction can be held on an exclusive basis or concurrently with another polity. He notes that when held concurrently, one needs rules to determine which government's laws prevail in the case of a conflict.⁸⁵

I could think of three possible explanations for the phenomenon of NAN directing other governments. First, that NAN's view of jurisdiction was a territorial one, and on that territory, NAN's jurisdiction was plenary, without any limit as to subject, person, or state entity. That NAN would see jurisdiction as limited in scope only by territory (prior connection to land) made intuitive sense and could have been a complete explanation, but for one, not insignificant hiccup. It required the acceptance of a border.

In the Declaration, there was no discussion of subject matter limitations, but nationhood was declared for a certain group of people "we of the Cree and Ojibway nation" who belonged to a certain territory "who come from within your boundaries of Ontario, Manitoba and Quebec, and who live in Ontario at the height of land known as the Artic Watershed".⁸⁶ People and land, always connected, but identified with marked reference to colonial boundaries, *your boundaries*.

This is not to say NAN is without known territory, quite (exactly) the opposite. Certain territory was occupied and controlled by the Ojibway and Cree for thousands of years. However, within the

international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.

⁸⁴ Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments", Research Paper for the National Centre for First Nations Governance, (October 11, 2007) at 1, online at <http://fngovernance.org/ncfng_research/kent_mcneil.pdf>.

⁸⁵ *Ibid.* at 2. See also Shiri Pasternak, *On Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy* (PhD Dissertation, University of Toronto, 2013) [unpublished] whose thesis centers around the concept of jurisdiction, defined as the inauguration of law: "[j]urisdiction orders legal authority. It 'inaugurates' law, bringing it into existence, and in so doing, draws its boundaries and subjects [citations omitted]" at 9. Pasternak uses jurisdiction to examine the overlapping authority claims of the Algonquins of Barriere Lake and Canada. Her study asserts that jurisdiction is a recognizable and translatable concept as between the Canadian legal system and the Onakinakewin (a system of natural laws that governs in that territory). The concept of jurisdiction is thus transferable between legal orders, though its source and the system of law it inaugurates, arises from responsibility to all living things, governing over the relationships between them. It should be noted that Pasternak's definition of jurisdiction is different than the one I rely on. I understand jurisdiction as a boundary around authority. Also of note, Pasternak provides for a historical overview of the concept of jurisdiction, and particularly helpful within that work, parses sovereignty from jurisdiction, allowing for clarity of understanding of the types of political legitimizing work done by each term.

⁸⁶ NAN Declaration, *supra* note 2 at 1.

resolutions, the territory is known by the relationships that are formed upon it, not by a line placed around it. Resolution 80/10 demarks NAN territory by use: “[t]hese rights include our treaty rights to hunt, fish and trap on the land and water on which we depend for our living.”⁸⁷ Resolution 80/6 demarks it by occupation: “the lands where we live are Indian lands.”⁸⁸ Resolution 83/3 states that NAN territory is that which was given to them by the Creator.⁸⁹ While there are references to northern Ontario or Treaty #9 and #5, in speaking of the land no resolution demarks NAN territory with regard to a clear border. So far as territorial jurisdiction under the Western definition requires a distinct territory, the only definition to be had is a living one, invoking complex interrelationships of use, occupation and sacred source.

This lack or refusal of fixed border has precedent. In Heidi Stark’s article, “Marked by Fire, Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada” a detailed explanation is given regarding the resistance to fixed borders by Anishinaabe leadership.⁹⁰ Boundaries were historically desired by settler governments to expedite land acquisition, and ostensibly to promote peace between nations. While some Anishinaabek were willing to establish marked territory, others resisted the imposition of boundaries. Instead land rights or tenure were known by relational boundaries, in Stark’s study, by relationships of kin or allies, individuals or families, with areas that were exclusive to the Anishinaabe or shared with other nations. According to Stark, “[t]hese relationships enabled various Native nations to exercise a land tenure that, though highly regulated, was flexible to the obligations and responsibilities that kinship carried across national boundaries.”⁹¹

Even if NAN were to establish territorial jurisdiction via a hard line, this type of jurisdiction typically does not allow for one state to direct the actions of another without some agreement as to the same. Unless, of course, those two states found themselves in a colonial relationship.

This led me to the second possible explanation. NAN’s view of jurisdiction represented in these resolutions was incoherent given the historical context: the practical reality of the current colonial relationship.

Canada had long assumed a totalizing right to govern in all Indigenous territory, destructively imposing its own governance, and governance systems on communities. As Resolution 80/6 put it, “...the governing system that has been imposed upon our people by the British North America Act, the Indian Act, and the James Bay Treaty (Treaty #9) has eroded our natural laws and the Indian government based on those laws.”⁹² The Declaration had signalled this domination was to end and

⁸⁷ Resolution 80/10, “Presentation by Chief Andrew Kakepetum, Sandy Lake, Fishing, Hunting and Trapping Rights”, passed January 16, 1980.

⁸⁸ Resolution 80/6, “Nishnawbe-Aski Government”, passed January 15, 1980.

⁸⁹ Resolution 83/13, “Treaties”, passed March 3, 1983.

⁹⁰ Heidi Stark, “Marked by Fire, Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada” (Spring 2012) *American Indian Quarterly*, Vol. 36, No. 2, 119 at 123 and 129-135.

⁹¹ *Ibid.* at 133. See also Shiri Pasternak, *On Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy* (PhD Dissertation, University of Toronto, 2013) [unpublished] at 18-19 who reviews the literature on territorial space or the construction of the concept of territory, where territory is the political form of space that is “owned, distributed, mapped, calculated, bordered and controlled”, a concept of space resisted by the Barriere Lake Algonquins.

⁹² Resolution 80/6, “Nishnawbe-Aski Government”, passed January 15, 1980.

control reverted: “[t]oday our relationship with you must change... It will be on our terms or not at all.”⁹³

Given that Canada had falsely assumed authority over NAN and was exercising the same, to regain control NAN might choose to similarly act outside legal logic and direct the law and policy making of an outside state. Issuing directives to the Canadian government, commanding the actions of its ministries both federal and provincial, would be a change in the relationship on NAN’s terms, and one critical means to create the space required for NAN to govern its own affairs. However, this correction of authority did not seem a complete explanation of jurisdiction according to NAN’s own legal traditions. Evidence that this was a shallow explanation arose as I considered the Declaration alongside resolutions on the topic of Treaty.

