Nêhiyaw Âskiy Wiyasiwêwina: Plains Cree Earth Law
and Constitutional/Ecological Reconciliation

by

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B.A., University of Alberta, 2003
J.D., University of Victoria, 2012
L.L.M., University of Victoria, 2017

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Abstract

I set out on this research concerned with human relations to the ecological world, and the role of law in these relationships. As one theory of nêhiyaw (Plains Cree) law and constitutionalism enables strong kinship relations between the nêhiyawak and non-human beings and things, I explore how nêhiyaw law can be revitalized to reconcile our land relationships. Wâhkôtowin, or the overarching principle that governs our relations, ensures that wellness and good living –miyo pimâtisiwin – is not only a human objective, but shared intersocietally with non-human relations and entities.

This dissertation examines the constitutive role that four areas of Plains Cree livelihood – nêhiyaw âcimowina (narrative processes), nêhiyaw âskiy (Plains Cree territory and territoriality), nêhiyawewin (Plains Cree language) and nêhiyaw mamâhtâwiwina (Plains Cree ceremony) – play in ensuring such good living. Taking a 'law as weaving' approach', these areas and institutions form a web to support kind relations to our environments and ecologies.

Treaties provide an integral avenue to revitalize the uses of nêhiyaw law in our land relations. Canadian constitutionalism's primary focus on human-to-human relations, without constitutional consideration of the agency of the ecological world, has had harmful effects on the wellness of non-human beings and things. When we apply the legal and constitutive principles within Plains Cree law and constitutionalism to Treaty 6, they obligate both the Crown and peoples within Canada in the same manner.

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Glossary (excluding terms whose English definition is given within a paragraph and not repeated)

Âcimowina	Oral narratives/stories
Ahcâhk	Spirit
Anishinaabemowin	Anishinaabe language
Asinîy	Rock
Âskiy	Earth, ground, territory
Askîhkân	Fake ground, reserves
Âtayôhkêwina	Legends, sacred stories, origin stories
Cahkipeyihkanahk	Spirit markers, syllabics
Câpân	Great grandparent
Cistêmâw	Tobacco
Ekosi	It is done
Iskotêw	Fire, home fire
Iskwêw	Woman
Kehte-ayak	Old ones, old people, elders
Kiskêyihtamowin	Acquiring knowledge and learning
Kisêyiniw	Kind loving protectors, elders
Kiyokewin	The act of visiting
Kôkom	Grandmother
K'sê-man'to	Kind spirit, creator
Kwayaskatisiwin	Honesty
Kwayaskwâtisiwin	Quality of being proper or moral
Kwayask takopayiwin	To arrive in an honest, proper way
Manitow wiyinikêwina	Creator's laws
Matotisân	Sweat lodge ceremony
Mamâhtâwiwina	Ceremony
Mamâhtâwisiwin	Tapping into the mystery
Maskwa	Bear
Maskipiton	Nêhiyaw chief Broken Arm

Mistatim	Horse
Mistasinîy	Big stone
Miyo pimacehiwin	Good way of life
Miyo-wîcêhtowin	Good relations
Moniyawak	European settlers
Môsom	Grandfather
Nahâsiwin	The act of developing keen senses
Napêw	Man
Nêhiyaw	Plains Cree
Nêhiyawak	Plains Cree peoples
Nêhiyawewin	Plains Cree language
Nêhiyaw âskiy	Plains Cree land/territory
Nêhiyawatisowin	Creeness
Nêhiyaw wiyasiwêwina	Plains Cree laws
Nêhiyaw pimâtisiwin	Plains Cree way of living, constitutionalism
Nipîy	Water
Nipisîy	Willow
Niitsitapi	Blackfoot
Ohcinêwin	Transgression against non-human beings and things
Ohcinêmowin	Transgressions in speech against non-human beings
Okâwîmâwâskiy	Mother earth
Okimâw	Leader, chief
Oskâpêwis	Helper
Ospwâkan	Pipe
Papimaw âsiniy	Flying stone
Paskwâwi-mostos	Buffalo
Paskwâwimostos sakihikan	Buffalo Lake
Pâstâhowin	Transgressions against humans
Pâstâmowin	Transgressions in speech against humans
Pawâkan	Spirit helper
Pimâtisiwin	Life

Sipîy	River
Sakihtowin	Love
Sohkeyitamowin	Strength/determination
Tâpwêwin	Truth
Tapateyimisôwin	Humility
Wîcêhtowin	Relations/assistance
Wîsahkêcâhk	Elder brother
Wihkotowin	Feasting
Wîtaskêwin	Living together in peace, neighborliness
Wîtaskêwinihk	The place where peace was made
Wîtaskêwin sputinow	The hills where peace was made
Wiyasiwêwina	Laws
Whetiko	Cannibal/consuming monster
Wâhkôtowin	Overarching principle that governs our relations

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And of course, I am forever grateful for the care takers of nêhiyaw pimâtisiwin and nêhiyaw âskiy throughout the generations. Kinanâskomitin, I thank you all.

Peyak (one): Bringing us Close to the Fire - The Four Directions of Wîtaskêwin

"[W]hat I have said, the sun, the river, and the grass, I have mentioned them; spirits for each one of them. If I don't deal with them, I could get punished too. My ancestors have set it up for me to deal with them in a proper way. That's what I'm trying to do. I'm not fooling around with the treaties." ~ Lawrence Tobacco on Treaty 6.[1]

So when the first [Indigenous person] was given kindness, [they] shared that kindness with the first [person] in the [moniyaw] race. ~ Peter O'Chiese on Treaty 6.[2]

I. Introduction: A Narrative Approach to Wîtaskêwin/Treaty

Tan'si nitotamtihk, ninaskomon e-miyoatamahk wâhkôtowin. Hello my friends. I am grateful that we enjoy this kinship. I have been taught that sharing kinship with others means an equal right to the warmth of the fires within our houses. Our *kehte-ayak*, our older ones, teach us about our *ahcâhk iskotêw*, our spirit, as being a hidden fire that animates us. I have heard many of them share that when we begin our lives, we are each given a little flame from *kisikâwi-pisim,* the sun. In this way we are all animated by a fire from the same source. In a metaphorical way, this writing is part of my fire. And so, in sharing some of my home fire in this way, I hope you can collect a bit of its warmth and think of it as part of yours as well.

To begin, I want to offer one of our many stories of treaty.[3] I will about *wîtaskêwin sputinow*, or the hills near Wetaskiwin, Alberta. This area is significant, as it

[1] Harold Cardinal &Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 8.
2 Peter O'Chiese, "Statement on the Aboriginal Man and the Treaties", online: (2019) *Canadian Plains Research Center:* < http://ourspace.uregina.ca/bitstream/handle/10294/2193/IH-198.pdf?sequence=1&isAllowed=y>
[3] The 'our' referring to Plains Cree peoples. Iam âpihtawkosisân nêhiyaw (mixed-rooted Cree or literally translated as 'half-son' Cree). I am currently not a member of a First Nation, though my family relations are from Samson Cree Nation. While the most recent changes to the *Indian Act* have assured me 'Indian-

is where the nêhiyawak (Plains Cree peoples) and the niitsitapi (Blackfoot) recommitted to live on the land together in peaceable relations.[4] While the story I am about to describe is about treaty, it is one of a collection of such treaty events from 1850 to 1870. Collectively, all of these eventually secured a long-lasting treaty – *wîtaskêwina* - between the nêhiyaw and niitsitapi on the northern prairies.[5]

European settlement on the Canadian prairies brought significant and often tragic disruptions in the social, economic, legal, and spiritual lives of prairie Indigenous nations during this period.[6] The decline and ultimate destruction of the population of *paskwawi-mostos*, the buffalo peoples, to whom both the nêhiyawak and niitsitapi respectively had kinship relations with, was especially devastating and the cause of rising tensions between the two nations.[7] Following dwindling herds in the northern prairies, each nation had camps in close proximity to each other north of *kasakiykanitiwitihk* or *notino-sipiy* (the Battle River)[8] around 1860. Fearing potential conflict with each other, the nêhiyawak and niitsitapi each sent a person to scout and observe where the other community was. In some accounts, it was two young leaders sent by each respective community. As it happened, both approached the same hills at the same time, surprising each other in their encounter.

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status' according to Canadian law, I account for my inclusion into Plains Cree peoples through my participation in our shared obligations as nêhiyawak, and commitment to nêhiyawisowin (Creeness).

[4] This is one translation of the origins of the town Wetaskiwin, Alberta. Other interpretations will be discussed.

[5] See Hugh Dempsey, *Maskepetoon: Leader, Warrior, Peacemaker* (Victoria: Heritage House Publishing Company, 2010) at 184-5.

[6] See Donna Feir, Rob Gillezeau & Maggie Jones, "The Slaughter of the Bison and Reversal of Fortunes on the Great Plains" (Department Discussion Paper, University of Victoria Department of Economics), (2017) online: University of Victoria.
<https://www.uvic.ca/socialsciences/economics/assets/docs/discussion/DDP1701.pdf>

[7] Dempsey, *supra* note 5, at 184-5.

[8] See Pauline Johnson, *E-kawôtiniket 1876: Reclaiming Nêhiyaw Governance in the Territory of Maskwacîs through Wâhkôtowin (Kinship)* (Ph.D. Dissertation, University of Western Ontario Graduate Program in Anthropology, 2017) [Unpublished] at 166. [Johnson, *Nêhiyaw*]

Our most gifted storytellers know the power of leaving pauses within a story's telling for the imagination to fill, before the plot is picked up again, moving unto what happens next. When I recount this story, I always wonder what this initial interaction between the nêhiyaw and niitsitapi looks like: I wonder about the surprise on their faces when they initially encounter each other, whether they knew each other from past interactions, what is gestured or said in their first interaction, what language they shared. I also think of how they each carried the burden of protecting their respective communities in the encounter, how their approach must have been filled with both fear and responsibility.

In every version of the story of wîtaskêwin, the two decide to fight but also choose to do so unarmed. In some accounts, this fight lasts for four hours. Perhaps it is this part of the story that has provided its endurance within Euro-Canadian narrative memory, as it is one of the few nêhiyaw stories shared widely outside of our communities. Undoubtedly, it is romanticism of Indigenous stereotypes – in this case the images of masculine 'Indian' warriors making honorable decisions in the face of war - that gives it this cache in *moniyaw* (Euro-Canadian)[9] narrative traditions.[10] Exhausted, the two men stop their fighting for break. During this pause, the niitsitapi man brings out his *ospwâkan* (pipe), and loads it with tobacco to smoke. The nêhiyaw *okimâw* (leader, or chief), wanting to do the same, sees that his has been broken during the fight. Empathizing with the other, the niitsitapi man offers his ospwâkan, and the nêhiyaw man

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[9] I will use the term *moniyaw* throughout this dissertation to identify settler-Canadians, primarily from European nations who homesteaded in the prairies from 1850 onwards. I am doing so to separate from the term settler, which has taken a different connotation within Indigenous rights discourses. Moniyaw is a Cree-specific term, originally derived to mean the 'people of Mount Royal (Montreal).

[10] Wetaskiwin, Alberta continues with this romanticized imagery in its official motto, "*Pacem Volo, Bellum Paro*", or "I wish for peace, I prepare for war", with a half-naked 'Cree warrior', axe in hand, aside its official town crest. See online: City of Wetaskiwin <http://www.wetaskiwin.ca/index.aspx?NID=360>

accepts it. In doing so, they both realize they have shared a 'common pipe', and thus have obligations to carry forward with each other. As a placeholder for deeper discussions further in this dissertation on what these terms mean for nêhiyaw peoples, they have a shared understanding of this event as a *sacred* one, and a constitutive one as well. They recognize in sharing tobacco, that their personal conflict on the hill is resolved. They also understand the larger obligations that have arisen by sharing the pipe, for each return to their respective camps and seeks out the collective advice of their communities for interpretation.

The two nations' subsequent actions confirm the significance of sharing tobacco through the ospwâkan. Upon their respective deliberations, each camp concludes that the shared medicines between the two men signals a treaty friendship. Acting upon these interpretations, the older leaders of each of the communities return to the hills, and under the guidance of further ceremony, enter into a larger treaty relationship with each other with the intent to have peaceable, kin-like relations with each other. For the nêhiyawak, these hills since then have become known as *wîtaskêwin-sputinow*, or the hills where we live on the land together. While the hills are the literal ground of the treaty event they are inextricably linked with the treaty making process, as it is not only an agreement for peaceable relations between the two nations, but also a renewed agreement to live in respect with the earth.

Figure 1.1: *A view from the Peace Hills southward. In the distance is Maskwacis (the Bear Hills). The ability to see across the relatively flat prairie make hills like this significant as territorial markers and lookouts upon nêhiyaw âskiy (Plains Cree territory).*

Maskipitoon Cairn Ceremony, Wetaskiwin, Alberta 1929

Figure 1.2: *A cairn was erected in 1929 to signify 50 years of treaty between the nêhiyaw and niitsitapi. The photo identifies it as the Maskipitoon cairn, for the nêhiyaw chief who was instrumental and ultimately lost his life forwarding the idea of treaty between the nêhiyaw and niitsitapi.*

A companion story to be channeled alongside the story of wîtaskêwin sputinow, is the creation of the Neutral Hills. It is an *âtayôhkêwin (*a sacred story), and just like the making of Wetaskiwin, it is a treaty-making narrative. The Neutral Hills are located a couple of hundred kilometers east of Wetaskiwin in central Alberta. During the same period of inter-societal conflict between the nêhiyawak and niitsitapi, as the story goes, *k'sê-man'to* (the compassionate, kind spirit) witnesses the enduring conflict between the two nations caused by the loss of buffalo. Not being able to bear witness to more hardship, they create hills on the prairie overnight to separate the two nations. Just like the occurrence at wîtaskêwin sputinow, both the nêhiyaw and niitsitapi recognize this as a sacred event. In this event, *âskiy* (land) is gifted as a sacred intervention, giving pause to the individual pursuits of each nation and offers a reminder to re-engage in kinship relations together. Upon seeing this, the older ones from the two nations walk their respective sides of the hills until they find a valley to reach each other, and make an agreement to share the newly created land.[11] As these two stories show, the history of nêhiyaw treaty-making rests upon hilltops and is nestled in valley bottoms, if we choose to remember these stories in this way.

a. Nêhiyawewin: Language as an Avenue to the Heart of Treaty

[11] Speight, Anne Speight, *The Shadows of the Neutrals and Open Memory's Door* (Coronation, AB: Old Timer's Centennial Book Committee, 1967) at 1-4. [Speight, *Neutrals*]

Nêhiyaw wiyasiwêwina (Plains Cree law) is a living, breathing ecology.[12] The term translates into English as the 'act of weaving'. [13] While the story could be interpreted on its own for lessons of inter-societal peace-making, to maintain the strength of the social fabric of nêhiyaw societies, the story requires braiding with other materials of nêhiyaw law and constitutionalism. I offer the two stories above at the introduction of this dissertation for the questions they raise regarding law, constitutionalism, and how our relationships with non-human agents – the lands, waters, flora, and fauna - have been historically entwined with our legal and constitutional processes. Nêhiyaw social institutions aid in illuminating these relationships. For example, when I contemplate treaty-events like the two noted above, I also contemplate what wealth lay hidden within *nêhiyawewin* (the Plains Cree language) about the legal principles that guide these treaty events.[14] As revitalization of Indigenous law "necessitates we find ways to hold the settler state to the original spirit and intent of our treaties", language brings us closer to the meanings and intentions that Indigenous treaty signatories brought to them.[15] Wîtaskêwin translates into 'the place where we live on the land together' or 'living in peace together.' Another interpretation of the term is when "peoples establish relationships that are to be governed by the laws of wâhkôtowin and which are reflected in the kind of land-sharing arrangements created between the parties."[16]

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[12]Johnson, *supra* note 8, at 152.
[13] *Ibid* at 152.
[14] See Keith Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albequerque, University of New Mexico Press, 1998); Matthew Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence" (2016) Online: Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1155&context=facpubs>.
[15] Heidi Kiiwetinepinesiik Stark, "Stories as law: A method to live by." Eds. Chris Andersen and J.M. O'Brien, *Sources and Methods in Indigenous Studies.* (Abingdon, Oxon: Routledge, 2017) at 255. [Stark, *Stories as Law*]
[16] Cardinal and Hildebrandt, *supra* note 1, at 41.

Wîtaskêwin is also multi-dimensional, as it applies to our familial, neighborly, and societal relationships. It is also only one of many ways to describe our treaty relations. Our *kêhtê-ayak* (old ones, or elders) used the term *iteyimikosiwiyecikewina* to describe treaties with the British Crown. This translates into treaties that are inspired by the *manitow* (Creator) and are "grounded in the laws of miyo-wîcêhtowin" or good relations.[17] *Okimaw miyo-wicihitowiyecikewin,* another treaty term, translates to "agreements or arrangements establishing and organizing good relations or relations of friendship between sovereigns."[18] More abstractly, *miyo-wîcêhtowin* and *wâhkôtowin* (laws that provide obligations to assist each other and that govern our relations generally) offer overlapping principles of friendship and kinship that play a role in our treaty relationships.[19]

This brief introduction to the linguistic wealth within the term wîtaskêwin reveals the necessity to examine related terms that hold similar legal and constitutional knowledge. Wîtaskêwin – as a constitutional and legal term - cannot be atomized and held separate from the other terms of its relation, but relies upon them for a full description of treaty. A linguistic approach towards the heart of wîtaskêwin requires a relationship with *nêhiyaw pimâtisiwin* (Plains Cree way of living, or alternatively, Plains Cree constitutionalism).

b. Nêhiyaw âskiy: Land-based Law and Constitutionalism

[17] Shalene Jobin, *Cree Economic Relationships, Governance, and Critical Indigenous Political Economy in Resistance to Settler Colonial Logics*. (Ph.D. Dissertation, Department of Political Science and Faculty of Native Studies, University of Alberta, 2014) [unpublished] at 121. [Jobin, *Cree Economic Relationships*]
[18] *Ibid* at 121.
[19] Harold Cardinal & Walter Hildebrandt, *supra* note 1, at 25-34.

Just as language and nêhiyaw narrative practices[20] offer directions understanding wîtaskêwin, we can recall our treaty obligations by visiting the valleys and hills where treaty was made. *Kiyokewin* (visiting) is necessary to have a living relationship with treaty. The story I provided above is a constituting story of the land that I grew up on. I was raised in Wetaskiwin, the city on the outskirts of the Maskwacîs communities (those of the Samson, Ermineskin, Montana, and Louis Bull Cree) in Central Alberta. The city's name is a subtle corruption of the term wîtaskêwin. Aside from my knowledge of the treaty, I know the hills in other ways as well. I have rubbed dirt from them in my hands, have been chased by bees down paths that cut through them after coming too close to hives on summer days. I have gathered at night with friends on the hills and watched stars and generally *teen-aged* together amongst the poplar and aspen trees. I have tobogganed down one of its bumpier trails in winter time with my cousins. And in moments where I disregarded one of our older familial beliefs that causes us to avoid owls, I have gathered barn-owl feathers along the ground. Just as the land is stitched into a collective nêhiyaw narrative memory, my own personal history becomes a part of this context.[21]

Similar bundles of legal and constitutional meanings are on locations within nêhiyaw âskiy, where law remains similarly written into the land. Approaching the Neutral Hills from the vastness of the prairies, where they seem to rise like mountains above the long plains around them, provides a deeper understanding of their force in teaching

[20] Neal MacLeod, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich Publishing, 2007). [MacLeod, *Cree Narrative Memory*]

[21] As Neal MacLeod points out, if we view acimowina as a collective practice, then no speaker holds the full story, but is integral to the collective. Thus my experiences at wîtaskêwin sputinow, however mundane they are, reflect upon the larger treaty narrative. *Ibid* at 6.

Figure 1.3*:* *Trails cutting down through the Peace Hills.*

the nêhiyaw and niitsitapi of loving kindness in sharing the land.[22] Southeast of Wetaskiwin is *paskwawi-mostos sakihikanihk* (or Buffalo Lake), a lake that was said to be given as a gift to the nêhiyawak through the kindness of the buffalo nation to provide nourishment and shelter for nêhiyaw peoples, especially during the winter months.[23] Southeast of paskwawi-mostos sakihikanihk, is *mistasinîy* (or the big stone), a large stone that our âcimowina tell us was once human who had the ability to shapeshift into a *paskwâwi-mostos* (buffalo). Lost by his human family as a child, he was taken in and raised by buffalo peoples. Upon learning of his human roots later in life, he chooses to

[22] See the story of the Neutral Hills, in Speight, *Neutrals, supra* note 11 at 1-3.
[23] The story of creation of Buffalo Lake, passed orally in my family, involved a buffalo being hunted and producing water, not blood, out of its wound. The water continued to spill out of the wound until it became the shape of a buffalo. Communities would gather at this new lake as it became a place of refuge and was plentiful in the food and shelter provided around it.

turn himself to stone to avoid having to hunt his own kin.[24] The site of the Mistasinîy, on the elbow of the *kisiskaciwani-sipiy* (the swift flowing, or South Saskatchewan River) was long a ceremonial gathering place for many prairie Indigenous nations.[25] This is not surprising if one understands the legal principles (as will be discussed later in this dissertation) that the account of mistasiny teaches. And so on. If you were to run your finger across a map of nêhiyaw âskiy territory, you will find similar constitutive and legal events written into the land. Nêhiyaw âskiy not only shelters and nurtures, but also teaches law. It becomes *constitutionally animated* as it continues to nourish us through the stories of its creation.

c. Ceremonial Approaches to Treaty

I also contemplate the necessity of ceremony in treaty. When I recount *wîtaskêwin*, I am inevitably reminded of the countervailing forces that the two men faced. Each approached the hill in the face of immense personal danger, and carrying the responsibility of their respective communities. Each undoubtedly must have seen the tragic effects of the violence between the two nations in their lives, a trauma that often goes untold in most accounts of the story. Each must have carried the weight of responsibility to represent their communities as leaders. And so to give and accept *cistêmâw* (tobacco) and enter into a relationship of kinship, when only moments before their relationship was one of physical conflict, must have been underpinned by similar teachings of loving-kindness taught through pipe ceremonies.

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[24] *Cree Narrative Memory*, *supra* note 20, at 23.
[25] The mistasiny was submerged in the damming of the South Saskatchewan River in 1967, and currently sits beneath Lake Diefenbaker.

For nêhiyaw peoples, cistêmâw is a significant and sacred gift whose exchange imports an "accumulated…wealth of sacred knowledge and ceremonial practices [that] become immanent" because of it."[26] The ospwâkan and pipe ceremonies are representative of a nêhiyaw constitution and provide a center for nêhiyaw wiyasiwêwina. As Pauline Johnson notes, the pipe "mandates our constitution as a people and we are bound to its teachings and reverence."[27] It provides a "direct link to natural law", and the "oral narratives of the kehte-ayak."[28] It also is "tell[s] the story of the promises which the [moniyawak] had made to" the nêhiyawak,[29] It is also vital to how nêhiyaw treaty relationships are constituted, as Johnson states "it is through our teachings of behind the ospwâkan that 'Canada' would be able to share this land with us."[30] Beyond mere 'custom', each must have been steeled in their convictions to continue in loving-kindness through the trust in shared learnings on the significance of gifting cistêmâw. While legal processes within the Canadian common law are not always analogous to those within Indigenous legal orders, in this instance the immanency of case law when invoked in the ceremonialism of Canadian court proceedings may be helpful. *Stare decisis* ensures that past invocations and deliberations on declared legal principles to become *immanent* in that proceeding. Cistêmâw provides similar consistency and certainty comparable to this principle. It allows shared understandings to arise in its gifting. In a metaphysical sense, we are calling on the multitude of ceremonies that tobacco plays a role in. As Mekwan Awasis notes, "in the offering, generations of ancestors who perpetuated and

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[26]Claire Poirer, *Drawing Lines in the Museum: Plains Cree Ontology as Political Practice*, Anthropologica 53 (2011) at 294. [Poirer, *Drawing Lines*]
[27] Johnson*, Nehiyaw, supra* note 8, at 152.
[28] *Ibid* at 152.
[29] Kâ-Nîpitêhtêw as recalled in *ibid* at 152.
[30] *Ibid* at 154.

accumulated a wealth of sacred knowledge and ceremonial practices become immanent through the act of exchange."[31] In a theoretical sense, the shared understandings of what gifiting cistêmâw brings to the respective gifter and receiver gives rise to shared understandings of the obligations and commitments tied to its gifting.[32]

II. The "Breathing Life" of Wîtaskêwin [33]

So as you can see, there are a multitude of directions that wîtaskêwin can take us in an examination of Plains Cree law and constitutionalism. The four areas I have loosely introduced above – nêhiyaw âcimowina (narrative process), nêhiyaw âskiy (Plains Cree territory), nêhiyawewin (Plains Cree language) and nêhiyaw mamâhtâwiwina (Plains Cree ceremony) - will serve as ontological themes for this dissertation. As constitutional and legal ordering can be comprised of multiple centers,[34] nêhiyaw law and constitutionalism can be described as constellating by nature; the connection of multiple sites of constituting practices provides the strength of the constitutional fabric nêhiyaw peoples coordinate our lives together on. The ordering of our lives is determined by how we interpret the constitutive bodies hanging celestially above us, and how we relate nêhiyaw social institutions and practices to each other in complex and beautiful

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[31] Poirer, *Drawing Lines, supra* note *26,* at 294.

[32] This is often described as being a 'contract'. I find this analogy helpful in describing the legal obligations involved when tobacco is gifted for those unfamiliar with the practice. I also acknowledge we must go beyond the simple metaphor to provide a deeper understanding if the laws involved.

[33] I borrow the phrase 'breathing life' to connote revitalizing lost treaty conceptions from Aimee Craft in *Breathing life into the Stone Fort Treaty: an Anishinabe understanding of Treaty One* (Saskatoon: Purich Publishing, 2013).

[34] However, part of the categorization of the character of Indigenous legal orders as 'decentered' is influenced by the inability for people outside of an Indigenous legal order to recognize and 'read' the texts of Indigenous law and to recognize the legal institutions within Indigenous societies. As will be discussed in the last chapter, there is a fluidity to nehiyaw governance that allowed for multiple centers to come together at certain periods, for example during conflicts and wars, as well as during periods of renewal in the summer.

patterns.[35] My use of these four directions to center this dissertation is significant to *nêhiyaw kiskêyihtamowin* (Plains Cree knowledges). One interpretation of *nêhiyaw* is the people of the four directions (*newo*, four, *iniyaw*, people). As I try to observe and impress throughout this dissertation, repeating things in fours is a significant process in nêhiyaw intellectual processes and spirituality. [36]

a. Non-human agency in our constitutive relations

Such ordering of course is not strictly 'celestial' but is grounded within the multitude of relationships with the non-human beings and things within the ecological world. It is this grounded voice - that of non-human agents - within our legal reasoning that animates this dissertation. It is the "original spirit and intent" of nêhiyaw treaty relationships to "uphold commitments to land, water, animals, flora and fauna."[37] As the accounts of Wîtaskêwin Sputinow and the Neutral Hills collectively speak, nêhiyaw treatymaking is not merely about setting strict governance and control of lands and waters but necessarily animates non-human entities upon nêhiyaw âskiy as active agents within treaty relationships. As the resulting relationships from treaty-making between Indigenous nations and Euro-Canadian controlled polities has generally been interpreted through Euro-centric interpretive processes, the personhood, sovereignty, and ultimately voice of

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[35] These directions are by no means the only locations of law, but serve as single points within a constellation of constitutive events, textualizations and institutions. Deciphering the pattern in our stars is not an individual endeavour; we require the guidance of our kehte-ayak (our old ones) and those of our ancestors accessed through the lessons they have embedded in stories and language, and through ceremonial relationships. But we also have individual agency in our interpretations, and a persuasive voice in the collective. The ordering of our stories, our ceremonies, the law written into the land, and the guidance within our language gains persuasive authority through our guided constellating; we teach it to our children and raise up those who we trust in their reading of the stars to be our leaders who will speak for us from this knowledge. It is both the multitude of constitutional and legal resources and the guided interpretative processes that make a living nêhiyaw law and constitutionalism.
[36] For one conception of this, See Mary Lee, Cree (Nêhiyawak) Teaching. (2008) Online: Four Direction Teachings < http://www.fourdirectionsteachings.com/transcripts/cree.html>.
[37] Stark, *Stories as Law*, *supra* note 15, at 255.

non-human agents has been removed from treaties. The imposition of Eurocentric legal reasoning upon nêhiyaw âskiy has subverted kinship relationships within non-human beings and things to merely property, commodity or have denied their existence entirely.[38] I am fearful that Canadian constitutionalism's primary focus is on human-to-human relations without making constitutional and legal room for the animacy of the ecological world will continue to result in devastation to the good living of non-human beings upon nêhiyaw âskiy. As John Borrows observes, when we view our constitutive and legal dealings solely on a human-to-human level, we fail to acknowledge inherent limits to our relationships with the ecological world.[39] This dissertation's call for a revitalization of nêhiyaw law and constitutionalism also reclaims the inherent limits on our uses, extractions, and exploitations of the ecological world. In this sense, it is a theory of constitutional reconciliation with the earth, based on nêhiyaw wiyasiwêwina.

b. Colonial interruptions of nêhiyaw environmental law

The significant power imbalance between Indigenous peoples and the Canadian state has led to present-day treaty implementation to be void of an understanding of obligation towards the ecological world based on nêhiyaw cosmology. While Indigenous-settler relations prior to the signing of Treaty 4 and 6 was based on centuries of developed mutual aid,[40] the 19th century saw a political and attitudinal shift towards Indigenous

[38] You would be hard pressed to find an acknowledgement of ancestral helpers within the common law, as we do within nêhiyaw law and governance.

[39] John Borrows, "Earth Bound: Indigenous Law & Environmental Reconciliation" in eds. Michael Asch, John Borrows, & James Tully, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto, 2018) at 50. [Borrows, Asch, & Tully, *Resurgence and Reconciliation*]

[40] Prior to the 'land cessation treaties', treaties between Indigenous nations and settlers were focused on the recognition of rights to land a government of Indigenous peoples, so called 'peace and friendship treaties'. John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) at 155.

nations by the moniyaw[41] polity.[42] Interdependence was replaced by paternalism.[43] The rapid settlement of the prairies after these treaties (for example, Saskatchewan's population alone grew over 1100% between 1891 and 1911)[44] significantly changed the demography of nêhiyaw âskiy. Guided by moniyaw-dominated Canadian constitutionalism, the introduction of the *Indian Act* and parallel colonial policies further disenfranchised nêhiyaw peoples from their historical roles in governing nêhiyaw âskiy. As a result, the nêhiyawak were denied the same benefits like title to land, voting rights, and the freedom of mobility, that settlers were provided. [45] Further, the reserve system, the pass system, severalty, and peasant farming policies limited nêhiyaw inclusions into moniyaw-reformed social and economic communities.[46] Aside from the individual terrors perpetrated within the schools, the residential school system had devastating effects on the political economy of the nêhiyawak. Depriving nêhiyaw children from teachings on nêhiyaw pimâtisiwin, they also simultaneously reinforcing negative beliefs about their continuation.

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[41] Plains Cree for settlers. The origins of this word is to describe non-Indigenous newcomers to the Montreal (Mont Royale) area. I use the term here not in any pejorative sense, but to better identify European settlers on the prairies from confederation to the middle of the 20th century, rather than the term'settler' which contemporarily has taken on a broader use in terms of the peoples it captures and the timeframe it encapsulates.

[42] See John J Borrows & Leonard I Rotman, eds, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th ed (Markham, ON: Lexis Nexis, 2012) at 23; Borrows, *ibid* at 161-165, 168-169

[43] See Mark D Walters, "Promise and Paradox: The Emergence of Indigenous Rights Law in Canada" in Benjamin Richardson et al, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009) at 21-50.

[44] Randy William Widdis, "Saskatchewan Bound: Migration to a New Canadian Frontier" (1992) 12 *Great Plains Quarterly* 254 at 257.

[45] See Sheelah Maclean, " We Built a Life from Nothing: While Settler Colonialism and the Myth of Meritocracy" (2018) online: Canadian Center for Policy Alternatives <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2017/12/McLean.pdf> ; Darcy Lindberg, "The Myth of the Wheat King and the Killing of Colten Boushie" (Apr 2018) online:The Conversation Canada <http://theconversation.com/the-myth-of-the-wheat-king-and-the-killing-of-colten-boushie-92398>.

[46] *Ibid.*

This period of thick imposition of colonial policy and law on nêhiyaw peoples assured the supremacy of the Canadian common-law in relation to Indigenous legal orders. This hierarchal relationship, while changing, is still largely in place today. This enabled common-law relationships to the land, namely the propertization and enclosure of lands, to propagate with little influence by nêhiyaw constitutional and legal principles. Common property concepts that favor individualism, commoditization, and the monetization of landscapes contrast nêhiyaw concepts of relationality, [47] equal benefit from landscapes by its citizenry,[48] and obligations towards land and waterscapes through kinship ties taught through nêhiyaw pimâtisiwin.

One result of this period of colonization was the loss of meaningful tools to practice nêhiyaw kinship with the ecological world within nêhiyaw âskiy. This has resulted in a silence about the sovereignty and autonomy of the ecological world in our treaty implementation, resulting in violations of nêhiyaw law. While still practiced, nêhiyaw legal concepts like *pastohowin*, or "something that violates natural law,"[49] *ohcinêwin*, or the consequences for violating our obligations to the ecological world,[50] *ohcinêmowin*, the threat of consequences that guide our speech towards the ecological world,[51] has seen little influence towards how the Canadian-state recognizes its obligations to the numbered treaties.

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[47] Art Napoleon, *Key Terms and Concepts for Exploring Nihiyaw Tapisinowin in the Cree* Worldview (Masters Thesis, Faculty of Humanities, University of Victoria, 2014) [Unpublished][*Key Terms*] at 86.
[48] For example, various forms of giveaway ceremonies within nêhiyaw ceremonialism not only redistribute wealth but also serve as a pedagogical tool for teaching this principle. See Jobin, *supra* note 17, at 172-82.
[49] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 85. [Borrows, *Canada's Indigenous Constitution*]
[50] *Ibid* at 85.
[51] See Johnson, *Cree Economic Relations*, *supra* note 8, at 155.

There is hope in a collective revitalization of relationships to the ecological world, as we are starting to see the constitutive journeys of other nations influenced by Indigenous relationships to the environment. In 2010, Bolivia enshrined inherent rights for 'mother earth' within its constitution.[52] Through centuries-old negotiation, the Maori peoples in New Zealand were recently successful in providing the Whanganui River with the same legal rights as a living entity.[53] In 2008, Ecuador granted essential rights to the environment within its written constitution, allowing citizens to raise legal challenges on its behalf.[54] The voices of Indigenous peoples were integral in many of those movements.

These constitutive moves are part of a collective movement towards 'earth jurisprudence'. Focused on developing the legal personhood of the environment, earth jurisprudence re-engages a relational view of the connection between humanity and the ecological world, understands that the health of humans is reliant upon the health of the earth, and thus seeks laws that aspire to reflect this relationship.[55] A common trait within nêhiyaw legal thinking is this type of relationality generally. As Art Napoleon explains: "[a]n underlying assumption of this kind of relatedness is that it signifies a kinship not just to humans but also to all other living entities and spirit beings."[56] Napoleon's use of 'living entities' is significant. Such relatedness within *nêhiyaw tapwewin* (Plains Cree truth) does not exclude lands and waters that Western thinking often holds as 'inanimate.'

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[52] See David Humphreys, "Rights of Pachamama: The emergence of an earth jurisprudence in the Americas" (2017) 20:3 *Journal of International Relations and Development* 459. [*Pachama*]
[53] Eleanor Ainge Roy, "New Zealand river granted same legal rights as human being", The Guardian (16 March 2017), online:
<https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>
[54] Clare Kendall, "A new law of nature" The Guardian (24 September 2008) online:
<https://www.theguardian.com/environment/2008/sep/24/equador.conservation>
[55] See *Humphreys, supra* note 52, at 459.
[56] Napoleon, *supra* note 47, at 86.

Similarly, Danika Littlechild observes that nêhiyaw peoples carry the "[u]nderstanding that elements of our environment(s) and ourselves have an inner life force." [57] This contrasts to many present-day attitudes towards the ecological world as found in and enabled by the common law and Canadian legislation: lands and waters are propertized and commoditized, our animal relations are viewed as merely resources. All is stripped of a spiritual animacy, significantly altering Canadian understandings of them as viable constitutive and legal actors.

While nêhiyaw kinship relationships support this type of relationality expressed in 'earth jurisprudence', this dissertation distinguishes nêhiyaw pimâtisiwin from the epistemological path that earth jurisprudence takes.[58] As I explore in the next chapter, the concept of the *ahcâhk* (or spirit)[59] within nêhiyaw thinking separates nêhiyaw constitutionalism from earth jurisprudence, as it is more concerned with the recognition of the autonomy of non-human beings and things, rather than the legal standing of non-human agents in human-centric legal processes. While earth jurisprudence provides non-human agents "human-like" stature within legal dealings or constitutional mechanisms,[60] Nêhiyaw pimâtisiwin treats non-human agents as autonomous beings, capable of their

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[57] Danika Billie Littlechild, "Transformation and Re-formation: First Nations and Water in Canada" (LLM Thesis, University of Victoria, 2013) [Unpublished] at 13. [Littlechild, *First Nations and Water*]

[58] Borrows, *Indigenous Constitution*, *supra* note 49, at 85.

[59] Littlechild, *First Nations and Water, supra* note 57, at 16.

[60] See Christopher Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects" (1972) 45 Southern California Law Review 450, a foundational essay in within the earth jurisprudence movement. Stone argues that offering legal standing to entities within the environment (like rocks, rivers, and trees) is not a large conceptual stretch, given that most legal jurisdictions already provide standing to non-living entities like corporations. My point of difference within nêhiyaw pimâtisiwin with this foundation of earth jurisprudence is that these scenarios generally involve human representation of the natural world in courts through a guardian-like role as advocate. While who voices the concerns of the ecological world is still an alive question within nêhiyaw law (one that this dissertation discusses later) the starting point that entities in the ecological world have laws, cultures, and governance practices ensures that the position of these entities is not just accounted for in conflicts, but in the myriad of interactions and relationships before formal legal processes.

own culture and laws, and capable of the inter-societal practice of law. This influences our legal processes to seek treaty relationships, and how we seek consent for infringing upon the autonomy of non-human beings and things.

Further, turning towards greater articulations of what exactly are our kinship obligations (rather than simply recognizing non-human things as human in our legal dealings) require a reconsideration of the legal processes we take in treaty implementation, revitalizing the constitutive practices that enable nêhiyaw self-governance. Far too often, romantic notions of Indigenous peoples as unfailing stewards of the natural world do not serve Indigenous peoples and the wealth of knowledges resident in Indigenous societies because they overlook the systems of norm creation, transformation, and contestation within them. Like all human societies, we are consumptive beings, and as John Borrows notes, "[a]ccordingly we must strive to attenuate our impacts."[61] Any idealistic vision of our kinship obligations with lands, waters, plants and animals is tempered by our reliance upon them for sustenance and survival. This reliance often results in exploitation and violence to non-human agents and the destruction of their socio-legal ordering. As this dissertation will explore, nêhiyaw constitutionalism ensures a pragmatic wholism in our legal ordering – it fully acknowledges the agency and spirit of non-human beings and things and sets out legal processes to coordinate how we engage in our relations, even when our relationships include consumption. A relational legal obligation within nêhiyaw piimatisiwin does not mean complete conservation of the 'resources' of lands and waters, but provides a different frame for how we carry out living in a good way with our non-human relations.

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[61] See Borrows, *Resurgence and Reconciliation, supra* note 39, at 49.

c. Wâhkôtowin as nêhiyaw legal theory

As this dissertation will explore, the view of non-human beings and things as embodied with agency and a spirit is an integral belief to how our legal relations are constructed, observed, and transformed with the non-human world. I recognize that there are differing beliefs on non-human agency and spirituality generally.[62] In my consideration of nêhiyaw law and constitutionalism flowing from epistemological beliefs of the inspirited nature of non-human beings and things, I also acknowledge that there are nêhiyaw peoples who don't share this belief. Nêhiyaw peoples variously are spiritual, atheists, socialists, conservative, liberal, gay, heterosexual, bi-sexual, two-spirit, catholic, non-religious, Mormon, pagan, monogamous, polyamorous, capitalistic, anarchistic, ceremonial, agnostic, hedonistic, and ascetic – that is, there are a myriad of beliefs, customs, and practices that make up our communities. My founding assumption of an understanding of non-human agency in beings and things is not meant to assert that this represents the totality of nêhiyaw thinking on animals, lands, and waters. However, it does represent a large distinct body of thinking within nêhiyaw kiskêyihtamowin (Plains Cree knowledges). I consider this a category of nêhiyaw philosophy or theory. This channel of nêhiyaw philosophy can be categorized as the wâhkôtowin school of legal theory. The acknowledgement of the agency of non-human beings and things is integral

[62] In terms of atheism, see Richard Dawkins, *The God Delusion* (Boston: Hougton Mifflin Co,, 2006); Peter Singer, *Animal Liberation* (New York, New York Review of Books, 1990). While Singer advocates for a recognition of non-human agency, he argues that sentience dictates our moral standards in terms of human conduct towards others. As Singer states: "The notion that human life is sacred just because it is human life is medieval." See Michael Specter, Ethics Man (1999) The Independent. Online: < https://www.independent.co.uk/arts-entertainment/ethics-man-1127735.html>. See also Peter Singer, "The Concept of Moral Standing" in A Caplan & D Callahan (eds.) Ethic in Hard Times, (Boston: Springer, 1981).

to wâhkôtowin, the principle of relatedness of all things, one that is governed by law. As Sylvia McAdam notes (quoting her father, Francis McAdam Saysewahum):

> Long ago after the human beings were created, they were allowed to walk with the animals and talked amongst each other like relatives. Even the trees, plants, all manner of life was able to communicate with each other. That was the beginning of understanding wâhkôtowin and the laws surrounding it…. We still remember we are related to all of creation, that is still followed to this day.[63]

Similarly, Métis writer Maria Campbell acknowledges that the observation of this relatedness has been narrowed to encapsulate human-to-human relationships only, and calls for a return to a broader understanding of wâhkôtowin. Campbell notes:

> There is a word in my language that speaks to these issues: 'wâhkôtowin.' Today it is translated to mean kinship, relationship, and family as in human family. But at one time, from our place it meant the whole of creation. And our teachings taught us that all of creation is related and inter-connected to all things within it. Wâhkôtowin meant honoring and respecting those relationships.
>
> They are our stories, songs, ceremonies, and dances that taught us from birth to death our responsibilities and reciprocal obligations to each other. Human to human, human to plants, human to animals, to the water and especially to the earth. And in turn all of creation had responsibilities and reciprocal obligations to us.

The agency of non-human beings and things is inseparably tied into wâhkôtowin. As a foundational legal principle within nêhiyaw thinking, this broader understanding of wâhkôtowin necessarily underpins this dissertation.

d. Inspirited versus Sentience and Atheistic Approaches

My use of *inspirited* to describe the animacy of non-human beings and things is a deliberate attempt to convey nêhiyaw spiritual beliefs on lands, waters, animals, flora

[63] Sylvia Saysewahum McAdam, *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems* (Saskatoon: Purich Publishing, 2014) at 10.

and fauna. Criticisms can be levied against this approach by those who come from an atheistic tradition, namely how legal and moral obligations are rooted in nêhiyaw beliefs on the *ahcâhk,* and thus spirituality. A corollary criticism can be how beliefs on the *ahcâhk* provide a different set of moral and legal obligations towards non-human entities, from both Canadian law, that generally views non-human beings and entities as property,[64] as well from ethical consumption advocacy, which usually uses the sentience of an entity as a standard for moral obligations in its treatment.[65] I resist viewing sentience as a standard for the humane treatment of non-human agents for a couple of reasons. First, as this dissertation details, this would distort nêhiyaw philosophies towards non-human agents, generally leaving out other non-animal agents that are viewed as having some level of animacy within nêhiyaw pimâtisiwin.[66] Secondly, despite the sophistication of the debate, ethical consumption discourse still requires subjective standard making through discourse and contestation, much like the creation and transformation of legal norms in all societies. [67]

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[64] See *Henderson v. Henderson* 2016 SKQB 282, where Justice Danyluk ruled it was a waste of the court's time in determining who get custody of a family pet in a domestic separation.
[65] See Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (New York: Harper Collins, 1975).
[66] On legal theory, Gordon Christie notes: "there is concern over the possibility that Indigenous scholars might unreflectively or uncritically fall into thinking and writing in non-Indigenous ways, a failing that can re-inscribe the very ways of thinking that historically have worked so powerfully against Indigenous peoples." Because of this danger, Christie cautions, when we rely upon non-Indigenous theory that Indigenous scholars: "(a) maintain their grounding in their communities, (b) carefully assess the web of conceptual relationships within which a non-Indigenous theoretical position or argument is embedded in relation to this grounded Indigenous existence, and (c) excise the content of the non-Indigenous argument or position from these extraneous matters, so it can be put to use by and for Indigenous peoples." See Gordon Christie, See Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J. Richardson, Shin Imai & Kent McNeal, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) c. 8 [Christie, *Indigenous Legal Theory*]. At 25 and 44.
[67] Consider one of the current lines of discussion within ethical veganism: whether the consumption of bivalves - aquatic mollusks such as oysters, mussels, scallops and clams - is ethical. As "[b]ivalves lack the type of centralized nervous system required for processes required for subjectivity", it is argued that their consumption doesn't cause them pain. While this consideration is rooted in neurobiology, the evaluation, in this case the consciousness and subjectivity of bivalves – is a subjective process determined by human interpretation. It requires multiple assumptions on standards (for example, the standard of humane

This returns to the broader question of attaching moral or legal obligations to spiritual beliefs generally. Atheists point to the potential dangers in setting moral and legal standards based upon metaphysical beliefs, like those based on spiritualities or religion. As Peter Singer states:

> "Once we admit that Darwin was right when he argued that human ethics evolved from the social instincts that we inherited from our non-human ancestors, we can put aside the hypothesis of a divine origin for ethics."[68]

This approach is troubled by the use of stories and spiritualities that consider spiritual or sacred entities as significant part of legal pedagogy. Similarly, Frances Widdowson would criticize my acceptance of invocations of the inspirited nature of animals as being out of step with scientific conclusions on the the physical or material world. The crux of Widdowson's blanket argument against Indigenous expressions of spirituality and the dangers of their use is found here:

> Unlike western bio-medicine, which is concerned with the material causes of illness (both physical and psychological), aboriginal cultures assume that spiritual forces influence disease. Essentially, this means that aboriginal cultures believe that people can fall ill because they have been affected by evil spirits or have failed to propitiate good ones.[69]

consumption, and what constitutes sentience) that is a product of human interpretation, including what is the foundation of moral and legal obligations towards animals. See David Cascio, "On the Consumption of Bivalves". (19 Jan 2017) Online: The Animalist < https://medium.com/@TheAnimalist/on-the-consumption-of-bivalves-bdde8db6d4ba>

[68] Peter Singer, *Ethics* (Oxford: Oxford Univeristy Press, 1994) at 5.