In the Declaration, NAN outlined that Treaty #9 was, at root, an agreement to share, and then generalized on NAN’s responsibilities and those of the settler governments:

We agreed to share. We lived up to the terms of our agreement. We kept the peace, paid the honour to the European sovereign, allowed the white man to settle and live according to his laws, and permitted his religions and cultures to be introduced to our people.

You agreed to share. You said our rights would never be lost. You did not live up to the agreement. You took most of our land, outlawed our religious beliefs and practices, destroyed much of our animal life and forest, restricted our movements, stopped us from using our languages, and tried to convince us that our music, dances and art were barbaric.⁹⁴

From the perspective of NAN, the Treaty was clearly intended to define an ongoing (rather than surrendered and settled) relationship between governments. This is a common view: “[t]he treaties were to define relationships between governments, they guaranteed peace and prevented war. They involved a mutual respect that was to be enduring.”⁹⁵ Further, specific to Treaty #9: “Some First Nations saw Treaty Nine as the beginning of a relationship that would develop flexibly over time. They believed that any issues over which there was some disagreement at the initial signing could be discussed further at a later time.”⁹⁶

One of the basic tenets or responsibilities of this relationship was that of non-interference. As was set out in the Declaration, NAN had lived up to this responsibility, allowing space for settler laws, religions, and customs. Canada had not allowed NAN the same.

⁹³ NAN Declaration, *supra* note 2 at 2.

⁹⁴ *Ibid.* As in chapter two, it should be noted that NAN’s interpretation of Treaty was not based on the written document, but rather the version enshrined in oral history as “...the actual treaty documents do not reflect our Elders’ understanding of the terms and conditions of Treaties number five and nine”: see Resolution 83/13, “Treaties”, passed March 3, 1983.

⁹⁵ Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 35.

⁹⁶ Rachel Ariss with John Cutfeet, *Keeping the Land, Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Nova Scotia: Fernwood Publishing, 2012) at 25.

Resolution 80/11 set this out again: “[b]ut they have their own government, the power, self control in their own society. That is exactly what we want.”⁹⁷ And Resolution 80/15 set this out again: “[a]s we would like to keep our way of living the way it is without the interference of the white society.”⁹⁸

As is indicated by these limited statements on Treaty, the relationship contained an agreement to share, and an ethic of non-interference: each party supporting one another but living in accordance with their own worldview. Therefore, issuing directives to the Federal government, even if those directives were limited to actions undertaken on NAN territory, clearly was not an endgame, a preferred manner of operation. However, it was permitted within NAN’s view of jurisdiction, though the reasoning underlying was still eluding me.

The third explanation and some answers were finally provoked by McNeil’s observation that the source of legal authority determines its scope:

The scope of the jurisdiction of Aboriginal governments depends to a large degree on the source of that jurisdiction.

...

We have seen that many Aboriginal people regard the Creator as the source of the inherent jurisdiction of their governments. From this perspective one would expect the scope of the jurisdiction to depend on the authority the Creator gave to Aboriginal nations.⁹⁹

Recalling from chapter three (dealing with authority and legitimacy in NAN) that legal authority was commonly held, rooted in prior historical connection, and gifted with land from the Creator, I found that authority was best understood as gifted responsibility taken up in relationships. This responsibility arose from our roles as co-creators, interdependence necessitating each of us to act in protection for the conditions for life. This is a simplification, the general idea presented at the highest level, but the move from authority as a right to exercise power to authority as an interdependent responsibility to protect the gift of creation necessarily reverberates through the concept of jurisdiction. Jurisdiction is then a limit on responsibility, not a boundary around authority.¹⁰⁰

⁹⁷ Resolution 80/11, “Presentation by Chief Silas Wesley, Kashechewan”, passed January 16, 1980.

⁹⁸ Resolution 80/15, “Presentation made by Chief Aglaba James, on behalf of Magnus James, Elder, McDowell Lake”, passed January 17, 1980.

⁹⁹ McNeil, *supra* note 84 at 8.

¹⁰⁰ See also Robert Clifford, *WSÁNEĆ Law and the Fuel Spill at Goldstream* (LL.M Thesis, University of Victoria, Faculty of Law, 2014) [unpublished] at 85 - 86, where he discusses the assumption of a certain kind of authority within jurisdiction and the absence of that kind of authority in an Indigenous legal order. To highlight the overlap in our observations and conclusions, I quote him at length:

If we step back from the conception of “jurisdiction”, several things become apparent. Jurisdiction may be exclusive, shared, or some combination therefore, but each tends to reflect a certain authority over a given area or issue. For example, the Department of Fisheries and Oceans has jurisdiction over fish and oceans. In drawing on Gordon Christie, this is an example of a “conceptual structure” that is “quietly residing in the background” within the sovereignty narrative. That is, *this thinking and acting with authority over the environment and fish becomes assumed*. Yet, if we look back to Chapter Two of this thesis and my discussion of WSÁNEĆ beliefs, this notion may be in many ways inconsistent with the WSÁNEĆ legal order.

Chapter Two stressed a deep relationality between the WSÁNEĆ people, the Earth, and other elements of creation. Several stories exemplified this point. The creation story of TETÁĆES, the islands within WSÁNEĆ territory, contain the following teaching:

After throwing the WSÁNEĆ People into the ocean, XÁLS turned to speak to the islands and said: “look after your relatives, the WSÁNEĆ People.” XÁLS then turned to the WSÁNEĆ People and said: “you will also look after your ‘Relatives of the Deep’.”

Perhaps then, it made sense that the scope of NAN's jurisdiction could not be explained with traditional western metrics, over a defined people, place, or subject. There is no logical boundary-limit that can be placed on interdependent responsibility beyond that of our relationships. Though each set of relationships, and the responsibilities held regarding the same would be unique, all elements of creation have responsibilities as co-creators. And if the gift of responsibility is commonly held, relational jurisdiction would be held concurrently, overlapping with all of creation. A person would have relational jurisdiction to protect the land they live on, gifted by the Creator, relational jurisdiction to protect the gifts of all those on that land, the fish, the rice, their Elders, their youth. Rather than a limit, jurisdiction would operate like an imperative call, relationships determining where responsibility is required.