[69] See Frances Widdowson, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal: McGill-Queen's University Press, 2008) at 176. Widdowson employs a simplistic duality between Western and aboriginal healing systems to make her point, as though there aren't large movements of non-Indigenous people who engage in the same rhetoric of the healing powers of the spirit alone (think anti-vaxxers, and proponents of 'clean' eating, etc) and that Indigenous healing systems are not capable of incorporating both Western medicine and historical ceremonial practices. Her critique overlooks the complexities of Indigenous spiritual beliefs. Though there are some people who maintain fundamental positions on spirituality and law, medicine, and other aspects of society, there is a broader understanding within nêhiyaw societies that spirituality is one point on an interconnected web of social practices that ensure collective good living.

As this dissertation works through, nehiyaw spirituality is not an authoritative institution that renders its subjects passive in relation to past beliefs and practices, but is an active field that requires agency of nehiyaw people in its continued practice. This requires individual agency in how we relate to and use metaphysical beliefs in law.

This dissertation is more concerned with presence of metaphysical entities within the lifeworlds of nehiyaw peoples, and the force of these metaphysical entities on the constitutional and legal norms of nêhiyaw societies. In this sense, this dissertation makes no claim to further a scientific interrogation into nêhiyaw metaphysics. What it does consider is the force of these beliefs on law. Thus I begin from the position that widely-held beliefs are reasonable. The concept of the k'sê-man'to (the creator), pawâkan (spiritual helpers), âtayôhkan (spirits), as well as the anthropomorphic qualities of non-human animals and other entities are all part of nêhiyaw metaphysics.

Further, beyond the question of the existence of a soul, nêhiyaw legal philosophy provides significant nuanced questions on human ethics, and the effect of the presence or absence of a soul on ethical obligations.[70] Recognizing the animacy of non-human entities has implications on our ethical responsibilities to them. These responsibilities often align with, or at times go further than atheistic approaches in ethical relations with the ecological world. For example, Sam Harris notes that one way to ground objective morality without the aid of religion or spirituality is to center it upon the 'well-being' of others. [71] Peter Singer takes this approach as well, as he argues that there are foundational ethical obligations like preventing "suffering and death from lack of food,

[70] For a detailed survey of discourses on morality within atheism, see Erik J. Wielenberg, "Atheism and Morality" in Stephen Bullivant & Michael Ruse, eds, *The Oxford Handbook of Atheism* (Oxford, UK: Oxford University Press, 2013).
[71] Samuel Harris, The Moral Landscape (New York: Free Press, 2010).

shelter, and medical" and "if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it".[72] Singer extends these ethical responsibilities to animal well-being.[73] These atheistic approaches share common threads with the principle of *miyo pimâtisiwin* (or good living). [74] As a general goal for nêhiyaw law and constitutionalism, miyo pimâtisiwin calls us to coordinate our actions to ensure non-human agents and entities are entitled to certain standards of good living as well. Nêhiyaw views of the inspirited nature of non-human beings and things provide a broad channel of ethical behavior towards non-human agents. Humane obligations do not stop at the subjective standard of sentience – it is acknowledged that waters, lands, and stones are active agents in our lives, and exist in a web of reciprocal obligations towards each other. As I have written previously, asinîy, our stones, are considered our grandparents, of which we owe a duty to take special care of, in return of the healing powers that they provide.[75]

Metaphysics and the force of law

Returning to my assumption of the reasonableness of nêhiyaw metaphysical beliefs, this raises the question of the uses of spiritual sources within law. My previous discussion on creative, imaginative, and material realities is instructive on the processes that enable

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[72] Peter Singer, "Famine, Aflluence, and Morality" (1972) 1:3 *Philosophy and Public Affairs* 229.
[73] As Singer argues, this moral obligation should lead us to "boycott all meat and eggs produced by large-scale commercial methods of animal production, and encourage others to do the same Peter Singer, *Writings on an Ethical Life* (New York: HarperCollins, 2001).
[74] If we are to generalise what the prescriptive point of beliefs of the animacy and inspirited nature of the non-human world, we come the conclusion that it is ensuring an egalitarianism to how the good living (miyo pimâtisiwin) of all things human or non-human. There is not an idea of human ascension (happy hunting grounds, but attainment is an actuality rather than a bar to reach), moral test to reach a higher ground of spirituality, nor is there an evolutionary purpose. The closest we get is in Blair Stonechild when he talks about returning to the manitow-flame, through the intellectual journey we are on in life. See Blair Stonechild, *The Knowledge Seeker: Embracing Indigenous Spirituality* (Regina: University of Regina Press, 2016). [Stonechild, *Indigenous Spirituality*]
[75] See Darcy Lindberg, Miyo Nêhiyâwiwin (Beautiful Creeness): Cermonial Aesthetics and Nêhiyaw Legal Pedagogy (2018) 16/17 Indigenous Law Journal 51. [Lindberg, *Miyo*]

metaphysical beliefs, like those of the animacy of non-human beings and things, to become functual as law. I described these realities as:

> "**Creator/Creative reality**: The process of receiving instruction, rules or guidance from a creative source. This instruction is received through such creative processes like ceremony, song, dream, medicine, sacred, natural or supernatural events, and within art making. Such a reality can be shared as a group, but generally is only consciously experienced by the individual person (or persons) experiencing the creative event.
>
> **Imaginative reality:** The process of acting on the instruction, rule or guidance as put towards a society from the intermediary of the creative source. This includes the deliberative processes as a community or society in interpreting sacred, natural or supernatural events, ceremonies, songs, dreams, or even positions on how society should govern….
>
> **Material reality:** The process of dealing with the things that are materially realized for a community. This includes deliberative processes to deal with day-to-day concerns that arise such as care-taking, wellness, and protection issues in communities, as well as environmental and economic concerns."[76]

I am careful not to make conclusions on the significant questions of spirituality and the existence of non-human entities. Again, as I previously wrote:

> "I should note my categorization of creative and imaginative reality does not discount the sacred experiences of Cree peoples by rendering them as strictly meta-physical/non-real. It in fact intends the opposite. Separating experiences of creative reality respects the autonomy of those who have those experiences [while withholding an interrogation] of the truth[fulness] of those experiences on an individual level. I respect the consciousness of the old ones, ceremonial holders, knowledge keepers, dreamers and medicine peoples and do not wish [for this interrogation] to delegitimize their sacred experiences.…For through the process of a creative reality held by one person becoming an imaginative reality for a community, there must be an institutional instrument to aid this transition. Ceremony with the autonomy, respect, and authority given to ceremonial holders is one such institution."[77]

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[76] Darcy Lindberg, kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming Gendered Protocols in Cree Ceremonies through Cree Law (LLM Thesis, University of Victoria, Faculty of Law, 2017) [Unpublished] at 83. [Lindberg, *Sacred Changes*]
[77] Ibid, at 86-7.

The functionality of certain aspects of Canadian state law require the same positioning of metaphysical beliefs. Consider the corporation and the legal personhood it is provided in Canadian law. Through the collective legal imagination, a corporation is given human faculties so it may operate as an individual entity. It has the ability to enter into contracts and take steps towards their enforcement. It has certain rights according to the *Canadian Charter of Rights and Freedoms*.[78] I will never consider a corporation human. I may even disagree with the scope of humanness that is provided through Canadian legislation and court decisions. Nonetheless, I would be a poor legal scholar if I did not acknowledge the *force* of corporate personhood within Canadian law and society. The use of the non-material and non-physical seems to be a necessity for the operation of law. As I previously wrote in my Masters thesis:

> While the characteristics and personality may be different, the creative realities, imaginative realities and [material] realities exist within other legal systems as well. Specifically, the ability for a society to create and foster imaginative realities is necessary for the function of a legal system. In her study of the history of the development of human beings, Yuval Noah Harari's description of the necessity of human 'myth-making' is instructive. Harari points our ability to imagine as a vital skill towards our legal collectivity.[79] As Harari states imagination "has enabled us not to merely to imagine things, but to do so *collectively*."[80] Imaginative renderings allow people to "cooperate in extremely flexible ways with countless numbers of strangers."[81] Not only does this cooperation occur in real time, but over generations as well.[82]

[78] See Elizabeth Foster, "Corporations and constitutional guarantees" (1990) 31:4 Les Cahiers de droit 1125.

[79] Harari, *Sapiens: A Brief History of Humankind* (New York: Harper, 2015) at 25.

[80] *Ibid* at 25.

[81] *Ibid* at 25.

[82] Linderg, *Sacred Changes, supra* note 76, at 87-8. Finally, my LLM is instructive as well on how to avoid delegitimizing the discussion on inspirited-ness in this dissertation to mere myth or fantasy, without implications on law and constitutionalism. I wrote:

> A common misunderstanding of origin, creation and re-creation stories is linked to the view of these stories as 'myth' and the diminished view ascribed to stories that are categorized as mythical in nature. As described above, the pursuit of a scientific truth within stories flattens out and empties the layers of knowledge within stories of their value. This moves us back into the era of Hart and Dworkin, where Indigenous legal orders are described as primitive, non-legal, or pre-legal in nature. There is a danger that this may destroy the authority and rationality of a narrative, in that stories that are deemed mythical in nature can see their positions as legal authorities diminished. Harari acknowledges and points out

While this may not fully satisfy the questions that those who come to law and constitutionalism from an atheistic approach on the inclusion, legitimacy, and usefulness of spirituality according to some nêhiyaw beliefs, it provides a bridge towards an understanding of nêhiyaw epistemology.[83]

Beyond these questions raised by atheistic approaches, the functionality of metaphysical beliefs can still raise important questions on law and authority. Val Napoleon raises a significant point on how we employ terms like 'spirituality' and 'sacred' in legal discourse. Napoleon provides a caution of resting upon declarations of inspiritedness without further interrogation, specifically in that declarations of the sacred can hide or obliterate the intellectual processes, traditions, and energies attached to what Indigenous peoples view as sacred.[84] Signaling a caution to the use of "spiritual claims as an ultimate guide to broader public policy" John Borrows adds that while such claims

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that legal positivism requires the same imaginative process that is often discounted as myth in Indigenous legal traditions. As Harari notes, the creation and belief in the limited liability corporation is every bit of an act of imaginative process as is the belief in, for example, the gift of horses to the Cree from the waters. As Harari states, corporations are:

> "a figment of our collective imagination. Lawyers call this a 'legal fiction'. It can't be pointed at; it is not a physical object. But it exists as a legal entity. Just like you and me, it is bound by the laws of the countries in which it operates. It can open a bank account and own property. It pays taxes, and it can be sued and even prosecuted separately from any of the people who own or work for it."

Our ability to enact and believe detailed and complex legal fictions is essential to the operation of Canadian law. We can imagine and stake our lives on the legal fiction of the limited liability corporation, and believe that it shields us from personal liability, despite its immateriality. It is our belief in 'imagined realities' that allows legal systems to work. As Harari asks, '[j]ust try to imagine how difficult it would have been to create states…or legal systems if we could only speak of things that [materially] exist, such as rivers, trees and lions."

[83] John Borrows offered this guidance in thinking of the audience of this dissertation: think of a ceremony or powwow (a ceremony of its own). You may be sitting around the big drum, reaching harmony (or even dissonance) with the other singers. Then there maybe some who are around the drum who have come for a closer listen. Of course, there are dancers in the arbour who are relying upon your work, and people in the stands who are observing, listening, and perhaps critiquing. Extending this metaphor, I wonder where Peter Singer and Sam Harris would be during the powwow, and although their questions are significant, whether their integrogations would stop the ceremony. This dissertation takes this approach to these questions, important and significant, but not necessarily the main point of interrogation.

[84] See Val Napoleon. "Thinking About Indigenous Legal Orders." In René Provost & Colleen Sheppard, eds. *Dialogues on Human Rights and Legal Pluralism* (New York: Springer, 2013) at 6

"have their place…they should not dominate public life…These perspecives are significant resources for reason and action…[a]t the same time, they could mislead us or be used to coerce us."[85]

This is also aided by Stark and Starblanket's discussion on relationality and Indigenous knowledges. They note: "[t]aking Indigenous knowledge seriously means not just taking up different answers but instead (or at least in addition) requires raising a different set of questions."[86] Or, fundamentally on this point, Starblanket and Stark observe:

> "[T]he question remains why Western academic fields will often engage Indigenous knowledge only when it's translated through the language of their discipline. Why does the onus continue to reside with Indigenous knowledge holders to translate Indigenous knowledge into cognizable frames?"[87]

I consider nêhiyaw spirituality as an intellectual tradition with its own theory, epistemology, and modes of practice. In the next chapter, I will explore how the concept of the ahcâhk provides nêhiyaw-specific philosophy on agency and law. In the fifth chapter explore how spiritualities are tied to vast and complex ceremonial cycles and systems. These examinations will aid in dealing with the concerns raised by Napoleon and Borrows, showing how spirituality works in concert with other deliberative institutions within nêhiyaw pimâtisiwin in a non-hierarchal, cyclical manner.

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[85] John Borrows, Law's Indigenous Ethics (Toronto: University of Toronto Press, 2019) at 83. [Borrows, *Indigenous Ethics*]

[86] Heidi Stark & Gina Starblanket, "Towards a Relational Paradigm – Four Points for Consideration: Knowledge, Gender, Land, and Modernity" in Michael Asch, John Borrows, & James Tully (eds.) Resurgence and Reconcilation: Indigenous Settler Relations and Earth Teachings (University of Toronto Press: Toronto, 2018) at 179. [Starblanket & Stark, *Relationality*]

[87] *Ibid* at 181.

Finally, the employment of the word 'spirituality' often acknowledges the significance of journeying towards, yet the impossibility of a full arrival, at a complete understanding of nêhiyaw spiritualities. It is part of nêhiyaw pedagogy to understand that our learning is only complete when our life on earth does; the animacy of the land, the inspirited nature of our non-human animal kin, and the elderdom of rocks will always contain an element of mystery. This element of mystery is essential to our further journeys into deeper relationship with them, as this ultimately requires a maintenance and renewal of a relationship with lands, animals, and rocks, to seek out answers to this mystery. Recognizing the inspirited parts of lands and waters ensures legal relations that remain open to transformations based upon the results of our continuous curious commitments to kinship with them.

III. Research Questions:

Thus, this research seeks to revitalize a version of *wîtaskêwin* (living on the land together) that is faithful to the full intention of the concept within nêhiyaw law and constitutionalism, To do so, we must revitalize the role lands, waters, animals, and other beings play in our treaty relationships. Starting from the preliminary assumption (one that will be strengthened throughout this dissertation) that nêhiyaw constitutional and legal orders set out and rely upon a kinship relationship with lands, waters, as well as flora and fauna upon nêhiyaw âskiy, my research questions are as such:

1. How is the legal status of lands, waters, animals, flora and fauna (the ecological world) characterized within nêhiyaw pimâtisiwin, and in turn within wiyasiwêwin (law)?

2. How does the revitalization of nêhiyaw constitutional kinships with non-human beings provide the ecological world with a greater position within our treaty relationships? How is non-human agency fulfilled within nêhiyaw law? How is this agency realized? How do our conceptions of these treaty relationships change with a revitalization of non-human agency within them, similar to the original intentions of treaties?
3. With respect to Treaty 6 specifically, how does the answer to the above bear a responsibility on the Canadian state and polity to adopt this approach in present or future Treaty 6 relations?

a. Narrative Approaches to Research:

As you may have determined by my writing at the start of this dissertation, my observations of this research will be set out by stories. Such narrative approaches are faithful to historical and contemporary nêhiyaw pedagogies, and to Indigenous approaches to research generally.[88] As Margaret Kovach notes, "from a nêhiyaw point of view…knowledge and story are inseparable."[89] Marlene Brant Castellano identifies three sources of knowledge acquisition: "traditional knowledge (from generation to generation); empirical knowledge (gained from observation); and revealed knowledge (acquired through spiritual origins and recognized as a gift)." [90] A storied approach to research weaves knowledge gained from each of these sources together. While each chapter will engage in a specific method to untangle answers to the questions above, a

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[88] See Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (University of Toronto Press: Toronto, 2009) 94-108.
[89] *Ibid* at 98.
[90] As described in Deborah McGregor, *Coming Full Circle: Indigenous Knowledge, Environment, and our Future*, 28:3/4 American Indian Quarterly 385 at 388.

narrative approach will underpin how these answers are relayed. In short, I will be explaining through story. Tied into this approach is the auto-ethnographic method that will support this dissertation.[91] I am *apihtawkosisan*[92] *nêhiyaw*, or mixed-rooted Plains Cree. My mother is the late Beverly Fraser, and my father is the late Brian Lindberg. My maternal kôkom and môsom are Viola Wolfe (Cree-Métis) and Joseph Fraser (Cree-scottish-Métis). Nosom Fraser was born in and raised in the Pigeon Lake area. My câpân, his mother, is Mary Suzanne Potts (prior Muskegopot) from the Samson Cree Nation. Nosom Fraser's father was Henry Fraser, the son of Simon Fraser (Scottish) and Sophia Brazeau (Stoney-Métis). Nokom Fraser's parents were Angele Wells (Métis) and Joseph Wolfe (Arcand) (Cree), both born and raised in the Battleford area.

Three of my dad's grandparents are Swedish-Canadian. The fourth, Mary Donald, was Cree-Métis, with lineage going back to Papaschase's band. As you may have been able to derive, we are not status 'Indians' according to the *Indian Act*. Mary Suzanne Potts lost status when she married Henry Fraser in Hobbema in 1921.[93] Joseph Wolfe left his reserve for fear that his children would be taken to residential school and for better farming prospects.[94]

The story of my family's lineage and the subsequent alienation from reserve communities is not uncommon.[95] The constriction of the *Indian Act* on band membership

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[91] See Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing: Winnipeg, 2008).
[92] Literally translating into half-son. Though not politically correct these days, we often referred to ourselves as half-breeds growing up.
[93] While it is unknown whether Viola Wolfe was enrolled as a status Indian on a band membership list, she would have lost status when she married Joseph Fraser in Hobbema in 1943. Finally, Joseph Fraser served in the Canadian Army in the 1940's and 50's. If he happened to retain status, his service would cause his enfranchisement.
[94] My uncle Steve Wolfe relayed this to me in May 2019.
[95] See *Sandra Lovelace v. Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/197; *Attorney General of Canada v. Lavell*, 1973 CanLII 175 (SCC), [1974] SCR 1349;

caused the removal of many people from Indigenous communities. This is antithetical to nêhiyaw citizenship practices. Our wâhkôtowin practices ensured our interconnectedness with our on-reserve and off-reserve relations. Despite the removals from band lists, we continued on generationally with our obligations, responsibilities, and reliance on good relations. You may read this and see a loss of connection to communities through Canadian law. However, our lives have never been without connection to my relatives within nêhiyaw communities. The reality is that I never considered the historical dislocation of the generations before me when I was young, my childhood was rich with my connections to my cousins, aunties, uncles, môsoms, and kôkoms (in our family, everyone who is two generations above is a grandparent). While Canadian law set out one set of relations (non-status nêhiyaw), wâhkôtowin ensured we had a thick relational web that embedded us in our nationhood.

I share this to position myself in relation to you. Perhaps there are relatives we share, perhaps we are cousins. On a more abstract level, there may be truths within my family's story that you can relate to. I also share this history to position myself in relation to the epistemology I am exploring in this research. The dislocation from the First Nation memberships experienced by my relations also means that my journey towards our language, ceremonies, and stories is one of individual and generational revitalization and resurgence. As I share my experiences in this research, I too am a

McIvor v. Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153; *Procureure générale du Canada c. Descheneaux,* 2017 QCCA 1238.

proxy for ancestral relearning. In this manner, this research is auto-ethnographic in nature, contextual to my positioning as a mixed-rooted nêhiyaw *nap*ê*w* (man).

b. Kind Relations: Nêhiyaw Constitutionalism and Legal Theory

Another way to frame the form of relationality that this research is predicated upon is the revitalization of constitutional kindness to address our consumptive tendencies. The vision of kindness I am setting out here is one that restores our kinship relations in the enactment of treaties. More complex than simply conservation, this version of kindness looks towards the constellations of nêhiyaw wiyasiwêwina to return to a form of relationality that guides how we are nourished, sheltered, and nurtured by our kin within the ecological world. Further, it offers guidance on present-day resource and economic development practices within nêhiyaw societies. This can be viewed as a nêhiyaw-centered approach to engendering and strengthening civility as well.

Sakitowin: Love

We will continue to move towards productive lives, promoting our Cree culture, language and traditional values by being caring and compassionate with all our People. We believe that love and sharing are essential for the development of a safe and healthy community.

Figure 1.3: Sakitowin (love) is one of four of the overall principles of the Samson Cree Nation.[96]

How kindness influences nêhiyaw legal norms is informed by theory of constitutionalism this research is predicated upon. I share John Borrows' observation that love has a significant place within the "language of rights in Canada".[97] This includes nêhiyaw law and constitutionalism, specifically within Treaty 6 obligations. While the general reader

[96] Samson Cree Nation, Vision Statement. (2019) Online: Samson Cree Nation < http://samsoncree.com/aboutus>
[97] See John Borrows, *Law's Indigenous Ethics, supra* note 85, at 24 to 49.

may be more familiar with 'constitutionalism' within a Canadian political context, where a constitution is comprised of formal and informal declarative positions located in founding texts as well as time-worn conventions, the constitutionalism I am impressing is broader. Nêhiyaw pimâtisiwin encapsulates the totality of the set of ideals, principles, and aspirations arising out of the ontologies and epistemologies that further a shared understanding of what it means to be nêhiyaw.[98] This totality is held collectively and can neither be fully understood or directed by an individual. It is also never fixed; as social and legal norms continue to be transformed through contestation and shifting agreements amongst society members, so does nêhiyaw pimâtisiwin. While nêhiyaw constitutionalism has its own proponents of 'originalism'[99] (like those that emerge in other constitutional debates), the transformative nature and traditions displayed by many of the institutions that hold and teach Plains Cree law evidence a dynamic, growing, interpretative constitution.[100]

The decentralized political and legal structure of the nêhiyawak means that other institutions (rather than central enactments and proclamations) are instrumental in

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[98] For other examples of Indigenous constiutionalisms see: John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press: Toronto, 2016) [Borrows, *Freedom*]; Aaron Mills, "The Lifeworlds of Indigenous Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847. Mills' full contribution is instructive to what I am seeking to express here, as he impresses the importance of Anishnaabeg lifeworld to inform what we think of as a constitution. Mills states that "any constitutional order…reflects an understanding of what a person is and what community is, and pursues a vision of freedom determined by these understandings for its members. It's only against a shared set of understandings that law comes into the world." (*Ibid* at 855).

[99] See Sylvia McAdam Saysewahum, *Nationhood Interrupted, supra* note 63.

[100] For a sustained exploration of the concept of originalism as it relates to Indigenous peoples in Canada, see John Borrows, "(Ab)Originalism and Canada's Constitution" in Borrows, *Freedom, supra* note 98, at 129-60.

carrying out and teaching constitutive principles.[101] Beyond written texts[102] or customary practices,[103] the epistemological and ontological underpinnings of constitutional principles lay within narratives,[104] songs,[105] artistic renderings,[106] ceremonies,[107] spiritual and place names,[108] kinship models,[109] bundles, [110] and language.[111] Like in all polities, there are differences in opinion on the nature of nêhiyaw constitutionalism, and what belongs within its constitutive tradition.[112]

The relationship between the normative constitutional practice within nêhiyaw societies and formal, written, declarative constitutionalism – where the norms serve as a foundation for a written constitution to arise from, is shared by other Indigenous societies and nations.[113] It is also the case for Canadian constitutionalism. The metaphoric

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[101] See Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (New York: Springer, 2013) at 234.
[102] For example, the Samson Cree Nation has affirmed in writing its constitutive principles of pimohciwin (Cree way of life), wâhkôtowin (kinship), sakitowin (love), and tapwewin (honesty) as directive teachings on how their leadership governs.
[103] Protocols surrounding ceremonial practices are examples of customary norms in Plains Cree societies. A good philosophical exploration of the importance of these protocols to the legal practice of ceremonies is found in Poirer, *supra* note 26 ,at 294.
[104] See Rob Innes, *Elder Brother and the Law of the People: Contemporary Kinship and Cowessess First Nation*, (Winnipeg: University of Manitoba Press, 2013). [Innes, *Elder Brother*]
[105] wahpimaskwasis (Little White Bear) Janice Makokis, *nêhiyaw iskwew kiskinowâtasinahikewina – paminisowin namôya tipeyimisowin: Cree Women Learning Self Determination Through Sacred Teachings of the Creator*, (MA Thesis, University of Alberta, 2005) [unpublished] at 10 [Makokis, *Cree Women*].
[106] See the work of Plains Cree artist George Littlechild in George Littlechild et al, *In Honour of Our Grandmothers* (Penticton: Thetus Books, 1994).
[107] Makokis, *supra* note 105, at 10.
[108] *Ibid* at 2.
[109] See Innes, *Elder Brother, supra* note 104, at 73-76.
[110] Kiera Ladner, "(Re)creating Good Governance, Creating Honourable Governance: renewing Indigenous constitutional orders". Paper Presented at the Annual Conference of the Canadian Political Science Association (Ottawa, May 2009). Online: https://www.cpsa-acsp.ca/papers-2009/Ladner1.pdf at 4.[*(Re)creating Good Governance*]
[111] Makokis, *supra* note 105, at 3.
[112] Both the Canadian and American dialogues on constitutional interpretation have had to deal with (and have settled in different manners) the tensions between originalist and 'living-tree' approaches to their respective constitutions. See Borrows, *Freedom*, supra note 54.
[113] For example, see Aaron Mills' conception of Anishnaabe constitutionalism in Aaron Mills, "The Lifeworlds of Indigenous Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

constitutional tree that is favored in interpretations of approaches of the Canadian constitution signals an acknowledgement to its foundation on a normative base. As John Borrows states, the Canadian constitution is:

> An open ended – perpetual work in progress, a living tree. It is comprised of various written texts, an assortment of established conventions, and a diverse array of oral traditions. It is an open-ended marriage, polyandrous in many ways, allowing for multiple partners. It even has rules that contemplate divorce. In many respects, Canada's constitution is a fluid arrangement, and many people seem to like it that way. [114]

Borrowing largely from UK constitutional traditions of parliamentary structuralism and unwritten norms,[115] Canadian constitutionalism is tangle-rooted. [116] While not fully realized in formal constitutional forums, Indigenous constitutions make it even moreso. The diverse potentials of constitutional pluralism in Canada through further recognition of Indigenous constitutional orders challenges "the conventional court-centric view of early constitution-making in Canada [that] has concentrated on formal British Imperial instruments." [117] This formalization has "privileged principle over practice."[118] Thus Canadian constitutional and law making is viewed as more machine than organic interactive process where constitutional growth is achieved through constitutional

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[114] Borrows, *Freedom* supra note 98, at 105.
[115] *Ibid* at 105-6.
[116] As I forward here, I view the entanglement of Canada's constitutional roots with various sources as a positive here. John Borrows notes that "entanglements can either be liberating or oppressive". In the positive, Borrows notes:

> "[o]ur enmeshment in unfolding routines and patterns often facilitates greater connections…our entwined languages, cultures, and worldviews also generate innovation and creativity. …Tradition can be challenged while recognizing that (even in its rejection) tradition is a source of different ways of living."

I argue that nêhiyaw law, like other Indigenous legal traditions, provide a challenge to the Canadian tradition. Of course, the opposite view of entanglement can be taken as well, that Canadian entanglements with Indigenous laws have harmed land/water/animal/plant relations. See Borrows, *Ethics, supra* note 97, at 119.
[117] *Ibid* at 106.
[118] *Ibid* at 106.

amendment or judicial interpretation only.[119] The deepening written articulation of the common law and increasingly technocratic nature of the Canadian legal system is further obscuring the unwritten and oral traditions of the Canadian constitution.[120] The entrenchment of constitutional practices in formal texts and processes provides Indigenous peoples with "false constitutional limits".[121]

The trend towards industrialized, formal constitutions has significant consequences for Indigenous peoples who approach the Canadian legal system to advance freedoms. As Borrows explains:

> "[t]he composite nature of Canada's constitution has made it simultaneously easier and more difficult to create greater space for Indigenous governance. Unfortunately, since the entrenchment of Aboriginal and treaty rights in Canada's constitution, it has been harder for Indigenous peoples to throw off false constitutional limits."[122]

The hyper-centering of constitutional authority in Canada (and the consolidation of law-making and constitution-amending powers within governments) has had pedagogical consequences as well, as legal ordering that occurs in a decentered or constellating manner[123] is often disregarded as being merely culture or custom, or overlooked altogether. This tendency provides an additional tension from Indigenous scholars and

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[119] This is symptomatic of Western legal systems generally. See Eve Darian-Smith, "Producing Legal Knowledge" in Eve Darian-Smith, ed, *Laws and Societies in Global Contexts* (Cambridge: CUP, 2013) at 100-101.

[120] As Eve Darian Smith suggests, this increasing reliance upon written and positivistic law has created a system where: "(1)That legal meaning is found strictly within legal texts, reports, and documents, (2) that law is almost wholly addressed in formal legal arenas such as courtrooms, governmental assemblies, and places of legal adjudication, (3) that law should be described in the vocabularies of European-based languages, primarily English, and (4) and common law and civil law legal systems are preferred." *Ibid* at 108.

[121] Borrows, *Freedom* supra note 98, at 110.

[122] *Ibid* at 110. For one, Borrows, as many other jurists note, that the rights recognition model that informs s.35 jurisprudence limits the rights of Indigenous peoples and societies to historical and site-specific practices.

[123] A metaphoric concept from earlier, where I view nêhiyaw legal ordering to occur through micro-centering of legal and constitutive institutions.

lawyers alike in producing work that is cognizable by a non-Indigenous public but also is faithful to their nations' understanding of constitutions, law, and culture. Aside from positivistic proclamations that say 'this is law!', the clear demarcations between what is 'law' and 'culture' in some instances requires close analysis, and at others is so intertwined that is hard to extract one apart from the other. Art Napoleon notes that:

> "the nîhiyaw holistic paradigm does not clearly distinguish between values, principles, ethics and wiyasowîwina, 'the laws'. Based on the language there is no distinct boundary between nîhiyaw philosophy, worldview, ontology or knowledge. From a language perspective there is overlap in meaning between nîhiyawîwin words like pimâtisowin 'life or culture', sihcikîwina 'ways of doing things', and nîhiyawâtisowin 'Creeness'. There is not a clear separation between the earthly plane and the spirit world. [124]

Sarah Morales notes the overriding tension that we do a "disservice to [our] communit[ies]" by misrecognizing aspects of indigenous social orders as laws" in our research projects.[125] Rob Clifford, noting this challenge in his research into W̱SÁNEC law and constitutionalism, takes the "approach [that] law is socio-legal in nature" where "law and culture (or worldview) cannot be separated."[126]

Demarcating law from social norm can create artificial power imbalances. W̱SÁNEC community member Victor Underwood once described to me his reticence towards naming things 'law'. After providing a teaching those in attendance at a ceremony he was hosting, he stated that what he had shared was not a law, even though others may describe it as such. His reasoning was that once something is determined a law, it then becomes the subject of multiple attempts at interpreting, each seeking to be

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[124] Napoleon, *Key Terms, supra* note 47, at 51.
[125] See Sarah Morales, *Snu'uyulh: Fostering an Understanding of the Hul'Qumi'Num Legal Tradition*. (Ph. D. Thesis: University of Victoria, Faculty of Law, 2014). (Unpublished) At 194
[126] See Rob Clifford, WSANEC Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River), (2016) 61:4 McGill LJ 755 at 761.

the authoritative one. By keeping something rooted as a teaching (in his practice), then it allows it to do the work without claiming authority, leaving the listener to take the lesson or leave it where it is. This suggests a turn towards the persuasive power of law rather than appealing to its authority. The over-reliance on rule-making tilts the 'supremacy' of our legal reasoning towards the coercive realm of authority, away from our well-laid methods of persuasion. As John Borrows notes, Canadian jurisprudence often overlooks "the broader social function of Canadian law" by unmooring legal reasoning from "their cultural contexts", thus providing the false notion that Canadian law exists almost primarily within a positivistic, declarative field.[127] Such favoring obscures law not sourced from positivist proclamations or deliberation over other origins.[128] The inverse is often true within Indigenous legal traditions – as Borrows notes, "Anishinaabe approaches require readers to activate their own agency in answering the questions presented".[129] He assesses that "nuance is sacred"[130] in light of this, and such nuance should be fostered within our legal ordering a world that continues to further industrialize law.[131]

Taking a normative constitutional approach, this research avoids an overriding need to resolve theoretical debates on what constitutes law in relation to social norm, a muddy discourse that may be unresolvable.[132] In saying this, I do not wish to over-represent the normative aspect of Indigenous legal orders and nêhiyaw constitutionalism. Positivistic law and law set by authority structures are undoubtedly prevalent in our

[127] Borrows, *Indigenous Constitution*, *supra* note 49, at 109.
[128] Darian-Smith, *supra* note 119.
[129] See Borrows, *Law's Indigenous Ethics, supra* note 85 at 17.
[130] *Ibid* at 223.
[131] John Borrows shared this in his talk at the Victoria Forum on November 18, 2017 in Victoria, BC.
[132] See generally Brian Tamanaha, "An Analytical Map of Social Scientific Approaches to the Concept of Law" (1995) 15 Oxford Journal of Legal Studies 501.

communities, and in many situations the most efficient use of law in the ordering of aspects of Indigenous societies. Written constitutions and legislation have been utilized by Indigenous communities for centuries.[133] They are an integral tool for centering the governing structures and rights of citizens within Indigenous nations through formal text.[134] Written constitutions also enshrine fundamental human rights for citizens within their central governments.[135] The further formal democratization of Indigenous nations has relied upon structures that have centralized and placed more authority unto elected or recognized leaders. For example, the Nipisihkopahk (Samson Cree Nation) is currently developing a detailed constitutional document that will textualize some of its unwritten constitutional and legal norms.[136] It addresses the tension between the normative development of constitutional and legal principles and codifying nêhiyaw wiyasiwêwina.[137] As Pauline Johnson notes, an early draft acknowledged the normative foundations of nêhiyaw wiyasiwêwina as it stated:

> Kisê-manitow Wiyinikêwina are Creator's Laws, also known as the Grandfather Laws of the Nêhiyawak Nation. Kisê-manitow Wiyinikêwina have been in existence since time immemorial and are acknowledged through our constitution held in the spiritual and cultural teachings of our, ospwâkan, the pipe…the following laws are living documents that through time and practice will change and reflect the interests and values of the

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[133] For example, see the Great Law of Peace written by the Haudenosaunee, which was first originally written on wampum belts. As paper texts became more prevalent in North America, the Great Law of Peace was published on paper. See Francis Jennings, The Ambiguous Iroquois Empire (New York: W.W. Norton, 1990); Borrows, *Indigenous Constitution*, *supra* note 49 at 72-5.

[134] For an analytical breakdown of modern written constitutions by First Nations, See Christopher Alcantara and *Greg Whitfield.* "Aboriginal Self-Government Through Constitutional Design: A Survey of Fourteen Aboriginal Constitutions in Canada" *Journal of Canadian Studies* Vol. 44 No. 2, pp. 122-145.

[135] *Ibid* at 124-5.

[136] Johnson, *supra* note 8, at 162-74.

[137] It sets out written law that directs the the authority of the kehte-ayak old ones, it sets out pihtokewin nêhiyawâskiy wiyasiwêwin (Entering Nêhiyaw Territory Law), provides declarations on nêhiyaw identity, guides iskeyitamowi tipiyawehowisowin wiyasiwêwin (or laws on knowledge ownership) and kiskinohamâkosowin miyomasinahikasowin miyasiwêwin (laws on accountability of academic studies); wâyino wiyasiwêwin (Turning back or returning law, focused on the repatriation of cultural items and remains); omâciw wiyasiwêwin (fish and wildlife law) and pîkiskwâsowewin wiyasiwêwin (or laws regarding consultation) amongst other things. *Ibid* at 162-74.

> people of Maskwacîs but remain rooted in the echoes of our ancestors and upheld by our Elders. [138]

It also acknowledges nêhiyaw pimâtisiwin exists within a constitutional plurality:

> We offer the ability to create a bridge of understanding that combines our Nêhiyaw way of life within the Western Society we find ourselves a part of. We therefore, present our laws in written text but must state, these written laws are not stronger than the oral teachings and narratives from our Kêhtê-ayak.[139]

So, even as the nêhiyawak codify expressions of their constitutionalism, there is an understanding of the imperfection of constitutional codes in their ability to fully reflect the totality of a nêhiyaw constitution.

c. The Relationship between Nêhiyaw laws and Constitutionalism

While this research does not intend to theorize exactly where social norm ends nêhiyaw law begins, it is important for this examination to reflect on the relationship between constitutive mechanisms and the production of law. In his explorations of the relationship between Anishinaabe lifeworlds and law, Aaron Mills provides a helpful parallel for the relationship between a constitution and law. Mills states that while Canadian constitutionalism is moored by law and policy developed upon a liberal rights lifeworld, Anishinaabe constitutionalism is given life through a rooted lifeworld.[140] He describes a rooted lifeworld as:

> The roots of a society are its lifeworld: the story it tells of creation, which reveals what there is in the world and how we can know. Creation stories disclose what a person is, what a community is, and what freedom looks like. The trunk is a constitutional order: the structure generated by the roots, which organizes and manifests these understandings as political community. The branches are our legal traditions, the set of processes and institutions we

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[138] *Ibid* at 162-3.
[139] *Ibid* at 162
[140] Mills, *Lifeworlds supra* note 113*,* at 860.

> engage to create, sustain and unmake law. The trunk conditions the branches: it doesn't determine what they look like, but it powerfully shapes them.[141]

The tree metaphor provided by Mills outlines a relationship between normative constitutional resources and the formalization of law. Thus a normative approach to Indigenous legal ordering[142] is also supported by social interactive theories of law.[143] Law is grounded within normative practices of a community, and emerges from them to facilitate social interaction,[144] or as Lon Fuller states, "[w]e cannot understand [positive] law unless we first obtain an understanding of what is called customary law."[145] What in the past was determined as 'customary' in nature, can be more accurately be rooted to natural, sacred, and deliberative sources. [146]

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[141] *Ibid* at 862.

[142] For much of the reasons that a normative approach is appropriate in this examination, many other Indigenous legal scholars have taken similar approaches to their study of Indigenous legal orders. For example, see Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Ph.D. Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished] Napoleon argues that implicit law is made explicit through collective processes of the Gitksan peoples; Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM thesis, University of Alberta, 2009). Hadley Friedland relies upon nêhiyaw and Anishnaabe accounts of windigo/wetiko to theorize laws surrounding child protection and safety; [142] See Nancy Sandy, Reviving Secwepemc Child Welfare Jurisdiction (LLM Thesis, University of Victoria Faculty of Law, 2011) [Unpublished]. Nancy Sandy uses Secwepemc Creation Stories as a constitutive source to revive Secwepemc peoples' jurisdiction over child welfare; John Borrows, "Stewardship and the First Nations Governance Act" (2003) 29 Queen's Law Journal 103. John Borrows relies upon Nanaboozo account to contemplate Anishinaabe principles on land management; Rob Clifford, WSANEC Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River), (2016) 61:4 McGill LJ 755. Robert Clifford uses WSANEC oral narratives to address a fuel spill on the Goldstream River, a significant salmon-bearing ground in WSANEC territory. Also see the continuing work of Aimee Craft, Aaron Mills, Alan Hanna, Johnny Mack, Sarah Morales, Lana Lowe, alongside many others for further examples of these approaches to Indigenous law.

[143] Lon Fuller, "Human Interaction and the Law, in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, revised ed. (Portland: Hart Publishing, 2001)

[144] While it is beyond the scope of this thesis, an interesting study would be conceptions of 'community' and whether that includes all beings within *nêhiyaw pimâtisiwin* teachings, and the effect on Fuller's theory when we see that it isn't just human-to-human interaction, but also human-to-animal or human-to-other being interactions in Cree law making.

[145] Fuller, *Human Interaction*, supra note 145, at 250.

[146] John Borrows, "Indigenous Legal Traditions in Canada", (January, 2006) online: Report for the Law Commission of Canada, at 7. <http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf> [Borrows, *Legal Traditions*]

Constitutional institutions like narrative, language, ceremonialism, and territoriality, serves a constitutional trunk where formal law arises. Jeremy Webber theorizes that law development sees "three levels of normative determination: the coordination of human interaction, the grammatical "language" structure used to express norms in a legal fashion, and the debates that utilize that grammar to negotiate the resolution of a particular situation."[147] Thus, constitutional institutions are integral to this process, as they provide a forum for the coordination of language and for discourse on legal norms to occur. Returning to the textualization of the wiyasiwêwina of Maskwacis, we can see the significance of the pipe and pipe ceremonialism as a social/constitutional institution in the production of law. In expressing that the "ospwâkan is our constitution," it is not relying on the pipe and pipe ceremonialism as an ultimate authority of law, but as a centering force to draw us towards the relationships between the ospwâkan and other constitutive institutions within nêhiyaw pimâtisiwin. Pipe teachings rely upon on other social institutions (narrative memory, ceremonialism, land-based experiences, and language, for example) to strengthen their meaning, as well as to provide a common understanding amongst nêhiyaw citizens. The ospwâkan in this sense plays an institutive role in the creation and interpretation of law. It provides a base for social norms to arise and become legal norms.

IV. Methodology – Revitalizing Wîtaskêwin through Four Directions

This examination unfolds in a *braiding* manner. The four social institutions introduced earlier - nêhiyaw âcimowina (narrative processes), nêhiyaw âskiy (Plains Cree territory), nêhiyawewin (Plains Cree language) and nêhiyaw mamâhtâwiwina (Plains Cree

[147] As described in Elizabeth Anderson, "Benevolent Grandfathers and Savage Beasts: Comparative Canadian Customary Law" (2010) 15 Appeal L J 1, at 7-8.

ceremonies) will serve as distinct branches of this braiding. This will support conclusions on the relationship between nêhiyaw constitutionalism and the Canadian constitution through Treaty 6. Such weaving allows for an immersion into this wealth of nêhiyaw pimâtisiwin. As nêhiyaw wiyasiwêwina requires multiple channels of legal teachings to interweave together, nêhiyaw legal theory supports this approach.

The constitutive institutions of nêhiyawewin (language), nêhiyaw âskiy (territory), nêhiyaw âcimowina (stories) and nêhiyaw mawmosicikewin (ceremony) will each center a chapter in this work. This is an adaptation of the the Nêhiyawak Peoplehood Methodology for a legal/constitutional analysis.[148] As Jeff Corntassel notes:

> "[a] peoplehood model provides a useful way of thinking about the nature of everyday resurgence practices both personally and collectively. If one thinks of people as the interlocking features of language, homeland, ceremonial cycles, and sacred living histories, a disruption to any one of the practices threatens all aspects of everyday life."[149]

Returning to the auto-ethnographic narrative approach, a language analysis engages in how concepts described in nêhiyawewin encourage and reinforce beliefs of lands and waters as a living, autonomous beings. A territorial examination of nêhiyaw lands will explore the complex legal relations between lands, waters, and peoples, including nêhiyaw practices of coming into treaty relationships with the land itself. A ceremonial examination will explore the pedagogical role of ceremony within a Plains Cree legal order. Finally, a narrative analysis will view nêhiyaw narratives and historical accounts for constitutive and legal relationships and legal decision-making with regard to lands and waters.

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[148] For a description of this methodology, see Jobin, *supra* note 17, at 63-73

[149] Jeff Corntassel, "Re-Envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination." 1 *Decolonization: Indigeneity, Education & Society* 86 at 89

Aside from the practical aspects as noted throughout this chapter, an adapted Nêhiyawak Peoplehood Methodology avoids methodological challenges that academic studies of Indigenous legal and knowledges systems can tacitly create. Historical social-science research into Indigenous communities would often utilize anthropological methods, positioning the researcher as the 'observant outsider' to the community who is the 'object' of their research.[150] Contemporary research using Indigenous legal knowledge requires attention to not re-instigate colonial practices[151] and to further our relationality with the epistemologies and cosmologies of the nation's we are working with.[152] Even as this research is engaging in my family, community, and nation, this ethic still directs me. To further my understanding of nêhiyawîhtwâwin (or Creeness) I am committed to *nisitohtamowin*, or the ability to develop my understanding, in a manner that is reciprocating a value to the people, societies and nation that will nourish this examination.

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[150] Returning to the point that Starblanket and Stark bring up about relationality, though perhaps in a better position to discern the nuances and complexities within the subject-matter of their research, Indigenous researchers must still be cognizant of their approach and method when engaging in research within their own families, communities and nations. See Heidi Stark & Gina Starblanket, "Towards a Relational Paradigm – Four Points for Consideration: Knowledge, Gender, Land, and Modernity" in Michael Asch, John Borrows, & James Tully (eds.) Resurgence and Reconcilation: Indigenous Settler Relations and Earth Teachings (University of Toronto Press: Toronto, 2018). Further, these relational methods can serve non-Indigenous peoples when engaged in Indigenous laws. See Rebecca Johnson, "#ReconciliationSyllabus – Finding Resources close to my Shushwap (Secwepmc) home…" (2015) Rebecca Johnson, Musings on Law, Film, Feminism and Decolonization, online: < https://rebeccaj63.wordpress.com/category/secwepemc-shuswap/>. Johnson asks critical questions - "What would it mean to find resources that speak to my own embedding, as a Settler-Canadian, in these histories? What would it mean to see MYSELF in this history?" - as a response to the Truth and Reconciliation Commission's Call to action #28.

[151] See Linda Tuhiwai Smith, Decolonizing Methodologies: Research and Indigenous Peoples (London: Zed Books, 1999).

[152] See John Borrows, "Heroes, Tricksters, Monsters & Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill L R 795; Hadley Friedland "Chapter 4: Wah-Ko-to-win: Laws for a Society of Relationships" in *Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada*. (Ph.D. Dissertation for the University of Alberta, 2016). [Unpublished].

The second chapter explores concepts of territoriality (nêhiyaw âskiy), and how sites within nêhiyaw âskiy serve as a 'legal texts.' Central to this chapter will be the animation of lands and waters through âskiy stories, and exploring how this animation of the land influences legal processes. This chapter observes how nêhiyaw peoples' arrivals on lands, recognizing the agency of lands and waters in the interactions of these arrivals, animates new legal relationships.

My examination in this chapter weaves place-making âtayôhkêwina amongst my visits to these places. This is a process that Dwayne Donald calls *unmapping*. As the displacement of nêhiyaw constitutionalism within nêhiyaw âskiy is "predicated upon spatialized colonial logics", unmapping is a significant process in re-storying the land with nêhiyaw conceptions of territoriality and jurisdiction.[153]

By examining the land in such a way, we can see a nêhiyaw constitution constellated across nêhiyaw territory, providing figurative (and commonly literal)[154] touchstones for nêhiyaw law. It also is significant for the creation of a nêhiyaw polity, as nêhiyaw-specific conceptions of places provides a collective understanding of land and territoriality. From these experiences and observations, I theorize how a nêhiyaw-specific conception of jurisdiction (or lawful obligations) arises through this cycle: nêhiyaw arrivals on new territories in honest and proper way, being gifted by lands and waters in a manner that allows our survivals, and the creation of reciprocal obligations through such gifting, leading to the creation and renewal of wâhkôtowin between nêhiyaw peoples and âskiy.

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[153] As explored in Jobin, *Cree Economic Relationships, supra* note 17, at 69.
[154] For example, the mistasinîy on the South Saskatchewan River and the manitow-asinîy (a meteorite that rested close to the banks of the Battle River in East-central Alberta) were sites where Plains Cree peoples, along with other nations on the northern prairies, would gather and ceremony around.

The third chapter turns toward nêhiyawewin for further guidance on our legal relationships and norms with non-human beings and things, and how the character and personality of nêhiyawewin influences these constitutive and legal relationships. Nêhiyawewin contains fundamental legal principles that can be articulated through a linguistic examination. I examine key legal terms within nêhiyawewin specific to law and our relationships to the ecological world. This furthers my knowledge of nêhiyaw ecological legal theory. [155] A key conclusion from this chapter is how the character of nêhiyawewin – as a verb-based language – ensures the recognition of the animacy of non-human beings and things. This has particular implications for law, as it favors a view of law as a living, breathing ecology, of which non-human beings fulfill a large part of law's animacy. Finally, nêhiyawewin is a relational language; in order to provide a full interpretation of legal terms like ohcinêwin and wâhkôtowin, we necessarily have to reflect on how the term is bundled with the practices within everyday life.

The fourth chapter returns to a textual analysis of *âcimowina* (stories) nêhiyaw narrative 'memory' and recorded historical accounts. First, I consider how nêhiyaw origin stories on the gifting of horses can be interpreted as a critical legal theory on the scope and limits of our wâhkôtowin with horses specifically, and more generally to the non-human animals we use for labour, for nourishment, or for other human survival needs. This theory is important, as it aids how we can consider non-human beings as

[155] The examination in this chapter is supported by Indigenous legal theorists and language methodologies. See Keith Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albequerque, University of New Mexico Press, 1998); Matthew Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence", (2016) online: Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series < https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1155&context=facpubs>.

inspirited, autonomous agents, and coordinates our actions when we step over this autonomy for nêhiyaw good living.

Secondly, as the previous chapter introduces the meta-principles of pâstâhowin and ohcinêwin, I look towards one narrative tradition within nêhiyaw societies – the Wîsahkêcâhk story cycle – to explore the role of narrative in teaching law, and influencing the deliberation and transformation of our legal norms related to non-human animals. Specifically, I consider the Wîsahkêcâhk story cycle as critical legal theory on types of legal authority. I observe lessons within one particular story that teach us on the relative nature of our authority to infringe on the autonomy of non-human beings – an authority provided only through maintenance of proper relationality with non-human beings. As Wîsahkêcâhk is often a negative example of proper relationships with animals, Wîsahkêcâhk offers key insights on the role of law in ordering our relationships.

The fifth chapter looks at our ceremonial cycles as pedagogical institutions for human-to-non-human agent relations. Just as ceremony serves a significant role in the development of treaty relationships by nêhiyaw peoples, it also integral for deepening the relationality between humans and the ecological world. It "serve[s] as cement…and determine[s] a new form of solidarity in complex societies…lead[ing] to a collapse of the separation between nature and culture" as "nature becomes culturalized and culture becomes naturalized."[156]

Legal theory serves this chapter through identifying gaps in our legal thinking regarding spirituality and sacred processes. This chapter begins with exploring how intellectual energy centres the spiritualities that are integral to our ceremonial cycles. It

[156] Hanne Petersen, "On Law and Music: From Song Duels to Rhythmic Legal Orders?" (1998) 41 Commission on Legal Pluralism 75 at 80.

draws upon nêhiyaw legal theory to view the 'sacred' in a democratized manner, working through perceived 'mystification' of Indigenous spiritualities to view an intellectualism that is resident within nêhiyaw spiritual institutions and forces. Because of the significant role of sacred processes in Indigenous law and constitutionalism, spiritualities cannot be ignored within Indigenous legal studies. Examination of spiritual processes within Indigenous law can ensure we maintain procedural and ethical obligations towards the knowledge systems we access.

The sixth chapter of this dissertation concludes it by offering the learnings arising from these four directions towards Crown-Indigenous treaty relations, and suggest how, namely through a return to the original intentions of Treaty 6, nêhiyaw pimâtisiwin can inform and influence Canadian constitutional practices. The possibilities of a kinder constitutionalism in our normative spheres requires a reimagining of Canadian constitutionalism that formalizes room for Indigenous constitutional and legal orders. Since the onset of the era of constitutional supremacy in Canada and the entrenchment of section 35 within the constitution, there have been instrumentalist approaches to realize both legal and constitutional pluralism. Keira Ladner argues that s. 35 provides for authority for "a recognition of inherent jurisdiction and sovereignty which exists as sui generis within the Canadian constitutional order."[157] While s. 35 provides grounds for such aspirations, its narrow interpretation generally,[158] the inability for the courts to recognize Indigenous governance rights in any substantial manner,[159] and the cultural

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[157] Kiera Ladner, "(Re)creating Good Governance, Creating Honourable Governance: renewing Indigenous constitutional orders". Paper Presented at the Annual Conference of the Canadian Political Science Association, (2009) online: Canadian Political Science Association <https://www.cpsa-acsp.ca/papers-2009/Ladner1.pdf> at 2.
[158] *Ibid* at 6.
[159] For the judicial treatment of self-governance claims through s.35, see *R. v. Pamajewon [*1996] 2 SCR 821. The SCC held that the claimants' governance rights (on gambling within their First Nations) were

approach towards aboriginal rights[160] has made s. 35 extremely limiting in court recognition of Indigenous law and constitutions. Thus, in concluding this dissertation, I examine a revitalization of the nêhiyaw-Canada treaty relationship in a manner consistent with nêhiyaw obligations to lands, waters, flora and fauna, and our collective good living with each other.[161] Specifically, I forward the idea of *constitutional kindness* - a concept that flows from the observations in this dissertation – as one avenue to address the consumptive tendencies within Canadian constitutionalism. A return to the spirit and intent of Treaty 6 from a nêhiyaw perspective is a realistic way to channel nêhiyaw conceptions of constitutional kindness, and earth reconciliation generally.

V. Concluding Thoughts

With regard to our obligations to nêhiyaw wiyasiwêwina, the old ones in our communities will often say, in one way or another, that someone living without a base in nêhiyaw pimâtisiwin is like a child caught out in a prairie winter storm, unclothed and unsheltered. I tend to think about this in a metaphysical sense, that there is necessity to be sheltered by *nêhiyawâtisowin* (Creeness). It recalls us to think about law as weaving again, that it is our responsibility to create a shelter through acting out nêhiyaw wiyasiwêwina. As young ones, we are bundled by nêhiyawâtisowin, furnished with teachings to shelter us from the outside storms. This is why we hold up our old ones

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limited to the right to participate and regulate in the activity, rather than the right to manage their lands broadly.

[160] See *R. v. Van der Peet* [1996] 2 S.C.R. 507, where the 'Integral to a distinctive culture' test is set out by the SCC to determine the existence of an Aboriginal right. As John Borrows notes: the test instills a 'frozen rights' approach to Aboriginal rights, where "aboriginal is retrospective. It is about what was, 'once upon a time'", failing to acknowledge the living, breathing legal lives of Indigenous peoples. See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: U of T Press, 2002) at 60.

[161] The term 'treaty ecology' will be discussed further in this dissertation. See Brian Noble, "Treaty Ecologies: With Persons, Peoples, Animals, and the Land" in Michael Asch, John Borrows & James Tully, eds., *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth* Teachings (University of Toronto Press: Toronto, 2018) 315-42. [Noble, *Treaty Ecology*]

(even while we acknowledge they are not perfect) because we have been lucky to have those older hands that are knowledgeable in working with the hides of our traditions, in sewing the strands of nêhiyawâtisowin that will furnish our cradleboards, in beading the âtayôhkêwina (spiritual stories) unto our vests. However, our cradling does not last forever. As we reach adolescence, grow into adulthood and then ultimately become these older ones, the tools for this cradle-making, shelter building, and star aligning have been turned over to us. We are given the responsibility to re-constellate our legal and social orders in our adulthood, allowing for strengthening, transforming, or even dismantling of our law and legal systems. Our four-bodied personhood[162] provides us all the aspects to be full agents in these re-constellations, and thus our law.

Lately though, I have been thinking of this refrain in a *literal* sense. What if a loss of nêhiyaw wiyasiwêwina means we are literally caught unsheltered? What if our loss of kinship with the ecological world means it will one day be unable to shelter and nourish us? As hard as it is to imagine, our collective constitutional unkindness towards the ecological world has already created unnourishing environments. In this sense we are experiencing ohcinêwin, or retribution for our transgressions against the natural world. So I turn to nêhiyaw law, and one lesson in particular, that teaches us against letting our collective consumptive tendencies overrun us. I turn to our whetiko stories for lessons on kindness.[163] Whetikos are known for their consumptive intentions and actions.[164] Within

[162] Nêhiyaw translates into 'four-directioned or four-bodied peoples, thinking of the emotional, spiritual, physical and intellectual aspects of people.
[163] For Anishinaabe conception of Wehtiko within literature, see Louise Erdrich, The Round House (New York: Harper Collins, 2012).
[164] See Hadley Friedland, *The Windigo (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishabek and Saulteaux Socieities – Past Present, and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta Faculty of Law, 2009) [unpublished] at 29.

nêhiyaw âcimowina, wehtiko accounts have been the subject of a variety of angles of analysis, including as psychosis.[165] Hadley Friedland contends they are "best understood as a complex intellectual concept with a social and legal history."[166] While there are historical accounts of wehtikos and community responses involving incapacitation and death,[167] in some instances a whetiko can be healed (or have their consumptive tendencies suppressed) through a collective turn to miyo-wîcêhtowin. This is enacted through kindness and generosity, often by sharing food.[168] As whetikowak are burdened by a freezing heart, one particularly important community action is that we bring people who are suffering this closer to fire, and ensuring they always have a spot around it.[169] The invitation that started this chapter – to come closer to the iskotêw (fire) - is not only individual, but societal as well. In a small way, this dissertation invites the heart of Canadian constitutionalism to come closer to the iskotêw of the nêhiyawak. I hope this invitation is fruitful. There may be disagreements and some words that feel like jagged stones going down. I hope there will be some shared medicine within these words for us. Let's seek out this warmth together. Â*stam.*[170]

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[165] Lou Marano et al, "Windigo Psychosis: The Anatomy of an Emic-Etic Confusion [and Comments and Reply]" (1982) 23:4 Current Anthropology 385.
[166] *Ibid* at 39.
[167] For example, Swift Runner, a Cree man, was sentenced to death for the deaths of his wife and children after he consumed them in the winter of 1878. See Robert Brightman, "The Windigo in the Material World" (1988) 35:4 Ethnohistory 337 at 352-3.
[168] Robert A Brightman, *Ācaðōhkīwina and ācimōwina: Traditional Narratives of the Rock Cree Indians* (Regina: Canadian Plains Research Center, 2007) at 106. [Brightman, *Rock Cree*]
[169] *Ibid* at 106.
[170] Come along.

Niso (Two): (Re) storying lands, (re)bundling nêhiyaw constitutionalism

"The people who stay closer to the earth, they will be protected." ~ Arsene Arcand[171]

"The stones, as you probably know, are listeners, they are grandfathers, they are…you know, just as old as Mother Earth." ~ Isadore Pelletier[172]

This chapter considers the role of nêhiyaw place-making – our arrivals and continued land-based relationships – in the creation of nêhiyaw jurisdiction. Our land-based stories reveal a *juris-making* cycle, where through the kindness of non-human agents, nêhiyaw people enter into a gift-obligation relationship based on mutual flourishment with the land. As this chapter explores, the recognition of the animacy of non-human agents is integral to these jurisdictional obligations.

The recognition of these obligations raises the question of how this view of nêhiyaw âskiy was lost in northern prairie governance. This chapter explores how the colonial logics of abstraction, mainly through common-law land tenure concepts, have obscured or subsumed nêhiyaw views of the 'inspirited' nature of the land, and law based on this view. Finally, the legal principle of *kiyokewin*, or visiting, is explored as the first step to re-bundling our legal ordering with nêhiyaw jurisdictional obligations.

I. Introduction: Creating New Lands

Winona Wheeler reminds us: "The land is mnemonic, it has its own set of memories, and when the Old People go out on the land, it nudges or reminds them, and their memories are rekindled." [173] The stories that arise from the land help constitute us. They teach us of our original relationships with *askîy* (land) and *nipîy* (water). With each retelling, we are provided legal teachings, each a thread that stitches together the fabric of our continued *miyo wîcêhtowin* (good relations) to aid our good living with each other, and the land itself. "[A]rtifacts carved on the landscape – trenches dug during warfare,

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[171] Spoken at a ceremony at Poundmaker's Lodge, St. Albert, Alberta in 2010.
[172] MacLeod, *Cree Narrative Memory, supra 20*, at 20.
[173] Winona Wheeler, "Cree Intellectual Traditions in History" in Alvin Finkel, Sarah Carter & Peter Fortna, eds., *The West and Beyond: New Perspectives on an Imagined Region* (Athabasca Unversity Press, Red Deer, 2010) at 55. [Wheeler, *Cree Intellectual Tradtions*]

wagon tracks, property boundary markers, even old abandoned cars – contain embedded stories and serve to nudge memory."[174]

Our stories, quite literally, ground us into our territory and jurisdiction. These are our *âtayôhkêwina* (origin or sacred stories) that tell of our original relationships with specific places within nêhiyaw askîy. These stories become aligned with these specific places with each retelling, so much so that we consider some as natural and inherent as the *asin*îy (rock) and *sip*îy (river) in our landscapes. Consider how *paskwâwimostos sakihikan* (Buffalo Lake) came to be. I offer one version of the story here:

Kayas (a long time ago), there was a time when a group of nêhiyawak (Plains Cree peoples) were struggling to find food. This was around the time when paskwâwi-mostos (buffalo) were disappearing from the prairies. One hunter, knowing she would need assistance to find buffalo, went into ceremony to seek guidance towards a successful hunt. She engaged in ceremony for four days. Finally, upon the fourth evening, she dreamt about a place where she would find a buffalo. The next morning, she set off with another hunter. After travelling another four days they came upon the hill, and faithful to her dream, they found a sole buffalo on the other side. With care, the hunter approached and was able to pierce the animal with an arrow. The buffalo sprang away, leaving a trail of blood across the prairies.

They followed this blood trail for another four days. Finally, they came to a spot where the buffalo had finally succumbed to its injury. Pulling the arrow from the buffalo, the two women were surprised to see water springing from the wound, rather than blood. They watched this for some time. The water formed a puddle, then a small pool, and then eventually a pond. The hunter who dreamt the buffalo left to gather the rest of the people. This took another four days. When she returned with them, they were surprised to see that the pond had turned into a large lake, in the shape of a buffalo. Understanding that the lake was gift from k'sê-man'to, the people understood that this would be a place of abundance for them. And the lake provided – it brought all sorts of animals, including

[174] *Ibid,* at 55.

buffalo from the prairies to its banks. It allowed large grasses, shrubs and trees to form at its shores. The lake became a place of abundance, and nourished the people for many years.

But this is not where the story ends: one winter, years later, the people were crossing the lake to visit relatives who had settled on the other shore. While they were crossing, a young boy came across a buffalo horn sticking through the ice. You see, the people used to run buffalo into the shallows of the lake for a more successful hunt. They must have hunted so much that year, for one must have slipped through their attention, and eventually floated to the center of the lake before freeze up. The young boy wanted the horn, and he begged his mosôm (grandfather) for it. Understanding that it would be a transgression to take it, the mosôm said no. But, as young ones have a special gift for, he was able to work the tenderness of his mosôm until the grandfather finally relented. Taking his hatchet, he hit the ice around the horn to retrieve it. Instead of freeing the horn, the ice cracked up, first around the two, then around the rest of the community. While some were able to scramble across the ice to the other side and others back to the shore they came from, some were lost in the water. [175]

It was my oldest brother who first told this story to me when I was 7 or 8 years old. We were travelling in my dad's large Ford Thunderbird along the highway between Wetaskiwin and Ponoka. It was around Christmas, and I remember pressing my hand to melt the frost on the window to see the stars out in the night sky. My brother finished the story with this warning: *if you go to the shores of Buffalo Lake at night, you can still hear the people crying as they fell into the water.* It was these fantastical elements that captured and froze the story (like the lake itself) in my memory. I carried this story for years, and as I grew older, each pass through the story brought me closer to

[175] *The Creation of Buffalo Lake* is also significant as a constitutional story in that it is used by other nations to describe their journeys and boundaries. For example, it is also used by Dene people to describe a split between their peoples, and helps explain the separation between the northern Dene peoples and their relatives that settled around the City of Calgary (the T'suu Tina).

contemplations and understandings of the legal lifeworld below the surface within the story.[176]

At its base, this story originally caused me to recognize the *inspirited* nature of the land, and how we are obligated to reckon with the autonomy of those who are inspirited in our laws when we hunt.[177] Among the wealth of legal knowledge in the story, *the Creation of Buffalo Lake* has also taught me the dangers of how we conceive and talk about the ecological world. When I consider *ohcinêwin* (retribution for transgressions against non-human beings and things), the *Creation of Buffalo Lake* is a tidy example of it. One interpretation can be that the carelessness of previous hunts causes the retribution at the end of the story. Relating the *Creation of Buffalo Lake* to other narratives that provide examples of ohcinêwin, we can see this retribution arising when we lose consideration of law in our interactions with the ecological world.[178] Further, remembering the obligation within nêhiyaw law that we *speak* properly about the environment (*ohcinêmowin*),[179] we can reflect on the story and our present-day tendency to categorize our animal kin as commodity or subservient to humans. Thus, the *Creation of Buffalo Lake* allows us to reflect on ohcinêwin and ohcinêmowin in present-day contexts, and guides us in alternatives to the colonial language of the Canadian common law, and the resulting attitudes towards lands, waters, animals, and other non-human beings.

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[176] This story has also implicitly served as a base for other stories that have pushed both my learning of nêhiyaw law, and my scholarship. I started my Master's thesis with a dream I had, about freeing a wolf/log from the middle of a frozen lake. Part of my interpretation of that dream (and undoubtedly how it was formed) is based on my continuing visits to the story of the *Creation of Buffalo Lake*. See Darcy Lindberg, *Sacred Changes, supra* note 76 at 1.
[177] I am using 'inspirited' here as a placeholder for nêhiyaw conceptions of the spiritual dimensions of the ecological world, that will be discussed further in this chapter.
[178] McAdam, *Nationhood Interrupted, supra* note 63, at 44.
[179] Johnson, *Nêhiyaw*, supra note 8, at 155.

a. Constituting ourselves on the land through story

My ability to engage in the very brief analysis above is a result of the constitutive practices that have been embedded inside me, and shared and understood within nêhiyaw societies generally. The analysis also highlights the theoretical and methodological questions this chapter will engage in. In a broad sense, I am looking at the role of place-making and storying in how we constitute ourselves as nêhiyaw peoples to our askîy. Tied into this constitutive place-making is the creation of nêhiyaw jurisdiction. This place-making develops constitutive and legal norms. Engaging in our *askîy âcimowina* or land stories, I will unpack the constitutive principles that flow from them, and apply both nêhiyaw intellectual philosophies and general legal theory to explore how this pedagogy teaches constitutional and legal principles.

As I have tried to show, our âcimowina are broad and rich intellectual devices.[180] They provide multiple avenues to affect nêhiyaw society. For example, the *Creation of Buffalo Lake* can be applied beyond a legal analysis to many areas of social ordering amongst nêhiyaw peoples. Thus, my approach in this chapter is necessarily narrow: I will center this examination on the principles of gifting, and the reciprocal legal obligations that arise as a result of them within our land/water relationships. The initial presumptions

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[180] For the use of stories in this way, see John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47:4 University of Toronto Law J 417; John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010); Linday Borrows, *Otter's Journey Through Indigenous Language and Law* (Vancouver: University of British Columbia Press, 2018); Alan Hanna, Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective (2013) 45:3 Ottawa Law Rev. 365; Val Napoleon, "Ayook: Gitksan Legal Order, Law, and Legal Theory" (Ph.D. Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished]; Sarah Morales, "Snu'uyulh: Fostering an Understanding of the Hul'Qumi'Num Legal Tradition." (Ph. D. Thesis: University of Victoria, Faculty of Law, 2014) [unpublished]; Hadley Friedland, The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns (LLM thesis, University of Alberta, 2009); Hadley Friedland and Val Napoleon, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories," 61:4 McGill L J 725.

explored above: 1) that land-based stories are a key constitutional practice in how they set out nêhiyaw jurisdiction and describe nêhiyaw treaty-making processes with other inspirited beings and things; and 2) this treaty and jurisdiction-making provides an alternate orientation that favors a relationality (as opposed to abstraction and alienation) with lands and waters, will be broadened for the remainder of this chapter.

This will be supported by my experiences in visiting the lands where these stories have originated. Over the course of this research, it was invaluable for me to revisit these sites within nêhiyaw âskiy. In this manner, the stories became supplementary to the relationships I have continued to develop with the lands and waters through continued relations. As I noted in the last chapter, Dwayne Donald considers this process a practice of 'unmapping'. Donald states:

> "The Beaver Hills Cree had intimate knowledge of the landscape and topography of the place and lived out their particular version of happiness many centuries before newcomers arrived from Europe. As a descendent of these people, though, I have lived in poverty because I was not told the stories, songs, and ceremonies that come from this deep relationship to land a place. I was not told because I was raised up in an era when those things were considered best forgotten and denied. As a result, I did not know who I was because I did not know where I was."[181]

My experiences on the land serve my individual conceptions of nêhiyaw âskiy (in a territorial and jurisdictional sense), and how I relate to our collective conversations about constitutionality and governance.

As I will explore, constitutive nêhiyaw place-making positions lands, waters, and other non-human beings and things as a gift to ensure our survival. Further, our

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[181] As relayed in Jobin, Cree *Economic Relationships, supra* note 17, at 69.

âtayôhkêwina displays the active mind of our non-human animal relations, and their compassionate ethic. Centering legal obligations upon this gift/obligation orientation ensures nêhiyaw constitutional legal ordering favors a relational approach. Finally, I will provide an exploration of the effects of colonial laws - those that propertize, enclose, and commoditize lands – on the continued practice of the constitutive norms that arise from place-making. A revitalization of nêhiyaw constitutionalism can address the harmful effects of this commoditization.

I pause here to acknowledge the concept of relationality. Though it might be the first encounter with it for some readers, it is not an original one. Heidi Stark and Gina Starblanket observe that relationality "represent[s] a shift away from an atomistic, human-centred world view and towards a relational way of being that is inspired by the principles of interconnectedness inherent in many Indigenous legal and political orders."[182] Often relationality is invoked by Indigenous scholars for the purposes of contrasting to Western worldviews that are exceedingly anthropocentric. While, I too, am using relationality as a view for a contrasting way of life for legal systems – that the relationality fostered through nêhiyaw law can influence Canadian state law – I also take up Stark and Starblanket's urging to interrogate my "discourse of relationship" within this dissertation to be mindful not to reproduce or fail to address "oppressive power dynamics" within nêhiyaw societies, laws, and academia.[183] Particularly, as this dissertation is predicated upon earth reconciliation, I am mindful of the harm with associating gender ideals – femininity particularly – with land reconciliation. [184] In

[182] Starblanket and Stark, *Relational*ity, *supra* note 86, at 176.
[183] *Ibid* at 183-4.
[184] See *ibid* at 183-9, for a further elucidation of relationality and gender within Indigenous law and goverance.

particular significance for this chapter, Stark and Starblanket remind me that nêhiyaw relationships to âskiy has always been attenuated by the "grammars of race, class, gender, sexuality, and sovereignty."[185] As I reach back to nêhiyaw constitutive relationships with lands and waters prior to European settlement (and imposition of colonial law), I am cognizant that nêhiyaw land relationships were influenced by power structures within our communities. Further, as this dissertation is a resurrection of knowledge that has been either hidden, obfuscated, or diffused within many areas of nêhiyaw life, I also acknowledge that gendered power structures influence what materials, information, and avenues for research are available contemporarily. Finally, relationality is a collective process and my observations necessarily rely upon and enter the broad discourses on gender, Creeness, and Indigeneity generally.[186]

If applied as a legal theory, wâhkôtowin allows for an interrogative view of relationality. It can be viewed as the nêhiyaw-specific concept of relationality. With all of this in mind, relationality is fulfilled through wâhkôtowin in three ways: 1) through an overall ethic of close relations with lands, waters, animals, and other non-human things that are recognized as animate within nêhiyaw ways of knowing; 2) through protocol that requires observing, gifting, carefulness, and stewardship towards non-human inspirited things, and 3) the continuation of narratives that infer a relational orientation towards non-human agents, in contrast to the alienation that Western law often orientates itself towards. Brian Noble's concept of treaty ecology is helpful in describing the human/non-human relationality at play in treaty relations. Noble notes that treaty ecology is:

> "living with the land and its diverse living inhabitants, and so to live together as peoples there as well. [It is] a praxis of treaty, animated by an ecology of sharing in

[185] *Ibid* at 190.
[186] As John Borrows reminded me in a previous draft of this dissertation.

> the land and its fruits, of exchange, reciprocity, mutual obligation, extended relations through ceremonial-material encounter among persons, animal-persons, animal collectives, and people's collectives". [187]

This relational orientation presents a counter-position to trends in Western legal ordering that, especially regarding its relationship with lands and waters, is becoming further oriented towards alienation. This will be explored later in this chapter.

II. Relationality and the Ahcâhk

Fundamental to the realization of relationality through wâhkôtowin is how nêhiyaw peoples understand the *ahcâhk* (spirit), where it resides, and what beings and things have an ahcâhk. The understanding that the land is inhabited by other animal nations and multitudes of other inspirited beings and things, makes treaty-making, even without prior human occupation, a vital legal process to reconstituting on new lands and waters.[188] Our ahcâhk connects us equally with other living beings and things within the inanimate world. Within nêhiyaw worldview, everything in creation is animated by some form of ahcâhk.[189] According to some teachings, we are our gifted our ahcâhk from a larger creative force during gestation before birth.[190] Further, our spiritualism is intellectual: our inspirited[191] nature requires "intelligence and brainpower" to serve the ahcâhk's purpose in the physical world.[192] As Danny Musqua explains:

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[187] Noble, *Treaty Ecology, supra* note 161, at 318.

[188] Heidi Stark makes a similar observation within Anishinaabe law as she states the principles of respect, responsibility and renewal as applied to lands "inform Anishinaabe political thought and practice as the Anishinaabe negotiated treaties with the United States and Canada and remain pivotal to contemporary legal and political struggles". See 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* at 147. [Stark, *Respect*]

[189] Johnson, *supra* note 8 at, 172.

[190] Stonechild, *Indigenous* Spirituality, supra note 74, at 55.

[191] I use the word *inspirited* here to describe those things that are viewed to have a spirit or ahcâhk within nêhiyaw epistemology. Inspired by the writing and thinking of Robin Wall Kimmerer in Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants* (Minneapolis, MN: Milkweed Editions, 2013). [Kimmerer, *Braiding Sweetgrass*]

[192] Stonechild, *Indigenous* Spirituality, supra note 74, at 55

> "Prior to birth the spirit knew everything about the spiritual universe from where it came. When the spiritual doorway is shut Ahcâhk has to go in the same state as the body that it has adopted. Its human vehicle is childlike and the spirit also becomes childlike. The spirit can fulfill its purpose and mission in this earthly life only through the physical body…So gradually the body responds to its purposes in life." [193]

Blair Stonechild notes, "entering the physical world creates another phenomenon: separation into individual entities, each with an artificial sense of self.[194] One of directives of the ahcâhk is to gather wisdom through the physical world by experiencing choices and returning such wisdom to the man'to iskotêw.[195] Our social and legal norms play a significant part of our ahcâhk's journey. Specifically, our legal norms that ensure the maintenance of miyo wîcêhtowin are integral to fulfilling our individual ahcâhk's journey from separation to reconnection with man'to iskotêw - creator's fire - where our individual ahcâhk was once a part of. Thus, this journey is social as "we take guidance from the paths followed by others, in particular from the ways of our family, kinship practices, and our ceremonies."[196]

a. The non-human ahcâhk and constitutional egalitarianism

The link between our individual intellectualism and our spirituality is described as *ahcâhkomâmitonihcikan*, or the spirit-mind.[197] The spirit-mind is not limited to humans. While there are beliefs that some species share a collective ahcâhk, [198]it is a common

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[193] Danny Musqua, as reported in Stonechild, *ibid* at 51.
[194] Ibid at 52.
[195] *Ibid* at 52.
[196] Ibid at 52.
[197] Napoleon, *Key Terms, supra* note 47, at 26.
[198] See Stonechild, *Indigenous Spirituality*, supra note 74, at 63.

understanding that plants[199] and animals, like humans, have individual ahcâhk.[200] As we all are given our ahcâhk from the same source, there is an inherent equality to our existence. Acknowledging the ahcâhk of plants, animals, lands, and waters implies a similar equality for the ecological world that we ascribe to other humans. It calls for a consideration of the autonomy of beings who are subject to an ahcâhk. As Jerry Saddleback notes, this requires that "we take of…[â]skiy…in the same compassionate manner that she takes care of us" where "[l]aw states that there should always be a conscientious effort in continuity of taking care of the interlinked balance" with âskiy "for our required sustenance and livelihood."[201]

b. Treaty-making and non-human agency

The ahcâhk resident in non-human beings and things according to nêhiyaw legal thought is a key understanding towards the relationality ethic. As you will recall from the introductory chapter, I caution against equating this ethic within the same theoretical bounds as *earth jurisprudence*. While offering a consideration non-human beings and things as rights-bearing (as opposed to simply commodity or property), earth jurisprudence takes a different approach to how legal regimes should address this consideration. It focuses on law and constitutional development in a manner that

[199] One of our protocols is to ask for permission when taking a plant for use as food or medicine. This recognition of the spirit of the plant in this way is similar to that expressed by Wendy Geniusz within Anishinaabe thinking. See Wendy Geniusz, *Plants Have So Much To Give Us, All We Have To Do Is As*k (Minneapolis: University of Minnesota Press, 2015) at 20-4.

[200] For example, The Rock Cree of Northern Manitoba believe that animals existed before humans in a state of ahcâhkowiwin, where animal nations lived out their own cultural values and practices. See Robert Brightman, *Grateful Prey: Rock Cree Human-Animal Relationships* (Regina: University of Regina Press, 1993). [Brightman, *Grateful Prey*]

[201] *See* Jerry Saddleback, Cree Testimony on Water published in International Organization of Indigenous Resource Development (IOIRD) Stakeholder Communication to the Office of the High Commissioner for Human Rights on Request further to Decision 2/104 on Human Rights and Access to Water, United Nations Human Rights Council. (15 Apr 2007) online: United Nations Human Rights Council < https://www2.ohchr.org/english/issues/water/contributions/civilsociety/IOIRD_Alberta.pdf>

provides 'personhood' rights to non-human actors in our ecological lifeworlds.[202] While holding similar relational motivations towards the ecological world, the recognition of the ahcâhk in non-human beings distinguishes nêhiyaw law and its application to inspirited beings and things from earth jurisprudence. Nêhiyaw law is not concerned with *personhood* rights (as understood by Western legal pedagogies) but recognizes a broader autonomy and sovereignty of ahcâhk -possessing beings. Instead of assigning personhood to the ecological world and incorporating liberal rights to ecological world actors, the inspirited nature of many non-human beings and things implies they carry an autonomy that effects our legal relations.

The implication of this line of philosophy is significant. It causes nêhiyaw peoples to rely upon nêhiyaw legal processes to seek consent when human action intervenes with the non-human autonomy of lands, waters, animals, and plants. In one way, we can describe these legal processes as treaty-making in general. I am employing 'treaty-making' in a broad manner here. At its base, treaty-making is a legal process that provides or signals consent for one polity to interrupt or even share in the autonomy of another.[203] Our stories provide information on such treaty making. There are other legal processes that make treaty with other non-human polities. Returning the *Creation of Buffalo Lake*, ceremonialism serves as one such legal process. The hunter engages in four days of ceremonies to gain consent (through the creator, who acts as intermediary between buffalo and humans) for the infringement on the autonomy of Buffalo peoples.

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[202] See See David Humphreys, "Rights of Pachamama: The emergence of an earth jurisprudence in the Americas" (2017) 20:3 *Journal of International Relations and Development* 459; Eleanor Ainge Roy, "New Zealand river granted same legal rights as human being", The Guardian (16 March 2017), online: <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>; Clare Kendall, "A new law of nature" The Guardian (24 September 2008) online: <https://www.theguardian.com/environment/2008/sep/24/equador.conservation>

[203] See Stark, *Respect, supra* note 188.

As a teacher of legal process, the gift of the lake (and all the sustenance that comes with it) is a strong persuasive example of the correctness of seeking such consent.

While the further work in this dissertation will ask questions on conceptions of present-day treaty-making based upon the consent and intelligibility of inter-species communication, this examination continues on with this basic assumption that stories, ceremonies, songs, and other institutive practices request and renew consent for nêhiyaw incursions in the autonomy of non-human inspirited beings and things.

III. Mutual flourishment and the Gift/Obligation Praxis with Nêhiyaw âskiy

> How do we refill the empty bowl? Is gratitude alone enough? Berries teach us otherwise. When berries spread out their giveaway blanket, offering their sweetness to birds and bears and boys alike, the transaction does not end there. Something beyond gratitude is asked of us. The berries trust that we will uphold our end of the bargain and disperse their seeds to new places to grow, which is good for berries and for boys. They remind us that all flourishing is mutual. We need the berries and the berries need us. Their gifts multiply by our care for them, and dwindle from our neglect. We are bound in a covenant of reciprocity, a pact of mutual responsibility to sustain those who sustain us. And so the empty bowl is filled.[204]

With a recognition of the animacy of the ecological entities within our relational practices, gifting becomes an integral agent in our inter-societal relations. Gifting is a significant and central practice to nêhiyaw societies.[205] Gifting has long been institutionalized within nêhiyaw ceremonies.[206] Aside from the mâhtâhitowin ceremony

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[204] Kimmerer, *Braiding Sweetgrass, supra* note 191, at 382.

[205] For more discussions on gifting as a legal principle and obligation to fashion intersocietal relations, see Aaron Mills, Miinigowiziwin: All That Has Been Given for Living Well Together One Vision of Anishinaabe Constitutionalism (Ph. D. Dissertation, University of Victoria Faculty of Law, 2019) [unpublished] at 72-78; James Tully, "Reconciliation Here on Earth*"* in Michael Asch, John Borrows & James Tully, eds., *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth* Teachings (University of Toronto Press: Toronto, 2018).

[206] Jobin, *Cree Economic Relationships, supra* note 17, at 150.

(the giveaway, or literal translation, "gift exchanged are a blessing") minor giveaways occur at memorials, round-dances, graduations, and other significant events.[207] Along with the "economic relations" it forges, giveaways are an integral practice for wâhkôtowin.[208] A story shared by Métis teacher Richard Letendre highlights the broadness of wâhkôtowin. He talked about being a young boy, watching his kôkom bead an outfit for a whole year. When it came time for a tea dance (where the giveaway was a part of), he saw his kôkom take the outfit she had worked on for a year, and gift it to strangers at the gathering who travelled a long distance to take part. He then says, the strangers were so touched to receive the gift that they went back to their camp and eventually returned with a shotgun, and gifted that over in return. Then he said, both his kôkom and the stranger approached the fire at the center of the ceremony with their gifts, and put them both in the fire, to give what they had received to the creator.[209]

Letendre shared this story for its pedagogy, he was teaching that gifting is not just a human social relation, but relies upon *all of our relations.* My own experiences of gifting have worked my understandings of giveaways beyond human-to-human relations to include non-human beings, things, and spirits as well. I have experienced strangers gifting moccasins, medallions, and part of their bundles on first meeting. I have done this myself as well. Understanding the protocols of this, there is an implicit understanding that our exchange is not an individual to individual relationship, but ties into a wider societal gifting.

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[207] *Ibid* at 172.
[208] *Ibid* at 174.
[209] Shared to me in March 2008, during my employment with Letendre at Norquest College in Edmonton.

Giveaways also encompass our non-human beings and things. Our *matotisân* (sweat lodge ceremony) involves gifting beyond our human relations. When holding (or asking for a person to put up) a matotisân we are obligated to bring gifts for the human oskâpêwis or helpers (usually clothing and/or honoraria), our animal relations who may visit the ceremony (usually through prints, and sometimes food), k'se man'to (tobacco), our ancestors who aid us in the lodge (sweetgrass, sage, and other medicines), and other participants (food). This ensures that all the relations involved have been gifted for their involvement.

Returning to the quote from Kimmerer at the start of this section, the reciprocal obligations for a gift may not exactly mean a return for the gifter. As lands and waters gift nêhiyaw peoples, fulfilling these obligations to other beings and things means lands and waters may eventually benefit from renewal and regrowth in the manner Kimmerer suggests. Kimmerer's observation that berries teach us that 'all flourishing is mutual' has specific application to Treaty 6. The final chapter of this dissertation puts forth that an interpretation of Treaty 6 more faithful to nêhiyaw conceptions of wîtaskêwin will result in mutual flourishment of nêhiyaw peoples, non-nêhiyaw peoples, and non-human agents alike.

IV. Juris-making: Constitutive Placemaking Practices

I have briefly explored the connections between wâhkôtowin (as an avenue for relationality), conceptions of the ahcâhk, and the mutual flourishment that can be realized through nêhiyaw gifting practices to ground the upcoming exploration of nêhiyaw place-making, and ultimately *jurisdiction-making* practices. Inherent in beliefs

on the inspirited nature and animacy of non-human beings positions them within nêhiyaw legal practices that order our relations. As gifting is an active practice for both the gift giver and receiver, this practice coordinates both human and non-human relations together, and sets out standards of conduct inter-societally. We can see the interplay of these concepts within the place-making practices explored further below.

a. Place-naming/place-making

Place making within nêhiyaw âskiy has been memorialized in at least two ways: place-naming that describe the features of lands and waters, and *place-storying* that inscribes historical events on lands and waters within narratives.[210] *Sputinow* (hill), *Wabumun* (Mirror, as the lake), *Kapasewin* (summer camp), *Amiskwaciwaskahikan* (Beaver Hills House, or Edmonton) *Maskwacis* (Bear Hills), *Mohkahasew* (Bittern Lake), *Astachikewin* (Cache Lake), *Missawawi* (Big Egg Lake), and *Mamawi* (The gathering place) are examples of place-naming, whose names are descriptive in nature.

Other place names reflect a broader history tied to the land. *Notino-sipiy* (the Battle River), which runs just north of Wetaskiwin easterly until it joins the North Saskatchewan River, demarcates the territory between the nêhiyaw and niitsitapi. Though the more popular belief is that the river derives its name from this period of conflict, the historical record suggests it held this name prior to the conflict between the nêhiyawak and niitsitapi, but with the Snake people (Shoshone).[211] *Paskapoo-sipiy* (the Blindman River) captures a hunting event where the hunting party suffered snow

[210] See Wade Leslie Dargin, *The 18th and 19th Century Cree Landscape of West Central Saskatchewan: Implications for Archaeology* (2004) (Masters Thesis, University of Saskatchewan, Department of Archeology) [unpublished].
[211] Dargin argues that notino-sipiy derives its name from nêhiyaw-Snake relations, according to historical records. See *ibid*, at 67-8.

blindness. *Unechekeskwapewin* (the historical name of Saddle Lake), translates into 'dark objects sitting on ice'. This reflects a period of time when food was scarce for the nêhiyawak, and they took to ice fishing at the lake to sustain themselves through the winter. A tributary of the Red Deer River is *maskihkîy-sipiy* (or Medicine River), referencing the ceremonies that occurred near the river's origins in the Rocky Mountains.[212]

Place-making is a fundamental practice engaged in by all polities in one manner or another. It is integral to the creation of jurisdiction.[213] At its most basic, it is the interactions with new lands and waterscapes, and subsequent processes of remembrance and re-engagement on these experiences.[214] This loop of remembrance and re-engagement allows space to move beyond mere geography towards the totality of "the combination of actions, conceptions and physical attributes interrelated".[215] Through "personal attachment to geographically locatable places, a person acquires a sense of belonging and purpose which give meaning to his or her life."[216] The social nature of constituting in a place means that "place-making is also, as Keith Basso notes, a form of

[212] Place-naming and place-making can aid in contemporary dialogues and conflicts over the status of traditional territories, whether there was exclusive occupation, or whether it was a practice of shared exclusivity. For example, place-naming analysis could be helpful in resolving conflicts between the Tsilhqot'in and Secwepemc on territoriality. See Secwepemc Lands and Resources Law Research Project, (2016) online: Shushwap Nation Tribal Council & Indigenous Law Research Unit < https://www.uvic.ca/law/assets/docs/ilru/SNTC%20Law%20Book%20July%202018.pdf> at 48.

[213] Different than present day conceptions of jurisdiction (that are tied in with present-day notions of sovereignty), I am using jurisdiction in a manner that allows us to conceive where nêhiyaw law may exist. I will introduce in this chapter a primary characteristic of nêhiyaw jurisprudence, the relational link between gift and obligation. So when an atayohkewin furthers nêhiyaw jurisdiction, it is also unfolding further obligations for nêhiyaw peoples. The *Creation of Buffalo Lake* is a good primary example of this, in that the narrative completes with a failure of fulfilling an obligation owed to newly-gifted lands and waters, and the consequences of this.

[214] Keith Basso, *Wisdom Sits in Places: Landscape and Language among the Western Apache*, (Albequerque, University of New Mexico Press, 1996) at 5. [Basso, *Wisdom*]

[215] See Eman Assi, "Memory of Place" in Ed. Laurier Turgeon, *Spirit of Place: Between Tangible and Intangible Heritage* (Montreal: Les Presses de l'Universitie Laval, 2009) at 123.

[216] As quoted in *ibid,* at 124.

"*cultural* activity...it can be grasped only in relation to the ideas and practices with which it is accomplished."[217] "[W]hat people make of their places is closely connected to what they make of themselves as a member of society and inhabitants" of the certain lands.[218] For nêhiyaw peoples, this ensures a close knitted link between relationships to lands and waters, constitutionalism, and jurisdiction.[219]

Beyond a culturing process, place-making through storying the land - where âtayôhkêwina memorializes our historical connection to these spaces - is deeply constitutive in nature. Integral to this is connecting our cosmology with our lands. This may be a constitutive process shared by other Indigenous nations. As C.F. Black notes:

> To explore the establishment of law…one must first enter the cosmology via the cosmological narrative. Central to that narrative are the constitution of authority and the jurisprudence that legitimates authority. It is by understanding the cosmology that an outsider can come to terms with the manner in which the laws of that society and the individual's behavior are understood.[220]

Seeking the cosmological narrative is quite literal in some respects, as some of our âtayôhkêwina link landscapes to starscapes and vice versa.[221] Embedding constitutional teachings within land stories allows for them to be heard over the breadth of nêhiyaw askîy. It also allows them to be carried on generationally. Thus, âtayôhkêwina are dense intellectual vehicles that share encoded constitutional teachings over large geographical

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[217] Basso, *Wisdom, supra* note 214, at 7.
[218] *Ibid* at 7.
[219] Julie Cruickshank's work with Tlingit elders in the Yukon Territory, and laws regarding proper conduct amongst glaciers is instructive on this point as well. Cruickshank, in recognizing the use of land stories as law and jurisdiction making, require a localized understandings of the meaning of place as a concept, and kinship laws. See Julie Cruickshank, *Do Glaciers Listen?* (Vancouver, UBC Press, 2005) at 66.
[220] C.F. Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Routledge Press, 2011), at 24.
[221] I borrow this from our Ininewuk (Eastern Cree) relatives. See Wilfred Buck, *Atchakosuk: Ininewuk Stories of the Stars* (2009) 1 First Nations Perspectives 2 71.

and temporal territories. I must have heard the story of the *Creation of Buffalo Lake* at least ten generations after our first relationship with the lake occurred. When I share this story with my son, Iskotêw, it will be another. And so on.

b. The *Juris-Making* Cycle and Relationship

Through an examination of our âtayôhkêwina linked to specific places, the relationship between the principles below structures our place-making âtayôhkêwina. While not always in a linear pattern, these stories cycle between these principles.

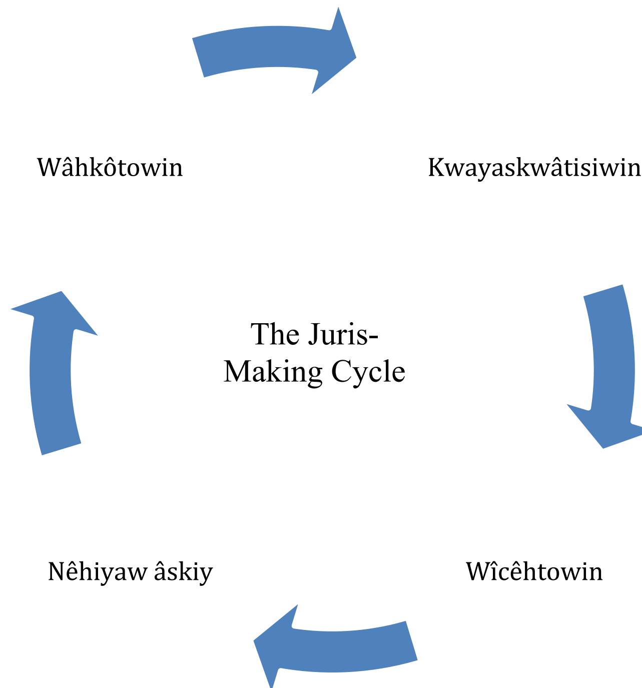

Figure 2.1: From Place-making to Norm Creation

1. **Kwayaskwâtisiwin (Legality or being moral):** Proper arrivals and original interactions with lands/waters. These can be governed by procedure and protocol, and usually require overcoming human hardship.