Jurisdiction limited relationally would explain NAN's directives. Also, what I have been reading as 'issuing directives' would be best understood not as a top down authoritative order, but rather as a direct reminder of responsibilities. As Canada clearly failed in recognizing its responsibilities under the Treaty relationship, to share and refrain from interfering with NAN's way of life, NAN acted within their jurisdictional responsibility: "it is our sacred duty to slow you down."¹⁰¹

IV.IV. CONCLUSION

In the story of the fat boy and the giants with no hearts, the giants took without limit from a strange territory. The only relationship offered was one of violence and terror, destruction characterizing every encounter. In the end, though they were giants who seemingly could not be killed, those who refused to acknowledge interdependence, who acted outside of its limits, were ended in order that other connections could be preserved.

This chapter began by outlining the value of interdependence to aid the identification of legal principles from NAN's resolutions. Understanding these legal principles will hopefully begin a process of becoming familiar with the legal order in its fullness. This is the first step in finding the details of law.

Interdependence was discussed as the interconnection between all elements of creation, all relations, with the consequence of mutual reliance and thus of responsibility. Interdependence, as the force that holds our relationships together, underlies those responsibilities. It describes our power and our need, our vulnerability and our agency, inherent in each of our connections.

Turning to the resolutions that addressed NAN's relationships, two separate principles emerged. One was that of earthbound need, the concept governing the fair distribution of goods or resources. In reviewing resolutions on the topic of service provision and resource distribution, I first learned that

Evident is that the WSÁNEĆ do not have an *authority over* the islands within their territory; rather, they each (the WSÁNEĆ and the TETÁCES) have a series of *responsibilities in relation to* one another. We see multiple other examples as well. SLEMEW (Grandfather Rain), with associated connections with water, was the first ancestor of the WSÁNEĆ. Salmon were also once people, and when the WSÁNEĆ say a prayer to the chum salmon asking them to feed us, we refer to them as EN ŠWOKE (your brother/ sister). Each of these represents an emphasis on relationships. The shift *from authority over to responsibilities in relation to* may be subtle, but is a significant shift from the thinking that underlies "jurisdiction" [emphasis in original, citations omitted].

¹⁰¹ NAN Declaration, *supra* note 2 at 3.

the NAN sought adequacy, rather than the expected equality. Adequacy ended up being defined by unmet need, a concept unique to place, community and culture, with the threshold of met need understood as a limit, rather than a standard to be reached. This limit was reasoned to be that as set by nature's limits, use counterbalanced by the responsibility to protect the ongoing-ness of Creator's gifts.

The other principle was that of relational jurisdiction, the idea that the boundary or extent of legal authority (in NAN understood as gifted responsibility) is not determined by bounded territory or subject, but by relationships. Held concurrently with all of creation, jurisdiction would permit the exercise of responsibility within one's own relationships, and the enforcement of responsibility where creation is under threat.

Fittingly, Resolution 83/26, the last resolution passed in the whole of the historical subset, spoke of ending relationships:

Whereas, the aboriginal peoples of Ontario do not and have not received an allocation of the funds voted by Parliament, commensurate with their population or needs; and,

Whereas, the National President of the Assembly of First Nations has not yet addressed this imbalance;

Therefore be it resolved, that the Chiefs of the Nishnawbe-Aski Nation give the two (2) representatives of the Nishnawbe-Aski Nation a mandate to withdraw from the assembly of First Nations if this imbalance in funding and delivery of services to the aboriginal peoples of Ontario is not addressed, such that the Indians of Ontario receive services and financing reflecting both their population and their accumulated need.¹⁰²

This resolution directed at the Assembly of First Nations was not an isolated occurrence, NAN had already sought the re-establishment or redefinition of other relations not acting in accordance with their responsibilities.¹⁰³ As these one-sided efforts likely continued, I wondered about the words directed at Ontario and Canada, opening the Declaration, “[i]t is so crucial that you understand today as tomorrow may be too late.”¹⁰⁴

¹⁰² Resolution 83/26, “Services to Ontario Indians”, passed August 11, 1980.

¹⁰³ See Resolution 82/4 on the topic of re-evaluating and reforming relationships with other “Indian governments” where they are not conducive to the principles of “true Indian Government”, Resolution 82/4, “Nishnawbe-Aski Nation All Chiefs’ Meeting Resolution #82-4”, passed March 11, 1982.

¹⁰⁴ NAN Declaration, *supra* note 2 at 1.

CHAPTER FIVE

V.I. TWO YEARS IN THUNDER BAY

I don't want to talk about death and dying and hate anymore. I want to talk about life.¹

It's unlike the whiteman's system where there is a judge, written rules and regulations, court system and jails and such. They have the visual things that you can see. Whereas the Anishinaabe way, you couldn't see it because it was the way of life.²

I started writing in Victoria in the fall of 2013, and will stop in Thunder Bay in the fall of 2017, during an intense increase in racial tension that has at its roots the worth of Indigenous life.

Two years ago, tired of sustained travel, I moved from Toronto to Thunder Bay. This happened in time to begin an eight-month inquest into the deaths of seven First Nations youth.³ Five boys, Jethro Anderson, Curran Strang, Reggie Bushie, Kyle Morriseau, and Jordan Wabasse had drowned in the McIntyre or Kaministiquia Rivers between 2000 and 2011. Two more youth, Robyn Harper and Paul Panacheese, died of other causes. All were high school students from NAN territory living away from their communities and families, in Thunder Bay only to be able to obtain an education.⁴

Two conversations happened at the inquest. One was about the set up to systemic danger: the policy choices and chronic underfunding that both removed the possibility of educating these kids in their home communities, and created the unsafe conditions that awaited them in the city. The other was about the immediate loss, the individual facts preceding each death. These losses held an eerie amount of detail in common. All of those who drowned were Indigenous males between the ages of 15 and 18. They went missing for days or sometimes months. Community and other searches ensued, and ended in heartbreak. All were recovered from the water, but never was any evidence found as to how the kids came to be there, as the point at which they entered the water was without witnesses. In every case, despite a lack of evidence, officials assumed accident.⁵

The purpose of having an inquest into these seven deaths was, like all Ontario inquests, to examine a preventable death closely and avoid similar deaths in the future.⁶ So it came as tragic *déjà vu* when

¹ Sam Achneepineskum, July 5, 2017. Status updated text [Facebook update]. Retrieved from URL, used with permission.

² Rachel Ariss with John Cutfeet, *Keeping the Land, Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Nova Scotia: Fernwood Publishing, 2012) at 44.

³ With Julian Falconer, and others at Falconers LLP, I represented NAN at the Inquest.

⁴ For the Verdict and Recommendations of the jury at the Inquest into the Deaths of Jethro Anderson, Curran Strang, Paul Panacheese, Robyn Harper, Reggie Bushie, Kyle Morriseau, Jordan Wabasse, please see <https://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/Inquests/Verdictsandrecommendations/OCCVerdictsSevenFirstNationsYouths.html>. It should be noted that the eventual verdict found three of the drownings to be by underdetermined means, and two by accidental means. For further facts on the lives of these kids and the circumstances leading to their deaths, including the legacy of residential schools, see Tanya Talaga, *Seven Fallen Feathers: Racism, Death and Hard Truth in a Northern City* (Toronto: House of Ansari Press, 2017).

⁵ Facts were presented during the Inquest as to the level of intoxication suffered by each of the boys in lieu of facts that would explain how they drowned. The evidence of intoxication, along with evidence of some proximity to water was enough for officials (including the Police Service and the Coroner's Office) to take the position that the five drownings were all accidental.

⁶ *Coroners Act*, R.S.O. 1990, c. C.37 at s. 31.

an Indigenous man was found in the same waters on October 19, 2015, about two weeks into the hearing. Within hours and before a post-mortem was completed or identification was made, the Thunder Bay Police Service deemed his death to not be suspicious. Later identified to be Stacy DeBungee from Rainy River First Nations, his death and the repetitive conclusion of accident without thorough investigation brought the conversation about the worth of Indigenous life from the past tense inquest to the present day.

In response to police inaction, a complaint was made by the DeBungee family and the leadership of Rainy River First Nations to the Office of the Independent Police Review Directorate (OIPRD). The complainants requested a conduct investigation and a systemic investigation with a focus on whether the Thunder Bay Police Service was proclaiming Indigenous deaths as accidents without thorough investigation because of racist assumptions.⁷

Then, while the OIPRD investigations were still ongoing, there were two more drownings. In May 2017, we lost Tammy Keeash and Josiah Begg. Both were found in the same small area of water ways. Both were NAN youth relocated to Thunder Bay to access services not available in NAN territory. Both went missing on the same night.⁸

On September 23, 2017, another Indigenous youth was recovered from the same area of river, Dylan Moonias, 21 years old, also from NAN territory.⁹ On September 28, 2017, another man, 20 years old, was pulled from the same area of river, alive, and blessedly expected to make a full recovery.¹⁰

These stories compound others. An Indigenous woman, Barbara Kentner, was killed in an act of random violence by a trailer hitch thrown from a passing car.¹¹ A Statistics Canada report indicating that hate incidents targeting Indigenous people in Thunder Bay account for 29% of all anti-Aboriginal hate crimes across Canada.¹² Personal accounts, story after story appeared on Facebook and Twitter, amounting to details of hate tagged with the hashtag #thisisthunderbay. All of this happened in the space of a few months.

And the reaction from those in police and municipal leadership is coldly nonplussed. At a press conference held June 7, 2017, Acting Police Chief Sylvie Hauth and Thunder Bay Police Services

⁷ For the terms of reference of the review to be conducted by the Office of the Independent Police Review Directorate, please see <<http://www.newswire.ca/news-releases/oiprd-to-review-thunder-bay-police-service-practices-for-policing-indigenous-peoples-599814051.html>>. The OIPRD review is taking a comprehensive view, including a review of the investigations into nearly 40 deaths, mostly the loss of First Nations people.

⁸ Tammy Keeash was found May 7, 2017. By May 12, 2017, Thunder Bay Police had concluded there was no evidence to indicate criminality. See “Nothing criminal about Tammy Keeash’s ‘tragic’ death, say police in Thunder Bay, Ont.”, cbc.ca (May 12, 2017) online at: <<http://www.cbc.ca/news/canada/thunder-bay/tammy-keeash-post-mortem-1.4112450>>.

⁹ Tanya Talaga, “More Grief in Thunder Bay as body of Indigenous man pulled from river”, thestar.com (September 25, 2017) online at: <<https://www.thestar.com/news/queenspark/2017/09/25/thunder-bay-reels-as-body-of-indigenous-man-pulled-from-river.html>>.

¹⁰ “Police say 20-year-old man in stable condition after rescue from Thunder Bay, Ont. River”, cbc.ca (September 28, 2017) online at: <<http://www.cbc.ca/news/canada/thunder-bay/neebling-mcintyre-floodway-rescue-1.4311037>>.

¹¹ Barbara Kentner of Wabigoon Lake Ojibway Nation was assaulted January 29, 2017, and later succumbed to her injuries on July 4, 2017. Nancy MacDonald, “Waiting for Death in Thunder Bay”, macleans.ca (June 27, 2017) online at: <<http://www.macleans.ca/news/waiting-for-death-in-thunder-bay/>>.

¹² Statistics Canada, “Police Reported Hate Crime in Canada, 2015” (June 14, 2017) online at: <<http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14832-eng.htm>>.

Board Chair Jacqueline Dojack denied that Indigenous people had any crisis of confidence in the police force, despite Indigenous assertions of the opposite. In response to #thisisthunderbay, city hall put forward #IchooseTBay, a place for positive stories to silence any negative reputation. With the Acting Chief stating that it was “business as usual” for the police service,¹³ and the Mayor protesting that it’s not the job of police to “babysit these children,”¹⁴ Thunder Bay became polarized between Indigenous crisis and settler calm.