2. **Wîcêhtowin:** Events occurring to aid the survival and good living for nêhiyawak. This involves non-human agents gifting nêhiyaw peoples.

3. **Wâhkôtowin:** Contemplation of obligations to the natural world because of gifts. This creates legal norms based on new relations.
4. **Nêhiyaw âskiy:** Jurisdiction created, outlined, and specified, as bounds of obligations are defined.

One constitutive land-event is an arrival on new territory that is usually (or eventually) made proper through adherence to protocol. Returning to Noble's treaty ecology, this protocol can be between humans, human-to-non-human animals, or to other beings generally. A second event usually within these types of stories is a gifting to nêhiyaw peoples of foods, waters, shelter, medicines, or ceremonies, to enable nêhiyaw survival and good living. Proper arrival and assistance create wâhkôtowin between the nêhiyawak and non-human agents in the stories, where there is a cultivated acknowledgement of relationships, often based upon mutual aid.[222] Finally, as constitutive and legal norms are created through wâhkôtowin, nêhiyaw conceptions of jurisdiction are created.

If we consider the legal principles at play in the *Creation of Buffalo Lake*, we can see this *juris-making* process. Prior to arriving at the lake, we see the people engaging in protocol (ceremonying). While it is under the auspices of a successful hunt, I link the four days of ceremony the hunters engaged in directly to the gifting of the lake. In this way the ceremony ensures *kwayaskwâtisiwin*, or legal, moral, or proper conduct. The hunt, and the arrival at the newly created lake, there is a long period of gifting to nêhiyaw peoples and signals a period of constitutive relating. Though the story does not give us details, the nêhiyaw peoples are gifted the nourishment and shelter they need for survival for some time, enough for communities to flourish on the other side of the lake.

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[222] I employ mutual aid in a manner similar to Aaron Mills, where he forwards that a common characteristic that roots many Indigenous constitutionalisms are legal relationships based on mutual aid with other human and non-human agents. See Mills, *Lifeworlds, supra* note 113, at 860.

From these gifts, obligations arise. Much of this implicit as we are told that nêhiyaw peoples flourished at the lake. Given the preceding context, we can imply they guide their relationships through the hunter's initial adherence to ceremony and protocol. Finally, the transgression at the end (the boy taking the horn, and the implied needless waste of the buffalo generally) provides an example of failed obligation.

An interpretation of the events in the story provides an opportunity to deliberate on the bounds of obligation, and the limits of what nêhiyaw can count on as being gifted. Or as this process can be summarized as:

1. **Kwayaskwâtisiwin:** the hunters engage in ceremony on behalf of the survival of the community. As a result, the lake is created and serves as a source of nourishment for nêhiyaw peoples.

2. **Wîcêhtowin:** the lake provides a place for nourishment for generations for the people.

3. **Wâhkôtowin**: Contemplation of obligations to the natural world because of the gifts provided. Implicit within the story is an obligation to avoid ohcinêwin and ohcinêmowin by respecting the non-human beings and things that provide nourishment for nêhiyaw good living.

4. **Nêhiyaw âskiy:** Jurisdiction regarding nêhiyaw needs and obligations created, outlined, and specified in the story. The bounds of what is gifted to nêhiyaw people is displayed through the transgression at the end of the story**.**

c. Nêhiyaw Arrivals on the Northern Prairies

The above is a useful tool that when applied to other âtayôhkêwina as it outlines the constitutive elements within askîy âcimowina (land stories). While this framing tool can

be applied to all our askîy âcimowina within the nêhiyaw askîy, I am limiting my observations to those land stories about the northern border of the territory. The nêhiyawak are part of a group of other distinctive Cree societies stretching from BC to Northern Quebec. Alongside the nêhiyawak, these include the Eeyouch (Eastern James Bay) Cree in Quebec, the Mushkegowuk (Moose Cree) in Northern Ontario, and the Swampy Cree in Northern Ontario and Manitoba, the Sakiwiniwak (Woods Cree) of Northern parts of Manitoba, Saskatchewan and Alberta, and the Aseniwuche Winewak in Western Alberta as well as communities in Northwest B.C.[223]

The nêhiyawak have historically been differentiated into two sub-groups: the *Natimîwiyiniwak* (Upstream people) and *Mâmihkiyiniwak* (Downstream people). [224]The stories I focus on are generally carried by two regional groups of the Uptstream people, the *Maskwacîwiyiniwak* (Bear Hills Cree) and *Amiskowacîwiyiniwak* (Beaver Hills Cree).[225] As part of the Upstream people, the Maskwacîwiyiniwak and Amiskowacîwiyiniwak have had close relations with the Wâskahikaniwiyiniwak (House Cree), Paskohkopâwiyiniwak (Parkland Cree), Sîpîwiyiniwak (River Cree), and (Sakâwiyiniwak (Northern Plains Cree).[226]

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[223] See Hadley Freidland, *Cree Legal Traditions Report: Aseniwuche Winewak Nation.*(2014) Online: Indigenous Bar Association, < http://indigenousbar.ca/indigenouslaw/>.
[224] See Jobin, *Cree Economic Relationships, supra* note 17, at 64.
[225] *Ibid* at 64.
[226] *Ibid* at 64.

Figure 2.2: *Nêhiyaw askîy outlined roughly above. Some of this territory is shared with other Indigenous nations.*

Focusing on stories of our norther arrivals is practical consideration; as part of the examination of this dissertation is land experience, it provides me with easier access to the lands the stories are attached to. A second consideration is the unique view on constituting practices that examining these stories bring. These constitutive processes are relatively recent in relation to the histories of other Indigenous nations. Nêhiyawak arrival on nêhiyaw askîy is the subject of some dispute. For a considerable amount of time, Eurocentric anthropology theorized nêhiyaw peoples came to occupy present-day nêhiyaw askîy in the late 17th or early 18th century.[227] Recent scholarship has questioned this timeline. Most notably, Dale Russell argues that nêhiyaw peoples occupied the

[227] The respective works of David Mandlebaum and Arthur Ray, both completed in the 1970's, were considered authoritative in this version of nêhiyaw migration. See Arthur Ray, Indians in the Fur Trade: Their Roles as Trappers, Hunters, and Middlemen in the Lands of Soutwest of Hudson Bay, 1660-1870 (Toronto: University of Toronto Press, 1998); David Mandelbaum, The Plains Cree: An Ethnographic, Historical, and Comparative Study (Regina: University of Regina Press, 1978).

Saskatchewan area of plains prior to 1690.[228] He notes that geographic terms were recorded in nêhiyawewin on the Northern plains by explorers in 1691.[229] According to Russell, subsequent assumptions of the western migration of nêhiyaw peoples have been based upon the original flawed presumptions of Alexander Mackenzie.[230] Further, there is archeological evidence that nêhiyaw peoples resided upon the northern prairies as far back as 1350 to 1600.[231]

My consideration of the stories in this aspect is not resolve or add substantially to this anthropological debate – that is not the focus of this dissertation. Or to put another way, I am not putting forth a theory of the temporality of nêhiyaw migrations on the Northern Plains through the analysis of these stories. The value of this analysis is how legal practices regarding our land relationships are realized and memorialized within these stories. As I overlap these stories onto each other, it becomes apparent that the linear flow of the model I provided earlier works as a cycle. With each arrival at a previously unvisited hill, river, or lake, nêhiyaw peoples brought the collective of previous place-making experiences with them. These are driven by the creation, vulnerability, transformation, ceremony, jurisdiction, and obligation described within them. The experiences on new land are attenuated by the previous cycles. This is the process of *juris*-making captured within these stories: the stories begin to outline the scope of nêhiyaw jurisdiction, and the obligations that come with upholding this jurisdiction. Further, the cycles can work in reverse as well, as acknowledgement of

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[228] Dale Russell, Eighteenth-Century Western Cree and Their Neighbors (1991) Archeological Survey of Canada Mercury Series Paper No. 143. At 421.
[229] *Ibid*.
[230] Dargin, *supra* note 210, at 30.
[231] *Ibid*.

jurisdiction leads to thickening of wâhkôtowin obligations, broadening obligations of good assistance, and renewed arrivals upon these site-specific places.

d. "Terra Plenus": The Inspirited Nature of Lands[232]

Regardless of the specific time period we arrived, the unique aspect of nêhiyaw arrivals on the northern prairies has resulted in an equally unique constitutionalizing process, in relation to other nations.[233] While we have origin stories within our âtayôhkêwina that stretch back to the creation of the world, our land stories have a contemporary element to them as well. The creation of nêhiyaw constitutional jurisdiction displayed in these stories shows the reliance upon legal processes that buttressed any normative colonizing behaviours.[234] Just as nêhiyaw wâhkôtowin practices informed relationships to new lands, waters, animals and other beings, our relationships with other Indigenous nations on the prairies were subsumed in the same wâhkôtowin practices. Thus, migration does not necessarily mean the displacement of other peoples, beings, and things from nêhiyaw askiy.[235] Or to put another way, there is no equivalency to *terra nullius* within nêhiyaw ways of thinking, as our epistemologies consider lands to be occupied by our non-human

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[232] I borrow the term Terra Plenus from Kelsey Wrightson as an alternative to the fallacy of terra nullius, that lands were vacant before nêhiyaw peoples arrived on them. See Kelsey Wrightson, *We are Treaty Peoples: The common understanding of Treaty 6 and contemporary Treaty in British Columbia* (Master of Arts Thesis, University of Victoria, 2007) [unpublished].

[233] Bruce Cutknife notes that our elders do describe stories in this manner, as going back before we can remember, or *kiyahte*, it has always been like that. See Buffalo v. Canada, 2005 FC 1622 at paras. 427-431.

[234] For example, Neal McLeod links nêhiyaw western migrations and the potential displacement of other Indigenous peoples caused by this migration to colonialism. See Neal McLeod, *Cree Narrative Memory, supra* note 20. As will be discussed further in this chapter, I find a colonial relationship more nuanced than territorial occupation, that it requires distinctive colonial relationships to human and non-human agents. For a discussion on the evolution of proto-Cree from proto-Algonquin also see Leo Pettipas, The First Crees, (2014), online: Manitoba Archeoloical Society < https://manitobaarchaeologicalsociety.ca/sites/default/files/page/pdf/cree-migration-june-2014.pdf>.

[235] The iron alliance between Plains Cree, Saulteaux, Métis, and Stony peoples on the Northern Prairies counteracts the idea of nêhiyaw colonization. Nêhiyaw peoples were working in political unity with other nations who resided in many of the same areas. See Rob Innes, *Elder Brother and the Law of the People: Contemporary Kinship and Cowessess First Nation* (Winnepeg: Univeristy of Manitoba Press, 2013).

relations, in the absence of human occupation.[236] Storying the land is a significant legal process in this manner, as it not only sets social and legal norms towards a physical space, but additionally sets and transfers information on our inter-societal norms. CF Black notes that "when a nation finds itself in a new ecological situation, there is an expectation that a new contract with the spirit of the Land will appear and validate the people's arrival."[237] Land-based law learning is a "dialogical encounter with Indigenous jurisprudence" that reveals "a logos posited in Land."[238] Within the story of the *Creation of Buffalo Lake*, the narrative not only provides jurisdiction for nêhiyaw peoples (the lake is gifted to the nêhiyawak to aid our survival), but ensures a shared ethos in those who know the story in their future interactions with the lake. So when an âtayôhkêwin furthers nêhiyaw jurisdiction, it is also unfolding further obligations for nêhiyaw peoples.

An examination of land creation/relationhip stories displays this gifting towards nêhiyaw peoples as a central element to the creation of the legal relationship between the nêhiyawak and land agents and elements. As I did with the *Creation of Buffalo Lake*, I will examine the constitutive processes of the following land stories: 1) the *Creation of the Neutral Hills*, 2) *The Boy Who Was Left Behind, 3) Papimihaw âsiniy* (Flying Rock), *Mistasinîy or Buffalo Child Stone*, and 4) *Red Berry Lake* respectively. Specifically, I am reflecting on the proper conduct of nêhiyaw peoples as they arrive or interact with new lands and waters. As all these stories display kind assistance from lands and waters in one way or another, these stories are integral examples of miyo wicêhtowin (good

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[236] For the view that Indigenous peoples, including the Woodland Cree, lost these relational practices with animals, see Calvin Martin, *Keepers of the Game: Indian-Animal Relationships and the Fur Trade* (Berkeley: University of California Press, 1978).
[237] Black, *supra* note 220, at 129.
[238] *Ibid* at 167.

assistance) flowing from non-human sources to nêhiyaw peoples for our survival. As a result, wâhkôtowin (laws that set out and govern relations) can be inferred. Finally, I theorize on how these actions within the stories set out and further conceptions of nêhiyaw jurisdiction, a jurisdiction based upon reciprocal obligations (between nêhiyaw and lands/waters) for aid, protection, and love of each other.

e. The Creation of the Neutral Hills

The Neutral Hills are a plateau formation in East-central Alberta. According to the origin narrative, the land in the area was originally a flat prairie, with nêhiyaw and niitsitapi peoples coming into conflict because of dwindling buffalo populations. It was a significant area because of its proximity to an old buffalo trail. [239] As there was violence (or the threat of violence) between the two, there is a (super)natural response. According to the narrative, K'se man'to creates the hills overnight to protect nêhiyaw and niitsitapi peoples from each other. Recognizing that the creation of new land is a gift, the nêhiyawak and niitsitapi travel along the hills, until they find a valley (the big gap) and make treaty there.

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[239] As Brian Lightning refers to this cite at Hardisty, AB, "the Beginning", as recorded in Government of Canada, Energy East Pipeline Ltd. Energy East Project and Asset Transfer, Vol. 10. (December, 11, 2015) at paras. 3585, 3444-3534. [Lightning, *NEB*]

Figure 2.3***:*** *The Neutrals. Though not discernible in the picture, they rise seemingly out of nowhere on the flat prairie.*

As it is silent on the historical arrivals of the nêhiyawak within the area, we must infer how *kwayaskwâtisiwin* was enacted. The narrative introduces a new inter-societal landscape that affects the governance and political economy in the area. Implicit in the conflict between the nêhiyawak and the niitsitapi is a need for natural/spiritual intervention. This is not only territorial intervention (that the growth of the hills provides), but relational, as the growth of the hills means that non-human life will converge there as well. Visiting the Neutral Hills, I came across a cairn that memorializes the story of their creation. While it romanticizes and generalizes the conflict (it considers the story an 'Indian legend' about 'warring tribes'), it notes there

have been various discoveries of hunting and ceremonial artifacts in the hills.[240] Much like the *Creation of Buffalo Lake,* implicit in the narrative is an acknowledgement of protocol and procedure to approach and live on the land in a correct and good way. The legal ordering provided by protocol will be discussed further in the fifth chapter.

The *wîcêhtowin* of non-human agents towards the nêhiyawak is the animating force of the story. K'se Man'to creates the hills in order to save both the nêhiyaw and niitisitapi from further violence. The hills are not only a landmark or barrier, but, much like the creation of lakes on prairies, provide an area of shelter and nourishment for all beings, and thus nêhiyaw peoples. Kind assistance is the overt theme of the story.

Through this gifting of the hills, *wâhkôtowin obligations* are created between the niitsitapi and nêhiyaw peoples. The reaction of the niitsitapi and nêhiyaw peoples signifies a commitment to *wîtaskêwina* (living on the land together) that is formalized through ceremony. Although there is no information in the story, implicit is an obligation to *wîcêhtowin* (assistance) to the hills, and the flora and fauna that converge there.

The story is explicit in its outlining and solidifying *nêhiyaw jurisdiction*. It sets out geographical boundaries. It also delineates trans-systemic legal relationships; the wîtaskêwina set between Blackfoot and Plains Cree peoples infers shared use of certain areas. The site was significant for ceremony and gathering, as it was viewed as a neutral ground for many nations. It also remained a border between nêhiyawak and the niitsitapi. [241] As part of the Palliser expedition in the mid-19th century, James Hector observed

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[240] The Neutral Hills are the site of a pebble quarry where the manufacturing of pebble tools occurred. See Martin Magne, Archaeology in Alberta 1986, Archaeological Survey of Alberta, Occasional Paper No. 31, 1987. (1987) Online: Government of Alberta < https://open.alberta.ca/dataset/0246d7f2-564a-4406-a450-247165e03404/resource/41ab7a7b-ba47-4cc0-b1b1-6e6588140cec/download/381804-1987-archaeology-alberta-occasional-paper-31.pdf>

[241] Seen Jennifer Brower, *Lost Tracks: National Buffalo Park, 1909-1939* (Edmonton: Athabasca University Press, 2008) at 17.

nêhiyaw peoples staying within "the latitude of Fort Ellice they sometimes pitched their tents as far west as the Elbow of the South Saskatchewan, and from that point their country may be bounded by a line carried into the Neutral hills, south of the Battle River, and thence on to the Beaver hills and Fort Edmonton."[242]

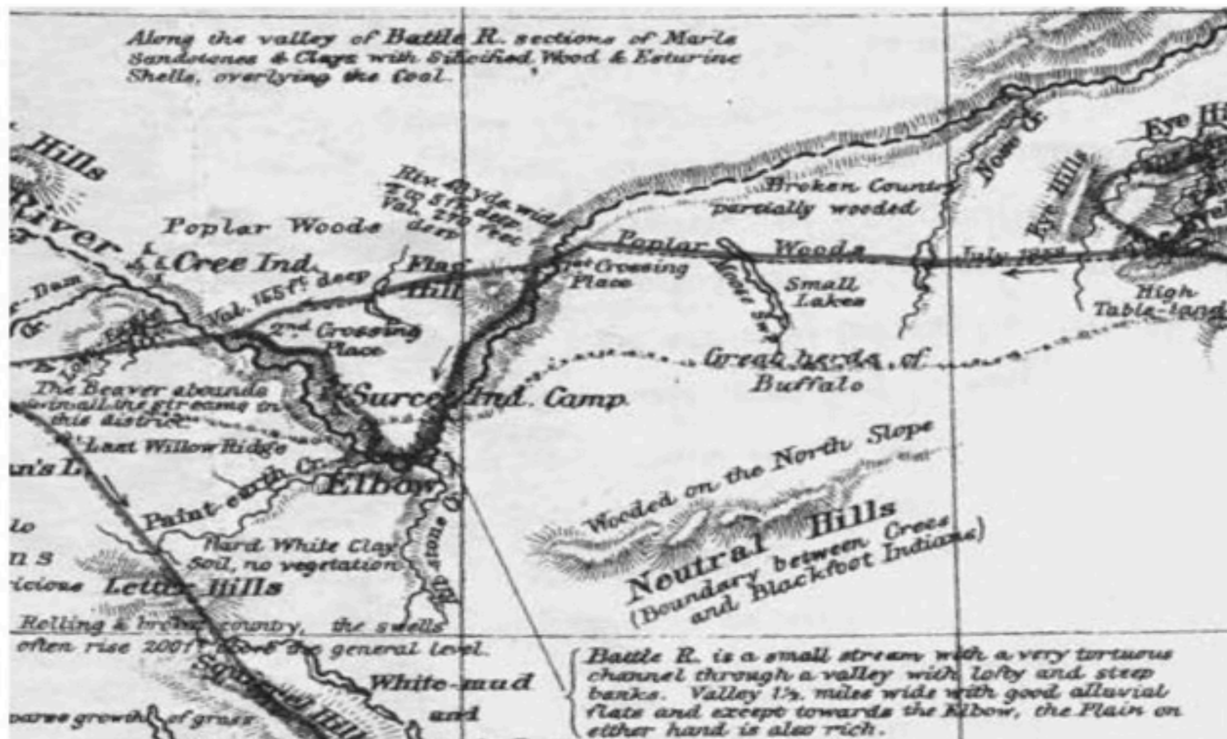

Figure 2.4: *A section of the "General Map of Routes in British North America Explored by the Expedition under Captain Palliser during the years 1857, 1858, 1859, 1860" map shows the Neutral Hills and their jurisdictional implications.*

f. The Child Who Was Lost

Just west of the Neutral Hills is Hardisty, Alberta. This is a significant site for Indigenous peoples because of its close location to large buffalo herds and migration roots. Hardisty is also known by nêhiyaw peoples as "the Beginning".[243] According to

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[242] Transactions of the Ethnological Society of London, vol. 1 (London, 1861) at 249.
[243] Lightning, *NEB, supra* note 239.

one story, a child was born at this site and placed in a moss bag, but was left there by their parents under unknown circumstances. The child is "blessed with a very gifted energy."[244] Because they are abandoned by their parents, this young person sets out on a journey to find them. In doing so, they travel in four directions, and at each is given a gift to help their journey. In the first direction, they travel to the Thundering Hills, where they are given the pipe.[245] They then travel to Pipestone Mountain and are given the pipe-bowl.[246] Finally, the child travels to the Sweetgrass Hills (or the Eagle Hills escarpment on the present-day Sweetgrass reserve near Battleford, Saskatchewan) and is gifted sweetgrass to fill their pipe.[247]

There is not much background to why the child is born in the area, or why they are left behind. However, the journeying of the child encompasses several examples of *kwayaskwâtisiwin* in practice. the story can be considered as an overall contemplation on territorial protocol; the gifting of elements of the pipe signifies the importance the areas, and implicitly consent to the territory. This narrative is significant for nêhiyaw jurisdiction, as the child's journey transforms to collecting the materials they need for the pipe, inferring a sacred relationship with the territories they travel unto. The constitutionalism that is inferred in pipe carriage is provided a physical dimension here, outlines the constitutional territory for nêhiyaw peoples. This has been home to a buffalo pound - used and managed by the niitsitaapi - that has been dated to have been in use for

[244] *Ibid* at para. 3447.
[245] *Ibid* at para. 3505.
[246] *Ibid* at para. 3507.
[247] Dargin, *supra* note 210, at 23.

7000 years, up until the extirpation of buffalo from the area in the early 1900's.[248] David Mandelbaum notes that this buffalo pound was a site of ceremony.[249]

The *wîcêhtowin* provided by non-human agents is resident in the story as the child is provided medicinal gifts for their journeying. These are all elements that allow for pipe ceremonialism. In this sense, the child sets out on a journey that describes nêhiyaw askîy. By providing the elements for pipe ceremonialism, our movements across nêhiyaw askîy is inextricably tied to the pipe; it gives us consent for our relationships within the territory and obliges us to return to its use to create or renew relations. This leads to the *wâhkôtowin obligations* to take seriously and be consistent with ceremony (as it acts as a surrogate for the kinship the boy is seeking). Implicit is an obligation to *kiyokewin* (visiting), as this is a journey story. These are linked to wâhkôtowin and miyo-wîcêhtowin.

The narrative can be understood as a *jurisdictional* story as it outlines the physical geography of nêhiyaw askîy. This jurisdiction is not exclusive; the areas visited by the child are also (more consistently) utilized by niitsitapi and Stoney peoples. This story is a territorial narrative in general, as it describes the child heading to certain places, and receiving gifts for their journey. As a common theme within nêhiyaw stories (where a person is working from a position of deficit and difficulty and is gifted for overcoming this) the child is seeking kinship in his journeying. They are provided gifts specific to the locations he visits, Sweetgrass from the Sweetgrass Hills, Pipestone from Pipestone Mountain, a Pipestem from the Thundering Hills).

[248] See Matthew Moors, "The Hardisty Buffalo Pound" (2017) Online: RETROactive <https://albertashistoricplaces.wordpress.com/2017/11/22/the-hardisty-bison-pound/>
[249] David Mandelbaum, *The Plains Cree: An Ethnographic, Historical, and Comparative Study* (Regina: University of Regina Press, 1979).

g. *Mistasinîy-Buffalo Child Stone*

The account of mistasinîy is also known as the story of *Buffalo Child Stone*. It is set in the days when children were transported by travois fixed to the back of dogs. In the different versions of this narrative,[250] a boy is lost by his *kôkom* when her dogs get away from her. Before he can be found by his searching family he is discovered by the Buffalo People.[251] They understand his vulnerable state, and decide to take pity on him and raise him as their own. Thus, the boy comes to live amongst a large herd of buffalo.

The boy experiences several hunts over the years. Seeing these hunts from the perspective of the buffalo, his anger towards humans grows; so much that he begins to express it outwardly. In response, an older buffalo reveals his nêhiyaw origins to the boy. He also soothes the boy's anger by explaining the law between nêhiyaw and buffalo peoples: in exchange for the nourishment and shelter the buffalo peoples provide to the nêhiyawak, they receive gifts, humane treatment, and ceremonial relationships in return. The elder buffalo teaches the human boy laws that ensure *miyo wîcêhtowin* (good relations) between humans and the buffalo. They have an obligation to only hunt as much as they need, and not to overhunt them. And they must provide gifts for the lives of the buffalo people. The older buffalo also shows him how to turn himself into a stone (by rolling over four times). It is during another hunt that, caught between the lives of his

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[250] See Barry Ahenakew, "The Story of Buffalo Child Stone", (2012) Online: Saskatchewan Archeological Society < https://thesas.ca/wp-content/uploads/2012/07/buffalo-child-stone.pdf>; Deanna Christensen, Ahtahkakoop: The Epic Account of a Plains Cree Head Chief, His People, and their Struggle for Survival 18161896 (Shell Lake, Sask.: Ahtahkakoop Publishing, 2000); Barb Frazer, *Mōstos-awāsis asiniy/Buffalo Child Stone,* (2019) Online: All Nations Hope Network <http://allnationshope.ca/userdata/files/187/ANHN%20Documents/April%2020%20(final)%20FRAZER%20%20for%20PRINTERS.pdf>.

[251] In this narrative, they are regarded as the Buffalo Nation, having their own social and legal norms.

family who hunts and his other family that is the hunted, he decides to turn himself into stone.[252]

This story is unique, as the interaction of lands (or more specifically a land mass, the m*istasinîy*) points to a story that revitalizes original interactions between humans and buffalo. In this way, it shows that *kwayaskwâtisiwin* is dependent upon the renewal of laws between buffalo and humans. This story aligns with *The Child Who was Lost,* as the young boys' journey serves to explain law and protocol. In turning to stone, the boy is a relational bridge between humans and land. The mistasinîy becomes a site of significant ceremony from this time forward.

The *wîcêhtowin* extending from the buffalo peoples towards humans the central point of the story, as it describes the foundational laws between humans and buffalo in respect of their natural relationship as nourisher/provider and receiver of such nourishment. Buffalo Child questioning of the hunt provides the opportunity for the older buffalo to explicitly describe the human reliance on the wîcêhtowin of buffalo peoples, and corresponding obligations. As humans are reliant upon buffalo peoples for survival, the *wâhkôtowin obligations* that flow from this reliance include restraint in the amount they hunt (ohcinêwin), reciprocation with gifts towards (wâhkôtowin), and a continue a ceremonial relationship with buffalo peoples (miyo wîcêhtowin), and to recognize them as equal, inspirited beings (ohcinêmowin).

The story provides guidance on *nêhiyaw jurisdiction* as it bounds the human/buffalo relationship. Buffalo Child's resistance to being subject to hunting serves as an intellectual device to provide legal pedagogy to correct his thinking; buffalo serve a

[252] See Neil McLeod, *Cree Narrative Memory, supra* note 20 for another analysis of this story.

necessary purpose in human life, and despite being hunted, receive good living in return. It places hunting within the jurisdiction of nêhiyaw law, limits the scope of this jurisdiction, and provides specific procedures to ensure miyo wîcêhtowin in the face of the hunt.

The story of *Buffalo Child* is memorialized in mistasinîy, a large stone that was located at the elbow of the South Saskatchewan River, and was a gathering ground for many nations and a place of ceremony. When the river was dammed in 1967, the land around the stone was flooded and it was submerged in Lake Diefenbaker, where it remains today. When we consider the effect of colonialism on nêhiyaw wiyasiwêwina – as Plains Cree law was submerged in some manner – mistasinîy may have much to offer if we think of its flooding, loss within our collective memory, and collective revival.

Figure 2.5: *Mistasinîy, before the land was flooded around it.*

h. Mihkomin Sahkahikan (Red Berry Lake)

According to our âtayôhkêwina, Red Berry Lake is the location where horses were gifted to nêhiyaw peoples.[253]In a version of the story shared by Eli Pooyak, a young boy is visited by a stranger, who invites him to travel to another camp.[254] The young man, too scared and shy to go on this journey, refuses this invitation for three nights. Finally relenting after the fourth night of being visited, the stranger takes him to the lodge of a *kehte-ayak* (old one). Here, the old one teaches the young man songs for four nights, as well as other procedures that are useful in maintaining good relations with horses. Following the instructions of the old one, the boy sings the songs he was taught by the water, and watches a stallion emerge followed by a number of mares. Again, according to the instruction of the old man, the young man leads the horse back into his community. Utilizing the songs and ceremony provided by the old one, the young man is able to 'animate' the horses, where they will be used by the community. Upon doing this, the stallion returns to the water.[255]

In terms of *kwayaskwâtisiwin* regarding conduct towards a territory, Red Berry Lake is the location of a key point in the history of the nêhiyawak, the gifting of horses. As part of the process of being gifted from the lake, the boy is taught to observe protocol (both gifting and song). *Mistatim* **(**horses**)** extend *wîcêhtowin* towards humans in the most literal sense, they are utilized to lessen the hardship of labour to live on the prairies. Much like the story of *Buffalo Child,* the story describes some of the foundational laws between humans and animals. As horses will be master helpers for nêhiyaw peoples, the

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[253] MacLeod, *Cree Narrative Memory, supra* note 20, at 25.
[254] See Horse Dance Origin Story (or how the Cree acquired horses) was told by Eli Pooyak from Sweetgrass Cree Nation in Saskatchewan, on March 18, 1974. Online: <http://ourspace.uregina.ca/bitstream/handle/10294/1610/IH-074.pdf?sequence=1>
[255] *Ibid*.

story is rich with legal procedure to maintain the specific wâhkôtowin between humans and horses. Although the explicit will of the horse is silent in the story, it can be implied that there is a pity of human suffering that results in the gifting of horses.

As humans are reliant upon horses to aid our lives and diminish our suffering, the story outlines the reciprocal *wâhkôtowin obligations* to take care of the needs of horses, including through gifts (wâhkôtowin), as well as to following procedural steps to ensure good relations (miyo wîcêhtowin) including our use of songs and ceremony (ohcinêmowin). In the story, the horses require protocol to be animated. We can consider this story as providing specific legal norms: for the consent of horses to be used for their labour, we must provide reciprocal gifts. The Horse Dance ceremony, a common ceremony amongst nêhiyaw people, is a resulting practice that enacts this obligation.

The story outlines *nêhiyaw jurisdiction* as it provides secondary rules to human/horse relationship.[256] The boy is provided ceremonial rules (through songs) and rules on the maintenance of horses day-to-day. Adhering to these rules provides a venue where the human/horse relationship is redeliberated on in ceremony. Implicit is an understanding that the gifting of horses increases nêhiyaw jurisdiction, as horses allow for greater and quicker travel. Horse ownership is considered a vital development in the emergence of the present-day nêhiyaw polity. [257] The gifting of horses to nêhiyaw peoples is a cultural moment that strengthens nêhiyaw governance and constitutionalism as it has allowed for greater mobility, sustenance, and in turn, greater stability.[258] Red

[256] See H. L. A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961) at c. 5. I consider the procedures that ceremonies provide akin to Hart's theory on secondary rules, in that they provide the base for primary rules to be applied, amended, and transformed. See Lindberg, *Sacred Changes, supra* note 76.
[257] Dargin, *supra* note 210, at 74.
[258] This raises the question, as John Borrows raised in reviewing this chapter, whether modern entities and things that allow for greater ease of living will be memorialized or constitutionalized in the manner that horses were? This is a significant question when we think of the development of law, and the role of

Berry Lake was a significant spot where people would bring their mares for breeding.[259] It has also been linked to our relationship with buffalo, as it is where buffalo descended into as they disappeared from the prairies.[260]

i. *Papamihaw asinîy/flying rock*

Papamihaw asinîy is a meteor that fell near Iron Creek, a tributary to *notino-sipiy* (Battle River). It derives its name (literally flying stone) because it was witnessed coming to earth by the nêhiyawak. Much like the Neutral Hills, papamihaw asinîy is regarded as a wîtaskêwina event, in that it landed in contested lands between the niitsitapi and nêhiyaw peoples. As Dwayne Donald speculates:

> "Perhaps papamihaw asinîy brought a message from the Creator that the Cree and Blackfoot should change the way they regarded this land and the resources it gave them. Perhaps the *flying rock* was sent to this contested territory by the Sky Beings to remind the people that no one can own the land or the buffalo"[261]

Donald's speculation is supported by trans-societal use of the rock's site, as it was a shared ceremonial site for nêhiyaw, niitistapi, and Saulteaux peoples.[262] As a site of collective gathering and renewal, the arrival of European settlers fundamentally changed Indigenous relationships to the site of the stone. Reverend George MacDougall stole the stone from its site in the 1860's.[263] It was eventually sent eastward to Cobourg, Ontario in

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relationality within it. A partial answer is provided by the late Ron Marshall (Niso Asiniy), who was meticulous to honour our 'modern fires' (ie, those that exist within phones, computers, cars) that assist in our good living. It is a vital question on why we don't see this ceremonialized more, and the effect on our laws if this pedagogy was more widespread.

[259] See Macleod, *supra* note 20, at 25.

[260] *Ibid.*

[261] Dwayne Donald, "Forts, Curriculum, and Indigenous Métissage: Imagining Decolonization of Aboriginal-Canadian Relations in Educational Contexts" (2009) 2 First Nations Perspectives 1, at 15.

[262] *Ibid.*

[263] See James Ernest Nix, *Mission among the buffalo: the labours of the Reverends George M. And John C. McDougall in the Canadian northwest, 1860-1876* (Toronto: Ryerson Press, 1960).

1886, where it remained until 1972. The stone has been held at the Royal Alberta Museum since then. Its removal by Reverend McDougall was considered a foreboding action that foretold of disastrous changes for nêhiyaw lifeworlds on the prairies, that ultimately became a reality soon after.[264] Nêhiyaw peoples witnessed papamihaw asinîy coming to earth and understood it as a cosmological gift. Like the *Neutral Hills*, this provides impetus for continued *kwayaskwâtisiwin* at its site, as it inflects a new orientation to older human-to-human relationship. It instigated a new point of ceremonialism on the land.

The story of *papamihaw asinîy* displays the *wîcêhtowin* provided through a cosmic force as the stone's appearance reconstitutes inter-societal orientations to the lands. As nêhiyaw and niitsitapi engage in contestation of the land, the stone provides a reminder against viewing the land as commodity to be fought over. As a new source of land for ceremony, the stone is a spiritual gift to the people.

The arrival of papamihaw asinîy sets *wâhkôtowin obligations* regarding inter-societal kindness. Through the ceremonies that historically took place around the stone, we can infer that it's landing spot was a site of land-based legal pedagogy. It also provides an explicit reminder for wîtaskêwina (living together in peace).

As noted above, it sets out an ethic of shared living within the territory between nêhiyaw and niitsitapi peoples, providing guidance on both the physical space and obligations within *nêhiyaw jurisdiction.*

[264] Hugh Dempsy, *Big Bear: End of Freedom* (University of Nebraska Press: Lincoln, 1984) at 37.

Figure 2.6: Papimahaw Asinîy, now held in the Royal Alberta Museum.

Story	**Significance of kwayaskwewin on arrivals**	**Miyo-wîcêhtowin**	**Wâhkôtowin**	**Jurisdiction**
The Creation of the Neutral Hills	New land is 'birthed' to interject in the relationship between nêhiyawak and the niitsitapi.	K'se Man'to provides the hills to assist both the nêhiyawak and niitsitaapi to move towards peaceable relations.	Resulting kinship between niitsitapi and nêhiyaw peoples, including in sharing parts of the territory.	Provides a geographical boundary for nêhiyaw people. Delineates the procedure involved in trans-systemic relationship.
The Child Who was Lost	The growth of the child includes learning ceremony from the acquisition of medicines across nêhiyaw askiy.	Lands and waters provide the child with medicines to ensure his survival.	The ceremonialism involved serves as a process to ensure good relations with lands. Also ensures visiting.	Sets out the physical geography of nêhiyaw askiy, and ties this jurisdiction to ceremonial processes.
Mistasinîy – Buffalo Child Stone	The loss (and adoption) of Buffalo Child revitalizes laws between buffalo and humans.	Identifies laws followed by the buffalo to provide for humans	Conversely, sets out obligations for restraint, gifting, and ceremony in human relationships with buffalo.	Bounds human/buffalo relationship. Limits the scope of 'right' to hunt buffalo. Obligates humans to specific procedure during hunts.
Mihkomin Sahkahikan (Red Berry Lake)	Protocol provided to the lake in order to facilitate the reception of the gift of horses.	Mistatim (horses) provide master assistance to humans, especially on the prairies.	Conversely, set out obligations for caretaking, restraint in use, gifting, and ceremony in human uses of horses.	Bounds human/horse relationship. Limits the scope of use of horses. Ensures protocol and ceremony guide relationship.

Papamihaw asinîy/flying rock	Provides an astral interjection into the relationship between the nêhiyawak and niitsitapi.	Through non-human gifting, re-orients relations on the land.	Obligates niitsitapi and nêhiyaw people to engage in ceremony when sharing the land.	Enables an ethic of shared living between nêhiyaw and niitsitapi people

Figure 2.7: Table of Key Analysis of Stories

j. General Analysis: Gifting Jurisdiction

Each of the stories above describe obligations for nêhiyaw peoples and society generally. It also supports the stated belief that lands and waters are an autonomous force that human beings are wholly dependent upon. In *Neutral Hills*, new askîy is provided between nêhiyaw and niitisitapi peoples to intervene in their harmful relations with each other. Similarly, in the *Creation of Buffalo Lake*, nipîy is provided as a gift to the people to abate the under-nourishment the people are suffering from. In *Redberry Lake*, horses are similarly provided as a gift to the people, once again from nipîy. While more will be talked about the human-animal relationship and the role narrative plays in setting out legal norms in their relationship in Chapter 4, *Red Berry Lake* provides a specific location for this gift. In the *Creation of Buffalo Lake*, beyond an immediate need for food, we were gifted with the lake that would provide an enduring sustenance and shelter and ensure miyo pimâtisiwin or good living. The gifting of lands and waters is considered "iyiniw saweyitakosiwin (the people's sacred gifts)…that originate in the special relationship [nêhiyaw] peoples have with Creator."[265]

Conversely, these gifts place obligations on nêhiyaw peoples. We are obligated to engage in wîtaskêwina, or peaceful living together with other humans, (*Neutral Hills* and *Papimaw Asinîy)*. The gifting of animals to further miyo pimacehiwin (good livelihood)

[265] Cardinal & Hildebrandt, *supra* note 1, at 100.

provides a different set of obligations. For those relations that we actively nourish ourselves on, we have heightened wâhkôtowin obligations that guard against over-reliance on violence towards them, towards avoiding wasteful conduct, and improper uses of the lives exchanged for our survival, improper speech towards them, and failure to continue a relationship with them (the *Creation of Buffalo Lake* and *Buffalo Child*).

The transformation of lands and waterscapes as a gift for nêhiyaw peoples, can be viewed as analogous regarding law – that legal landscapes necessarily adjust to accommodate, protect, and provide for newcomers. Thus the development of nêhiyaw law is not human-centered, but is conditioned by these experiences and interactions on the land. In this manner law is not dictated to those it intends to subjugate, but moreso blankets and shelters all entities and agents involved in and upon the land. It causes nêhiyaw peoples to consider obligations that move beyond mere adherence to the life, liberty, and security of others, but how we are obligated – like the lands, waters, and animals – to provide vital parts of us for others to survive. While our humanness will always cause us to gravitate towards our needs for survival (we are often described as the most pitiful of all beings because of our inability to survive without the assistance of other animals), provision is not a one-way relationship. Nêhiyaw law, and its interactions with other social and legal norms, is inherently inter-societal.

This provides a new insight into the meaning of wîtaskêwin, that living together on the land requires legal transformation (not just social, physical, or material adaptation). As nêhiyaw people come onto new lands and into new relationships on old lands, the stories above show that nêhiyaw law is transformed with each transaction.

Observation, ceremonialism, and deliberation inform how nêhiyaw people transform law to live well with other beings and things.

Analogizing the gift-obligation relationship to law reclaims an understanding of law as a gift. The reception of gifts is not a passive act.[266] It is based on the hard work of kinship and relating generally to non-human beings, things, and entities. Observation and deliberation ensures we are entering these relationships in a proper way. Protocol institutionalizes this proper introduction to the relationship. In one manner, ceremonies can be viewed as complex systems of gift-obligation. Thus the gifting that occurs to nêhiyaw peoples is the result of the proper engagement of nêhiyaw agency in the respect of non-human autonomy.[267]

k. Reflections on Gender within the Stories

I acknowledge that my interpretations of the stories, like all of my observations within this dissertation are influenced by my positioning and experiences as a nêhiyaw napêw (Plains Cree man). Much of these stories have been retold and recorded by men. Implicit gender bias and explicit gendered power imbalances in the recording and retelling of stories, often obscure the individual and collective agency of other genders in their

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[266] In reviewing a draft of this dissertation, Rebecca Johnson raises the significant point of human providing reciprocal gifts to the ecological world of kinship and relationality through vibrations and other energies, including artistic. While beyond the scope of this dissertation, there is a valuable question on the role of Indigenous performing arts as a distinct human gift to the natural world, given a deeper understanding of the health and wellness qualities that these arts provide. See Max Peter Baumann, "Preface: Music and Healing in Transcultural Perspectives" (1997) 39:1 The World of Music 5. This ties into the sweetgrass experiment by Robin Wall-Kimmerer discussed in the next chapter.

[267] Orit Kamir advocates the broadening of how we conceive dignity and respect in a pluralistic, multicultural world to "to maintain the discourse of human rights and adjust it to a world which is ever more pluralistic and multicultural." See Orit Kamir, Applying Dignity, Respect, Honor and Human Rights to a Pluralistic, Multicultural Universe (2015) European Institute Working Paper RSCAS 2015/55. As "any deep consideration of any aspect of dignity combines philosophical, political and legal perspectives with psychological, sociological, anthropological and theological ones", the observations in this dissertation can lend support to viewing the practice of this view of the autonomy of non-human being and things, and the implication on law as a human right. *Ibid* at 2.

retelling.[268] As law is gendered through its "language and reasoning", we also must be cognizant "that gender matches the male gender of its linguistic architects."[269] This same reasoning can be applied to stories, that gender representation in stories is going to match the male gender of narrative architects.

Because these stories are resources of law and governance practices, gender imbalances portrayed in these narratives can be entrenched under the guise of traditionalism. As Snyder, Napoleon and Borrows state: "tradition is not neutral and it can be purposefully deployed in ways so as to discipline and morally police women."[270] In particular my reflections on the importance of ceremonialism portrayed in the story can be employed in a harmful manner as "evocations of culture and tradition can corrosively inhibit nuanced, non-essentialized views and practices of Indigenous law."[271] In this manner, the stories are not gender neutral. In *Mistasinîy, and the Creation of Wîtaskêwin*, the centering of males as protagonists, attributes the legal pedagogy described within them as either implicitly or overtly as a male-dominated domain. This is particularly true with the ceremony involved.

While not readiliy apparent in the stories reflected upon in this chapter, these narratives can essentialize gender roles through the conflation of historical roles of women and girls to motherhood. Examples of this include rhetoric that talks of women as 'mothers of nations' or are the 'backbones of our communities.' Moreso, in these stories, we see a

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[268] For a detailed analysis of the implications of gender imbalances within Cree stories, see Emily Snyder, *Gender, Power, and Representations of Cree Law* (Vancouver: UBC Press, 2018). [Snyder, *Representation*]
[269] Lucinda Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning." Notre Dame L.Rev 64: 886 at 892. [Finley, *Breaking Women's Silence*]
[270]Snyder, Napoleon, & Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593 at 618.
[271]*Ibid* at 618.

positive essentialization of the male gender, as they are held out to be the ones who are going through the challenges/hardships, and thus are worthy of the gifts provided to them. The absence of women in these roles in the stories can lead to what Snyder, Napoleon, and Borrows suggest is the effect of "ultimately obscur[ing], mischaracteriz[ing], and too narrowly fram[ing] Indigenous women's options, choices and contributions within their societies. This is particularly problematic when women's responsibilities and contributions as citizens are only framed in relation to nurturing and caring for the nation."[272]

As I have previously written, "[l]egal theory can do the work of teasing out the nuances in these terms and find their flexibilities and fluidity." [273] Utilizing the analytical frame developed by Emily Snyder, these questions arise: [274]

Original Question(s):	**Issues of gender involved in the question.**	**Questions on Gender:**
What guidance on wâhkôtowin and miyo-wîcêhtowin is provided by the story?	Gender roles and expectations can be implicitly guided through interpretations of wâhkôtowin and miyo wîcêhtowin.	Are conclusions on wâhkôtowin and miyo-wîcêhtowin in the story gendered? What are the implications of this?
What types or instances of authority are signaled in the story?	Stories are often male-oriented, signalling where authority lies or is delineated in gendered manner. Processes that lead to the delegation of authority can be gendered.	What are the gendered implications of this authority? How can these gendered implications be addressed?
Do sacred processes or natural laws play a role in the story? What is the	Essentialized gender roles can be entrenched through dialogues about	Are there harmful messages regarding non-male agency in dealing with and transforming sacred or natural laws?

[272] *Ibid* at 611.
[273] Lindberg, *Sacred Changes, supra* note 76, at 43.
[274] Snyder, *Representation*, *supra* note 268, at 7.

role of human agency in these laws?	the sacred and natural law.	Do the sacred or natural laws reinforce negative or harmful gender stereotypes?
Who recorded this story? For what purposes? Are there multiple versions of these stories?	The textual recording of stories is often done by anthropologists, who often sought male voices for these stories. Implicit gender biases can occur in the recording of stories.	Are there versions of the story told by other than men? Are there contemporary criticisms of the story and storyteller based upon possible gender biases?