Some say this city was always divided.¹⁵ But these recent deaths, and the reaction thereto, have again and again split Indigenous and settler peoples to the core of well-being: a question of safety and ultimately of worth.¹⁶ Though part of the city easily dismisses these drownings as tragic accidents, many cannot rest with that assumed explanation given the routinely experienced aggression, improbable similarity and proximity of now nine “accidental” drownings, and lack of thorough and impartial investigation. The air in this town feels thick with hate and colonialism, racism and death.¹⁷

¹³ Doug Diaczuk, “Thunder Bay Police say they are not in crisis”, Sudbury.com (June 8, 2017) online at: <<https://www.sudbury.com/around-the-north/thunder-bay-police-say-they-are-not-in-crisis-637474>>. In July 2017, Senator Murray Sinclair was appointed by the Ontario Civilian Police Commission, to study the effectiveness of the Thunder Bay Police Service Board following a complaint about the same by Indigenous leadership from Rainy River First Nations, NAN and Grand Council Treaty #3. He has since released an interim report, which can be found here: Murray Sinclair, *Interim Report of the Honourable Murray Sinclair submitted to the Executive Chair, Ontario Civilian Police Commission*, (October 31, 2017) online at: <<http://www.slasto.gov.on.ca/en/OCPC/Documents/Final%20TBSPB%20Interim%20Report%20-%20Oct%2031%2C%202017.pdf>>.

¹⁴ Jody Porter, “First Nations call for RCMP to take over investigations in Thunder Bay, Ont.”, cbc.ca (May 31, 2017), online at: <<http://www.cbc.ca/news/canada/thunder-bay/thunder-bay-police-rcmp-1.4138676>>.

¹⁵ Thunder Bay was, for a long time, literally divided into two cities, Port Arthur and Fort William. Amalgamated in 1970, it is still composed of two separate residential and central business districts, with the “Intercity” area, a large business district, in between. As Tanya Talaga writes, “Thunder Bay has always been a city of two faces. The Port Arthur side is the white face, and the Fort William side is the red face.” See Talaga, *supra* note 4 at 3. Particular to this division, as Senator Sinclair noted in his interim report, one-sided concerns about police inaction on Indigenous deaths is not new to Thunder Bay. See, Rudy Platiel, “Police accused of ‘Systemic racism’: Groups call for inquiry into unsolved killings of Thunder Bay natives”, *The Globe and Mail* (27 November 1993) A7, as quoted in Sinclair, *supra* note 13 at 9. See also, Leisa Desmoulins, *Diversity in Policing Project: Phase 1 report*, (June 6, 2007), online at: <<http://www.diversitythunderbay.ca/uploads/documents/diversity%20in%20policing%20project%20phase%20i.pdf>>.

¹⁶ Robert Jago also pinpoints the issue in Thunder Bay as settler indifference to Indigenous lives in “The Deadly Racism of Thunder Bay”, *walrus.ca* (December 11, 2017), online at: <<https://thewalrus.ca/the-deadly-racism-of-thunder-bay/>>. For further recent news outlining the events of the past few years, and focusing on the resulting racial tension, please see Jon Thompson, “What would it take for Thunder Bay to admit it’s in crisis?”, *TVO.org* (July 6, 2017) online at: <<http://tvo.org/article/current-affairs/shared-values/what-would-it-take-for-thunder-bay-to-admit-its-in-crisis>> or Nancy MacDonald, “Thunder Bay’s Divided Community is Haunted By its ‘River of Tears’”, *Macleans.ca* (July 7, 2017) online at: <<http://www.macleans.ca/river-of-tears/>>. For the opinion of the leadership of the involved territories, see Alvin Fiddler, Francis Kavanaugh, and Jim Leonard, “Chiefs Demand Answers on Thunder Bay River Deaths”, *thestar.com* (June 6, 2017) online at: <<https://www.thestar.com/opinion/commentary/2017/06/06/chiefs-demand-answers-on-thunder-bay-river-deaths.html>>.

¹⁷ In one extraordinary example of the opposite, a letter to the editor appeared in the *Chronicle Journal* on October 19, 2015, just weeks after the start of the Inquest, and was lovingly directed at Indigenous students with decolonial truths:

When the racists taunt you, when they call out mean things, or throw eggs, or use hurtful words, remember that they are afraid of you.

They know that this is territory that was occupied without permission. It is human history; some tribe with newer technology and greater numbers has taken over the land of some other tribe. It happened to their own ancestors, in another place, so long ago that they don’t even remember the story.

But in North America, the story changed. The other tribe was not wiped out, it was not assimilated, and its culture did not disappear. You remain. And they are afraid of you. Their fear and ignorance make them do these things.

I want to talk about life.

V.II. FOUR LEGAL PRINCIPLES ABOUT LIFE

Of course, NAN has evolved to meet its changing needs over the past 35 years. But underlying this continual recreation, there are two strong indications that NAN's constitution remains committed to the legal values and principles outlined here. First, NAN remains committed to the 1977 Declaration of the Nishnawbe Aski as a foundational document: it is present in self descriptions, reproduced in full on NAN's website, and referenced consistently. And second, NAN yet receives its mandate from resolutions passed at meetings of the Chiefs-in-Assembly, indicating a stable view of authority derived from the chiefs, but not delegated.

Another sign of constancy, both in my current experience and within the resolutions, law is described as a 'way of life'.¹⁸ This turn of phrase is not unique to NAN, it appears in relation to many Indigenous legal systems, restated and well argued. In Leroy Little Bear's words, "...the philosophy, the values, and the customs in Aboriginal societies are also the law. Law is not something that is separate unto itself. Law is the culture and culture is the law."¹⁹ Or, as according to Rachel Ariss:

The way law permeates life can be understood by remembering that in most First Nations' oral traditions, law is not a separate institution... This is a significant difference between First Nations legal systems and Euro-Canadian legal systems, in which law is specialized and idealized as separate from and often, superior to, other social institutions, norms and cultural beliefs.²⁰

When first starting down this road, law spoken of as a 'way of life', seemed to be an implicit admission that this legal tradition was inarticulable. Without a boundary, law as a 'way of life' dissolved; I could see nothing in front of me but the assertion that law existed.

Now, at the end of this work, this same statement conveys such fullness. As settlers separate law into its own faculty building, its own profession, its offices and courts and legislatures, in the Indigenous

They don't understand. And as frustrating as it is, as hard as it is, you need to live in a way that proves that they are wrong.

Cindy Spackman, "Live in a way that proves they are wrong", Chronicle Journal (October 19, 2015) online at: <http://www.chroniclejournal.com/opinion/letters_to_editor/live-in-a-way-that-proves-that-they-are-wrong/article_85ef67ae-7450-11e5-8022-bf7c3851591a.html#user-comment-area>.