The representation of men and women in the stories, and the agency displayed is problematic. The four stories I relied upon in this chapter show little to no agency of non-male characters. *The Creation of Buffalo Lake*, *Buffalo Child*, the *Neutral Hills*, the *Making of Wîtaskêwin*, and *papimihaw asinîy* provide no explicit description of female decision-making within it. Relying upon these stories without considering the absence of women in the stories mischaracterizes nêhiyaw law and constitutionalism. The male-dominated retelling (and thus reinterpretation) of these stories may have distorted, silenced or forgotten the role of nêhiyaw iskwêwak and iskwêsisak in these events.[275] Further, as the stories signal ceremonialism as a way to ensure good relations with the natural world (for example the pipe ceremonialism in the *Child Who was Lost*, or the Horse Dance ceremony in *Red Berry Lake*), we must be critical on how this conclusion is utilized. As the gendered nature of nêhiyaw ceremonialism has express implications on

[275] The prevalence or dominance of male charactering in the stories above mischaracterizes the positioning of power historically in our communities. Consider the story I re-told of *the Child Who Was Lost*. The gifting of ceremonial protocol (pipe ceremonialism) is gendered – nêhiyaw communities have gendered protocols within various ceremonies. Retelling the story, without due attention to gender, reinforces the power imbalances that the gendered nature of our ceremonies can and do create. Recasting the gender in this story is a clear, transformative act.

gendered power imbalances, the importance of ceremonialism portrayed in the stories should not be associated with male privilege or right to enact ceremony.[276]

Aside from being critically vigilant in my interpetations of law within the stories, I am cognizant of my individual and our collective agency to address gendered imbalances on how we carry these interprations forward in our respective pedagogies. For example, the Indigenous Law Research Unit at the University of Victoria engaged in a gender project that uses stories to actively address gender issues within Indigenous law.[277] Similarly, a practice I am continuing to do is to interchange genders in retelling these stories. For example, speaking at the Indigenous Solutions for Environmental Challenges Conference at the Banff Center for the Arts in November 2018, I relied upon the *Creation of Buffalo Lake* to support my call to consider wâhkôtowin as a potential avenue to respond to environmental harms caused by corporations. By changing the genders in the story – as you recall, the story involves hunting and ceremony, roles that are often portrayed as male within nêhiyaw societies – it works to recast how gender is portrayed. As incremental as this is, the public use of stories becomes more accurate to the gendered nature of the practice of not only these roles but law within nêhiyaw communities. This dissertation will continue to use the questions from the table above as a guide in the conclusions it draws.

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[276] See my LLM thesis for a sustained critique of the gendered nature of nêhiyaw ceremonies. Lindberg, *Sacred Changes, supra* note 76.
[277] See Jessica Asch and Darcy Lindberg, *Gender inside Indigenous Law:* Toolkit (2016) Online: Indigenous Law Research Unit, <https://www.uvic.ca/law/assets/docs/ilru/Gender%20Inside%20Indigenous%20Law%20Toolkit%20October%202017.pdf> ; Jessica Asch and Darcy Lindberg, *Gender inside Indigenous Law: Casebook*, (2016) online: Indigenous Law Research Unit <https://www.uvic.ca/law/assets/docs/ilru/Gender%20Inside%20Indigenous%20Law%20Casebook%2001.01.16.pdf.>

V: Colonial Interventions of Abstraction

a. Abstraction through Land Tenure

We also have contemporary stories that are telling of how we constitute nêhiyaw âskiy. Âcimowina about colonial interuptions to nêhiyaw constitutive practices are vitally important to recall as well. These stories show how the juris-making cycle that guided nêhiyaw land relations has been interrupted over the last 150 years. The onset of the common law (and its resident liberal legal philosophies) has affected the continued use of the gift-obligation ethic described above. Brian Noble observes that the gift-obligation orientation of treaty ecologies "is very different form the norm of action in deeply entrenched liberal settler-Indigenous political, social, cultural, and economic lives."[278] He contends:

> "coloniality can be thought of as the tendency of a "self" in an encounter to impose boundary coordinates – such as those as territory, knowledges, categories, normative practices – on the domains of land knowledge, ways of life of another who has had prior principal relations with those lands".[279]

Fueld by a logic that views non-human beings and things primarily as property and commodity, the property laws within the common law are often opposite wâhkôtowin's relational ethos. The propagation of this way of thinking replaces real relationships within our lifeworlds with an alienating practice that Brenna Bhandar calls a *commodity logic of abstraction*.[280] This process of abstraction erases the "social bond" that is "presuppose[d]" between an owner and their private property.[281]

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[278] *Noble, Treaty Ecology, supra* note 161, at 322.
[279] *Ibid* at 322.
[280] Brenna Bhandar, "Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony" (2015) 42:2 J of Law and Society 253
[281] See David Harvey, *Seven Contradictions and the End of Capitalism* (Oxford: Oxford University Press, 2014) at 39.

One of these âcimowina is the situation George Rain faced early last century in trying to continue his relationship to the land while adapting to common law land tenure concepts. Rain drew his treaty annuity as part of Samson's band.[282] Like the majority of Indigenous peoples in Saskatchewan and Alberta (my family included), Rain farmed post-Treaty 6.[283] As he homesteaded off-reserve, Rain's Indian status created a legal problem: as a status Indian, he was not eligible for a homestead allotment.[284] Despite homesteading upon the traditional territories of nêhiyaw and Stoney peoples, he was a squatter according to Canadian state law.

Rain faced a difficult but all too common decision of that era for a status Indian: to eligible to apply for a homestead, he had surrendered his treaty rights. However, this was not a simple paper transaction. In order to be eligible for a homestead, Rain also need to prove he had transitioned into moniyaw way of living. As the Indian Agent advocates in Rain's homestead application at the time:

> "From the report of our Agent it certainly appears that [Rain] is not leading what is regarded as the Indian mode of life. When he hunts and fishes he hunts and fishes as a white man. He works at the saw-mill and does freighting. He is settled on land outside of a reserve, has broken ground and put up fencing. He owns horses and cattle, and other property." [285]

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[282] Though he was part of a Plains Cree band, Rain is identified as Stoney in the correspondence. Such multi-culturalism was and is a common place within Plains Cree First Nations. See Library and Archives Canada, Black Series, R216-245-8-E. "General Correspondence Regarding Admission to and Discharge from Treaty in the Hobbema Agency" MIKAN no. 2058964, Microfilm reel C-10203. Online: Collections Canada: <http://collectionscanada.gc.ca/pam_archives/index.php?fuseaction=genitem.displayItem&rec_nbr=2058964&lang=eng&rec_nbr_list=2061389,2061880,2059264,2058964,2059726,2058935,2059266,2059027,2058011,2061802> items 66 to 84. [*Rain Correspondence*]

[283] See Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990).

[284] Section 126 of the *Indian Act* in 1904 made status and non-status Indians ineligible to homestead land in the prairies.

[285] In correspondence dated November 4th, 1904. *Rain Correspondence, supra* note 8.

As this situation shows, these policies not only targeted Indigenous peoples through legal status, but also normatively. It is not only concerned with Rain's legal status, but with his practices within his day to day life. [286] The attempted severance of these constitutional relationships is not only *jurispathic* in its consumption of other legal systems but attacks the normative heart of Indigenous legal orders.[287]

As I read these correspondence, it is clear that the local Indian agent is a strong advocate for Rain, while the regional and national offices are seemingly indifferent to the dangers he faces in surrending his treaty rights.[288] This was a common dilemma faced by status Indians at this time. For example, when the Maskwacis reserves were created in the late 19th century, there were internal debates on whether it was better stay in treaty and be subjugated to the *Indian Act* or to take scrip as a 'halfbreed' and live off the reserve.[289] Proponents of taking scrip understood the paternalistic pressures that those who lived on reserve would face.

While the correspondence (nor my subsequent research of the homestead records of the Pigeon Lake area) does not reveal whether Rain was successful in gaining a

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[286] George Rain's circumstance was not only a normative challenge, but a strict legal one as well. In a series of subsequent letters between the local Indian agent, the regional office, and the federal department of Indian Affairs, officials struggle to find a legal justification to unencumber Rain from the strictures of the *Indian Act*. As the Department of Indian Affairs asserts at the time: "Section 126 of the Indian Act makes every Indian and non-treaty Indian ineligible to homestead or pre-empt land in Manitoba or the North West Territories. Now unless a discharge from treaty makes an Indian cease to be an Indian or non-treaty Indian, it would under that section be impossible to protect George Rain in his occupation of the land upon which he has squatted… " In correspondence dated May 30th, 1904, *Rain Correspondence, supra* note 8.

[287] As Robert Cover notes, "[c]ourts, at least the courts of the state, are characteristically jurispathic" as he argues their need is "to suppress law, to choose between two more more laws, to impose upon laws a hierarchy." See Robert Cover, The Supreme Court, 1982 Term – Foreword: Nomos and Narrative (1983). Faculty Scholarship Series. Paper 2705, at 41.

[288] *Ibid.*

[289] As a Mr. Wadsworth, Inspector for Indian Affairs reported in 1886, "those who have already taken discharges take every opportunity of taunting those who are apparently contented to remain Indians by calling them slaves and saying every thing you have belongs to the Government." See *Montana Band v. Canada*, 2006 FC 261 (CanLII), <http://canlii.ca/t/1mp5m> at para. 155.

homestead allotment, the letters capture the ambition of Indian Affairs to use Rain's predicament to further their strategies of reserve land surrender during the period. In March 13th, 1907, the secretary of the Department of the Interior writes:

> "If it is of the opinion that entry should be granted to the Messrs. Rain for the lands in question if they are enfranchised, and time ripe for the formation of a precedent for their introduction by proclamation of the Governor in Council into the Province of Alberta and other of the younger provinces, also [consider] whether he would think it desirable to give these two men a portion of the reserve (which would be a fundamental necessity of their enfranchisement) in addition to the proposed homestead."

Such land surrenders – this one by allotment in severalty - were a common strategy taken by Indian Affairs in this period to resolve "the Indian problem." [290] In her study of land surrenders from reserves in the prairies between 1896 and 1911, Peggy Martin-McGuire found that "21 per cent of the land reserved to prairie First Nations were surrendered to the Crown to make way for western expansion and influx of immigrants."[291] Surrender strategies included the improper inducement of First Nations by officials, faulty or dubious voting practices on potential surrenders, the use of procedure that violated surrender provisions within legislation, and *Indian Act* amendment to allow for easier surrenders.[292] The conditions proposed to attach to Rain's enfranchisement displays the cravings of Ottawa at the time to diminish reserve lands.

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[290] As Duncan Campbell Scott stated he wanted "to get rid of the Indian problem" by continuing assimilative policies, "until there is not a single Indian in Canada that has not been absorbed into the body politic." See National Archives of Canada, Record Group 10, vol. 6810, file 470-2-3, vol. 7 55 (L-3) and 63 (N-3).

[291] Peggy Martin-McGuire, (1998) First Nation Land Surrenders On The Prairies, 1896-1991 Executive Summary, Online: Indian Claims Commission <http://publications.gc.ca/collections/collection_2017/trp-sct/RC31-93-1998-1-eng.pdf> at xiii. Indigenous nations in the United States share this history with the Dawes Act in 1887, and subsequent amendments. See *"General Allotment Act (or Dawes Act), Act of Feb. 8, 1887 (24 Stat. 388, ch. 119, 25 USCA 331), Acts of Forty-ninth Congress–Second Session, 1887;* Rose Stremlau, "To Domesticate and Civilize Wild Indians": Allotment and the Campaign to Reform Indian Families, 1875–1887.(2005) 30 *Journal of Family History* 265; Thomas King, *The Truth about Stories: A Native Narrative,* (Toronto: House of Anansi Press, 2003) at 130; Kristin Ruppel, Unearthing Indian Land: Living with the Legacies of Allotment, Albaquerque: University of Arizona Press, 2008).

[292] *Ibid* at xxi-xxiii.

b. Enclosure of Lifeworlds

These land enclosure strategies in the late 19th and early 20th centuries had devastating effects on the social, economic, spiritual and legal spheres of the nêhiyawak, of which common-law land tenure practices were a small part of. The destruction of buffalo populations (from historic populations believed to be well above 25 million to only several hundred remaining by 1880) severely disrupted the lives of the Plains Cree.[293] While contact narratives often romanticize the erosion of Indigenous political economies by settler-colonial influences as a natural consequence of settlement, a broader reflection on this period reveals the willful acts by the dominion government to bring Indigenous peoples into subjugation.[294] The destruction of the buffalo in both Canada and the United States was aided by aimless hunting expeditions, which served only to deprive prairie Indigenous nations of a key relation to their sovereignties.[295] Further, Canadian governmental policy was complicit in the outbreak of experiences of starvation and disease experienced by Plains Cree peoples during this period.[296]

Discriminatory intervention into Indigenous farming further stunted the well-being of reserve political economies. As Sarah Carter notes, "[q]uite contrary to the belief that the Indians of the plains had maintained an undeviating way of life for centuries, the

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[293] Scott Taylor, "Buffalo Hunt: International Trade and the Virtual Extinction of the North American Bison" (2007) 101:7 American Economic Review 3162.

[294] For a sustained examination of the mythologization of Indigenous peoples in North America, see Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America* (Minneapolis: University of Minnesota Press, 2013); Daniel Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992).

[295] See Adrian Jawort, "Genocide by Other Means: U.S. Army Slaughtered Buffalo in Plains Indian Wars", *Indian Country Media Network* (10 April 2017) online: <https://indiancountrymedianetwork.com/news/genocide-by-other-means-us-army-slaughtered-buffalo-in-plains-indian-wars/>.

[296] James Daschuk, *Clearing the Plains: Disease, Politics, Starvation, and the Loss of Aboriginal Life* (Regina, University of Regina Press, 2013) [Daschuk, *Clearing the Plains*].

Cree['s]…history was one of constant change and adaptation."[297] With the loss of such a cornerstone relation, nêhiyaw peoples turned towards farming. Carter notes, "[f]rom 1889 to 1897 [reserve agriculture] was subjected to unprecedented administrative involvement by way of allotment in severalty and the 'peasant' farming policy."[298] Allotment in severalty removed portions of land from reserves for the homesteads of enfranchisement applicants.[299] Thus, successful enfranchisement resulted in losses in the landscapes under band control. It also severed the individual nêhiyaw farmer from his or her spiritual, social, economic and legal place within his or her community, while dissolving the tenuous land base of Plains Cree communities, which were allotted through the reserve system. The 'pass system', or policy requiring on-reserve residents to get permission from Indian agents to leave their reserves, created a system of physical enclosure for nêhiyaw communities. Without the free ability to enter into the social and economic lifeworlds of settler peoples, it ensured the social, political, economic and spiritual practices of the nêhiyaw could not integrate with (and be an influence upon) settler communities. A final enclosure policy targeting the Indigenous person was the creation of residential schools.

Returning to the normative pressures of assimilation, enfranchisement required a status Indian to speak English or French proficiently, to have a school-based education, and be deemed of 'good moral character.' Or in essence, sufficiently adapted to a Euro-Canadian mode of living. Enfranchisement not only meant that communities lost

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[297] Carter, *Lost Harvests, supra* note 283, at 31.
[298] *Ibid* at 193.
[299] *Ibid* at 194.

members from their geographic sphere (as it meant they would live off-reserve), but also socio-political positions within nêhiyaw societies.

While many of these enclosure policies may seem contradictory (some isolate Indigenous peoples away from interactions with the settler, while others seek their assimilation into settler lifeworlds) there were two main strategies at play.[300] The first was *tutelage*, informed by a belief that with proper instruction, nêhiyaw peoples would move away from their constitutive social and legal norms and assimilate to settler-colonial legal and social orders. Enfranchisement, severalty, and the residential schools sought to 'teach' the nêhiyaw of European practices. The second was *isolation*. The nêhiyawak, a people whose history involved movement and who were accustomed to such transitions, were stopped from continuing mobile and transitional practices.[301] Enclosure was integral to both strategies. Further, both required targeting not only Indigenous lands, but Indigenous peoples themselves.

Such policies further abstract nêhiyaw relationships with the land towards the commodity logics of the common law. Bhandar contends that the commodity logic of abstraction disproportionally affects Indigenous peoples in a negative way.[302] She notes that:

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[300] See Colin Calloway, *White People, Indians, and Highlanders: Tribal People and Colonial Encounters in Scotland and America* (Oxford: Oxford University Press, 2008) for another sustained look at Indigenous enclosures.

[301] As John Borrows notes, there are traditions of mobility, both physically and philosophically, practiced by many Indigenous communities, that colonization has significantly hampered. Canadian jurisprudence has particularly affected Indigenous conceptions on the freedom of physical and philosophical mobility. See John Borrows, "Physical Philosophy: Mobility and Indigenous Freedom" in *Freedom & Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) [Borrows, *Freedom*]. Further, the reserve system has impeded the fluid nature of community memberships with respect to the intercultural and inter-societal habitation that occurred before the treaties. See Rob Innes, *Elder Brother and the Law of the People: Contemporary Kinship and Cowessess First Nation* (Winnipeg: University of Manitoba Press, 2013) [Innes, *Elder Brother*].

[302] Brenna Bhandar, "Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony" (2015) 42:2 J of Law and Society 253

> "The commodity logic of abstraction obliterates pre-existing relations to the land, and pre-existing conceptualizations of land as something other than a commodity. The legal form renders invisible (and severely constrains) the ways in which people live, act, (re)produce the conditions of their existence, and relate to one another in ways not confined." [303]

As George Rain's predicament shows, the "logic of registration" has had devastating effects for Indigenous communities. For example, the development of the Torrens system in South Australia in the 18th century – the model for contemporary land registration within Canada - resulted in the dispossession of Indigenous lands and territories.[304]

c. Transitioning back to an inspirited view of lands and waters

George Rain's story exemplifies the dual avenues that prairie governance, at the behest of Canadian constitutionalism, turned away from nêhiyaw relationality. It pragmatically subjects the land to a different legal praxis, while simultaneously attempting to change those who practice this relationality. Enclosed and commoditized, the land loses its relational value within the nêhiyaw gift-obligation praxis for an abstracted value as a product.[305] Bhandar argues that this is the "cunning of abstraction" where a registration logic versus a relational logic "congeals multiple forms of use value, the various types of labour involved in producing, cultivating" and "tending to the land."[306] Forced to adopt

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[303] Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) at 98-99.

[304] See *ibid;* The logic of registration has had a similar effect in Canada as well, specifically when Indigenous nations who have not signed treaties or contest the land cessation that occurred through treaty, the respective registrar has been an obstacle in protecting lands. See Paulette et al. v. The Queen, 1976 CanLII 200 (SCC), [1977] 2 SCR 628. In Paulette, the Supreme Court ruled that sixteen chiefs could not register caveats indicating Aboriginal title on unpatented crown lands.

[305] See Alan Pottage, "The Originality of Registration" (1995) 15 Oxford J. of Legal Studies 371. Pottage links the development of a 'logic of registration' in modern real property law to the continuing abstraction away from actual possession.

[306] *Ibid* at 264. As Bhandar notes the words of Toscano describing Marx's notion of real abstraction: "from [a' fundamentally intellectualist notion of abstraction…to a vision of abstraction that, rather than depicting it as a structure of illusion, recognizes it as a social, historical, and trans-individual phenomenon." See A.

Canadian-state law to continue to live upon the âskiy he homesteaded on for over a decade, Rain has to adopt *common-law storytelling* about the land. He describes it in numbers only (Section 12, Township 47, Range 2 in the 5th Meridian). His working of the land is deemed an 'improvement', abstracting from a relational view of the spiritedness of the land. It is far from acknowledging its autonomy. Such turn to abstractions were always contemplated as such by nêhiyaw peoples. Our term for reserves, askîhkân, acknowledges this. It translates literally into 'fake land.'[307]

VI. Re-bundling Canadian Constitutionalism

What lessons do these askîy acîmowina – both our older creation stories and those about land surrender - provide? The maintenance of understandings of the *inspirited* nature of non-human beings (and non-beings) ensures relational thinking, even amidst norm creation and transformation. It also guards against nêhiyaw conceptions of law becoming over-reliant on form rather than the historical and day-to-day normative practices. As these land stories show us, our legal responses are contextualized by the movements of non-human agents. As I discuss further in this dissertation, our ceremonial practices are the physical embodiment of this philosophy – that law is contextual to the time, place, and the relationships of the agents involved. Rather than codifying or legislating how we view asinîy (rocks or stones) as kôkoms and môsoms, ceremony ensures we are *practicing* these relations, not just *observing*.

Toscano, "The Open Secret of Real Abstraction" (2008) 20 Rethinking Marxism: J. of Economics, Culture and Society 273, at 275.

[307] The other term employed is iskonikan, which translates into, left over land. This implies that lands reserved were the 'left-overs', the best land was held for homesteaders

Or to put another way, the integrity of relationships with the natural world favors nuanced, living legal relationships over fixed, static law.[308] Nêhiyaw legal jurisdiction is created and sustained through wîtaskêwin creation and renewal. Restoration of our philosophies on the role of the ahcâhk in all areas of our legal thinking can restore legal relationality[309] in the wake (or perhaps the continued face) of the assertion of the commodity logics of abstraction. It sets out a horizontal, egalitarian view of our relationships with other inspirited beings and things. In thinking of the purpose of âtayôhkêwina as constitutional text, I think of the significance of stories in our constitutional works. "Constitutions are the stories nations tell about themselves." [310] Implicit in the use of âtayôhkêwina within placemaking is the act of rooting deep within nêhiyaw askîy.[311]

This raises the question of how Indigenous constitutionalisms generally, and nêhiyaw constitutional practices specifically, can aid the deeper rooting of Canadian

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[308] Malcolm Lavoie argues that a property law system does provide the ability for local relationships to prevail on lands, and thus allows for nuanced, living legal relationships as well. He argues that "property rights play an important but largely under-appreciated role in channeling local knowledge into decisions about physical resources." See Malcolm Lavoie, "Property and Local Knowledge" (2020), *Catholic Univeristy Law Review* (Forthcoming).

[309] Of course, the caution offered by Starblanket and Stark regarding how we envision relationality is important. My use of it here is not to romanticize relationality as perfect or always harmonious. However, further relationships is important for legal kindness. This is why kiyokewin, or visiting, is a foundational nêhiyaw principle.

[310] Eric Adams, "Canadian Constitutional Identities" 2015) 38:2 Dalhousie Law Journal.

[311] Considering that using the word 'deep' to describe the rooting examined above is subjective, I offer this thought to aid my thinking here. My partner - who is gifted with the ability to work with plants and the continued curiosity that furthers her relationships with them – once described to me once the process of rooting that occurs once an area is cleared by fire, human intervention, or otherwise. The first plants that root are usually those who seek to reach out horizontally as a strategy. Unconcerned with sturdying their roots deeply, they use all their energy on choking away space, occupying as much land as possible to prevent others from the sunlight. This strategy is fruitful, at first. It is only later, when these plants persist through the ambition of the thinly-rooted plants that the land becomes deep-rooted with those who walk amongst it. I consider nêhiyaw placemaking as engaging in setting roots deep in the earth. This is why the language in which we describe our legal relationships to the land is so important. We describe it as an obligation-based relationship (rather than rights-based) for us to consider what is within our individual and collective ability to tend to these obligations.

constitutionalism. Replacing rights-based theory with gift-obligation theory and practice is one step. As Tully notes, (re)conciliation in Canada is fundamentally two integral processes, (re)conciliation between Indigenous and non-Indigenous nations, and human (re)conciliation with the earth.[312] He notes that:

> Every second of the day the living earth gives countless gifts of goods and services needed to sustain all the interdependent forms of life, beginning with the air you are breathing here and now…Gift exchange at treaty talks reminds partners that they too should see themselves as both embedded in these cyclical gift-reciprocity relationships".[313]

Thus, reconciliation of nêhiyaw law with the earth requires conciliation between the Canadian state and nêhiyaw worldviews. Aaron Mills observes a "practice of gift – ordering" within Anishinaabe constitutionalism. Mills' vision provides a similar path to (re)conciliation, or as Mills puts it, a 'giftway'.[314] Both Tully's and Mills' provide separate but similar thinking on recentering gift-obligation practices within our constitutive ordering.

One challenge is how the propertization of lands impacted our use of the sites of many of our constitutive stories. As I mentioned earlier, the mistasinîy that memorializes the story of *Buffalo Child Stone* resides under Lake Diefenbaker, a human-made lake after the South Saskatchewan River was dammed in 1967.[315] The papimihaw asinîy (flying rock) sits in the Royal Alberta Museum, with the museum claiming ownership of the stone.[316] Hardisty, Alberta, where The *Child Who was Lost* is set, remains a hub for

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[312] See Tully, *Reconciliation, supra* note 205, at 88.
[313] *Ibid* at 88.
[314] See Aaron Mills, Miinigowiziwin: All That Has Been Given for Living Well Together One Vision of Anishinaabe Constitutionalism (Ph. D. Dissertation, University of Victoria Faculty of Law, 2019) [unpublished] at 72-78.
[315] Stan Cuthand, "mistasinîy" in Earl H Waugh and K Dad Prithipaul, eds, Native Religious Traditions (Waterloo: Wilfred Laurier University Press, 1979) at 34.
[316] Poirer, *Hunting buffalo under ground: encounters in heritage management* (Doctoral Thesis, Memorial University of Newfoundland, 2018) [unpublished] at 1. [Poirer, *Hunting Buffalo*]

pipelines that move oil and gas eastward. The nêhiyaw and Dene communities at *Buffalo Lake* have long been replaced by moniyaw settlement.

However, because access to sites of stories has been limited, it does not mean land-based learning has diminished. The continuation of these stories provide a metaphysical experience on askîy. This is also aided by contemporary forms of art, literature, and dance. Finally, each of these stories is closely linked with our ceremonies. The same lessons that are transmitted through *Buffalo Child Stone* are closely linked to our protocols for use of buffalo during our matotisan and thirst dance ceremonies. The Horse Dance ceremony provides the procedures described in *Red Berry Lake*. The pipe ceremony, as described in *The Child Who Was Lost*, and its origins is an integral process for nêhiyaw legal relations.

a. Kiyokewin: The Act of Visiting

We are also required to continue to visit. Métis writer and legal knowledge holder Maria Campbell reminds us that visiting is one of our most fundamental part of our laws and governance. Wîtaskêwin, if we consider it as neighborliness in one of its conceptions, requires visiting as a necessary precondition and project of renewal. Anna Corrigal Flaminio notes that kiyokewin provides a methodology and an analytical lens that provides deliberative processes and healing situations and environments.[317] As part of my work for this dissertation, on several occasions I have visited some of the sites I have talked about in this chapter. While I cannot share all of my reflections here, these visits were instrumental in my understandings of nêhiyaw âskiy, the constitutive elements

[317] See Anna Flamino, Gladue Through wâhkôtowin: Social History Through Cree Kinship Lens in Corrections and Parole (Master's Thesis, University of Saskatchewan Faculty of Law, 2013) [unpublished].

within each site, and their connection to each other. For example, in April of 2019, rising with the sun, I drove to visit four sites, Ribstone Hill (just outside of Viking, Alberta), Hardisty, Alberta (*The Child Who Was Lost*), the Neutral Hills, and Buffalo Lake. Travelling upon nêhiyaw âskiy, it is impossible not to be taken by its expansiveness. This expansiveness undoubtedly influences our stories and our laws. The descriptions in our stories are so significant to relate this information across the territory. The significance of these places, especially the hills, valleys, and lakes that interrupt this expansiveness, becomes apparent by visiting. My mind inevitably drifts to imagining buffalo, elk, antelope and moose traversing to the hills, valleys, and lakes. These vital confluences of life. It is little wonder why we have âtayôhkêwina attached to them.

With my dog, Maskwa, the day full of contemplation out on our territory. The morning had all the quietness of early spring, as though the plants and animals were taking a restful breath from enduring the last of winter. While this dissertation was at the foremost on my mind, as we left the city my composition changed. Any thought of theory or methodology melted away, as we drifted further away from the city with more space to 'feel' the land, a new awareness of the significance of our âtayôhkêwina began to take hold. The first stop was Ribstone Hill. The Ribstone site is a hilltop where a stone that has been carved into the shape of buffalo ribs. It is a historical and present-day site of ceremony. Though this is the only public site with such a stone, there have been discoveries of other ribstones in the area. From Ribstone Hill, you can see Iron Creek Hill in the distance, the historic site of *papimihaw asinîy*. From Iron Creek Hill you can see Flagstaff Hill, a hill that was a significant treaty site for nêhiyaw and niitisitapi

people, where it was said a niitisitapi chief was buried. The name Flagstaff Hill comes from the ceremonial prints that historically hung on the hill.

Figure 2.8: *The Ribstone at Ribstone Hill. I have taken care not to take detailed pictures of the area around, as there are a significant amount of prayer flags and tobacco offerings, as well as other gifts laid at the stone.*

When I arrived at the Ribstone, I was taken aback by the feeling of the site. It was centered, and full of prayer flags, tobacco offerings and other gifts around the site. North of the stone is a small thicket of bushes and trees; these too were full of flags. Perhaps it was my attenuation of the site with my previous ceremonial experiences, but the energy here was different. The height of the hill, though not daunting, provides another sense of the centeredness of the site. You could see in all directions for at least

fifty kilometers. Spending time at Ribstone, singing songs (I brought my drum) and offering cistêmâw, I was reminded of the link of sites and ceremony to different generations. My actions were the same as countless generations before me. Visiting showed me it is not only a site of ceremony but also a significant marker of territory. We forget about the presence of a place when we are thinking and theorizing on law within a city or academic institution; visiting displaces this forgetfulness. Visiting Ribstone reminded me of the quiet futility of theorizing law without grounding on the territory. Kiyokewin creates a unique experience based on unique spatial experiences and time. In a rush to have Indigenous laws considered on par with Canadian-state law, we can lose sight of the richness of the aesthetic of nêhiyaw law. I was moved by simply visiting.

Figure 2.9: *Approaching Iron Creek Hill*

I visited the Neutral Hills next. I was struck how the hills rise out of folds of the prairies as you approach them. Because of their surroundings, they maintain almost a mountain range quality. I can understand why we have a creation story attached to them, I could see them almost shaped by hand, as though someone pulled the earth up, and made them the shape they were. I can imagine their significance as a wintering spot, a territorial marker, and a view of the land.

Figure 2.10: *Atop the Neutrals*

My final visit that day was to Buffalo Lake. I was struck by how plentiful and large the lake was. There were large marshy shores where medicines were certainly ready to spring forth again. Two large coyotes roamed through the marshes, popping out every so often in the distance. Visiting helped me understand the connection between

relationality and survival; everything from the lake, the waters, the animals that use its shores, the medicines growing in it, the fish underneath its ice, would have become part of those who lived there at the time of the story's creation.

Figure 2.11: *Maskwa tempting the shores of Buffalo Lake.*

My visits allowed me to further understand the dimensions and importance of the obligation to visit. I understand that kiyokewin, or visiting, is just as significant to the operation of our legal ordering as wâhkôtowin. It provides one avenue to practice the advice of Arsene Arcand, to remain close to the land and remain protected.

It is not that our communities have never stopped visiting. While the protocol and process has been interrupted by the Canadian state, âcimowina continue to be told. Further, land-based legal teaching is a necessary step in teaching Indigenous laws

generally, and nêhiyaw wiyasiwêwina specifically. For example, the new JD/JID program at the University of Victoria, legal teachings are occurring on the land, as well as through the respective land stories of various Indigenous nations and societies. Many schools have also engaged in field schools where land-based education is a priority.[318] Law students within the general degree program at the University of Victoria had the opportunity to engage in a field course in W̱SÁNEĆ Law, where they spent a full semester focusing on W̱SÁNEĆ legal practices, and how they are regenerated and continued through guided teachings on the lands and waters of Vancouver Island. The Osgoode Hall law program has begun annually to take part in an Anishinaabe Law Camp. Hosted by the Chippewas of Nawash First Nation on the Bruce Peninsula in Ontario, students are immersed in the ecology of Anishinaabe law. The University of Alberta has worked with Aseniwuche Winewak Nation to bring law students out onto its territory and, through the careful guidance of community elders and youth, learn about wâhkôtowin through exploring the connections to the non-human beings and things on AWN territory. Finally, while not affiliated with a law faculty, Dechinta Center for Research engages in land-based teaching socio-cultural practice forms the basis of the on-the-land university.[319]

b. Conclusion:

Finally, I consider these moves (back) to land-based pedagogies and to law within land/water stories as not only forms of legal pedagogy, but constitutional teaching as well. As Aaron Mills notes: “students need a course (and not just a few lectures) on an

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[318] See John Borrows, “Outsider Education: Indigenous Law and Land-Based Learning” (2016) 33:1 Windsor Yearbook of Access to Justice 1.
[319] See Dechinta Center for Research. Online:Dechinta < http://dechinta.ca/what-dechinta-offers/>

Indigenous people's constitutional order before they are prepared to being learning about its legal order."[320] It is shifting our pedagogies within law schools. I consider our ability to visit the spaces within nêhiyaw âskiy, to relate once again to our âskiy âcimowina, to reclaim our kinship with the inspirited around us as a high act of high law, a reconstituting practice, and perhaps quietly revolutionary. *Ekosi.*

My key observations and conclusions in this chapter are:

a. The constitutive practices of nêhiyaw peoples are displayed within âcimowina as they describe nêhiyaw place-making as land relationships are developed. Nêhiyaw conceptions on the ahcâhk and on gifting guide these place-making processes.
b. This place-making creates nêhiyaw jurisdiction. The cyclical flow between kwayaskwâtisiwin (being lawful or moral towards lands as waters), wîcêhtowin (aid provided by non-human agents and entities towards us), results in wâhkôtowin that sets out human obligations towards the ecological world. Thus, jurisdiction upon nêhiyaw âskiy is a relational paradigm with reciprocal obligations for nêhiyaw peoples, not a blanket right to govern the territory from a position of superiority over the ecological world.
c. These constitutive practices have been interrupted by the imposition of Canadian law. Property law concepts that sometimes diametrically oppose these relational understandings have abstracted these land relationships.
d. Renewal is an important to the revitalization of nêhiyaw placemaking and juris-making practices. Kiyokewin, or visiting, is vital to this renewal.

[320] Mills, *Lifeworlds, supra* 113 at 872.

Nisto (Three): Walking on the Breath of our Ancestors - Law through Nêhiyawewin

This chapter envisions a different type of visiting. A linguistic approach to law and constitutionalism provides key observations on the legal relations between humans and non-humans. The verb-based nature of nêhiyawewin affects the agency and animacy of non-human beings within nêhiyaw legal and constitutional ordering.

Key legal terms within nêhiyawewin are analyzed in this chapter to provide scope and limits to the wâhkôtowin between nêhiyaw peoples and non-human beings. This analysis allows for a reflection on the challenges and opportunities of using linguistic methods to raise up Indigenous laws. The concept of *bundling* – where a word's meaning is intimately intertwined and contextualized with the situations and practices it is used – is integral for the re-inclusion of non-human agency in how we think of and enact law.

I. Introduction

We have stories on the origins of nêhiyawewin. One talks about, *kayas* (a long time ago), a flood occurring across the whole of prairies, causing many people to take refuge in the foothills of the *asinîywaciy*, or the Rocky Mountains. It was on these hills that the people were provided for during the flood. Once the floodwaters receded, the people on the hill dispersed into separate groups. Each group was given certain gifts; the nêhiyawak were given the gift of language.[321] This is to say, we understand our speech to be significant and precious. It is often said by the old ones that our speech is like a prayer, not to be wasted, always spoken in earnest. And mostly not to be harmful in our speech; remember that pâstâmowin and ohcinêmowin are laws linked to talking wrongfully about human and non-human beings and things, respectively. One interpretation of the word

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[321] Joachim Fromhold, *Mountain Cree Traditional Land Use in the Yellowhead Trail Corridor* (First Nation Publishing, Red Deer, AB, 2018). I note here to the reader that the gifting that occurs in stories is representative moreso of the value of the 'gift' (in this case language) rather than a comment on the ease or difficulty of it being acquired. Much of the stories that have gifting involved usually have hardships, disciplines, or challenges to overcome before the gift. For example, in the story above, the flood can be interpreted as representative of the agency and resiliency of humans in obtaining the gifts.

nêhiyawewin relates to 'those who speak precisely.'[322] This is a characteristic that should be readily understood by lawyers and academics; in these lines of work there is an expectation of tâpwêwin (truth) in speech. Like all legal orders, speech and language are the fabric of wiyasiwêwin. As "language encodes the identity of Cree people," it not only provides the building blocks for law to emerge, but also for the collective coordination of action of our relationships with lands, waters, and other non-human beings.[323]

This chapter will examine the role that language in specifying our expectations and obligations in our relationships with the non-human agents and entities we harmonize our lives with. As these kinships provide the materials for a nêhiyaw constitution, nêhiyawewin is integral to the formalization of the constitutional expressions explored in the previous chapter. Specifically, I will look at the language of responsibility, relationship, and obligation within nêhiyaw pimâtisiwin. This is not only a significant examination for constitutionalism and law, but also for procedure as nêhiyawewin provides guidance on legal process.

Precision of language is a central characteristic of other legal orders. Literalism, or the aspiration to share singular primary meanings to words, is one theoretical approach within Sharia law.[324] Precision of language is especially important for civil legal systems

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[322]See Gary Bottling, Chief Smallboy: In Pursuit of Freedom (Fifth HousePublishers: Markham ON, 2005). As you recall, the more common interpretation of nêhiyaw is the four-bodied ones. I accept both interpretations of nêhiyawewin, of being of four-bodies, and of speaking precisely. Both interpretations serve as constitutional foundations for the collective identity of nêhiyaw peoples.

[323] Blue Quills, Blue Quills 30th Aniversary Book. (Feb 2012) Online: Blue Quills < http://www.bluequills.ca/wp-content/uploads/2012/02/BQ-30th-Anniversary-Book.pdf> at 22. As John Borrows reminded me in a draft of this dissertation, English can be viewed as a Cree language as well, as it is the primary language used by Cree peoples. For this point regarding Anishinaabemowin, see Lindsay Borrows, *Otter's Journey Through Indigenous Language and Law* (Vancouver: University of British Columbia Press, 2018).

[324] Robert Gleave *Islam and Literalism: Literal Meaning and Interpretation in Islamic Legal Theory* (Edinburgh University Press, Edinburgh, 2012).

as well, where the Civil Code has a paramountcy over case law, thus interpretation of codes remain an integral practice.[325] This precision, of course, is significant within Canadian law generally, as a dual-linguistic approach helps resolve cases of ambiguity within legislation, where the alternative version of an Act (French to English, or vice versa) is used to narrow a word or phrase to a precise interpretation.[326] As language is significant in the deliberation and reformation of legal norms in all societies,[327] nêhiyawewin is no different as it offers nêhiyaw-specific forms of norm contestation and formation.

Language and land have a natural entanglement. Nêhiyawewin is "closely connected with the experiences of the natural and supernatural world."[328] Marie Battiste and James Sakej Henderson generalize that it is understood within Indigenous societies that "humans perceive the sensuous order of the natural world through their eyes, noses, ears, mouths, and skins" and "[t]hus language exists in a sensory relationship to the world."[329] The ecological world has a strong hand in the development of language. "Since people enter into language through their sensory relationships with the natural world, languages cannot be understood in isolation from the ecologies that give rise to them".[330] Nêhiyawewin and *pimaciwin* (way of living) are intimately linked. Ida Swan notes this connection:

> "Wapawakasik was a totally Cree speaking community, comprised of two extended families who nurtured the cultural context for the natural

[325] James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L. Rev. (1993) 1, at 3.
[326] See R. v. Daoust, 2004 SCC 6
[327] See Jeremy Webber, "The Grammar of Customary Law" 54 McGill LJ 579
[328] Ida Swan, *Language Shift: A Study of Three Generations within A Cree Family* (M.Ed. Thesis, University of Saskatoon, 2000) [unpublished] at 24.
[329] Marie Battiste and James Sakej Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage* (Purich Publishing, 2000) at 26.
[330] *Ibid* at 26.

> acquisition and transmission of the Cree language. Our task as children was to imitate our Cree role models by making traps, fixing nets, making moccasins, moss bags, and cooking food while at the same time discussing the motions and actions of each activity. We learned the importance of each action, event, and social practice. The daily enterprise of listening and talking was augmented by adults enabling us to learn the sounds and meanings thus connecting words to the practices."[331]

The binds between nêhiyawewin and livelihood within nêhiyaw communities have been significantly interrupted by Euro-Canadian settlement and governance. As communities - via imposition or necessity - further adopted and practiced Euro-Canadian social and economic values, English has become the 'language of work'. As Swan notes, Indigenous languages are displaced when: "1. Indigenous language groups mov[e] from kinship-based economies to wage-based economies; 2. [A] significant portion of community members us[e] a language other their mother tongue in the workplace; 3. A change in views as to what language skills children will need to prepare for the future [occurs]; and 4. Parents mak[e] [English] the national language of their children."[332] This describes the loss of nêhiyawewin within my family. Two generations back, nêhiyawewin was a primary language amongst many of my grandparents, my *câpâns* (my great grandparents), and great uncles and aunties. When my câpân, Joseph Wolfe, went blind in his 70's, he taught his dog instructions in nêhiyawewin to guide him around. Within my mother's generation, the language began to fall out of use. My uncles speak nêhiyawewin in fragments, but my mother's use of nêhiyawewin was limited. Amongst my generation, it was not taught to us kids aside from words and phrases we would commonly use at home.

[331] Swan, *supra* note 328, at 3.
[332] *Ibid* at 14.

Of course, the "language of work" hypothesis does not account for overt acts to oppress Indigenous language use. It was a common feature of those who attended residential schools to face severe hardships and harms for speaking Indigenous languages.[333] Language loss has had a significant effect on norm creation and adaptation within nêhiyaw society. If we consider nêhiyaw law as weaving expectations and obligations on how we coordinate our lives together into a collective bundle, a common understanding of language is fundamental to engage in this weaving.[334] As Ida Swan notes, "words and sentences are formed accordingly to reflect the mutual understandings of both the speaker and listener. This necessitates the understanding of cultural worldviews, behaviors, norms, and perceptions." [335]

Contemporarily, there are three linguistic environments where nêhiyaw people engage in legal norm creation: 1) in societies and spaces where there is a critical mass of nêhiyawewin speakers; 2) in places with a mixture of nêhiyawewin speakers and English speakers; or 3) in spaces where deliberations on nêhiyaw wiyasiwêwina that occur primarily in English. Aside from the first environment where a critical mass of language speakers are present and engaged in legal discourses, there is an elevated burden on nêhiyawewin speakers to interpret epistemological, constitutive or legal concepts within nêhiyawewin to English, and to ensure that nêhiyawewin plays a role within Indigenous law revitalization.

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[333] See Truth and Reconciliation Commission of Canada, (2015). *Truth and Reconciliation Commission of Canada: Calls to action*. Retrieved from the TRC Findings website: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Acti on_English2.pdf

[334] My comment here does not purport to resolve the whether language determines worldview and cognition (linguistic determinism), but is supported by studies that see how how language influences some areas of cognition and worldview. See *Laura M. Ahearn, An Introduction to Linguistic Anthropology* (West Sussex, UK: Wiley Blackwell, 2012).

[335] *Swan, supra note* 328, at 7.

This chapter aims to aid this work in a humble but earnest manner. As a modest learner of nêhiyawewin, it reflects this period of my own language reclamation. At its base, I aim to understand the meanings of key legal terms, their interconnections with how we sense the ecological world, and their links to nêhiyaw intellectual philosophies on law and law creation. First, I will explore key terms in nêhiyawewin in relation to law and constitutionalism. I will then rely upon theoretical discussions on language and Indigenous legal traditions to deepen the analysis of the constitutional principles in the second chapter. Finally, I will examine how this nêhiyawewin-based constitutional and legal theory applies to our relationships with non-human beings and things.

II. The Scope and Personality of Nêhiyawewin

Nêhiyawewin (or the *Y* dialect of Cree) is one of five dialects of the Cree language, including Woodland Cree (the *Th* dialect, spoken in Northern Saskatchewan and Manitoba), Swampy Cree (the *N* dialect, spoken in Manitoba and Northern Ontario, as well as a small part of Saskatchewan), Moose Cree (the *L* dialect, spoken around Moose Factory and the Hudson Bay areas) and Atikamewkw (the *R* dialect, spoken in Quebec).[336] Cree has most speakers of any Indigenous language in Canada, with nêhiyawewin having the most speakers amongst the Cree dialects.[337] It is a part of the Algonquian language family, a subfamily of some 30 languages, including Blackfoot, Anishinaabe, and Mi'kmaq.[338]

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[336] Jean Okimasis, *Cree: Language of the Plains/nêhiyawewin: paskwâwi-pikiskwewin* (University of Regina Press: Regina, 2004) at 1.
[337] See Nick Walter, "Indigenous Languages of Canada" National Geographic. (15 Dec 2017) Online: National Geographic < https://www.canadiangeographic.ca/article/mapping-indigenous-languages-canada>
[338] See Leonard Bloomfield, "Algonquian" in Harry Hojier (ed.) Linguisitic Structures of Native America (New York: Viking Fund Publications in Anthropology, 1946).