¹⁸ I heard this from various community members previous to beginning any study about the same. With regard to the material studied, see, for example, Resolution 80/6 "Nishnawbe-Aski Government", passed January 15, 1980: "Whereas the Indian way of life is in accord with the Natural laws of the Creator."

¹⁹ Leroy Little Bear, "Jagged Worldviews Colliding" in Marie Battiste (ed.) *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77 at 83. See also Marie Battiste and James [Sákéj] Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon, SK: Purich Publishing, 2000) at 14; Christine Zuni Cruz, "Law of the Land – Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin Richardson, Shin Imai and Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009) at 322-323 and at 325, "The word that comes closest to "law" in Tiwa is the word for tradition – *keynaithue-wa-ee* which translates, "this is our way of living".

²⁰ Rachel Ariss with John Cutfeet, *Keeping the Land, Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Nova Scotia: Fernwood Publishing, 2012) at 44. See also Aaron Mills, who restates and cites many Elders for the proposition that the "world beneath law" and law is often collapsed for Indigenous peoples: Aaron Mills, "The Lifeworlds of Law; on Revitalizing Indigenous Legal Orders Today", (2016) 61:4 McGill LJ 847 at 857.

tradition it is gifted by the Creator to all beings in creation.²¹ As settlers debate and resist the role of law in our private interactions,²² Indigenous legal traditions permeate, governing all interactions of life lived. In the words of Elder Allan White: “We are actually living it...law is all around us.”²³

Law as a ‘way of life’ is a statement of law’s ubiquity, and, as according to Little Bear above, of its cultural embeddedness. It is a reminder that Indigenous law can only be understood from within its cultural commitments, its own worldview. This condition is not unique to Indigenous legal traditions, but applies across all legal traditions: “[e]very system of law – Indigenous or not – has a home.”²⁴

So, both systems of law, Indigenous and Canadian, are embedded in their respective worldviews. And, according to academics working across systems, these worldviews have different commitments. As Patricia Monture-Angus writes: “[t]he basic tension buried in First Nations / Canadian legal relations stems from the difference between our worldviews.”²⁵

There are many descriptions of the differences between worldviews and thus between legal traditions. Mary Ellen Turpel writes of a contrast between individual rights as opposed to responsibilities to creation:

Although there is no culture or system or beliefs shared by all Aboriginal peoples, the paradigm of rights based conceptually on the prototype of right of individual ownership of property is antithetical to the widely-shared understanding of creation and stewardship responsibilities of First Nations Peoples for the land, for Mother Earth...Social life is based upon responsibilities to creation and to the Creator....These are *responsibilities* which each person owes to others representing the larger function of social life, that is, to live in balance in order to honour and respect Mother Earth. There is no equivalent of ‘rights’ here because there is no equivalent to the ownership of private property, and no equivalent to private or exclusionary spheres of social life.²⁶

²¹ See also Patricia Monture-Angus, “Now That the Door is Open: First Nations and the Law School Experience”, (1990) 15 Queens LJ 179 at 188: “The separations of law, government, family, education, religion, etc., simply do not exist within the First Nations worldview.”

²² Mary Ellen Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-1990) 6 C.H.R.Y.B. 3 at 14-16.

²³ As quoted in Aimee Craft, *Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders June 20-23, 2013 at Roseau River, Manitoba*, (Spring 2014) at 8.

²⁴ Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today”, (2016) 61:4 McGill LJ 847 at 858. See also M. Cohen, “Canada and the International Legal Order: An Inside Perspective” cited in G. Alexandrowicz, J. Claydon, S. Fairly, J. Hatfield Lyon, K.V. Raman, eds., *International Law: A Casebook* (Kingston: Queen’s Faculty of Law, 1987) at 1-1:

The nature and function of law are uniquely a reflection of the nature of political and social organization prevailing in the society to which it refers...Such a system is shaped by and is susceptible to the evolving social, political, economic, cultural, religious and other pressures and developments. Therefore, to understand law it is necessary to learn and appreciate the conditions of the community in which it functions.

See also Mary Ellen Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-1990) 6 C.H.R.Y.B. 3 at 6: “It is easy to forget the extent to which the constitutional system, both institutionally and imaginatively, is a system of a particular historical and cultural set of circumstances and interests.”

See also Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence* (Halifax: Fernwood Publishing, 1999) at 49: “Canadian law is not objective but rather grounded in Euro Canadian cultural assumptions”.

²⁵ Monture-Angus, *supra* note 21.

²⁶ Mary Ellen Turpel, *supra* note 22 at 29.

Justice Iacobucci, during the travels made for the report, First Nations Representation on Ontario Juries, described contrasting approaches to conflict resolution:

First Nations leaders and people spoke about the conflict that exists between First Nations' cultural values, laws, and ideologies regarding traditional approaches to conflict resolution, and the values and laws that underpin the Canadian justice system. The objective of the traditional First Nations' approach to justice is to re-attain harmony, balance, and healing with respect to a particular offence, rather than seeking retribution and punishment. First Nations people observe the Canadian justice system as devoid of any reflection of their core principles or values, and view it as a foreign system that has been imposed upon them without their consent.²⁷

For Monture-Angus, the “tension and disagreement at the fundamental level of construction of legal relations” is not about two differing approaches to conflict, but about whether conflict resolution properly belongs at the root of law. In her work, the Western legal system begins with an idea of human society as a place of natural conflict and the law responds as a system of resolving those conflicts. In contrast:

To First Nations, this ideology is nothing short of ridiculous. Harmony is the center of our relations with the universe and all other beings, be they human, animal or plant. Not only is this the basis of First Nations legal relations, it is a total and integrated philosophy around which all social relations are constructed.²⁸

Not to be left out of the parsing of difference, I would add one minor note on the themes above. As opposed to compartmentalized Canadian law concentrated on specific interventions, (for example, the protection of individual rights or the resolution of a conflict), Indigenous law is holistically and positively committed to harmony, or the responsibility to live in balance with all of creation. In other words, law is not only a *way of life* for the people of NAN, it has a substantive commitment. It is, in fact, *about life*.