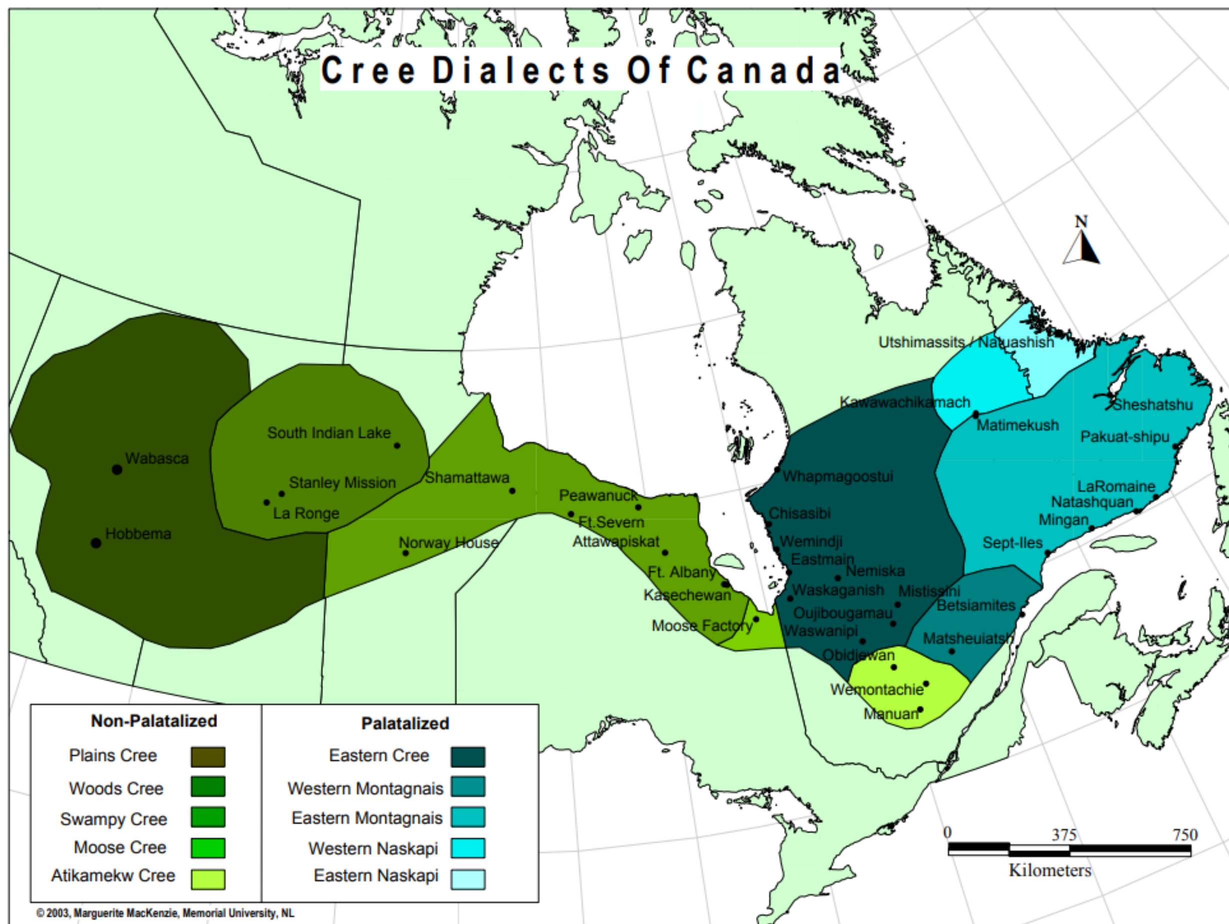

Figure 3.1: Map of Cree Dialects. *Note this map includes Montagnais and Naskapi that are considered proto-languages for current Cree dialects. (www.easterncree.org)*

The demography of nêhiyawewin speakers serves as a general outline of nêhiyaw âskiy as well. In this sense language mimics jurisdiction, and is significant to nationhood. It is estimated that at one time there were 600,000 words in nêhiyawewin, while present-day numbers have about 75,000 words in use.[339] Nêhiyawewin is polysynthetic, allowing single words to be comprised of many morphemes. As Joan Oxendale notes, "Cree words

[339] See Reuben Quinn's teaching in: Amaskwaciy History Series, "History of Cree Language, Part 1." Online video clip. Youtube, June 9, 2016. Accessed on December 9, 2016. <https://www.youtube.com/watch?v=CpvuED_hJTM>

are often whole thoughts strung together polysynthetically in a manner so vivid to the listener (or narrator) that they are easily remembered."[340] It is also fusional, where inflectional morphemes (such as a suffix, for example) can rearrange its grammatical or syntactic features.

a. Nêhiyawewin, Relationality, and Animacy

Its polysynthetic and fusional nature aid nêhiyawewin's relational character. The etymological breakdown of word for law reveals the relationality of nêhiyaw legal and constitutional theory. As I have shared previously, wiyasiwêwina translates into the act of weaving.[341] An etymological breakdown of the word provides another angle for its definition. "Wiyasowe" means "a meeting"; wina is "the collection of ideas."[342] Both of these interpretations reinforce the collective and deliberativeness of nêhiyaw legal processes.

The constitutive work that is enabled by nêhiyawewin is informed by its personality. As a verb-heavy language, nêhiyawewin reflects an animated view of the world around us. As Leona Makokis notes, "Cree verbs and nouns are based on spirit. Some words are inanimate. These are the words that describe man-made items. The natural aspects of life made by the Creator are spiritually derived and are animate."[343] Kisikiskwew (Skywoman) notes:

> "The language tells the story because nêhiyawewin (Cree language), think of that word itself, what is it derived from? What is the root word? It describes that you are talking four directions, and the language if you study it, it is a feeling, an expression. You can almost feel the movement, the feeling about

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[340] Joan Oxendale, "Reflections of the Structure of Cree in the Spoken English of the Bilingual Crees" 1 Western Canadian Journal of Anthropology 65 at 70.
[341] Johnson, *Nêhiyaw, supra* note 8 at 152.
[342] Leona Makokis, Leadership Teachings from Cree Elders: A Grounded Theory Study (Lambert Academic Publishing, 2010) at 56.
[343] *Ibid* at 71.

> what is going on when you tell the story; and that is why your language is your feeling."[344]

This reflects a commitment to the agency of non-human beings and things. Nêhiyaw âskiy and its ecological residents are active participants in the development of language. Nêhiyawewin also favors metaphor as a valuable oratory tool. This is rooted in the descriptive, relational personality of nêhiyawewin. Consider one of our terms for blanket, *wapoweyan*. It is rooted in the world *wapos,* or rabbit. The development of the word blanket is rooted in the older ways of making blankets, where rabbit skins were weaved together to create a cover. Expression in nêhiyawewin is implicitly relational.

The use of metaphor as a favored rhetorical tool can lead to miscommunications for those who are not familiar with this metaphoric type of speech and the relationality it implies. This was a challenge in our treaty relations. Consider mistahi-maskwa's (Big Bear) thoughts on meeting with treaty commissioner Alexander Morris. Prior to meeting Morris, mistahi-maskwa mused: "When I see him, I will make a request that he will save me from what I most dread, that is: the rope to be about my neck."[345] Morris considered this statement literally, thinking that Big Bear was advocating for the removal of the death sentence within the Canadian common law. However, it is fairly obvious that Big Bear was describing the dangers of treaty making, and the loss of freedoms that would come from it. Similarly, Aaron Paquette highlights how the personalities of nêhiyawewin and English have led to different conceptions of treaty and resulting practices. Paquette notes:

> Treaty 6 was agreed to by two different peoples with two very different world views. Municipalities, provinces, and the federal government are

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[344] *Ibid* at 71.
[345] Gary Bottling, *Chief Smallboy: In Pursuit of Freedom* (Fifth House Publishers: Markham ON, 2005) at 12.

> bound by the language of laws. The English language is a noun-based language that, by its nature, lends itself to the concept of physical, time-based ownership. The Cree language is a verb-based language that, while certainly has nouns, is more focused on action, relationships, and an understanding of cycles and impermanence. As you can imagine, this led to two entirely different understandings of what the words of Treaty conveyed.
>
> This difference could have led us to fundamentally important understandings of one another and concepts that could grow and strengthen relationship and, in many ways, one could argue it did.[346]

As Paquette intimates, nêhiyawewin informs our relationality towards non-human being and things and their place within our constitutional order. Brittany Johnson observes:

> "Relationality is complex: it explains not only where our place is in the universe, but how that place is related to all the other places and persons within the spaces that we occupy together; it includes and explains how we are interconnected to one another. Within these shared connections and spaces, there are included other-than-human, other-than-animal, (non)bodied, and unseen beings, and these beings are understood as being either animate or inanimate; not everything that is inanimate means that it cannot become animate or cannot be acted upon, as much of animacy is dependent on the actors, actions, or connections that are needed for something—such as a dream—to become animate."[347]

Nêhiyawewin is a significant vehicle for the transfer of nêhiyaw relationality and how it is passed down generationally. The animacy portrayed within nêhiyawewin is a key characteristic to this transference. Johnson continues:

> "When discussing relationality, it is impossible to attempt to find a definition or to find a way to incorporate Indigenous understandings of what relationality means without including animacy."[348]

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[346] Aaron Paquette, Treaty Acknowledgement at Urban Planning Committee, City of Edmonton, May 21st 2019 (remarks reproduced on Aaron Paquette's facebook page).
[347] Brittany Johnson, *Relationality: Women, Sex, and the Animate* (Masters of Arts Thesis, University of Alberta, 2017) [unpublished] at 7.
[348] *Ibid* at 42.

The respective views of animacy (Euro-western and nêhiyaw) explain the orientation of their respective legal ordering as well. Western epistemologies often show that "the only way to be animate, to be worthy of respect and moral concern, is to be a human,"[349] Western law most often approaches ecologies in a hierarchal manner, with humanity at its apex. As I previously noted, this remains a core challenge to earth jurisprudence movements, and the orientations of legal personhood framed within Western legal thought. Remaining within western lexicon inhibits *personhood* from moving beyond limited Euro-Canadian conceptualizations. Nêhiyaw animacy, engendered through language, maintains autonomous relationships (as a starting point) our relationship with ahcâhk-possessing beings and things. Or as Robin Kimmerer notes:

> "This is the grammar of animacy…In English, we never refer to a member of our family, or indeed to any person, as *it.* That would be profound act of disrespect. *It* robs a person of selfhood and kinship, reducing a person to a mere thing. So it is that in Potawatomi and most other indigenous languages, we use the same words to address the living world as we would use for our family. Because they are our family." [350]

This animacy is reflected in the verb-based nature of nêhiyawewin. With verbs making the majority of nêhiyawewin words, this contrasts English and its high use of nouns. Further, there are nouns within English that only exist as verbs in nêhiyawewin. As Art Napoleon notes: "the word for 'rain' does not stand on its own as a noun but only exists as *îkimowan* literally meaning, 'it is raining'. The n[ê]hiyaw[e]win word for wind is

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[349] Kimmerer, *Braiding Sweetgrass, supra* note 191 at 57. Returning to the arrivals on nêhiyaw âskiy described in the previous chapter, our nêhiyawak ancestors relied upon social practices, ceremony, and story to build a relationship with the ahcâhk of nêhiyaw-âskiy.
[350] *Ibid,* at 55.

yôtin meaning 'it is windy' or 'it is winding".[351] Wind and rain only exist in relation to their movements, and their animation of lands, skies, and waters.

Although nêhiyawewin is verb-heavy, the word for land (âskiy) is inanimate. [352] This complicates the use of the word okâwîmâwâskiy (mother earth) as it is combining an animate word okâwîmâ (mother) with an inanimate one, âskiy.[353] While the polysynthesis of the word may be grammatically incorrect, it reflects how contemporary language has developed to describe historical views of the land as a living entity. [354] As Art Napoleon notes:

> Given the close holistic connection we had with the land and the spirit world; and given that trees, plant varieties, rocks, creatures and many entities born of the land are seen as animate, I would argue that many elders do see the earth as a form of sacred living entity. These views are often reflected in the âtayohkîwina 'sacred stories', in the traditional prayers, and in the affectionate way that the land is spoken of by elders and traditionalists.

Nêhiyawewin continues to develop alongside our conceptions of the animacy of the ecological world. Nêhiyawewin braids its speakers, in a metaphysical sense, into the earth and waters around us. As Kisikiskwew notes: "We are called iyiniwak. That is the foundation of who we are, our identity…Iyiniwaskamkohk, [*iyiniw* (person) and *âskiy* (land)] you hear those terms when the Elders speak to all of you. It means it is a healing land, the land itself."[355] This boundedness is tied to the words for other beings and things. For example, *maskwasiy*, is the term for grass. Kisikiskwew describes its etymology: "if

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[351] Napoleon, *Key Terms, supra* note 47, at 43.
[352] *Ibid* at 40.
[353] *Ibid* at 40.
[354] *Ibid* at 41.
[355] Makokis, *Cree Leadership, supra* note 342, at 54.

you put the bear, maskwa and the land âskiy, it gives you the grass, maskwasiy."[356] It is also linked to *maskihkiy*, the word for medicine. This connotes the healing nature of the land, and the connections between grasses and bears respectively in our healing practices. Maskwa is a significant animal being for nêhiyaw peoples. Maskwa teach us about medicine: it is believed our knowledge of the medicinal powers of the red willow bark (and its pain-relieving qualities) comes from observing maskwa chewing these barks. Bear grease – taken from bear fat - is a significant medicine as well, used for a number of ailments, including for healthy skin and hair, as well as for digestion. One of our important medicines is bear root, whose medicinal qualities include aiding digestion and other stomach ailments. It is significant in our spiritual health as well, maskwa are a *pawâkan* (spiritual helper) for many individuals, and are significant agents within our ceremonies. *Maskwa matotisan* (bear lodges, one type of sweat lodge ceremony) have a specific healing focus.

Nêhiyaw people carry understandings of maskwa oriented from nêhiyaw socio-legal practice, and despite describing the same physical being, understand maskwa different thing than *bear*. Robert Brightman observes the Rock Cree view maskwa as "omnivorous scavengers, hibernators, fierce fighters, animals whose meat can satisfy the need to eat, owners of marketable hides, and sources of spiritual power".[357] Brightman argues, as a cultural sign, maskwa is "an apriori construct that defines what a [maskwa] is and does and to which each worldly experience with [maskwa] is oriented and assimilated.[358] Thus bear imports the collective values from English/Canadian lifeworld

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[356] *Ibid* at 64.
[357] Brightman, *Grateful Prey, supra* note 200, at 33.
[358] *Ibid* at 32.

to the animal, while maskwa imports beliefs, relationships, and previously held experiences that nêhiyawak have had with the animal.[359]

Returning the critiques of the use of 'spirit' or 'inspirited' to describe the animacy of non-human agents, much of the misunderstandings of its use comes from the Euro-Canadian understandings of 'spirit' or 'sacred', as these critiques are based upon apriori constructs of spirituality and sacredness that ultimately is underpinned Euro-Canadian experiences of spirituality. In this view it is easier to conceive how the view of the ahcâhk (the nêhiyaw conception of spirit) forwarded in this dissertation and spirit (the Euro-Canadian conception of ahcâhk) may depart from each other, despite the seemingly interchangeability of the terms. Claire Poirer reveals this in a different but vibrant way, describing how different language orientations results in differing legal approaches to the same physical being. In her example, it is nêhiyaw apriori understandings of *paskwâwi-mostos (*buffalo*)* conflicting with provincial approaches to buffalo heritage sites. The perspective of the Alberta government, that of buffalo-as-heritage, "sets severe limitations on the extent to which networks of ancestral relations can be activated throughout heritage management processes."[360] Conversely, the nêhiyaw view of paskwâwi-mostos as "living relative, integral to the mutual life-giving bonds of kinship" provides positive obligations on human beings towards a renewal of this relationship. [361] Beyond mere preservation, these obligations can include: ceremonies at historic sites, the revival of stories, and most importantly, the revitalization of paskwâwi-mostos

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[359] A key difference between maskwa and bear is the relationships that maskwa have with nêhiyaw peoples, versus bears with non-nêhiyaw. As Louis Bird notes, maskwa have powers that enable their survival, and serve as pawakan (special helpers) to nêhiyaw peoples. See Louis Bird, *the Spirit Lives in the Mind: Omushkego Stories, Lives, and Dreams* (Montreal: McGill-Queens University Press, 2007) 71-80.
[360] Poirer, *Hunting Buffalo*, supra note 316, at 190.
[361] *Ibid* at 83.

populations and their living habitats.[362] Our legal responses to challenges are influenced by the languages we express them in.

b. Cahkipeyihkanahk- Syllabics and Star-maps

Alongside the material and linguistic developments,[363] the development of nêhiyawewin is also connected to spiritual and natural sources. While historically unwritten, it was first textualized through syllabics. The origins of syllabics is contested. In one of their earliest uses, they were used by missionaries to provide the bible in nêhiyawewin. There is an alternative belief where they gifted to nêhiyaw people from a spiritual source. As Fine Day recalls:

> "Mestanuskwe-u," or Badger Call, once died and then became alive again. While he was dead he was given the characters of the syllabic and was told that out of them he would write Cree. He was of the "Sakawiyiniwok," or Bush Cree. Strike-Him-On-the-Back learned how to write syllabic from Badger Call. He made a feast and announced that he would teach it to anybody who wanted to learn it without pay. That is how I learned it. The missionaries got the writing from Badger Call, who taught it to them. When Badger Call was given the characters he was told, "They will change the writing and will believe that the writing belongs to them, but only those who know Cree will be able to read it." So it is that no one can read the syllabic writing unless he knows Cree, and so the writing does not belong to the whites.[364]

Fine Days' account is supported by a letter written by Calling Badger to James Evans (the missionary who is often credited with setting nêhiyawewin to syllabics in the

[362] See the *Buffalo Treaty: A Treaty of Cooperation, Renewal and Restoration* (2014), online: University of Saskatchewan <https://sens.usask.ca/documents/BuffaloTreaty_2014.pdf>
[363] See George Yule, *The Study of Language*, 5th ed. (Cambridge: Cambridge University Press, 2014); James R. Hurford, *The Origins of Language*. (Oxford: Oxford University Press, 2014); David F. Armstrong and Sherman E. Wilcox, *The Gestural Origin of Language* (Oxford: Oxford University Press, 2007); Morten H. Christiansen and Simon Kirby, Language Evolution, (Oxford University Press, 2003)
[364] Fine Day, "Societies", My Cree People: A Tribal Handbook, no. 9 (Good Medicine Books: Calgary, 1973) at 58.

other view), “strongly criticiz[ing] the minister for misinforming the public about the origins of Cree syllabics.”[365]

The use of syllabics is in a period of revitalization as well. Rueben Quinn teaches syllabics as *cahkipeyihkanahk* (spirit markers) in a “heuristic” and “organic” manner, allowing the learner to self-discover their use of syllabics not only through practice but also through story. He attributes his Rosanna Houle for the liberation of nêhiyaw star chart and its revival.[366]

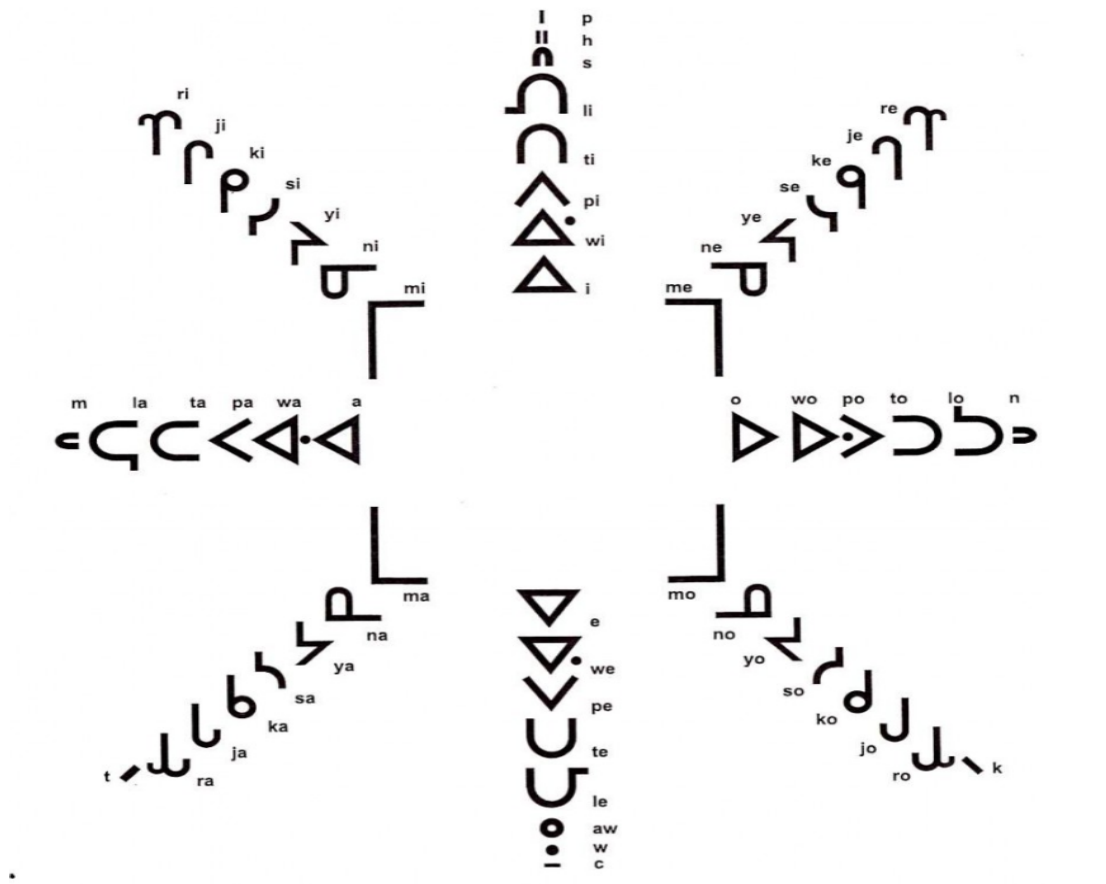

Figure 3.2: the Cahkipehikanak or Star Chart Method for syllabics.

[365] Jobin, *Cree Economic Relationships, supra* note 17, at 135.
[366] See John Copley, University of Alberta Offers A Unique Writing Course This Fall (2018), online: Alberta Native News < https://www.albertanativenews.com/university-of-alberta-offers-a-unique-writing-course-this-fall/>.

As part of a larger decolonization effort, the revitalization of syllabics concretizes the revitalization of nêhiyawewin into our landscapes. For example, there are various monuments in Edmonton that use syllabics to share nêhiyawewin publicly.

Figure. 3.3: *Iskot*êw *monument at the Indigenous Art Part in Edmonton, with my son Iskot*êw amongst the grasses. This monument was created by Métis artist Amy Malbeuf.

III. Analyzing Key Legal Terms within Nêhiyawewin

Just as rain and wind are only properly expressed as present acts in nêhiyawewin, law can be considered the same. When it is not being practiced, as part of our social lives, it is only an abstract memory of an event. Law is most present when we move it and are

moved by it; Law can be a verb.[367] This also means that law is contextual, its existence is dependent on the environment in which it is enacted. Art Napoleon's holistic approach to linguistic translation bears out this theory. Napoleon describes this approach as the following: 1) to seek out a common translation of a term, 2) find the literal translation, 3) interpret the root words involved, 4) provide translation of relevant morphemes and affixes, 5) provide information on any hidden, connotative or implied meanings, and finally 6) seek the origin of the word when possible.[368] This links words to their epistemological roots. For example, let's reapply the word for laws, *wiyasiwêwina*, to this process.   Its **common translation '**laws', is informed by its **literal translation**, 'an act similar to a type of weaving.' Its **root word,** *wiyasowe***,** describes coming together or meeting. Its **morpheme**, *~wina* describes a collection of ideas. These translations relate it to other **hidden or connoted meanings**. It relates to sweetgrass, which is braided together after picking. This braiding is done in a deliberate manner, with specific teachings attached to it.   McAdam notes that "the weaving describes all of creation as bound together, have been given laws."[369]

Utilizing this approach, I will work through some more of the key terms of nêhiyaw legal theory below: wâhkôtowin, wîcêhtowin, wîtaskêwin, pâstâhowin, pâstâmowin, ohcinêwin, and ahcâhkowiyasiwêwina.

a. Wâhkôtowin: The common translation for wahkôtowin is the act of relating. It is literal translation is 'to relate to, or kinship'.[370] It is rooted by *Wahkot~,* which

[367] As Val Napoleon is keen to say. Similarly, John Borrows observes, "[w]hen we see constitutional law as a verb – how we are constituted, how we are constituting" then we are able to observe the role of sakihitiwin (love) in Canada's constitutional system. See Borrows, *Indigenous Ethics, supra* note 97.
[368] Art Napoleon, *Key Terms, supra* note 47, at 78.
[369] McAdam, *Nationhood Interupted, supra* note 63, at 38.
[370] See Matthew Wildcat, "Wâhkôtowin in Action" in 27:1 Canadian Constitutional Forum 13 at 14.

means ‘relation’, and supported by the morpheme *~win*, which makes it a collection of ideas, a noun, or a thing. Wâhkôtowin has significant connotative meanings. Harold Cardinal notes wâhkôtowin is the law that governs all relations.[371] Maria Campbell provides a broad view of wâhkôtowin that reaches towards its origins. She notes:

> “Today [wâhkôtowin] is translated to mean kinship, relationship, and family as in human family. But one time, from our pace it meant the whole of creation. And our teachings taught us that all of creation is related and inter-connected to all things within it. Wâhkôtowin meant honoring and respecting those relationships. They are our stories, songs, ceremonies, and dances that taught us from birth to death our responsibilities and reciprocal obligations to each other. Human to human, human to plants, human to animals, to the water and especially to the earth. And in turn all of creation had responsibilities and reciprocal obligations to us.” [372]

Sylvia McAdam supports this broader understanding of wâhkôtowin. She contends that human/kinship laws were historically described by a related term, *wahkomtowin*. McAdam states:

> “Wâhkôtowin is used to describe the kinship connections to all of creation, such as the various clan systems that create kinship responsibilities to the animals and to creation in general. Wahkomtowin is the blood kinship to human beings.”

b. **Wîcêhtowin:** The common translation is relationship or harmony. It is often invoked with *miyo* (good) in a legal context, meaning an obligation to good relations or to live in harmony. [373] Its literal translation is the act of supporting or aiding. It is rooted by *wiceht~,* that translates to help or support. *~owin,* “makes

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[371] Cardinal & Hildebrandt, *Treaty Elders, supra* note 1, at 14.
[372] Maria Campbell, “We need to return to the principles of Wâhkôtowin” Eagle Feather News (November 2007), online: Eagle Feather News <http://aboriginalasasktellwebhosting.com/Resources/November-2007.pdf> at 5.
[373] Chelsea Vowel, “Building Miyo –wîcêhtowin” (2014), online: Apihtawikosisan <https://apihtawikosisan.com/2014/09/building-miyo-wîcêhtowin />.

the root word into a noun, and refers to everybody involved."[374] Miyo wîcêhtowin can describe our treaty relations,[375] and can be learned through "watching how our nonhuman relations behave."[376]

c. **Wîtaskêwin:** Wîtaskêwin is commonly understood as living on the land together. It is literal translation is to live next to each other. It is rooted by *witask~,* that has two parts: *wi~* by or near, and *aski~,* land. ~ewin, makes it a noun and denotes everyone is involved. Wîtaskêwin has "multiple applications and multidimensional meanings".[377] It can relate to our individual relationships or can encompass treaty relationships. As I described in the first chapter, wîtaskêwin also implies that an obligation to shared good living on a territory is not only human-to-human, but extends to non-human agents as well.

d. **Pâstâhowin:** Pâstâhowin is commonly understood as "stepping over or breaking 'creator's laws' against human beings,"[378] or "going outside the boundaries you are entitled to." [379] It has lasting effects, as the retributive aspect of pâstâhowin is seen as "[s]hattering one's future" [380] It literally translates into "stepping over"[381] or a "transgression, or breach of natural order"[382] Its rooted in *pasta~,* to step over, curse. Leah Dorian notes that "a pâstâhowin is often compared to the effect of breaking an egg

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[374] Makokis, *Cree Leadership, supra* note 342, at 59.
[375] Jobin, *Cree Economic Relationships, supra* note 17, at 117.
[376] *Ibid*, at 90.
[377] Cardinal & Hildebrandt, *Treaty Elders, supra* note 1, at 39.
[378] McAdam, *Nationhood Interupted, supra* note 63, at 213.
[379] Patti Laboucane-Benson et. al, "Are we Seeking Pimâtisiwin or Creating Pomewin? Implications for Water Policy" 3:3 *International Indigenous Policy Journal* 1 at 14.
[380] Napoleon, *Key Terms, supra* note 47, at 92.
[381] *Ibid*.
[382] Arok Wolvengrey, *nêhiyawêwin:itwêwina: Cree to English, English to Cree Dictionary* (Regina: University of Regina Press, 2011) at 177. [Wolvengrey, *Cree]*

which is impossibly to put back together, hard to contain, and difficult to clean up"[383] Sylvia McAdam limits pâstâhowin to human-to-human relationships.

e. **Ohcinêwin:** Ohcinêwin is often described as the natural or enforced consequences when "we do not follow accepted practices."[384] As sibling law to pâstâhowin, McAdams links it to the overstepping of boundaries against non-human beings and things, as it is "breaking of the Creator's law against anything other than a human being, such as the abuse of animals, traditional hunting laws, over harvesting of trees and polluting the environment." [385] Its rooted in Ohci~ "from there, because of, thence, out of."[386] Ohcitaw "predicates of all events conceived to result from the exercise of someone's deliberate will."[387] *-ewin,* makes it a noun, and denotes everyone is involved.

l. **Pâstâmowin**: Pâstâmowin is commonly understood as a transgression towards others through speech or scorn. It is literally translated as a curse, blasphemy or curse word. It is rooted in Pastamow~, translating into 'he/she curses."[388] *-ewin,* makes it a noun, and denotes everyone is involved. It is understood that pâstâmowin is linked to ohcinêmowin, suffering retribution for transgressions of speech.[389]

m. **Ahcâhkowiyasowewin:** Ahcâhkowiyasiwêwina is understood to be spiritual laws. It literally translates into the act of weaving spiritual things, or coming together with ideas from spirit. It is rooted in *ahcâhk*~ (spirit), and *wiyasowe*~ (bringing together). *~wina* makes it a noun and related to everyone involved. Its hidden or connoted meaning is

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[383] Leah Dorion, Opinawasowin: The life long process of growing Cree and Métis children (Masters Thesis, Athabasca University, 2010) [unpublished] at 54.
[384] Jobin, *Cree Economic Relationships, supra* note 17, at 212.
[385] McAdam, *Nationhood Interupted, supra* note 63, at 8.
[386] Wolvengrey, *Cree, supra* note 382, at 148.
[387] McAdam, *Nationhood Interupted, supra* note 63, at 8.
[388] Wolvengrey, *Cree*, *supra* note 382, at 176.
[389] See McAdam, *Nationhood Interupted, supra* note 63, at 39.

natural law with spiritual origins. It is liked to natural laws: *mahtahitowin* (sharing), *sohkeyitamowin* (strength/determination), *sakihtowin* (love) and *kwayaskatisiwin* (honesty).[390] Its break down signifies that spiritual law and the norms that arise from it is a social activity.

IV. Challenges and Opportunities of Linguistic Approaches

a. Interpretative Challenges

The above terms and their translations are significant in our recognition of principles according to nêhiyaw law. The non-fluent speaker (like myself) must work on our language acquisition to develop an understanding of how the above terms influence normative development contemporarily, specifically our day-to-day relationships with non-human beings and things. A full linguistic approach is full of potentials of infusing more accurate understandings of laws. It is also fraught with the challenge of accessibility. For example, Anishinaabe jurist Matthew Fletcher advocates using Indigenous terms as primary sources for infusing "custom and tradition" within U.S. tribal courts.[391] In this method, "an important and fundamental value signified by a word or phrase in a tribal language" is identified.[392] Once it is identified, a secondary rule (usually from the Anglo-american tradition) can be harmonized with the first principle.[393] This is undoubtedly a pragmatic approach, heavily influenced by the jurisdictional environment of U.S. Tribal law, where tribal sovereignty means exclusive jurisdiction.

[390] Makokis, *Cree Women, supra* note 342, at 44.
[391] Matthew Fletcher, "Rethinking Customary Law in Tribal Jurisprudence", 13 Michigan Journal of Race & Law 57 at 75.
[392] *Ibid* at 94.
[393] *Ibid.*

Fletcher's pragmatism acknowledges the challenge of linguistic accessibility. Growing from accessibility challenges are the secondary challenges of authority of interpretation.[394] Hadley Friedland cautions that a linguistic method has "risks…in terms of distortions relating to superficial pan-Indigenous values" where "serious interpretive conflicts can emerge concerning a single word" as "reasonable minds can differ regarding the interpretation of any law." [395] Friedland is most concerned about the linguistic method in scholarship, as she notes that:

> "applying single linguistic terms as legal values, without anything more, seems to raise the risks of oversimplification that Napoleon cautions against, as the terms are presented as isolated values, rather than as one principle to consider, which must be balanced against others in a comprehensive whole. While the competing interests before tribal courts may provide this balancing, in scholarship per se there is no obvious way to deal with the attendant risks of rigidity, essentialism and fundamentalism using this method."[396]

While Friedland's concern is important, the revitalization of language use as a method to Indigenous laws must take on such potential dangers. The goal is not to place the linguistic approach in a favorable hierarchical position in relation to other methods, but to ensure language has plays a central supportive role in the revitalization of nêhiyaw wiyasiwêwina. Other legal tradtions are able to center linguistics in this manner. "[T]he mastery of Arabic is a prerequisite" to access "the Qur'an and Hadith from which the main principles of Islamic legal theory are derived."[397] Hebrew plays a similar role in Judaism, as the language provides the closest meaning of laws written within the Torah

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[394] See Hadley Friedland, *Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada*. (Ph.D. Dissertation for the University of Alberta, 2016). [Unpublished] at 36. [Friedland, *Language of Law*]
[395] *Ibid* at 38.
[396] *Ibid* at 39
[397] Mhd. Syahnan et al., "Language and Law: The significance of Language Competence in Islamic Legal Theory" (2019) The Second Annual International Conference on Language and Literature Volume 2019

and Mishnah.[398] Like these two legal traditions, nêhiyawewin is at the center of nêhiyaw law, but is not the whole. Our incremental steps – even if incomplete – are important to undergird nêhiyaw legal ordering.

When I think of the present-day 'usefulness' of nêhiyawewin in specific contexts, I think of the 'language of work' theory and my family's past considerations on whether to take up the language or not. I also consider the writing of nêhiyaw chief Maskipiton, to a missionary (Robert Rundle) in 1844. Maskipiton writes:

> He who speaks from above, I send you a letter. I want to send you all greetings, greetings from here to you and the stoneys. I am going to prepare red willow for my pipe. I want my small son Benjamin to speak English. One hundred and sixty buffalo from me for my son. I give my word. My Friend. I maskipiton.

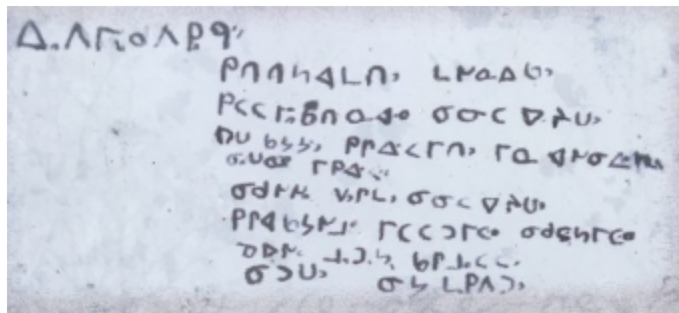

Figure 3.4: *Maskipiton's 1844 letter, written in syllabics*. Glenbow Archives, Calgary, M1083 F4

Maskipiton's commitment to his son's well-being, and its link to learning English, was a common refrain of the time. I am struck by the magnitude of Maskipiton's value of English: one hundred and sixty buffalo. While this may be a metaphoric turn-of-phrase (Maskipiton's use of 160 is interesting given that land was quartered in that area of Alberta in 160-acre sections), it signals a large commitment by Maskipiton.[399] The

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[398] The Mishnah is the codification of Jewish oral laws. See Herman Strack, *Introduction to the Talmud and Midrash* (Philadelphia: Jewish Publication Society of America, 1945).

[399] My great-great grandfather (Simon Fraser) and great-great grandmother (Sophie Brazeau) resided at Rundle's camp near Pigeon Lake, where maskipiton would visit Robert Rundle. Simon Fraser eventually

displacement of nêhiyawewin has been a practice going on two hundred years, and has affected generational attitudes towards its use. Letting present-day judgments of the usefulness of linguistic approaches to Indigenous law is dangerously teleological. The circle of logic is thus: a potential robust use of nêhiyawewin in legal arenas is challenged by a lack of speakers, yet providing more people opportunities to acquire nêhiyawewin is challenged by a lack of environments where it is robustly used. There is deep value in infusing nêhiyawewin in our current formal legal processes, even if our understanding of these principles is small.

I also note that interpretive challenges of nêhiyaw legal terms are the same challenges that are viewed upon as vital traditions within the Canadian legal system. Consider the freedoms set out in the *Canadian Charter* of 1982. Since the Charter's adoption in 1982, Canadian judiciaries have had the challenge of interpreting its terms. Though there may be some shared understandings of what an obligation to "life, liberty, and security of the person" is, the deliberative processes to settle differences of interpretations ensures a healthy legal process. As John Borrows notes, "ambiguity is a legal reality in all rights language. Rights are necessarily expressed in general terms to provide a wide-ranging protections against state intrusions."[400] In the case of section 7 of the Charter, the public and judicial contemplation of the special language of the clause, the scope of the freedom, and the corresponding duty it places on governments, is integral to its vitality and adaptability. In much the same manner, if fostered with the same understanding of openness to disagreements and processes where interpretations are deliberated upon, a

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obtained a quarter section of land in the area, a privilege, in the very literal sense of the word ("private law") he had in comparison to George Rain, due to his half-Scottish roots.

[400] See Borrows, *Indigenous Ethics, supra* note 85, at 30.

linguistic method towards Indigenous laws can reclaim the same central vitality within nêhiyaw legal ordering. [401]

b. Revitalization opportunities

This revitalization of course, is already happening. Consider the resurge of wâhkôtowin in a number of areas within nêhiyaw society. As you will recall, wâhkôtowin is regarded as the "laws governing all relations."[402] When charged with applying wâhkôtowin to a legal problem, there is much to discover on how wâhkôtowin works as a guide to our relations. While we may be able to infer some of the law through a textual definition, the collective understanding of wâhkôtowin requires collective discussion, constestation and agreement on what it means. There is of course, a wide and varied contemporary interpretation of wâhkôtowin. Maria Campbell notes that wâhkôtowin:

> [t]oday is translated to mean kinship, relationship, and family as in human family. But at one time, from our place it meant the whole of creation. And our teachings taught us that all of creation is related and interconnected to all things within it.[403]

David McPhee notes that:

> Wah-ko-to-win is how we are related to one another, and how things relate to one another. We all exist within larger relationships and these relationships are the foundation for everything else. Most importantly the word describes how all is related to God the Creator. In relationships there are roles that each party has. It is critical to recognize there is also responsibility as part of relationships. The issue of responsibility creates a lot of discussion if it was not exercised appropriately[404]

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[401] As Borrows notes: "Our societies would be much weaker if we did not struggle for life, liberty, security, equality, freedom, peace, order, and good governance in our constitutional orders – themselves all high but nevertheless ambiguous ideas. Likewise, we can be enriched if we endeavour to live by love, truth, bravery, humility, wisdom, honesty, and respect, even though what these concepts require is not crystal clear. " *Ibid*, at 240.
[402]Cardinal & Hildebrandt, *Treaty Elders, supra* note 1, at 14.
[403] Campbell, *Wâhkôtowin, supra* note 372, at 5.
[404] Friedland, *Language of Law, supra* note 394, at 37.

Sylvia McAdams furthers this understanding of wâhkôtowin extending beyond human-to-human relationships. She shares her father's (Francis McAdam Saysewahum) understanding of wâhkôtowin:

> "Long ago after the human beings were created, they were allowed to walk with the animals and talked amongst each other like relatives. Even the trees, plants, all manner of life was able to communicate with each other. That was the beginning of understanding wâhkôtowin and the laws surrounding it… We still remember we are related to all of creation, that is still followed to this day. [405]

Finally, Matthew Wildcat observes that wâhkôtowin can be broken into three parts:

> "First it references the act of being related – to your human and other than human relatives. Second, it is a worldview based on the idea that all of existence is animate and full of spirit. Since everything has spirit it means we are connected to the rest of existence and live in a universe defined by relatedness. Third, there are proper ways to conduct and uphold your relationships with your relatives and other aspects of existence."[406]

Wâhkôtowin has also been the subject of university courses,[407] academic conferences,[408] social gatherings at law schools,[409] been interpreted in a sentencing lens within the Canadian Criminal Court system, [410] centered within Child and Family services organizations, by academic research units,[411] the theme of a Two-spirit and Female

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[405] McAdam, *Nationhood Interrupted, supra* note 63, at 47.
[406] Matthew Wildcat, "Wahkohtowin in Action" (2018) 27:1 Const Forum 13 at 14.
[407] My colleagues at the University of Alberta, in conjunction with Asinewuche Winewak Nation, offered an interdisciplinary course that taught wâhkôtowin through engagement in moose hide tanning. See Priscilla Popp, "Out of the Classroom and Onto the Land: Introducing the Wahkohtowin Projection" (Nov 2016) Online: University of Alberta <https://www.ualberta.ca/native-studies/about-us/news/2016/november/out-of-the-classroom-and-onto-the-land>
[408] Reconciliation/Wahkohtowin Conference. (Sept 2017) Online: University of Alberta <https://www.ualberta.ca/arts/events/arts/vvk74m74p9qttnfeo2c1jum200>
[409] See Wâhkôtowin – a Cree word meaning kinship – on display at Osgoode, Osgoode Hall Law School. Online: < https://www.osgoode.yorku.ca/news/27478-2/>
[410] Anna Louisa Flaminio, Gladue Through wâhkôtowin: Social History Through Cree Kinship Lens in Corrections and Parole (2013) LLM Thesis, University of Saskatchewan [Unpublished].
[411] See Wâhkôtowin Law and Governance Lodge, (2019), Online: University of Alberta< https://www.ualberta.ca/law/faculty-and-research/wahkohtowin-law-and-governance-lodge>

Performers Variety Show,[412] and is the central force behind the revitalization of control of the education system at Maskwacis.[413]

Wâhkôtowin continues to be applied, interpreted, contested, and re-interpreted today. In my first class as an assistant professor at the University of Alberta's Faculty of Law, we tasked students with applying the principle of wâhkôtowin to a complex situation of intimate harms within a nêhiyaw community. Within the traditional 'fact pattern' methodology that law schools employ, students worked through the legal procedures and substantive laws in responding to a situation of spousal violence. Wâhkôtowin was the principle at the center of all of the students' procedural and substantive responses. Much like where a law student applies a principle from the common law, the students relied upon precedential wâhkôtowin events (through stories) and interpretations (through commentaries) to provide contextual responses to the harms they were addressing. Most of the students were unfamiliar with wâhkôtowin and Cree law generally before the course. Given 3 months of instruction, they were able to infuse their centering of wâhkôtowin as a principle to guide the community response to the harm with 'precedent' from stories, experiences, and theory from nêhiyaw peoples.

V. Language and Written Constitutions: Nisichawayasihk Cree Nation Case Study

The revitalization of constitutive principles is also occurring within First Nation legislation and constitutions, including those of many Cree First Nations. This raises the question of the most effective ways to textualize constitutive principles, in the face of the trans-systemic work that written law and constitutions are often employed to do. One

[412] See Wâhkôtowin Variety Show (2018), online: Grindstone Theatre <https://www.grindstonetheatre.ca/shows/wahkohtowin-indigenous-2spirit-and-female-variety-show/?fbclid=IwAR3axkdqooTpCS5s1teWxQoY90Dg1npDed4lTSt2iW5v76JCUQFaBjuim28]>
[413] Wildcat, *supra* note 370, at 15.

example of this work is the constitution of the Nishichawayasihk Cree Nation (NCN) in northern Manitoba. NCN approved their Othasowewin (Constitution) in 2017.[414] Within the Othasowewin, nīhithawīwin (the *th* dialect of Cree) plays a prominent role. The NCN Othasowewin utilizes a linguistic approach to law to ensure that legal relationships to the ecological world are constitutionalized.

Revitalization of nīhithawīwin is one of their constitutive principles.[415] The constitution textualizes the significance of the terms, t*ipethimisowin* (sovereignty), *n'tuskenan* (our sacred land), *mamawi nisitawenachikewin* (mutual recognition), *mamawi kistithichikewi* (mutual respect), *mamawi wichihitowin* (sharing), *mamawi tipethimisowin kanawapatamasowin* (mutual responsibility), and *tapwetamowinihk* (honesty, truth, trust and understanding).[416]

The Othasowewin also employs nīhithawīwin to constitutionalize customary law principles related to earth relationality. This includes:

> "(a) Kwayaskonikiwin (reconciliation) - the conduct of a person must be reconciled with Kihche'othasowewin, the Great law of the Creator;
> (b) Kistethichikewin (respect) - the conduct of a person must be based on the sacred responsibility to treat all things with respect and honour;
> …
> (d) Aski Kanache Pumenikewin (responsibility for the land) - the conduct of a person must be in accordance with the sacred duty to protect N'tuskenan, the land, life, home and spiritual shelter entrusted to Nisichawayasi Nehethowuk by Kihche'manitou for our children michimahch'ohchi, since before the beginning of time;
> (e) Ethinesewin (wisdom) - duty to respect and seek traditional knowledge and wisdom, including the influence of the moons and seasons on climate,

[414] While a different dialect than Plains Cree, this constitution is illustrative of the challenges faced by Cree communities in implementing legal terms in the Cree language.
[415] Section 1.3 states: "As preservation our culture and our language is of paramount importance, this Constitution shall be printed and published in Nehethowewin and English in the event of a conflict between the two language versions, both versions shall be treated equally." Nishichawayasihk Cree Nation Othasowewin (Constitution) (29 Nov 2017), online: Nishichawayasihk Cree Nation < https://www.ncncree.com/wp-content/uploads/2017-11-29-NCN-Constitution-Final-Approved.pdf>
[416] *Ibid*, Preamble.

> weather, animals, plants and Ethiniwuk, individuals as well as seasonal harvesting cycles and practices;
> …
> (h) Oh'chinewin (cause and effect) - what a person does to all creation will come back to that person;
> …
> (j) Kanatethechikewin (sacredness) -a person has a sacred responsibility to ensure that our ancestors, their belongings or the things that they used on Earth are respected;
> …
> (m) Nehetho Tipethimisowin (people's government) - the exercise of sovereignty by all persons must be in a manner that is consistent with Kihche'othasowewin, the Great Law of the Creator, and decision-making roles established in accordance with Nehetho Tipethimisowin); and
> (n) Pastahowin (breaching sacred laws) – a person has a responsibility to obey the sacred laws."[417]

While the constitution takes on a similar form to non-Indigenous legislation and constitutions, the inclusion and codification of terms represents a blending of 'customary' constitutional principles with positivistic ones. This is reflective of the position of many Cree nations contemporarily, that there is a recognized need to bridge their historical constitutive principles in an inter-societal manner. For example, an early draft of Samson Cree Nation's laws acknowledged this. It stated:

> We offer the ability to create a bridge of understanding that combines our Nêhiyaw way of life within the Western Society we find ourselves a part of. We therefore, present our laws in written text but must state, these written laws are not stronger than the oral teachings and narratives from our Kêhtê-ayak.[418]

Similarly, the Nishichawayasihk Cree Nation acknowledges this bridge work. In discussing the tension between constitutional development and spirituality, it states:

> "Sometimes it is difficult to understand the connections between our culture, our language, our traditions and the actions we are taking today…Our teachings tell us that everything is connected. We are

[417] *Ibid.*
[418] Pauline Johnson*, supra* note 8, at 162

> connected to each other, to Mother Earth, to Grandmother Moon, the seasons and what they teach us…This Constitution is about change. It is about our ability to use everything we have learned in the past to make a better future for our Nation, for all of us."[419]

c. Analysis: Bundling as Method

The Nisichawayasihk Cree Nation's use of its customary law provides an avenue to work through Friedland's concern – remember her caution against a 'single interpretation' – towards a thickened revitalization of key legal terms. One way to think of the Nisichawayasihk Cree Nation's method is as 'bundling'. Returning to their use of ethinesewin (wisdom), the principle is bundled with experiences within ecological cycles. Hence, interpretation is dependent on the continuance of relational practices with the varying moons, the seasons, the harvests, and the knowledges within them.