I started in chapter one by identifying two central values underlying the view of a good life (one lived in line with the rhythms of creation): interdependence and creation. Closely related concepts, creation was later defined as the action and result of living in relationships; interdependence as the creative force that is inevitable mutual responsibility or the force that functions to hold the relationships of co-creators together. Having laid out four legal principles which further these values, I now understand that the good life is one focused on the protection of all life.

After laying out some of the relevant history and geography of NAN as I know it, in chapter two I asked that any conclusions within this work be situated in context. NAN's legal principles must be understood from within their worldviews (to the limited extent I am able to understand and explain) and from within the material reality created by time and place. The violent effects of colonial policy

²⁷ First Nations Representation on Ontario Juries, Report of the Independent Review Conducted by the Honourable Frank Iacobucci (2013), at ¶ 210, online at: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html>.

²⁸ *Ibid.* See also Leroy Little Bear, *supra* note 19.

are not visited uniformly on Indigenous communities across Canada, and it is of no aid to NAN to assume their struggles or solutions are the same as their southern neighbours.

Chapter three outlines two principles. One is the supremacy of sacred/natural law over all other forms or sources of law. Supremacy clauses order the hierarchy of laws, pre-determining in the event of a conflict of laws which rule will be followed. This principle operates to ensure that natural law trumps any other conflicting dictum, and in this way, the earth and its life-giving force are secured from law that would permit destruction or exploitation. Sacred natural supremacy is a safeguard in law for natural law: an inalienable protection of creation.

The second principle is that of gifted responsibility. When exploring legal authority for law-making in NAN, I found it held commonly by all. Law-making is a responsibility of every person, not delegated but retained, held by NAN community members. The source of their authority is rooted in historic connection, inherited relationships, and in the Creator, who gifted to them land and law. These observations led to an understanding of authority as responsibility; as the gift is received, so is the responsibility to protect it. Put this way, the responsibilities of a law-maker and co-creator were realized to be the same. Gifted responsibility is the positive obligation to act towards re-creation of the original gift of land, or the conditions for life.

Chapter four also outlines two principles. The first is a principle of earthbound need, a concept governing the fair distribution of goods. In filling out the concept of need, I determined it must be defined by those with direct experience as it is unique to place, community and culture. I then explored whether it should be understood as a standard to be met or limit, and settled on the latter. Earthbound need is a limit on the use of goods determined by sustainability, bound by what the earth can safely bear.

The second principle is that of relational jurisdiction. In trying to find the limit of legal authority, or NAN's view of jurisdiction, I considered a few potential theories before realizing that to understand a limit on authority, I had to consider the nature and source of that authority. Remembering that legal authority in NAN is responsibility gifted by the Creator, I realized that the only logical limit on this responsibility is defined relationally. Relational jurisdiction is responsibility owed to all relations, and held concurrently with all of creation.

All four of these principles operate to ensure the continuation of life. And as law-making is a commonly held responsibility, these principles are the province of community, not cabinet. With sacred/natural law supreme over any other; a positive common responsibility on each element of creation to act towards continual re-creation; a limit on resource use to that what the earth can safely bear; and authority/responsibility extended to and defined by our relationships within creation, this legal order sees every community member together supporting life.

Perhaps it is because the focus of my work in Thunder Bay has been in response to loss that I see so prominent in these principles a constructive focus on life. But I dwell on this, and sadly contrast it to so many grieving clients. In representing NAN at the inquest, RRFN and the DeBungee family on the OIPRD complaint, and throughout my career, the legal assistance I can provide seems to be always reacting to loss.

Or perhaps I'm disturbed not by the particulars of certain cases, but about the values inherent in and absent from the Canadian legal systems and the implications thereof. Lawsuits are for compensable damages. Inquests are to prevent a similar death. Public inquiries are official reviews. We look back at what happened and we redress a wrong as "there is no right, that is, no right which the court recognizes, without a remedy"²⁹. Canadian law is triggered in reaction. This is a heartbreaking realization.

Before becoming a lawyer, I worked in a women's shelter as a counsellor. After a particularly tough day, it was gently suggested to me that one must find the work that suits their skills *and* their stamina. As a storied illustration of this point, my co-worker told me the "public health parable":

Imagine a large river with a high waterfall. At the bottom of this waterfall hundreds of people are working frantically trying to save those who have fallen into the river and have fallen down the waterfall, many of them drowning. As the people along the shore are trying to rescue as many as possible one individual looks up and sees a seemingly never-ending stream of people falling down the waterfall and begins to run upstream. One of other rescuers hollers, "Where are you going? There are so many people that need help here." To which the man replied, "I'm going upstream to find out why so many people are falling into the river."³⁰

Leaving the shelter system and learning Canadian law was my way of heading up river. I haven't abandoned my belief that there is good work to be done within the Canadian legal system, though I often and strongly waver. There are many who are creative, responsible and realistic: consciously lawyering for social change (considered in this context as prevention, rather than perpetual reaction).³¹ But even when we bring all the tools and tactics within Canadian law to remedy a loss, I can't help but wonder. What would those students from NAN be doing now, had they lived? Artists, police officers, political leaders, caretakers, how would they have changed their families and communities? How would they have changed us?

What if they had grown up within a legal system circled around the support of their healthy life, protecting life, rather than (at best) preventing another needless death?

V.III. ONE THOUGHT MORE

My last point is a very old, embarrassingly often repeated statement, and one that is not my own: settlers have a responsibility for understanding Indigenous peoples and land. I think this is true of every person, but here, I'm speaking particularly to lawyers, legal workers, and law academics, those that share my chosen work, and enjoy the privileges and responsibilities that therefore adhere to it.

I want them to know that understanding Indigenous peoples and the land necessarily includes learning Indigenous systems of law, while leaving behind colonial assumptions about what law is, or how it

²⁹ *Mackie v. Standard Trusts Co.*, (1922) 67 D.L.R. 201 (AB CA).

³⁰ Randall G. Sheldon and Pavel V. Vasilev, *Controlling the Dangerous Classes: A History of Criminal Justice in America* 3rd ed. (Illinois: Waveland Press, 2018) at 313.

³¹ Of the articles I have read regarding progressive or social justice lawyering, the one that has been of most use to me has been Nancy Polikoff, "Am I my client?: the role confusion of a lawyer activist" (1996) 31:2 *Harvard Civil Rights-Civil Liberties Law Review* 443.

should look. I know what I'm urging is as critical as it is sometimes difficult, as "the conceptions of law are simply incommensurable."³²

To the above quote, I am staying out of the question of what a lack of common ground may mean moving forward. I am, of course, open to the possibility that the tensions are fundamental:

That there is tension and disagreement at the fundamental level of construction of legal relations, is disappeared within the legal systems of Canada, in much the same way as Professor Waddams fails to recognize that he (and many other profound scholars) disappear other world views in their unquestioned belief in universality. Uncovering the myths on which the legal system is built, is one of the fundamental challenges facing the legal system. In my view, it is the philosophical source of centuries of oppression of non-European-based philosophies.³³

And, with the possibility of fundamental tension outlying, we must be cautious of how these systems of law are discussed and employed, when, how and by whom.

At this point, knowing (some of) the differences between the two systems, lawyers should use the tactics available in Canadian law on behalf of Indigenous communities only with honest acknowledgement that what we win are settler-valued remedies from the thief of power.³⁴ We should learn Indigenous legal traditions.³⁵ We should consider the ways that Indigenous legal traditions can be worked into legal practice, while being conscious that limitations are inherent and perversions will occur without care.

Opposing viewpoints on law will inevitably arise. However, these conflicts can no longer be resolved by the unquestioned cultural authority of the Canadian legal system. As Mary Ellen Turpel writes, "[b]y cultural authority, I mean, in this context, the authority which one culture is seen to possess to create law and legal language to resolve disputes involving other cultures and the manner in which it explains (or fails to explain) and sustains its authority over different peoples."³⁶

This has long been the response in the case of a conflict of laws. As Ariss writes: "Indigenous law has been adopted and applied in various situations in Canadian law, but when there is a conflict between Euro-Canadian approaches and First Nations' approaches, Indigenous law is categorized as "tradition" and discounted as "non-law."³⁷ This is evidenced in the sentencing decisions *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*³⁸, and *Frontenac Ventures Corporation v. Ardoch*

³² Turpel, *supra* note 22 at 30.

³³ Monture-Angus, *supra* note 21 at 188-189.

³⁴ Christine Zuni Cruz, "Law of the Land – Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin Richardson, Shin Imai and Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009) at 330-332.

³⁵ *Ibid.* at 334. The duty to learn has been set out in several places, including in Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Summary, Honoring the Truth, Reconciling for the Future* (Toronto: Lorimer, 2015) at 16 and Call to Action 27 and by the Honourable Chief Justice Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" in *Indigenous Legal Orders and the Common Law* (Continuing Legal Education British Columbia, November 2012) at 2.1.8.

³⁶ Turpel, *supra* note 22 at 4.

³⁷ Ariss, *supra* note 20 at 43.

³⁸ *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 CanLII 11049 (ON SC)

*Algonquin First Nation*³⁹, both raising Indigenous legal traditions in conflict with Canadian court decisions. Both were cases where private companies obtained injunctive relief allowing for exploratory drilling on traditional territory, and Indigenous leadership continued to refuse despite the court orders to the contrary. In the *Frontenac* case, admitting contempt of these court orders, Mr. Lovelace and the other protestors made specific reference to the paramountcy of Algonquin law.⁴⁰ However, the interaction between two legal orders was not discussed as the very idea of a second system of law was rejected by the court in clear terms: “there can only be one law”.⁴¹ This one law was specified to be the law of Canada.⁴² And then further specified as the law of Canada as it is expressed through the court.⁴³

I am confident that anyone who puts in the work of understanding Indigenous peoples and land will understand what it means to be a Treaty person⁴⁴ and will then see the faults in Canada’s legal legitimacy. As Shiri Pasternak put it, taking up the argument and position of Kent McNeil:

I do not contest here that Canada is recognized as a sovereign state by the rest of the world and by its citizens. But as the Algonquins have clearly expressed to me, this recognition has no bearing on Canada’s authority over them and their lands. Canada loses legitimacy to exercise this sovereign authority by its lack of respect for Indigenous self-determination.⁴⁵

In all, this is a plea for others to take up the work of understanding, with urgency. What’s the rush? I began by relating the recent history of Thunder Bay as I think its time to be painfully clear about what is at stake in the work of learning Indigenous legal traditions: it is life itself.⁴⁶

³⁹ *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534; 91 OR 3d 1.

⁴⁰ The Court of Appeal summarized Mr. Lovelace’s testimony, “[t]he essence ... was that uranium exploration on the subject lands would violate Algonquin law” *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534; 91 OR 3d 1 at ¶ 27. The court quoted from the sentencing judge who wrote: “...Mr. Lovelace says that while he respects the rule of law, he cannot comply because his Algonquin law is supreme. He says he finds himself in a dilemma. Sadly this is a dilemma of his own making.” *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ See Shiri Pasternak, *On Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy* (PhD Dissertation, University of Toronto, 2013) [unpublished] at 46: I consider myself a treaty person. To share this territory, we must respect the laws that govern our right to be here... I consider myself party to these treaties my government signed or inherited from previous imperial regimes.

⁴⁵ *Ibid.* at 4-5.

⁴⁶ As in the following quote from Aaron Mills, I believe our efforts of understanding Indigenous legal traditions are a matter of life:

So long as your home is on colonized Indigenous lands (and there’s nowhere on Turtle Island where this isn’t the case), I want you to respect – and that means live by – Indigenous legalities as they exist within Indigenous constitutional orders. I’m not expecting that you already know how to do this, and even as you learn, I’m not expecting you’ll get it right. Given where our relationship is at, what your government has decided not to teach you about it – and has not expected from you within it – your total lack of understanding of our law is the very thing to be expected. I want you to want to learn, to care passionately, and to risk the vulnerability necessary in trying your hardest. I want you to persist even through some of us will judge and sneer, because after 150 years (and in light of the Truth and Reconciliation Commission’s Final Report), you’ve accepted responsibility for understanding where the hurt that causes such behaviours comes from, and you account for that knowledge as you endure these negative experiences. I want you to pursue an understanding of the law of the Indigenous peoples whose territory you now call home as if not only your legitimacy but also your life depended on it, because for many Indigenous persons, it does.

I know this plea for understanding is not my own. I only now recognize my responsibility to hear and then to echo it, in the hopes that eventually it is too loud to ignore.

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