This process of infusing language with our preceding lifeworld experiences is a legal methodology. Our legal terms are, as Maria Campbell states, "word bundles."[420] Bundling is a significant action in our knowledge systems. Consider how Campbell describes bundling of our awâsisak (children):

> "Now imagine that awâsis is carrying a bundle. Inside that bundle are ceremonies and rituals that belonged to them—birthing ceremonies and rituals, birthing songs and stories, naming ceremonies, "Walking Out" ceremonies, etcetera, etcetera—everything in the life of a child was celebrated by family and community. Imagine the sense of self a little one would have with that kind of family and community support and that kind of celebration for that child's birth and life. This teaching helps us to better understand the honour and respect given to children and reminds us

[419] Nishichawayasihk Cree Nation, *supra* note 416. Further, we can see how the codification retains a commitment to land reconciliation through the use of nīhithawīwin. Not only does it highlight ohcinêwin and pâstâhowin as foundational principles, but also sets out *ethinesewin* (wisdom) as one as well. This is described as the "duty to respect and seek traditional knowledge and wisdom, including the influence of the moons and seasons on climate, weather, animals, plants and Ethiniwuk, individuals as well as seasonal harvesting cycles and practice."
[420] Flaminio, *supra* note 317, at 17.

> of the importance of our daily interactions with them, and the importance of each of the related circle teachings." [421]

A renaissance of Indigenous law requires us to return to language and the legal principles with the same care and curiosity to the bundles carried by our children. Returning to Starblanket's and Stark's call for contextualized approaches to relationality, I would add that language revitalization within Indigenous legal traditions requires a pressing "need to remain attentive to the way in which individual roles and responsibilities within relationships are identified and taken up on an everyday level", particularly how we favor language acquisition and fluency and power and influence over legal ordering.[422] Or to put another way, we must be cognizant of the power dynamics involved in language retention and reaquisition. If we hold up language fluency as a fundamental characteristic within the practice of nêhiyaw law, we should be cognizant of what this means for the majority of nêhiyaw peoples who are not fluent speakers.[423] Nêhiyaw intellectual traditions provide guidance in this. As our old ones often invoke that our learning journeys encompass lifetimes (including language learning), it should provide humility and understanding for language speakers at any stage.

V. Conclusion: Re-Learning the Language of our Legal Relationships

As our use of nêhiyawewin is revitalized in our legal processes, nêhiyaw peoples face the dual task of inviting broad and diverse channels of interpretations of legal concepts, while trying to provide specific definitions to satisfy Western legal processes and educational

[421] *Ibid,* at 17-8.
[422] See Starblanket & Stark, *Towards a Relational Paradigm, supra* note 86, at 177.
[423] I am concerned with a particular challenge that has been shared by other people in a similar situation to mine, that approaching language tables, classes and speakers for lessons comes with dealing with a hidden shame that we did not know existed until these moments – a false guilt of not knowing the language better. From strictly anecdotal experiences, this is a common feeling.

settings. There is a danger in that ‘relating’ to Western legal processes, the non-human relationality of nêhiyaw legal terms is lost or set aside in these processes. Word bundling, as a necessary practice within a linguistic method allows for a broadness of our terms to relate to the ecological world with more fidelity to our epistemologies. As you recall, wâhkôtowin has two distinctive meta-principle connotations, the overarching principle that describes specific obligations in our human-to-human relations (wahkomtowin), and a less defined recognition of our connection to all of creation. As wâhkôtowin becomes more familiar in contemporary day-to-day life within Treaty 6 territory especially, nêhiyaw scholars and academics are outlining this distinction further. From my experience, as a non-Indigenous public becomes familiar with the term, there is a response from communities to show its specificity.[424]

Of course, academic interpretation of wâhkôtowin is just one element in the bundle. It is the practice that provides a thicker understanding of wâhkôtowin, and the obligations towards non-human beings and things that arise from it. Maria Campbell shares one method to put bundling into practice. She shares:

> There is a word in our language—Notokwew Matchiwin—Old Lady Hunting. The nokom/grandmother would take the small children out on the land and teach them to hunt small game on their very first hunt. My nokom did it with my brothers and I—we’d all get ready, making our small snares and packing our small hunting bags—muskimutsa— with a knife, matches, a tin cup and some salt and a piece of bannock. Then she would take us out and she would show us the kind of terrain rabbit inhabited, pointed out their trails and showed us the proper protocols before showing us how to set our snare—all the time by telling small stories, giving information.

[424] For example, I was speaking on a panel addressing racism in Treaty 6 territory, where Colette Arcand, nêhiyaw iskwew from kipotakaw (Alexander First Nation) related that she grew up understanding the specific terms for family relations, including those of her uncles. Uncle has different meanings in nêhiyawewin, depending on whether they are maternal or paternal. A maternal uncle is nisis (my uncle or father-in-law), while a paternal uncle is ohcawis (or dear father).

> After our snares were set, we walked to another area, took out our tin cups and banged them together making as much noise as possible and scaring the rabbits so that they would run into the snares. Then she showed us how to kill them as quickly and painlessly as possible so that they wouldn't suffer. All the time, through little stories, teaching us about our responsibility and obligation to the relatives who gave their life for our nourishment. She…taught us about taking life. Through her teaching and stories, we learned respect for the food we ate and the relatives who gave their life to us.[425]

I bundle this story, like many others I hear of relational practice, in how I conceive wâhkôtowin, its link to the non-human world, and who are the teachers of it. Like the practice of snaring rabbits, nêhiyawewin also provides thicker understandings of the legal obligations to the non-human world. As the etymology reveals encoded information of our historical relationships to non-human beings and things – prior to the period of Western Prairie coloniality – a revitalization of our land/water/animal relationships requires a resurgence in our use of nêhiyawewin. Beyond simply learning words, it is necessary that we are braiding our language use with experiences on the land. To understand our maskwa relations as *maskwa* - rather than bear – requires our interactions with *maskwasiy* (grasses), our gathering of *maskihkiy* (medicine), or our ceremonying in bear lodges. By doing so, our language use becomes relational. The verb-based and relational personality of nêhiyawewin does the work of (re)orienting maskwa as kin, and the pre-conditioned obligations that kinship brings. There is a general consensus that land-based language learning is an integral part of language (re)acquisition. Nêhiyaw iskwew Belinda Daniels has started and operated the Nêhiyawak Land & Language Camp, integrating land learnings with

[425] Flaminio, *supra* note 317, at 23.

language (re)learning.[426] The Opaskwayak Cree Nation in Manitoba operated from a "storywork approach" to revitalize nêhiyawewin "through hands-on activities centred on land-based knowledge and storytelling, while exploring…wâhkôtowin…and mino pimatiswin."[427]

Returning to Maskipiton's message to Robert Rundle, we are now in moments of renaissance, where nêhiyaw families are sharing the opposite desire that Maskipiton did a century and half ago. Though Maskipiton may have sought English for his son, and was willing to part with "one hundred and sixty buffalo" to do so, we now see things very differently. For me, I prepare my pipe, like all my relations have done so continuously for generations, so that my son, iskotêw, learns to speak nêhiyawewin. In an abstract way, I recognize that if he does so, one hundred and sixty thousand buffalo may also eventually return to the prairies. Ekosi.

My key observations and conclusions in this chapter are:

a. Nêhiyawewin directs nêhiyaw law towards an orientation that animates lands and waters. Thus, language loss has impacted the orientation of law towards land reconciliation.
b. The revitalization of nêhiyaw law necessarily requires a linguistic approach to support other constitutive institutions within nêhiyaw societies. While there are practical challenges and dangers in making a linguistic approach the primary avenue for the revitalization of nêhiyaw law and earth reconciliation generally, it provides a vital foundation for other institutions like ceremonies and narratives.

[426] See David Bateman, "Saskatchewan teacher Belinda Daniels nominated for $1M 'Nobel prize of teaching" (12 Oct 2015), Online: the Star < https://www.thestar.com/news/canada/2015/12/10/saskatchewan-teacher-belinda-daniels-nominated-for-1m-nobel-prize-of-teaching.html>
[427] See Aski Achimowin, Stories from the Land Trailer, (accessed Dec 2019) Online: Youtube < https://www.youtube.com/watch?v=m1BPJGRdtOI>

c. As there is a necessity for the formalization of law through legal codes, legislation, and constitutions, nêhiyawewin can play a unique role in ensuring that laws based on principles of land/earth reconciliation are included in modern legislation.
d. Finally, bundling is a key method to revitalize law, and ensures we renew our relatinships with âskiy in this revitalization.

Ne'yo (Four): Âtayôhkêwin – Law through Sacred Stories

"*They never died. They are scattered here, there,*
Everywhere, somewhere. They know the language,
The sleep, the dream, the laws, these singers, these healers,
Atayohkanak, *these ancient story keepers*." ~ Louise Halfe

Wîsahkêcâhk: Common translation: Elder Brother to nêhiyaw peoples. Literal translation: "a loving spirit that wants the best for the people."[428] Root words: *saki*~loving, *ahcâhk*~ spirit. Morpheme: *wi*~ desiring or wanting.

Âtayôhkêwina, or sacred stories, offer vital avenues of critical legal theory towards our relationships with lands, waters, flora, and fauna. This chapter looks at âtayôhkêwina as theory in two ways. First it considers stories about human uses of animals (for either labour or nourishment) as critical theory or philosophy on wâhkôtowin. Specifically, these stories make visible critical questions on what it means to recognize the ahcâhk, or inspirited nature of non-human beings, yet have laws that allow for human infringement on their inherent autonomy.

The second line of theory this chapter explores is within the Wîsahkêcâhk cycle of stories. Wîsahkêcâhk stories are examined for their theory on law and authority. This theory raises questions on how relationality towards non-human agents is resurged and revitalized in a critical manner. Engaging our âtayôhkêwina in this way allows for us to apply the lessons on wâhkôtowin to our legal norms.

I. Introduction

Howard Norman states that our stories have social lives too.[429] When they are not being spoken, being shared either by the fire of ceremony or gathering, or casually amongst our kin, they are living lonely lives away from us. Stories rely upon us to carry on their lives, much in the same way that stories nourish, teach, and sustain us. The need for storied living is not just limited to humans. Stories are integral to non-human inspirited beings

[428] Johnson, *Nêhiyaw, supra* note 8, at 90.
[429] Howard Norman, "Crow Ducks and Other Wandering Talk" in David M. Guss, ed, *The Language of the Birds: Tales, Texts, & Poems of Interspecies Communication* (San Francisco: North Point Press, 1985) 18 at 19.

as well. They are a highly sophisticated tool of relationship. Consider Potowami botanist Robin Wall Kimmerer and her experiments with sweetgrass. She was seeking to 'test' the knowledge of Potowami basket weavers, who observed through generations of knowledge and experience that sweetgrass requires the nourishment of story and touch to flourish.[430] According to the basketweavers' knowledge, if sweetgrass is interacted with, or even better, when it is treated as a relation and conversed with, it will flourish. If this relationship is ignored, it will go away.

Kimmerer's experiment used three different plots to test this knowledge. The first plot was the control plot, where the sweetgrass was left alone to grow, without human intervention in any way. The second plot received generous human interaction, harvested with great care and gentleness. The sweetgrass was lightly pulled with roots left intact. The researchers adhered to protocol according to Potowami practices, and provided gifts for their pulling. The third plot was harvested with a heavier hand, the researchers worked it rougher with little attention to maintaining the roots of the grass. The results were surprising. The plots that had human interaction, whether gently or roughly harvested, outpaced both the growth and the healthiness of the isolated control plot. Without human intervention or interaction, even at its very base, the plot withered in comparison to the other two.[431]

Norman's refrain and Kimmerer's experiment are anecdotes of the central theme that this chapter will explore, that *storied living* is an integral process to healthy relations between humans and non-human beings and things. Like many, if not all, Indigenous

[430] Kimmerer, *Braiding Sweetgrass, supra* note 191, at 156-60.
[431] *Ibid*, at 156.

societies, storied living is an integral key to nêhiyaw legal process.[432] As you know from previous chapters, narrative cycles are imbedded within nêhiyaw cultural institutions like ceremony, song, land/water navigation, and deliberative legal processes generally. Of course, storied living is not just an Indigenous practice, but is fundamental to all societies and their legal traditions. Canadian state-law relies heavily upon storied living as a foundation if its formal legal processes and deliberations. Case law, in one light, is a repository of stories, recollected and recalled to inform in-the-moment judgements. Further, what is a constitution but a story that the citizens of a nation tell collectively tell of themselves?[433] Both the force of constitutional documents and the precedent of past decisions require, above anything else, a belief in a story and the forum in which the story is recollected and retold.

Storied living and Wâhkôtowin

As Indigenous stories are bodies of constitutional and legal knowledge, Kimmerer's experiment puts its finger on one of the challenges of raising up Indigenous constitutional and legal knowledge in an inter-societal manner. In the present-day, where "the unblinking assumption [is] that science has cornered the market on truth", [434] legal knowledges within Indigenous forms of narrative can be met with caution, or even skepticism. As Kimmerer suggests, "[g]etting scientists to consider the validity of indigenous knowledge is like swimming upstream in cold, cold water. They've been so

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[432] See Robert Cover, The Supreme Court, 1982 Term – Foreword: Nomos and Narrative (1983). Faculty Scholarship Series. Paper 2705, at 41.

[433] Constitutional narratives carry a certain amount of force. As Eric Adams notes , the constitutive narrative can have such force that "in some instances, [they operate] as a shadow constitution cast off at an angle from the formal one. At times, a constitutional identity can even become dominant enough to challenge the legality – *de facto* or *de jure* – of the constitution itself." See Eric Adams, "Canadian Constitutional Identities" (2015) 38:2 Dal LJ 311, at 316-32.

[434]Kimmerer, *Braiding Sweetgrass, supra* note 191, at 160.

conditioned to be skeptical of even the hardest of hard data that bending their minds towards theories that are verified without the expected graphs or equations is tough."[435] Kimmerer's experiment, and the 'hard data' it provides regarding the essentiality of connection in an inter-species relationship, is a small salve to the hard cynicism of the scientific academy towards Indigenous methodologies that are based on accrued, observed, an passed down knowledges.

Of course, respective Indigenous "teachings…are very strong. They wouldn't get handed on if they weren't useful."[436] If "scientific theory is a cohesive body of knowledge, an explanation that is consistent in a range of cases and can allow you to predict what might happen in unknown situations", then *âcimowin* (story) structures one form of nêhiyaw critical legal theory.[437] Nêhiyaw âcimowin provides one approach to predict potential outcomes in for how we practice our human/non-human relations. Specific to this chapter, one outcome documented within our âcimowina is ohcinêwin – the retribution for harms against the natural world.

Within this chapter, I approach nêhiyaw âcimowina as a body of critical legal philosophy or critical theory that characterizes legal relationships with non-human beings.[438] Taking up our stories as critical theory also raises important questions about

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[435] *Ibid*.
[436] *Ibid*, at 156.
[437] *Ibid,* at 159.
[438] For history and discussion of Critical Legal Studties, see Roberto Magabiera Unger, The Critical Legal Studies Movement (Harvard University Press, 1983); Costas Douzinas and Adam Gearey, Critical Jurisprudence: The Political Philosophy of Justice (Oxford: Hart Publishing, 2005). For Critical Race Theory see See Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals From Deconstructed Rights' [1987] 22 *Harvard Civil Rights – Civil Liberties Law Review* 401; David M Trubek, 'Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How To Get Along with a Little Help from Your Friends (2011) 43(5) *Connecticut Law Review* 1503; Kimberlé Williams Crenshaw, 'Twenty Years of Critical Race Theory: Looking Back To Move Forward' (2011) 43(5) *Connecticut Law Review* 1253.

treaty, consent, communication, and mutual dependency for good living, all integral considerations if we are going to live in good relations with each other. Specifically, I will examine âcimowina to give further meaning to the legal principles of wâhkôtowin and ohcinêwin. This examination is important for three reasons in particular. First, our story cycles display legal processes that are integral to how we practice wâhkôtowin at an inter-species level. Second, principles within our âcimowina provide meaning to treaty terms like wâhkôtowin and wîtaskêwin. Finally, our stories and story cycles are meta-narratives on treaty, and thus have specific application to Treaty 6, and the positioning of lands, waters, animals, plants, and other non-human agents within it.

In doing so, I will look for specific legal processes that link legal principle to its practice. First, I will explore our âtayôhkêwina (sacred or genesis stories) that describe gifting of nourishment and labour to the nêhiyawak by non-human animals. This is a critical examination as it provides guidance on wâhkôtowin obligations in situations where we incur hardship upon the autonomy of others for nêhiyaw good living. These stories provide legal processes that ensure our reliance avoids exploitation, and that 'mutual flourishment' can occur in these relationships. I will then focus on one form of âtayôhkêwina, our Wîsahkêcâhk story cycle, for the critical legal theory it provides. This story cycle has two distinct stages. The first is the 'Wîsahkêcâhk as hero' phase, where Wîsahkêcâhk is engaged in the creation or reformation of the world. The second portion of the cycle describes the travels of Wîsahkêcâhk and his interaction with other beings and things, often in a haphazard manner. As often a negative example for humans, these narratives are rich with information regarding ohcinêwin and responses of the ecological world to human transgressions on non-human autonomy. This examination has specific

implications on law and authority, especially claimed authority of humans over animals; viewing Wîsahkêcâhk stories as critical legal theory, reveals and strengthens the relational authority of the legal relationships between nêhiyaw peoples and non-human agents.

II. Nêhiyaw âcimowina as critical legal theory

My consideration of nêhiyaw narrative traditions as critical legal philosophy is informed by the character of storytelling traditions within nêhiyaw societies. As Gordon Christie notes, "there is concern over the possibility that Indigenous scholars might unreflectively or uncritically fall into thinking and writing in non-Indigenous ways, a failing that can re-inscribe the very ways of thinking that historically have worked so powerfully against Indigenous peoples."[439] When dealing with theory, Christie calls for Indigenous legal scholars to: "(a) maintain their grounding in their communities, (b) carefully assess the web of conceptual relationships within which a non-Indigenous theoretical position or argument is embedded in relation to this grounded Indigenous existence, and (c) excise the content of the non-Indigenous argument or position from these extraneous matters, so it can be put to use by and for Indigenous peoples."[440] Starblanket and Stark similarly note that a critical resurgence of relationality to Indigenous knowledges requires historical intellectual traditions or theoretical practices to be identitied and applied to current studies as philosophies or theories.[441] Taking these respective calls earnestly, the meta-narratives on law within nêhiyaw story cycles provide nêhiyaw legal theory. They

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[439] See Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J. Richardson, Shin Imai & Kent McNeal, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) c. 8 at 25.
[440] *Ibid* at 44.
[441] Starblanket & Stark, *Relationality, supra* note 86.

provide the dialogic room for normative discussions that may transform law. With specific regard to our relationships to other animals, nêhiyaw narrative traditions allow for a broad examination of the power imbalances that are overlooked in our day-to-day interactions with animals. Stories often portray animals as full autonomous agents, with the power to directly communicate through a shared language with nêhiyaw peoples. While often anthropomorphic in nature, the role and characterization of animals in nêhiyaw âcimowina provides new reflections on human-to-non-human legal relationships. These dialogues raise questions on 'bargaining power' within legal relationships, exploitation, consent, and ultimately, treaty.

Story based methods have become the most prevalent within academic observations of Indigenous law. One popular tool to observe and analyse Indigenous law is the adapted case brief method, utilized by the Indigenous Law Research Unit at the University of Victoria and the Wâhkôtowin Law and Governance Lodge at the University of Alberta.[442] I take a single-story interpretative approach in this chapter. Although some of the principles, or legal responses within the stories below may be reached through the adapted case brief method, my approach differs in that I am asking questions of stories with regard to specific principles, and am applying the answers to the questions raised in this dissertation.[443] These specific critical questions are:

1. How does this story give specific meaning to wâhkôtowin between nêhiyaw peoples and non-human animals in the story?

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[442] For an explanation of the adapted case brief method, see Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead Law Journal 16; Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding, and Applying Indigenous Laws, 11 Indigenous Law Journal 1

[443] This is more akin to a 'single-case' analysis method that John Borrows often employs, most often in John Borrows, Drawing Out Law: A Spirit's Guide (Toronto: University of Toronto Press, 2010).

2. Does the story characterize ohcinêwin, or retribution for transgressions against non-human agents?
3. What legal processes are outlined in the story?
4. What does the story tell us about treaty relationships between nêhiyaw peoples and animals?

As these questions are answered, a sub-set of other questions are raised specific to each story. These new questions, and the discussions they enable, add to nêhiyaw critical legal theory.

a. Caretaking of Stories: Truth and Collectivity

As evidenced by the reliance of this dissertation on story, nêhiyaw narrative processes are integral to the survival of nêhiyaw pimâtisiwin. Neal McLeod calls this Cree narrative memory, a collection of story that is held communally by nêhiyaw peoples, kept alive by present-day storytelling.[444] There is a general understanding that our *âtayôhkêwina* (sacred stories) and *kayas-âcimowina* (long ago stories) are the collective responsibility of nêhiyaw citizenries as a whole - no one owns stories, but carries obligations to follow procedures specific to nêhiyaw narrative norms. For example, consider these two seemingly conflicting characteristics that are integral to maintaining the collectiveness of nêhiyaw narrative process regarding 'sacred' and 'long-ago' stories. The first is a historical practice of acknowledging that no single person can know a whole story on their own. This is expressed in subtle but strong ways. The most common is the refrain, more often expressed by our older ones: "take pity on me, for I don't know much." I have heard our old ones speak this in ceremonies, educational settings, public gatherings, and in private one-on-one conversations. It is not only an outward contemplation of

[444] See MacLeod, *Cree Narrative Memory, supra* note 20.

tapateyimisôwin (humility) but also an acknowledgement of how they resist individuality (and in turn ultimate authority) in the experience or information they are sharing. As McLeod notes, one of his relatives always began stories with the acknowledgement that he could "only speak of things he knew about", leaving room for other stories to compliment their knowledge, avoiding an absolute position. [445]

Coupled with the acknowledgement that generally stories are owned and shared collectively, there is an obligation for the listener to take what is relayed in the story as truthful. MacLeod notes the older practice within his home community where a speaker presents a knife to the listener with the instructions, "if what I say angers you" or "if you do not believe what I say, then you can use this knife on me".[446] Similarly, Hadley Friedland notes a similar expression in her work with the old ones from Aseniwuche Winewak Nation in Western Alberta. During the course of one of her interviews, an elder began to describe his communications with moose, including speaking the same language and conversing with them. After he recalled these experiences, he asked her the question, "Do you believe me?" Friedland notes that the elder (whom she knew and had strong relations with prior to her research) was challenging her as a researcher, that her role required her full openness to his story.[447] This expectation of the listener in the storyteller/listener relationship is not about authority, attempts to stop the listeners' own interpretation, or their questioning of the story entirely. It is a call to consider the information relayed earnestly.

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[445] *Ibid*, at 12.
[446] *Ibid,* at 12.
[447] Hadley Friedland, "The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns" (LLM Thesis with the University of Alberta, 2009) [Unpublished] at 60.

When we braid these two aspects – that the speaker does not have all the knowledge, and that the listener must seriously account for what they hear – we see that they are not antithetical aspects of each other but both just as integral to nêhiyaw reasoning. They groom the mind to engage in a form of nêhiyaw intellectualism that requires any potential cynicism in the listener to the 'authenticity' of a story to be replaced with an intellectual curiosity. Often a story is shared for far more than its 'factual basis'. If we acknowledge that there is more to what a story holder knows, then it makes the listener seek other stories that confirm, deny, transform, collaborate with or show hidden paths within the original speaker's stories. Further, by demanding the serious attention of the listener – even to the aspects of a story that challenge our current intellectual processes – it also demands that the speaker's story is included in its rightful place alongside the other strands of a community. These narrative skills ensure there is no threat of the authority of the single story or of one dominant way of thinking of law. This relegates the idea of a Herculean judge, that one theoretical person who could hold all legal knowledge (thus the possibility of perfect justice), as mere fantasy.[448] Justice is only capable collectively.

The publication of âcimowina complicates the principles of collective caretaking and remembrance of stories within nêhiyaw citizenries. While a text may be publicly available (like the Wîsahkêcâhk stories in this chapter) it remains moored to nêhiyaw communities through an evaluation of its authoritative value.[449] 'Sourcing' a story, often through a teller acknowledging its lineage, allows for the listener to gauge the weight of

[448] As opposed to Dworkin's hermetic view of a legal system including a Herculean judge who, by gathering all the available evidence, can make perfect judgment.
[449] See Walter Lightning, *Compassionate mind, implications of a text written by Elder Louis Sunchild* (Masters of Education, Thesis, University of Alberta, 1992) [unpublished] at 2.

the story.[450] The closer a story is related to a storyteller with known stature, or a respected old one, it implicitly carries authority and weight.[451]

There is also an understanding that âcimowina are contextual beings, as they need to be told within a specific context to avoid potential misunderstandings of the actions within a story, or its purpose. Within nêhiyaw narratives, there is a value to linking stories to contexts and situations, to avoid legal teachings becoming a "jumble of misinformation and confusion."[452] A teller of these stories needs to know where it fits within the fabric of narrative tradition, the metaphor used, and the authority in which the story is told.[453] Protocol helps maintain this structure. As Walter Lightning notes:

> "Without the protocols, and without the face-to-face interactional context, the reader is left with a focus on exotic symbols. In the living literature, the metaphor can change on the context. That is a part of their "aliveness."[454]

Âcimowina protocol and procedure sustains the specific use of story. Finally protocol ensures that our interpretations are guided by tapwewin. As Lightning notes, it is impossible to reach a truth through deception.[455]

b. Embracing Childlikeness within our Legal Texts

Nêhiyaw narrative – like many other societies – uses entertainment and humour as a vehicle to teach. As I will be using âcimowina as legal resource that have an undeniably entertaining quality to them (our Wîsahkêcâhk stories owe at least some of their intersocietally popularity to their humor), it is important to recognize the earnest work

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[450] *Ibid* at 3.
[451] *Ibid.*
[452] *Ibid* at 3.
[453] *Ibid* at 3.
[454] *Ibid* at 3.
[455] *Ibid* at 79.

that entertaining stories do. Toquaht scholar Johnny Mack raises the issue of Indigenous stories losing the visibility of their constitutive elements through a misidentification of stories as merely entertainment. He states that "where we do have awareness of the stories, they are often likened to folklore, since we stand before them substantially rationalized by modern liberal ideology."[456] Because a lack of understanding of the constitutive elements of its own creation and 'long-ago' stories, liberalism slips into the easy comparison and resulting reference of Indigenous narratives as folk tales. Indigenous narratives are then incorporated into liberal traditions in very much the same cultural positioning that Anglo-folktales situate: entertaining, containing psycho-analytic and archetypal value, but ultimately dismantled of their constitutive and legal force.

Nêhiyaw narrative, even those that are primarily for our *awâsisak* (children), are received differently by nêhiyaw societies in comparison to contemporary reception of European folk traditions. First, there is an understanding that stories do not have singular, etiologic purpose. This long has been the sacred search of ethnographers within Indigenous communities, seeking singular or simple reasons for our origin stories. In his work with the Rock Cree, Robert Brightman is certainly cognizant of the etiologic methods that many anthropologists implicitly or overtly take up. Noting that a bridge "between what people take their myths to explain and what structuralists take them to explain remains" elusive,[457] Brightman acknowledges the pragmatic yet complex reasons for the use of etiologic vehicles within Rock Cree narrative. He notes:

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[456] Johnny Mack, *Thickening Totems and thinning Imperialism* (Masters of Law, Thesis, University of Victoria, 2010) [unpublished at 130.

[457] Though this work is cognizant of the challenges of etiological engagement, his work engages in it. As an example of an etiologic interpretation of story, he cites the Rock Cree story of the Whiskeyjack (Gray Jay), to describe its personable and thieving nature. See, Brightman, *Grateful Prey, supra* note 200, at 52.

> My experience with Cree narrators indicates that [etiological themes] are central to what Crees find most compelling in the [Creation story] literature: the constructive effect of primordial events on the design of their contemporary social and bio-physical environments. The etiological themes themselves are symbolically complex, often integral rather than peripheral to the plots that are their contexts.[458]

Brightman concludes that etiology is an integral part of, yet not the reason for sacred stories. Their purpose is more pragmatic than central to the stories. These qualities – where a story describes the origin of a feature of an animal, for example - serve as a mnemonic device. It allows stories to be catalogued and recalled. Consider the story of *Rolling Head.* If we were to surmise that its purpose was to explain the origins of *namêw* (or sturgeon, as the story concludes with Rolling Head transforming into a sturgeon), we would miss the wealth of social, spiritual, and legal information the story provides.[459]

The etiologic elements of nêhiyaw âcimowina allow for a greater *relationality through reimagined reality*. *Rolling Head* abstracts our present day-to-day relationship with sturgeons and causes us to consider its prior humanness. I consider this a reimagined reality, in that there is no expectation that sturgeons will once again be human, and vice versa. The story allows us to reimagine our thinking from our present reality to a position of greater relatedness – in the case of Rolling Head, we envision the sturgeon as a descendant of Wîsahkêcâhk's mother, and thus linked to us.

Relationality through reimagined reality is a practice and perhaps a required element of all legal systems. As I mentioned earlier, within Canadian-state law it is simultaneously believed that a corporation is a non-living entity whose existence is owed

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[458] *Ibid* at 53.
[459] For a critical examination of the Rolling Head story and its gendered nature, see Emily Snyder, Val Napoleon, and John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593, at 605.

to legislation (think 'a creature of statute'), yet simultaneously is capable of entering into contracts as a human and holding certain Charter protections as a 'person.'[460] Or as I have previously written:

> "Our ability to enact and believe detailed and complex legal fictions is essential to the operation of Canadian law. We can imagine and stake our lives on the legal fiction of the limited liability corporation, and believe that it shields us from personal liability, despite its immateriality. It is our belief in 'imagined realities' that allows legal systems to work. As Harari asks, '[j]ust try to imagine how difficult it would have been to create states…or legal systems if we could only speak of things that [materially] exist, such as rivers, trees and lions."[461] If we look at myth making and myth telling from new, depoliticized eyes, we can view the necessity of this practice."[462]

Shared reimagined beliefs create certainty and order in our lives together. Another example of the power of shared beliefs are how we envision the *ka-nimihitocik*, the northern lights, or literally, *those who are dancing* (referencing our relatives that have passed on dancing in ceremony across the sky). As Fine Day stated in 1934:

> "[t]he Indian believe that these are the spirits of the dead dancing in the sky. But the White man say that it is only the shadow of the ocean. I believe the Whiteman too, for they have airplanes and they can go up at the sky and look all these things. But I believe the old Indian too who said that it was the spirits of the dead dancing…I believe both explanations.

We can *believe* both, and both serve significant purposes. I can believe that the northern lights are the result of stardust burning in our upper atmosphere, and I can also gaze upon

[460] For example, in *Canada (Attorney General) v. JTI-Macdonald Corp*., [2007] 2 S.C.R. 610, 2007 SCC 30, it was held that legislation that required mandatory warning labels on tobacco products violated the right to freedom of expression of tobacco corporations. While this violation was found to be justified, it restated the scope of Charter protections for corporations. Giving the Charter a broad interpretation, commercial expression continues to be protected by s. 2(b). Also see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. Such protection has not extended to s. 7 for example, as it is acknowledged that a commercial entity is not living, thus not entitled to life, liberty and security of the person.
[461] *Ibid* at 31.
[462] Lindberg, *Sacred Changes, supra* note 76.

them and see our ancestors who have passed on dancing in ceremony.[463] Such double belief is not a fault of intellectualism but the opposite, it is an ability to comprehend and engage in multiple forms of thinking. Just as we would not consider the corporate lawyer as 'unintellectual' or 'backwards' in their practice based on the simultaneous belief that the corporation is a fiction of statute and yet a body capable of immensely influencing our lives, we can consider two views of the story because their social and legal force.

The second point I want to consider is the *childlikeness* of some of our narratives. Some of our atayokewina contain elements that are undeniably suited for our awâsisak as they grow. One of my favorite Wîsahkêcâhk stories to share in large settings is the one about Wîsahkêcâhk and the council of the dogs. One of the integral points of the plot is when dogs of all type take off their rear ends as they enter a great council, hanging them up like coats on hooks on the walls. The story concludes with Wîsahkêcâhk interrupting their great council, causing the dogs to run out of the hall in such a hurry that they gather whatever rear end they can get a hold of. The etiologic punchline of this story is that this is why dogs sniff each other's rear ends to this day: searching for their old ass.

I have told that story in a number of different forums (including at law schools in front of future colleagues), and the punchline, however big a reaction it gets, never blunts the lessons of ohcinêwin embedded within the story. The story talks about the deep friendship between Wîsahkêcâhk and a certain dog, and how the negative parts of

[463] This may raise a question of the compatibility of these two truths. My belief in the latter is not necessarily for the physics of it, but for the ideas, lessons, and connections it provides to both familial teachings and law. Richard Dawkins would not be troubled by this view as much as we may believe. Though a staunch atheist, he has expressed that there is value in such teachings for the historical or cultural value they provide. Where such teachings start moralizing about evilness or wickedness, they lose their value, and can turn dangerous. See Laura Geggel, "Why Atheist Richard Dawkins Supports Religious Education in Schools" (2017) Live Science Online: < https://www.livescience.com/59455-richard-dawkins-on-school-religious-education.html>.

Wîsahkêcâhk's humanity (his hubris, greed, and co-dependence) shatters this friendship. Despite its humor, the listener always is left with solemn reflections of our relationships to non-human animals, and how our collective consumptive and controlling nature affects these relations.[464]

What I am implying is the childlike nature of some of our legal resources is a constructed and necessary characteristic. Within nêhiyaw societies especially, there is an understanding that a child's legal education begins very young. The childlike nature of our stories serves a purpose. This may be a countervailing approach within nêhiyaw legal systems in comparison to Western legal ordering. Law, its interpretation and enforcement, is held exclusively by adults.

III. Âcimowina Genres and Categories

Nêhiyaw narrative practices are categorized in three distinct genres: *âtayôhkêwina* (sacred stories); *kayas âcimowina* (long ago stories); and *âcimowina* (present-day or future stories).[465] Kayas âcimowina are "stories that are temporally remote from the situation of narration, although people may differ as to how remote the temporal setting may be."[466] While not sacred stories, they are historical stories that have been passed down long enough where the contemporary tellers no longer have a direct connection to the events. *Âcimowina* are generally biographical in nature, describing personal or

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[464] See John Borrows, *Drawing Out Law, supra* note 180 at 213-5, for another version of this story. As a testament to the strength of our oral traditions, I heard this story from Robert Metchoyeah from the Dene Tha' First Nation in 2002, told around a fire at a cultural camp for Dene Tha youth that I was working at. Although John's and Robert's variations have some differences, they both center upon the trust relationship between humans and other animals, and dog's mediation of this.

[465]Interestingly, despite normative understandings that stories evolve, change, and have lives of their own, all of these conceptions of stories are inanimate within Nêhiyawewin. The ~ina signifies a non-animate plurality. If it were atayohkewinak, it would be animate. See H. Christopher Wolfhart and Janet Carrol, Meet Cree: A Guide to the Cree Language (Edmonton, University of Alberta Press, 1981) at 20-1.

[466] Brightman, *Grateful Prey, supra* note 200, at 7.

community histories, past community practices or hardships overcome. Âcimowina are vitally important to legal narrative practices, as embedded within them is a wealth of information regarding law, legal decision making and legal processes. For example, the story of "Indian Laws" recounted by Peyasiw-Awâsis (Thunderchild) relays responses to intersocietal harms within a nêhiyaw society. It involves responses from the *okimâw* (chief) and gift-giving as a retributive legal process.[467] Such stories have been used within a case-brief methodology to pull out human responses to challenges or problems. This is one method to use stories raise up legal principles and processes.[468]

a. Âtayôhkêwina as present-day critical legal theory

Âtayôhkêwina "are sacred stories of how the world was shaped, when pisiskiwak, animals, and humans could talk, and when Wîsahkêcâhk transformed the world of misadventure, love, and mischief."[469] This lineage of stories deals with the creation of things, with relationships with animals, beings and other things, and of serious, significant or noteworthy historical events to the Cree people. Âtayôhkêwina "place importance on the spiritual history or the narratives involving spiritual beings known as âtayôhkanak."[470] They are "often repeated and familiar narrative which may belong to a well-known body or canon of traditional accounts."[471] These stories are significant to our understandings of how we relate with and support non-human animals and things. Within

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[467] "Indian Laws", recounted by Chief Thunderchild to Edward Ahenakew, and recorded in writing in Edward Ahenakew, Voices of the Plains Cree, ed. Ruth M. Buck (Saskatchewan:Canadian Plains Research Centre, 1973) 17-19.
[468] For example the Indigenous Law Research Unit at the University of Victoria's Faculty of Law primarily utilizes an adapted case brief method to draw out legal principles from publicly accessible stories. See Friedland, *Reflective Frameworks, supra* note 442.
[469] Johnson, *Nêhiyaw, supra* note 8, at 27.
[470] *Ibid* at 87.
[471] W.C. Holfart [ed], âtalôhkana nêsta tîpâcimowina – Cree Legends and Narratives from the West Coast of James Bay" [1979] University of Manitoba Press: Winnepeg. At xix.

them, “animals and other non-human agencies sp [eak] and behave like humans” and “the landscape and fauna had not yet acquired [the] customary characteristics” we attribute to the land today.[472]

Collectively, âtayôhkêwina make up a body of nêhiyaw critical legal philosophy or theory. As the stories are widespread, differentiations in the respective tellings of sacred stories does not affect the veracity of the belief of the story.[473] Winona Wheeler notes that âtayôhkêwina are complex vehicles of information, as they contain “spirituality, philosophy, and world view, and contain laws given to the people to live by.”[474] They are “a narrative embodiment that creatively reflects on the situation and the world in which we find ourselves.”[475] By some cosmological teachings, our first laws are recorded in âtayôhkêwina, first given to the nêhiyaw peoples through our elder brother, Wîsahkêcâhk.[476]

One way our âtayôhkêwina serve as critical legal theory is through their portrayal of ohcinêwin (transgressions through actions) ohcinêmowin (transgressions through speech) against non-human agents within nêhiyaw ecology. Often implicit in these portrayals is a critical discussion or commentary on these laws. These thicken our understandings of wâhkôtowin, for, as Pauline Johnson notes, “[t]hese narratives give insight into the way that Nêhiyaw people are related to their ecology and environment, and importantly with other beings.”[477] As “[m]any âtayôhkêwina and teaching stories are

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[472] Brightman, *Rock Cree, supra* note 168, at 6.
[473] *Ibid* at 6.
[474]Winona Wheeler, “Reflections on the Social Relations of Indigenous Oral Histories” in Ute Lische & David T. McNab, eds., In *Walking a Tightrope: Aboriginal People and their Representation (*Waterloo, Ontario: Wilfrid Laurier University Press, 2005) at 202.
[475] MacLeod, *Cree Narrative Memory, supra* note 20, at 97.
[476] McAdam, *Nationhood Interupted, supra* note 63, at 37.
[477] Johnson, *Nêhiyaw, supra* note 8, at 87.

about marriage, births, and transformations between humans and animals," there is a kinship aspect to this wâhkôtowin.[478] When âtayôhkêwina display the laws and societal norms of non-human beings, we can view the critical history within âtayôhkêwina as meta-narratives on legal pluralism; many stories involve the conflict and resolution of human and non-human legal norms.

i. Buffalo Child Stone

The âtayôhkêwin of *Buffalo Child Stone* provides an example of a conflict of norms, and resulting shared laws in its resolution. One of the underlying critical commentaries within the story is the conflict between nêhiyaw and *paskwâwi-mostos* (buffalo) legal norms. There is an implicit tension between the nêhiyaw normative practice of hunting paskwâwi-mostos for nourishment, and the obligation and limits placed upon paskwâwi-mostos to provide for nêhiyaw peoples. This is resolved towards the end of the story where the elder buffalo states:

> "This is our life. Those people you saw, they come from the same creator that we do. Our work is to feed the people, we cover them, and we keep them warm. The people live by us. That is the reason you saw what you saw."
>
> The father continued, "But there is another law. They cannot kill too many of us. They cannot get greedy and kill too much. They can only kill as many of us as they can use. These Crees have to take care. They must treat us with respect and we must be good to them. We multiply quickly and there are many of us, but even then, we must flee when we see them."[479]

Here we have two laws that bridge the conflict. According to the narrative, paskwâwi-mostosak have an obligation in practice (through an inherent loving-kindness) to feed,

[478] Napoleon, *Key Terms, supra* note 47, at 86.
[479] "Ahtahkakoop Learns the Story of Buffalo Child" in Deanna Christensen, *Ahtahkakoop: The Epic Account of a Plains Cree Head Chief, His People, and their Struggle for Survival 1816-1896* (Shell Lake, Sask.: Ahtahkakoop Publishing, 2000) at 34-46.

clothe, and generally shelter the people. The nêhiyawak, in turn, must respect buffalo, including not overhunting. In connection to the mistasinîy site (and the ceremonies that occurred there), there is also an understanding that nêhiyaw peoples must give gifts as part of this obligation.

The story sets parameters on the relationship between nêhiyaw peoples and buffalo peoples. Instead of resting upon a simplified understanding of the relationship between nêhiyaw peoples and buffalo (a hunter-prey framework), it acknowledges the power relations between humans and buffalo (the reliance of Plains Cree peoples on buffalo, and the vulnerabilities for both buffalo and humans that exist because of this reliance), and speaks directly to the norms that are affected by these relations. This also critically raises what is normally implicit in human-non-human relations: namely the acknowledgement of the *ahcâhk* of paskwâwi-mostos, their agency in their relationship with humans, and the intellectualism involved in navigating this relationship. In this story, they converse, display humanity and governance (in the version shared above, the younger buffalo consult with the head buffalo when finding the child). Implicit in this is the sovereignty of the paskwâwi-mostos nation; it has its own governance structure, culture, and legal ordering.

The story provides significant clarity on the nature of the wâhkôtowin between nêhiyaw peoples and animals. The resolution of the conflict is a raising or restating of normative behavior and expectations between human and buffalo. Despite the animation of voice within the story, it obviously does not account for the collective voice of all paskwâwi-mostos, in all contexts and situations. There are arguments, like the one regarding anthropomorphism that I engage in a little later in this chapter, that these

stories are unreliable as meta-narratives on law, especially when we view the positions of animals within them from an animal rights orientation. Further, since the gifting of the stories to nêhiyaw peoples, our âtayôhkêwina have been continuously retold and reinterpreted. Thus the information on legal norms encoded in the story has transformed. Some versions of the same story may have contradicting plots or interpretations. This may be because of the retelling (and reinterpretations that come from them) of stories have distinct lineages from each other. Or a story may be actively inverted to provide a critique of the popular interpretation of a story, or to provide an alternative view on the issue a story is centered around. As I noted earlier, this is a useful tactic to raise and address concerns about hidden gendered representations (or lack thereof) within stories.

Regardless, the accepted fluidity of some of our origin stories resists an 'originalist' approach to nêhiyaw story interpretation. Further not all âtayôhkêwina have such overt considerations of law within them. *Buffalo Child Stone* is a rare example where the dialogue within the story is about laws. The critical commentary within many other narratives - like the Wîsahkêcâhk stories discussed later in this chapter – is implicit, relying upon interpretations of the lawfulness, the procedures, and the consequences of acts. Regardless, *Buffalo Child Stone* still requires the support of other resources to interpret the wâhkôtowin and ohcinêwin within the story. *Buffalo Child Stone* does not provide humans the right to hunt buffalo indiscriminately; it sets out the base of an ongoing relationship that, under certain conditions, allow humans to intervene in the autonomy and sovereignty of Buffalo peoples. Another âtayôhkêwin, one that that talks about buffalo returning into Red Berry Lake can be viewed as the sister story to *Buffalo*

Stone Child, as the buffalo leave the prairies because of the harms humans have done to them and the landscape.[480]

ii. The Moose and the Pipe

Another story that adds to the critical legal theory on human/non-human wâhkôtowin, is *Moose and the Pipe*. This story deals with human use of animals, ceremony and the bodily integrity of the animal. According to this story, a family of moose are sitting in their own lodge (as the story is premised on the assumption that the moose lived in this manner long ago).[481] During the evening, a pipe comes floating through their lodge. The older moose know to leave it alone, but a younger moose, curious, takes the pipe and smokes it. Within the story, the older moose admonish the younger one for smoking the pipe, as they understand the implications of taking the pipe: the young moose has created a treaty and agreed to be hunted by humans. The next day holds true to the wisdom and experience of the older moose, as the young one is unable to escape the hunters. The story concludes with lessons on this relationship: the young moose returns to the lodge the evening of the hunt, and shares that there was nothing to fear, for the humans provided gifts to the moose in return for taking his life. There is also an acknowledgement that the young moose is regenerated, due to proper adherence to hunting protocol by humans.[482]

I note that the story does not mean that every moose consents to being hunted; the older moose refuse the pipe. It also does not mean that it gives every nêhiyaw hunter the right to hunt moose. What it does is set out the procedures of how to re-engage in this

[480]See MacLeod, *Cree Narrative Memory, supra* note 20, at 57-58.
[481] Michael Caduto, Joseph Bruchac, Keepers of the Animals: Native American Stories and Wildlife Activities for Children (Fulcrum Publishing: Golden, Colorado, 1991) at 7.

relationship. There is an obligation for the present-day hunter to engage in the procedures (in this case offering tobacco through the pipe) to continue this relationship with moose. Thus, treaty (in a nêhiyaw view) is not a settlement of terms of a relationship, but rather an acknowledgment of a dependence and mutual aid with each other, with legal procedure to renew this relationship.

If we consider this story a treaty/consent story, it provides a wealth of information on how we should conduct human-to-moose wâhkôtowin. The offer and acceptance of the pipe separates the hunt as relational act rather than one of naked exploitation and extraction based on domination. While the consent of the young moose in the story is complicated by his ignorance to the consequences of taking the pipe, it is potentially resolved by his acknowledgement of the benefit at the end of the story. As Walter Lightning notes, pipe ceremonies enact "mutual thinking" among the participants.[483] "This meeting of minds…must occur in ceremony, since it ensures that the conditions for truth are being cultivated."[484]

This story explicitly links pipe ceremonialism to wâhkôtowin obligations. If we consider the role of the pipe in the narrative the *Creation of Buffalo Lake,* where we see the hunters engage in ceremony as well (they ceremony for four days) and thus are successful in their hunt and resulting creation of the lake. This is consistent with historic and contemporary nêhiyaw practices. As the late Yvonne Dion-Buffalo notes:

> [T]he keepers of the Cree rituals or the male and female protectors and warriors, would sit down before the door of the tipi; then the sacred pipe would be filled with tobacco and set on a bison chip altar. The pipe would be lit, offered to the four directions or winds (a condensed metonym for the idea of self as part of a community alongside notions of 'appropriateness', 'truthfulness and 'beauty'. These concepts informed the

[483] Lightning, *supra* note 449, at 62.
[484] Poirer, *Hunting Buffalo, supra* note 316, at 63.

> indigenous peoples' perspective on maintaining good relationships with an intricately-related physical world); to the Great Spirit above, and to Mother Earth (a composite epigram for the beating spirit of nature and of the entire universe). Then one of the keepers of this particular ceremony would pass the sacred pipe to the scouts while giving thanks to buffalo for giving the people food and shelter for an entire year. 'The nation has depended on you. Now, we are coming to get you,' the keeper would say, 'but we will do it so your spirit will live on' [485]

The conclusion of the *Creation of Buffalo Lake*, where the môsom attempts to take the horn from the lake ice, without consent (no offering was made) offers an example of peril due to unlawfulness. The two stories connect the relationship between wâhkôtowin, pâstâhowin, and ohcinêwin.

If we think of Treaty 6 with this story in mind, some new considerations arise. Despite the unequal power relations in the treaty event, the moose is treated with miyo wicêhtowin: they are gifted appropriately. This offers a lesson to Canada, that even when the bargaining position is uneven, there is an obligation, set by the pipe ceremonialism that occurs, for equitable treatment afterwards.

b. Anthropomorphism within âtayôhkêwina

If we consider this story as one that *creates treaty* a number of critical questions arise. These include questions about renewal and consent, for as much as nêhiyaw law attempts to account for the voice of lands, waters, and animal beings, we will always be limited by a lack of a shared language. This raises questions on the reliance within nêhiyaw law on anthropomorphic interpretations in the characterization of the 'voice' of the ecological world within stories. Related to this is the idea of treaty relationships with non-human

[485] Dion-Buffalo, Yvonne. (2019). Four generations: a story of a family of Plains Cre Women (Dissertation, University of New York at Buffalo, 1996) [unpublished] at 61-2.

agents generally: can we truly have treaty relationships with our animal relations (for example) if their agency in treatymaking and treaty renewal is compromised by human interpretation? While a treaty relationship encoded in âtayôhkêwina may describe an agreement for nêhiyaw people to infringe upon the autonomy of a species, I am troubled by accepting such stories at face value without a critical reflection on how consent is presented in the stories, as it is humans who are interpreting stories. If we consider these treaty relationships requiring ongoing renewal, what does a story say about revocation and consent?

Anthropomorphic representations of animals through story is a critical area of concern within animal law.[486] Simon Schneider notes, "[i]n science, the quest for utter objectivity is not helpful, but…neither is the opposite extreme of utter subjectivity – investing animals with [human] emotions and characteristics".[487] While still providing similar dangers, the form of anthropomorphism practiced within nêhiyaw âcimowina is rooted in a different epistemology than European anthropomorphic practices. In European traditions, anthropomorphic representations of animals were popularized within literature through Aesop's Fables, which were an adaption of *Panchatantra,* historical Hindi stories.[488] These stories place "human vices (as well as virtues) onto animals so that they can be confronted, examined and satirized from a safe distance."[489] The historic use of anthropomorphism as a critical legal device to comment on human behavior in European traditions has eroded over time. Simon Schneider argues there has been an

[486] See Maneesha Deckha, "Initiating a non-anthropcentric jurisprudence: the rule of law and animal vulnerability under a property paradigm" (2012) 50 Alta. L. Rev 783.
[487] Simon Marshall Beattie Schneider, "Animal Sapiens: The Consequences of Anthropomorphism in Popular Media" (Master of Fine Arts Thesis, Montana State University, 2012) [unpublished] at 6.
[488] *Ibid.*
[489] Derek Bouse, *Wildife Films* (Philadephia: University of Pennsylvania Press, 2000) at 92.

erosion of the line between "anthropomorphism as literary device and anthropomorphism as fact" in the present day.[490] This has led to animals who exhibit human-like characteristics and tendencies to be favoured in species conservation and habitat protection.[491] As I have noted previously, it also creates the danger of moral or legal rights being determined from an anthropocentric gaze; that non-human beings and things are evaluated and provided rights from a human vantage point.

As our apriori conceptions of animals is often based on a different relationality, the anthropomorphic tendencies practiced within nêhiyaw âcimowina are distinctive from Euro/Canadian/American practices. Returning to the *Moose and the Pipe*, the moose in the story are not Disney characters. Whatever characterization of the moose and the interpretations based upon them is grounded in the pragmatic reality of taking the lives of animals for our survival. The story is ancillary to the hard responsibilities and spiritual and emotional labour involved in hunting properly, as it involves taking and making the most of the life of the animal that will nourish the hunter. The utilization of anthropomorphic images or characteristics strengthens an understanding of kinship with them.

Further, any anthropomorphism within stories is ideally practiced in relation to other social institutions like ceremonies. This aids our practices (and even critical questioning of) consent and renewal, in relation to hunting. Ceremony offers an environment where interspecies communication occurs, where conversations on the

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[490] Schneider, *supra* note 487, at 7.
[491] A major example of this has been the decades-long activism against the harp and hooded seal by the Inuit. While the Inuit hunt is far more humane than run-of-the-mill factory farming in North America, the visibility of the hunt (cute white seal pups whose blood is visible on a white background) has made the activism a commercial success. See George Wenzel, Marroned in a Blizzard of Contraditions: Inuit and the Anti Sealing Movement (1985) 9:1 Inuit Studies 77.

renewal of a treaty relationship can occur. Ceremony provides an avenue for enhanced conversation with non-human beings and things in a direct manner (through *pawâkan*, or spirit helpers, that assist in ceremonies), and in an indirect manner (in how ceremony provides a pedagogical model for *nahâsiwin* – heightened observation and interaction with the non-human world – to be practiced).[492] Âtayôhkêwina provide a tool for these discourses to occur.

It is of course, not perfect. Aside from a very select few of our gifted people or those whose lives intertwine with our animal relations in an ongoing and close manner, adequate communication with our animal kin is an ongoing human aspiration. However, despite our human capacities failing us in this manner, it should not impede us to strive for the best forms of communication. Nahâsiwin requires all of our technologies, our past historical ones and those available to us in the present day. Our continued ceremonial cycles can be used to support the knowledge we have of our animal relatives gained from present-day technologies, and vice versa. Returning to the *Moose and the Pipe*, even if we do not have the present-day capacity for language sharing with animals, it is ceremony, through its compelling us into a four-bodied awareness of our relationship with the ecological world, that provides us with the technology to envision this type of kinship.[493]

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[492] Atheists like Richard Dawkins, Frances Widdowson, and Peter Singer would question the value of these beliefs, considering their lack of belief in them. While the following chapter on ceremony and law will help attenuate the utility of beliefs in *pawâkan,* I have refrained from talking about this in strict utilitarian terms to attempt to provide some space for members from nêhiyaw communities who hold these beliefs – who may feel alienated in such discussions – may find a place in the reasoning in this dissertation.

[493] This is distinct from the standard of kinship (or lack of within Canadian state law. In 2015, animal rights ctivist Anita Krajnc was charged with interfering with the lawful use of property in 2015 for giving water to pigs that were heading to slaughter. While the judgment found that Krajnc did not obstruct or interfere with the use of property, it plainly held that pigs have no human rights, that they are tradeable property. See The Guardian, Judge dismisses case of woman who gave water to pigs headed to slaughter"

IV. Dealing with the Sacred within Critical Legal Theory

As I will discuss further in the next chapter, law often has a difficult time with the term 'sacred.' The affective economy it carries is loaded, especially considering its attachment to religious practices and dogmas within Western practices. Deeming âtayôhkêwina as sacred is not a call to blind dogmatism, but rather an invitation towards nêhiyaw intellectual philosophy within spiritual practices. At its base, it signifies that the stories are gifts provided at or near creation for nêhiyaw peoples to be able to get along in the world. While dogmatic practices around nêhiyaw spirituality certainly exist within our communities, expressing *sacredness* as a source of law is broad and complex. The sacredness of our âtayôhkêwina does not preclude working rigorously with the stories, or exploring their humanity, inhumanity, earnestness and humor, and their law.[494] Considering Wîsahkêcâhk stories again, his adventures throughout the story cycle range from the sacred to the profane. In one story Wîsahkêcâhk could be shaping the course of the lands and waters to give them their shape, and in another could be burning his own rear end with a stake, only later to mistake those wounds for dry meat.[495] All of this action – however creative, superhuman, mundane and profane - is considered sacred. So, although many sacred stories deal with cosmological and epistemological concerns – such as the creation of the world, the gathering of sacred knowledges, and the positioning of relations between humans and other beings and things – the broad spectrum between the revered and the profane within the stories resists their canonical treatment.

(04 May 2017) Online: the guardian < https://www.theguardian.com/world/2017/may/04/canada-anita-krajnc-pigs-water-case-dismissed>

[494] See Johnson, *Nêhiyaw, supra* note 8, at 27.

[495] Brightman, *Grateful Prey, supra* note 200, at 29.

a. Reinterpreting and reinvigorating âtayôhkêwina

Another consequence of importing western connotations of the word 'sacred' is its synonymous relationship with 'authoritative.' In this light, the creative interpretation or critical application of the story in the present day can be stifled or outright discouraged. Such a dogmatic view of nêhiyaw narratives implies a non-reflexivity of nêhiyaw narrative processes. If we consider nêhiyaw narrative traditions as a collective practice, then reflexivity must be a fundamental element. A storyteller still retains an obligation to remember, recall, and recite âtayôhkêwina in a factual or accurate way. Communities do account for speakers to tell stories properly.[496] However, the direction of the story (or its intention) is left for the listener to interpret. This interpretative room is necessary for the nuanced work of stories to be pliable and applicable to a multitude of situations. Stories are often employed as a method of behavior checking and modification. As there are older principles of non-interference that respects the autonomy of a person's actions, a story may be used to direct behavior without infringing on the agency of a person to choose their future actions. For example, if I were a hunter who engaged in conduct that was needlessly harmful or wasteful in my hunting practices, a story like *Buffalo Child Stone* or the *Creation of Buffalo Lake* may be employed as an attempt to correct my behavior back towards community norms. This is a long used pedagogical tool, as couching the corrective behavior within a story limits the potential defensiveness that a listener may have, as opposed to a direct confrontation.

As Starblanket and Stark note, engaging in âcimowina as a theoretical or philosophical tradition must give critical attention to the historical and contemporary

[496] Lightning, *supra* note 449, at 3.

gendered nature of storytelling, and the implications of this. As discussed in the first chapter, Emily Snyder observes an absence or erasure of Cree women's voice within publicly available legal resources, including stories. One manner to address the concerns raised by Starblanket, Stark, and Snyder (amongst many others) is to move beyond current publicly available resources towards those that are harder to access.[497]

Further, Snyder notes the hyper-centering of the masculine within sacred/origin stories" engenders a "phallocentric" structure of stories that signals "the masculine…as universal (as unmarked), while the feminine is relegated to the particular (as marked)."[498] While the gender-switching that I have engaged with in this dissertation with some of the stories may provide a particular glimpse at decentering of the masculine as the universal, it is a small momentary change without sustained and collective action by others, or myself in other forums, to do same. Further, the duality that is often employed within nêhiyaw âcimowina raises challenges in its depiction of a heteronormative world where only two genders (male and female) are visible.[499]

As origin stories, there may be a tendency to frame our âtayôhkêwina in an originalist approach. Within constitutional studies, originalist approaches interpret constitutional and legal texts closely to the intentions of the original drafters. This is taken to the extremes within interpretive debates about the US constitution. In the context

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[497] For a sustained look at the absence or erasure of the voice of Cree women and girls in Cree legal education materials, see Snyder, *Representation, supra* note 268.
[498] *Ibid* at 193.
[499] One avenue of methods to address the phallocentric nature of nêhiyaw stories and storytelling tradititions, and the heteronormativity it simplisticly replicates are Indigenous feminisms and/or Indigenous feminist legal theory. For example an Indigenous Feminist Legal Methodology "encourages analysis that is attentive to gendered power dynamics as they ply out in Indigenous legal contetxts." It is "expressly political and activist in its orientation", especially to the coercive and oppressive effects of unreflective use of tradition as a stand in for law. Tradition is often invoked as a means for continuing embedded and encoded oppressive acts, structures and laws. This makes the discussion of story interpretation and tradition vitally important. See Snyder et al, *Gender, Violence, & Indigenous Law, supra* note 270, at 645.

of sacred stories, the originalist approach seeks a similar fidelity, albeit in more nuanced form. This is often invoked through describing sacred stories as setting out 'Creator's laws', 'natural laws' or 'Elder brother laws' (laws provided to Wîsahkêcâhk, to be our original instructions.'[500] Implicit understandings of stories, by their nature, as requiring interpretation, their versatility in their uses and meanings, and that they belong to the collective where no one person can claim ownership or even academic mastery of a story, bar against claims of 'intentitionalism'[501] Taking a strict interpretation that seeks the intent of the speaker or drafter is required, intentionalism is a popular position of proponents originalist approaches to constitutionalism. Within nêhiyaw story interpretation, arguments for a 'soft originalism' are often employed in discussions about the interpretation and transformation of creation stories.[502] The debate on an 'originalist' approach is more explicit in debates on nêhiyaw ceremonies and the gendered nature of some protocols the enable or bar participation.[503]

Because of the above, I also take a very liberal reflexive approach to

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[500] See McAdam, *Nationhood Interupted, supra* note 63 at 37. As McAdam quotes her father, Francis McAdam: "wisahkecahk went to okimawaskwaciy (Chief Bear Hill in the Cypress Hills area – minatahkawa), at the top of okimawaskwaciy, he sang four songs. As he sang the four songs to the four directions, the Creator gave him the laws to bring to the people to follow for all time." McAdam also notes that no one person can know all the laws, thus signals a move from originalism towards interpretation.

[501] See Mitchell N. Berman, Originalism is Bunk (2009) 84:1 NYU LR 1 at 38-59 for a detailed look at intentionalism in the interpretation of constitutional documents. As Berman notes:

> Intentionalism is the theory that the meaning properly attributed in a successful interpretation is the meaning(s) intended by the text's author(s), and therefore that the activity of interpreting a text is an effort to identify the authorially intended meaning(s). This thesis can be supported in either of two ways, which intentionalists do not always clearly distinguish. One can maintain either that authorially intended meaning is the only coherent meaning of a given text or that, although a text may possess diverse types of meaning, authorially intended meaning is the only appropriate target of the activity of interpretation. At 39.

[502] Mitchell Berman notes "[s]oft arguments claim that originalist interpretation best serves diverse values like democracy and the rule of law."[502]

[503] See Erica Lee, "Skirting the Issue: A response and call to action*"* (19 June 2015*),* online: *Moontime Warrior,* <https://moontimewarrior.com/2015/06/19/skirting-the-issue/> [Lee, *Skirting the Issue*

âcimowina generally, including âtayôhkêwina. Val Napoleon's exploration of Gitksan law is instructive in how to use a reflexive methodology towards Indigenous narrative processes. Napoleon's description of Stefan Krieger's analysis of two Rabbinical approaches to Sacred Jewish stories (those of Rabbi Akiva and Rabbi Ishmael), guides such a reflective approach. [504] She notes that Rabbi Akiva interpreted stories in a way that viewed the laws drawn from these stories as "mandatory, and people have no autonomy in their decision making."[505] This can be described as a 'rigid traditionalist' approach. This is contrasted with Rabbi Ishmael's practice of recognizing the agency of people "to reason in their decision-making processes, and individuals have some independence in their own decisions."[506] This can be described as 'a reflexive interpretation' approach. The reflexive approach parallels the nêhiyaw narrative process, and is a method here.

The reality is our stories carry the answers to the hard questions we have about them, including what interpretive approach we take. As I have previously written about questions of interpretation and transformation of law:

> "I believe the answer lies within our stories. Our stories and teachings are full of instances of transformation, shape-shifting and fluidity. A boy is shape-shifted into a buffalo and then back again, and finally into a rock, in order to teach of our relations to the buffalo people.[507] A prairie becomes full of hills, in order to demarcate a territory so we stop needless violence between us Cree and our Blackfoot sisters and brothers.[508] A buffalo

[504] Napoleon, Ayook, *supra* note 142, at 274
[505] Stefan H. Krieger, "The Place of Storytelling in Legal Reasoning: Abraham Joshua Heschel's Torah Min Hashamayim" (2007) Legal Studies Research Paper Series, Research Paper No. 07-26 online: Social Science Research Network http://ssrn.com/abstract=1010930 at 4 [footnote omitted] [Krieger] at 44.
[506] Napoleon, "Ayook" *supra* note 142, at 274
[507] See the story of paskwaw-mostos awasis (Buffalo Child) in Neal Macleod, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich Publishing, 2007) at 21.
[508] See the story of the Neutral Hills, in Anne Speight, *The Shadows of the Neutrals and Open Memory's Door* (Coronation, AB: Old Timer's Centennial Book Committee, 1967) at 1-3.

> becomes a lake that nourishes our ancestors in a time of great need.[509] The northern lights shape-shift above us, and transform our realities only if we so whistle and so dare. The lessons and language of transformation is all around us."[510]

V. The Gifting of Horses

As I stated before, âcimowina are living, breathing things. As they grow older, they become wiser as they are adapted, more rooted, and more cherished by multiple generations. Perhaps our stories of experiences with residential schools, with interactions with settlers, with overcoming the Spanish flu, and with the reserve system will one day become known as âtayôhkêwina, with valuable lessons of resilience within them. The *Creation of the Neutral Hills* shows that âtayôhkêwina can be 'born' in contemporary times. As part of the lineage of treaty stories with the nitsitaapi, the events it describes are relatively contemporary.

The creation of âtayôhkêwina in present day is significant to a growing and adaptive treaty ecology[511] with non-human beings. Our âtayôhkêwina that describe how nêhiyaw peoples *were* gifted or acquired *mistatim* (horses) creates a treaty relationship based upon human reliance and need, as well as reciprocity. It also reinforces the cosmological positioning of nêhiyaw ahcâhk within the ecological world; one that has humans as fully reliant upon other living beings to continue life. The story is one in a continued lineage of other (usually animal) nations observe humans, recognize our vulnerabilities, and in turn showing loving-kindness and concern for us (see *Buffalo*

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[509] The story of creation of Buffalo Lake, passed orally in my family, involved a buffalo being hunted and producing water, not blood, out of its wound. The water continued to spill out of the wound until it became the shape of a buffalo. Communities would gather at this new lake as it became a place of refuge and was plentiful in the food and shelter provided around it.
[510] Lindberg, *Sacred Changes, supra* note 76, at 92-3.
[511] See Noble, *Treaty Ecology, supra* note 187.

Stone Child, Neutral Hills, the Creation of Buffalo Lake, the *Woman who Married Beaver, Hunting Moose*). We can also view the '*Gifting of Horses'* stories as narratives about our obligations to new technologies within nêhiyaw pimâtisiwin. Nêhiyaw peoples acquired horses in the 1700's.[512] Below, two versions of this story are examined to see how âtayôhkêwin develop and transform.

The first version was told by Eli Pooyak in 1974 to the anthropologist David Mandelbaum.[513] In Pooyak's version, the reader is introduced to the hardships of nêhiyaw living during the period of time the story is taking place. In this setting, a young man (who is described as shy) is visited by a stranger his lodge one night. The stranger asks the young man to follow him away from his lodge, for there is a gift waiting that will help his community if he takes on the journey. The young man is reluctant, but finally agrees after the man visits him on the fourth night. He follows the stranger to a lodge, where an old one lives. Here, over the course of four nights, the young man is taught songs by the old one, gaining the story of each song as he learns them. At the completion of these four nights, the young man is told the protocol to call horses from a lake. Following these instructions, the young man successfully calls the horses from the lake.

This is not where the account ends. The old one had given the young man instructions on what to do once he acquired the horses, for the horses are not "animate" yet; they are described as being stone-like, and not useful to nêhiyaw peoples. This is setting protocol: the young man is instructed to circle and smudge the *mistatimak* (horses)

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[512] See John S. Milloy, *The Plains Cree: Diplomacy and War, 1790 to 1870* (1990) (Winnipeg: University of Manitoba Press, 1990) at 24-25. [Milloy, *Plains Cree*].
[513] Pooyak, Eli. "How the Cree Acquired Horses" based on an interiew conducted at Sweetgrass Cree Nation in Saskatchewan, on March 18, 1974. (22 Mar 2016) Online, University of Regina: <http://ourspace.uregina.ca/bitstream/handle/10294/1610/IH-074.pdf?sequence=1. >

four times, and then they would come to life. The young man does so, and the horses (all mares but one stallion) are animated.[514] This account contains as significant amount of information. In one manner, it serves as a template for the Horse Dance, a ceremonial practice that still continues today. It also passes along information regarding protocol in maintaining a good and healthy relationships with horses.

A second version of this story reveals the complexity of âtayôhkêwina. Fine Day tells a different version of the story to David Mandelbaum.[515] In his first account, Fine Day gives a literal, physical description of the acquisition of horses. He states, as one of k'se-man'to's final acts in creating nêhiyaw âskiy, the nêhiyawak receive a vison that they would one day be given horses. Later an okimâw remembers this story, and decides to go in the direction that k'se-man'to pointed to (west), in search of the mistatim. Fine Day's first account ends with nêhiyawak acquiring horses from this action, slyly stealing them from the niitsitapi. This is described as horse-raiding, or counting coup within nêhiyaw traditions. I consider this story a *kayas-acimowin* (a long-long ago story).

In recounting this to Mandelbaum, Fine Day then circles back into the âtayôhkêwina version of the story. His story is similar to Eli Pooyak's, with a few key differences. Most importantly, Fine Day's version provides additional information regarding the role of protocol in setting the stage for gifting: in his version, four kôkoms provide the young boy with gifts on how to deal with his encounter with the old man who will gift him horses. Following the procedures given by the kôkoms, the boy stays with

[514] *Ibid.*
[515] *Ibid.*

the old man for four nights, listening to his stories each night.[516] By doing so, he is able to gain the horses.

a. Analysis: Wâhkôtowin obligations to those we burden

When they arrived in the lives of the nêhiyawak, mistatim were a much-needed gift for nêhiyaw peoples to alleviate some of the hard living on the prairies. The challenge faced by the young man is the choice to remain in his lodge (in one version) or take responsibility for his community and search for a gift. We can see an obligation to the health and well-being of one's family and community, even if it includes surrendering some safety (the shy boy leaves the safety of his lodge and follows a stranger in the night). It is significant that he is visited four times by the first stranger in one version, and in the other visits four kôkoms and spends four nights with the old man in the other. I connect this to our protocols and signals that the stranger has come in a proper way *(kwayaskwâtisiwin*), and the young man visits properly as well. Provided with the opportunity, the young man chooses to follow the stranger to the lodge. He also chooses to adhere to the procedures set out by the second man in the lodge. We can also see an obligation to accept gifts and the importance of gift-giving (the boy accepts the offer and is given the gift of horses). The story also furnishes us with the obligation to follow procedures and protocols (the boy listens to the advice of the second man, and learns the four songs, sings them by the water to draw the horses to his community, and smudges them to animate them back at his camp). The lessons on wâhkôtowin that the story provides is the display of a duty to lessen the hardship of your community, even through

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[516]In Fine Day's version, the boy does not stay awake for four nights, but has an owl's head that speaks for him while he sleeps.

adversity. For the animals that we burden this hardship with, there is a duty to take care of the non-human animals and things that are provided as a gift to lessen human hardship.

This view, that nêhiyaw peoples and animals have a relationship based on reciprocity even in the face of exploitation of animals by nêhiyaw peoples, has been critiqued for its anthropocentric view of these relationships. Calvin Martin argues that the Cree view that animals willingly give themselves to hunters (as long as the hunters observe relational obligations and do not create pâstâhowin in their conduct of the hunt) is harmful in terms of preservation of healthy moose populations in hunting areas.[517] I responded to this critique in my Master's thesis:

> "While taken out of the web of related principles on moose-human relations this may seem so, I contend that this is a flat understanding of such a statement. It is tied up in a different ethos towards ecological relationships that many Cree continue to practice towards animals. Such refrains reinforce kinship with the moose; in doing so it attempts to remove a large mediating force between humans and moose (that the moose as a different species is a 'resource') and causes further reflection and care in our obligations to moose populations in our kinship with them.[518]

Elizabeth Anderson notes that tangible benefits for moose populations occurs when communities engage in a relational, even anthropomorphic approaches to land governance. As Anderson observes:

> "Evidence is being amassed that speaks to a complex communicative structure within species. Furthermore, their non-Western metaphorical structure often allows the Cree to produce an explicit level of rational knowledge that scientists have been unable to reach, due both to insufficient practical engagement and the fact that "because of their preferred metaphors, they lean toward mechanistic models of population

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[517] Calvin Martin, "Keepers of the Game: Indian-Animal Relationships and the Fur Trade" (Berkeley: University of California Press, 1978). Martin's thesis, that Indigenous people abandoned traditional beliefs because of the outbreak of disease, believed to be linked to maltreatment of animals, has been critiqued for the simplistic cause and effect argument that Martin puts forth. See Shepard Krech III, ed, *Indians, Animals, and the Fur Trade: A Critique of Keepers of the Game (*Athens, GA: University of Georgia Press, 1981).

[518] Lindberg, *Sacred Changes, supra 76*, at 93, fn 3.

> dynamics, rather than understandings that also take account of animal perception, intelligence, learning, and social organization, without which it is impossible to anticipate animal response to changing conditions."[519]

As Indigenous legal orders and legal traditions become more prominent within ecological studies, past harmful misconceptions of Indigenous peoples and environmental management are being replaced with realistic views of these relationships.[520] Studies have found historical environmental management regimes stretching back 13,000 years in Heiltsuk territory in Central Coast, British Columbia.[521] Contemporarily, Indigenous peoples remain the leaders in maintaining biodiverse areas within their territories. A recent UBC study focusing on Canada, Brazil, and Australia found that lands managed or co-managed by Indigenous peoples had the highest level of diversity amongst vertebrates, even more than protected areas like national parks in many instances.[522]

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[519] Elizabeth Anderson, "Benevolent Grandfathers and Savage Beasts: Comparative Canadian Customary Law" (2010) 15 Appeal L J 1 at 23. For another contribution that explores a relational approach to environmental conservation see Charlotte Cote, *Spirits of Our Whaling Ancestors: Revitalizing Makah and Nuu-chah-nulth Traditions* (Seattle: University of Washington Press, 2015).

[520] For an example of one of these critiques see Shepard Krech, the *Ecological Indian*, (Norton & Company: New York, 1999). Krech's work is a supposed exposé on the myth of the environmentally conscious Indigenous person. Indigenous legal and governance studies set aside much of this thesis, as it replaces the idea of Indigenous peoples as carrying on balanced relationships with their ecological lifeworlds as an inherent quality, with the hard work of law and governance. Indigenous legal orders and environmental relationships grounds these discussions in the realities of Indigenous peoples and reliance (and even exploitation) of non-human agents. Indigenous environmental laws provide an avenue that makes Krech's central thesis – that Indigenous peoples are not natural stewards of the land –moot. It is the work of law that informs the ability or inability to have good environmental relations that ensure abundance for all beings. As both *Buffalo Stone Child* and the *Creation of Horses* tell us our reliance and even exploitation of our animal kin (buffalo for nourishment and horses for labour) provides us with obligations to ensure they have collective opportunities for similar abundance within their nations as well.

[521] See Nature of Things, "Pacific Salmon, Scavenger Wolves, and Grizzly Bears: Wild Canada". (2020) Online: Canada Broadcast Corporation < https://www.youtube.com/watch?v=QywX3K6KIqk>.

[522] See Richard Schuster, Ryan, Germain, Joseph Bennet, Nicholas Reo & Peter Arcese, "Vertebrate biodiversity on indigenous-managed lands in Australia, Brazil, and Canad equals that in protected areas" (2019) 101 Environmental Science and Policy 1.

b. Applying Mistatim Lessons in the Present Day

In the present day, we can apply the knowledge from the horse gifting stories to our newer technologies. Such thankfulness that we show these technologies continues in other ways in nêhiyaw practices. I am reminded of a sweat lodge I shared with the late Niso Asini (Ron Marshall) in 2012. Ron would make it an explicit act to share what he was grateful for in the first round of his sweats, splashing water on the asinîy for each being or thing he would mention his gratitude for. During one particular sweat, Ron's list of gratitudes was so long, the first round ended up taking close to two hours to complete. I specifically remember him talking about the 'tiny fires that power our lives', including the sparks and electricity that powers our phones, our cars, and computers. I remember contemplating this for some time afterwards, thinking of our older teachings on our collective origins from *man'to-iskotew* (spirit flame), and how our animal and plant relations receive the same gifts, and transform into what powers those little flames, even over the course of millions of years. I consider how we are dependent upon - even in our contemporary, blink-of-an-eye paced world - our animal and plant relations for all of our lives. So I too think of this in our Horse Dances, how mistatim stands for rocks, rivers, muskrats, willows, for all non-human agents that we rely upon for our good living. If we curiously contemplate these lessons long enough, we can see how upholding our wâhkôtowin obligations to them links to the rest of creation in the present day.

VI. Of diving and remembering: Wîsahkêcâhk Stories as Critical Legal Theory

I have a small admission to make. When I initially envisioned where my dissertation research would lead me, I tried to avoid thinking of our elder brother/

Wîsahkêcâhk stories. My reticence to include them is not because of their significance to our laws, or as normative icon generally – it is undeniable that Wîsahkêcâhk story cycles have been historically and remain a social and legal force within nêhiyaw societies. My reticence was due to their popularity (and subsequent misinterpretations) in non-nêhiyaw intellectual and pop-culture circles. There is something elementally popular about Wîsahkêcâhk-type of figures that causes them to be devoured by non-Indigenous people. These characters – Glooscap amongst the Wabanaki, Nanaboozho amongst the Anishinaabe, and Raven amongst the Haida (to name only a few) – are often generalized as tricksters. This can lead to misunderstandings of the respective cultural positioning of these characters. The term trickster is a "simplified and essentialized element used for Native literary criticism"[523] that "misrepresents the complexity of this character that is simultaneously a Cultural Hero, Deceiver, Transformer, and other terms."[524] This categorization is symptomatic of the cause of my reticence – that Wîsahkêcâhk stories, in whatever form, are comfortably digestible by non-Indigenous peoples. Without guidance or earnest will to delve deeper beyond the humor or Aesop-like fabling that some Wîsahkêcâhk stories display, they can be discounted as simple, linear, and childlike. Wîsahkêcâhk refers to sâki ahcâhk, a loving spirit that only wants the best for the people.[525] Wîsahkêcâhk is considered the "elder brother" within the narrative practices of many nêhiyaw societies.[526] This is attributed to the Wîsahkêcâhk cycle of stories that is shared by other Cree societies. Within this narrative cycle, Wîsahkêcâhk is the elder of

[523] McLeod, *Cree Narrative Memory, supra* note 20, at 24.
[524] Johnson, *Nêhiyaw, supra* note 8, at 87.
[525] *Ibid* at 90.
[526] See McLeod, *Cree Narrative Memory, supra* note 20, at 24.

two brothers (the younger who is transformed into *mahikan* or wolf), who upon fleeing their mother (*Rolling Head*) is involved in the creation of many features of land.[527]

Because of their popularity and longevity, a sustained view of the effect of âcimowina on nêhiyaw law requires a look at Wîsahkêcâhk story cycles. Beyond a trickster, Wîsahkêcâhk is a mirror to humans and the human condition. With a capacity to be wise, foolish, smart, thrifty, cunning, aloof, kind, loving, violent, thoughtless, compassionate and funny, Wîsahkêcâhk can be thought of as a super-caricature of humanness, superimposing human capability and frailty, often within the same story. Further, he does not operate in a vacuum. He has the capacity to interact, speak, and even shape-shift into animals, plants, and other non-human beings. Wîsahkêcâhk stories are encyclopedia of relations. How Wîsahkêcâhk relates to non-human animals, beings, and thing is the underlying element of Wîsahkêcâhk stories; like present-day science experiments, Wîsahkêcâhk is the catalyst, the active agent within their stories that causes a change in relations. In this sense, Wîsahkêcâhk stories are *always* about human interaction with the environment. Thus, Wîsahkêcâhk stories remain enriched fields for legal observation.

a. The Original Law Professor

Because of this, Wîsahkêcâhk is often presented as our first teacher on law. Pauline Johnson notes that the "elder brother represents the legal system for the law of the people."[528] Sylvia McAdams notes: "Wîsahkêcâhk went to okimaskwaciy (Chief Bear Hill in the Cyprus Hills Area – minatatahkwa) and the Creator gave him directions, he

[527] Brightman, *Rock Cree, supra* note 168, at 56-78
[528] Johnson, *Nêhiyaw, supra* note 8 at 90.

was told to bring the laws to the people."[529] As he often is 'negative example' for expectations for human behavior, Wîsahkêcâhk stories often show pâstâhowin (transgressions) and the resulting retribution (ohcinêwin).

The Wîsahkêcâhk story cycle is a gift to nêhiyaw peoples for us to live good lives together.[530] It is not only the nêhiyawak who engage in Wîsahkêcâhk narratives, as they are shared by other Cree nations and societies.[531] As I previously noted, there are two distinct section of stories within the Wîsahkêcâhk story cycle. The first section shares Wîsahkêcâhk's 'heroic story'. This section generally occurs in the following order: 1) the tale of Rolling Head; 2) contests with Wîsahkêcâhk's father-in-law, Waymosisew; 3) the defeat of the Short-Noses; 4) the saving of his brother, who has become a wolf; and 5) the Flood. [532] Within the *Rolling Head* narrative, Wîsahkêcâhk and his younger brother flee their mother (who has subsequently been beheaded by their father, on the account of her 'madness') as she chases them across a vast territory. During this pursuit, Wîsahkêcâhk creates the desert, prairies, mountains, and a great river to escape Rolling Head. This portion of the narrative cycle also describes the creation of *nam*êw (Sturgeon). The Rolling Head portion of the cycle provides an opportunity to reflect on the gendered aspect of nêhiyaw acimowin, and nêhiyaw law generally.[533]

The second portion of the narrative cycle describes Wîsahkêcâhk's contests with his father-in-law Waymosisew, and his attempts to have Wîsahkêcâhk killed (by giant

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[529] McAdam, *Nationhood Interupted, supra* note 63, at 38.
[530] Sylvia McAdam, Wesakechak, Syvia McAdam –Cree Teachings, (2017) Online: Youtube < https://www.youtube.com/watch?v=5u2HxpUtVPk>
[531] Brightman, *Rock Cree, supra* 168 note at 56-78.
[532] See Edward Ahenakew, Cree Trickster Tales, 42:166 Journal of American Folklore 309. [Ahenakew, *Cree Trickster*]
[533] See Snyder, Napoleon & Borrows, supra note 270 for a sustained look at the gendered aspect of this story and a critical re-examination of it.

Crimson eagles, and by a giant moose, respectively). Wîsahkêcâhk's abilities grow, as he is able to work his way out of the predicaments set by his Waymosisew. In the third portion, Wîsahkêcâhk achieves a position of leadership with the people as he is able to kill the Short-Nosed people, giants who feast on humans. The fourth section of the cycle, Wîsahkêcâhk saves his brother from a Wolverine. Finally, Wîsahkêcâhk rescues some animals and recreates the world in the Flood, probably the most well-known portion of the cycle.[534]

The second section of the Wîsahkêcâhk narrative cycle is remarkably different then this first. Storying that show his courage, cunningness, and strength, is replaced by plots that highlight Wîsahkêcâhk's humanness, hubris, and frailty. The stories generally involve Wîsahkêcâhk attempting to fool animals and other humans, and ultimately having his gains undone by his own human faults. For example, he gets fooled by his own reflection, tricks ducks into closing their eyes in dance while he eats them, loses his eyes, and eats his own scabs, in the various stories of this cycle.[535] These stories are significant for the relationship they portray between humans and animals, and provide examples of ohcinêwin and pâstâhowin within them. Finally, there is a third type of Wîsahkêcâhk story that can be viewed as contemporary additions to this second section. It is generally understood, as Harold Johnson notes, we are able to make up stories about Wîsahkêcâhk in the present day as well.[536] As Johnson observes, if we continue to tell stories about Wîsahkêcâhk, perhaps he will return to help nêhiyaw peoples once again.[537]

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[534] Ahenakew, *Cree Trickster, supra* note 532.
[535] See Brightman, *Rock Cree, supra* note 168, at 58-78.
[536] Harold Cardinal Keynote, Think Indigenous Conference (2019) Online: Youtube< https://www.youtube.com/watch?v=6D8l1Emvpnk >.
[537] Johnson, *Nêhiyaw, supra* note 8, at 88. The Anishinaabe figure Nanaboozho and the stories that surround them share this characteristic as well. For example, see Joe Auginuash, "Gii-pakeitejii'iged

b. Wîsahkêcâhk & Critical Theory on Authorities

Reframing Wîsahkêcâhk narratives as a collection of critical theory on our wâhkôtowin obligations to the non-human beings and things provides a unique frame to the stories. Wîsahkêcâhk's 'negative example' is as an invaluable resource and teaching tool. As Smith Atimoyoo explains:

> "The Old People had laws for everything, and the teacher of those laws was Wîsahkêcâhk…He went around telling lies, in stories, and it didn't matter how many lies he told, they all came out as good teachings…He was very wise, he knew everything and he shared that wisdom in stories…We call him nistasinan, our elder brother. He could make stories come alive, even the lies. After he left us, when someone would lie, people would say, "Hmmm, that's what our elder brother used to say." That would force the liar to either tell a real good story, or face humiliation. That was the law.[538]

Because it is known that Wîsahkêcâhk engages in untruthful conduct and there are good teachings within this conduct, we are required to approach Wîsahkêcâhk stories critically.

The narrative of when *Wîsahkêcâhk learns of Double Shout Lake* is a good example of a critical commentary on our relationships with non-human beings running beneath the plot. This narrative is from Samuel Grey-Sturgeon, Omushkego Cree from Kiskitto Lake, Manitoba.[539] The story begins with Wîsahkêcâhk visiting the first village he created (as Wîsahkêcâhk recreates the world in some of our stories) and coming upon an old woman, cleaning fish. The old woman, who is well aware of Wîsahkêcâhk's vanity, teases him by pretending to not know his name and his role in creating the world. When Wîsahkêcâhk demands that the old woman acknowledge who he is, she notes that

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Wenabozho/When Wenabozho played Baseball" in Living our Language: Ojibwe Tales and Oral Histories, Anton Truer, ed (St. Paul: Minnesota Historical Society, 2001).

[538] See Wheeler, *Cree Intellectual Traditions, supra* note 173, at 58.

[539] As relayed in Norman Howard, "Wesucechak Becomes a Deer and Steals Language: an anecdotal linguistics concerning the Swampy Cree Trickster" in *Recovering Word: Essays on Native American Literature* Eds. Brian Swann & Arnold Krupat (Berkeley: University of California Press, 1987) 401-27.

she will go ask Two Loons (the old woman's name, essentially she is going to ask herself) because "Two Loons has the best memory in the world, better than you, Wîsahkêcâhk, who has none. If that's who you really are."

Wîsahkêcâhk, angry from this, follows the old woman to the lake. She dives in and returns to the surface as a loon. She still refuses to acknowledge who Wîsahkêcâhk is. Growing even angrier, Wîsahkêcâhk removes Two Loons' ability to remember the names of animals. As the story finishes:

> They walked back to the village and Wesucechak turned into a deer. He asked Two Loons "WHAT IS MY NAME?" She said "deer horns". Two Loons noticed that everyone looked worried. She heard someone say "She can't remember the name." She cried out, "deer's sinew... deer eyes... deer voice, deer hooves." Wesucechak told her, "I'M MAKING IT SO THAT YOU ARE THE ONLY ONE WHO CAN CALL DEER IN CLOSE. IF YOU CAN'T REMEMBER HOW TO SAY DEER, ALL THE DEER WILL BE INSULTED AND THERE WILL BE NO DEER TO EAT."
>
> Two Loons flew back to the lake, dove in and swam on the lake for a while. She flew back to the village and began to sing. Her song had many deer in it and the many things you see them doing. The deer were listening and were pleased that Two Loons knew so many things about them. They walked into the village. "They're giving themselves up", someone said, and they killed many deer to store and to eat that day. Wesucechak became frightened and turned back to his old self. Two Loons teased him, saying "Wesucechak remembered to change back in time. He's no longer a deer."[540]

The story concludes in a humorous manner familiar within Wîsahkêcâhk stories – Wîsahkêcâhk returns to the village, empty-stomached, and must humble himself to the people. They take pity on him, but only enough to quell his hunger and send him on his way.

c. Analysis on Authorities

[540] *Ibid* at 409.

I view the underlying critical narrative in the story as a lesson on hierarchal versus relational power. With the turn in the story where Two Loons, despite not being able to speak their names, is able to call on deer through knowing much about them, lessons on authority versus relationality becomes visible. As two meta-figures, the depiction of both Two Loons and Wîsahkêcâhk in the story invite the reader to think of their respective dispositions – one proclaiming authority, the other practicing relationality – and which one provides the better avenue to resolve issues of scarcity of nourishment and shelter, amongst other things. The plot causes the reader is implicitly consider two paths in relationships with non-human animals, authoritative or dialogic (or persuasive).[541] Dialogic expressions of authority are less coercive than expressions of absolute authority. They invite a dialogue and investigation into claims of authority. Persuasion (rather than force) is the preferred method to ensure fidelity to laws by those who practice dialogic authority. Nicole Roughan observes "that in circumstances where there is an overlap between the domains of authorities, and/or interaction between authorities whose distinct domains come into contact…then their legitimate authority should be conceived as a relative power."[542] Two Loons' relational actions – singing the song with a deep knowledge of the deer – legitimates an authority to hunt. It is relative, as it is dependent

[541] For a deeper look at these types of authority, see Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* Oxford: Oxford University Press, 2013

[542] Nicole Roughan, "Polities and relative authorities" 16:4 International Journal of Constitutional Law, 16 1215, at 1218. For more of Roughan's thoughts on authority, law, and interactions of jurisdictions see Nicole Roughan, "From authority to authorities: Bridging the social/normative divide" In R. Cotterrell, M. Del Mar (Eds.) Authority in transnational legal theory: Theorising across disciplines (Cheltenham, UK: Edward Elgar Publishing, 2016); Nicole Roughan, & Andrew Halpin, (2017) A response. 8:4 Transnational Legal Theory 415; Nicole Roughan, "Sources and the normativity of international law: From validity to justification" In S. Besson, d'Aspremont J (Eds.) The Oxford handbook on the sources of international law (Oxford: Oxford University Press, 2017).

upon future adherence to the norms that allowed for its legitimation. I conceive of this as further engaging in relational activities towards the deer.

The type of authority that Wîsahkêcâhk presents is in a form more familiar with positivistic law – that declarative propositions enable social ordering. His attempt at ensuring this ordering in the village, by making so that deer will only come when the name he has given them is invoked, represents the consolidative force of positivistic legal ordering. The success of Two Loons in a social, relational form of law is a rebuke against positivism. Relations are not declarative (and thus hierarchal) but rather lateral and cooperative. They are persuasive. Two Loons sings of her relations (the deer) and thus they are happy to give themselves to the people. Further, it teaches us of the importance of relationality even within formal procedure and process. Songs (and by connection, ceremony) are not merely a formal procedural step in our relationships, but provide substantive information that is critical to maintaining good relations with non-human beings and agents.[543]

The story also develops our understandings of the boundaries of our gift-obligation practices: The deer 'give themselves' to the people, as an act of approval for Two Loons observation, understanding, and appreciation of the deer. One can consider

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[543] This relational approach informs our understandings of pâstâhowin and is integral to our use of lands and waters, as it ensures we keep our mind on non-human good living. Elizabeth Anderson notes it has allowed "the Cree to produce an explicit level of rational knowledge that scientists have been unable to reach, due both to insufficient practical engagement and the fact that, because of their preferred metaphors, they lean toward mechanistic models of population dynamics, rather than understandings that also take into account of animal perception, intelligence, learning, and social organization." See Elizabeth Anderson, "Benevolent Grandfathers and Savage Beasts: Comparative Canadian Customary Law" (2010) 15 Appeal L J 1, at 23

the relationship that Two Loons affirms (through the song) is one of *loving-kindness* towards the deer.[544]

Secondly, the story reinforces the idea of *law as weaving.* The narrative reinforces the dangers of consolidating power and authority; the peril within the narrative is caused by power being consolidated in Two Loons. As Wîsahkêcâhk arranges: “"I'M MAKING IT SO THAT YOU ARE THE ONLY ONE WHO CAN CALL DEER IN CLOSE. IF YOU CAN'T REMEMBER HOW TO SAY DEER, ALL THE DEER WILL BE INSULTED AND THERE WILL BE NO DEER TO EAT."[545] Wîsahkêcâhk presents one version of legal ordering here, that subjectivity occurs through invocation alone. The result of Wîsahkêcâhk’s ploy - he ends up forced to wear antlers and hooves, clumsily begging for food - is a playful indictment of the thinness of this characteristic of legal positivism.

Thirdly, the story outlines the *precision of language* to our legal relations: the story provides a subtext on language. On top of the potential offense that Two Loons may show the deer by not remembering their name, language is a significant symbol in the story. Two Loons pretends to not hear Wîsahkêcâhk, and thus rejects the legal frame Wîsahkêcâhk attempts to assert. The lake represents a repository of language as well – it ‘double-shouts’ – repeating what it hears twice back to the speaker. The reason for this is opaque at first, but is given more force when it is revealed that the lake, in some manner,

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[544] My observation – based on Roughan’s theory of authorities - that the ‘authority’ given to humans to hunt deer in these situations is ‘relative’ and only legitimized by a renewal of relational obligations like observation, careful hunting, sharing opportunities for abundance, and regeneration, provides a counter to Calvin Martin’s critique about how such thinking can lead to abuse. Viewing this gifting in a legal frame (as I argue this story theorizes) gives rise to these relational obligations.

[545] Cory Silverstein, “That’s Just the Kind of Thing This Lake Does”: Anishnaabe Reflections on Knowledge, Experience, and the Power of Words in Papers of the Twenty-Eighth Algonquan Conference Volume 28, (University of Manitoba Press: Winnipeg, 1997) at 358.

is a knowledge retainer. It is the resource Two Swans relies upon for the deeper knowledge (and loving-kindness) of the deer relations.

Fourthly, we are *bound to some form of ceremonialism* to maintain our good relations: Through the story, we are presented with a contrast in forms of legal processes. Two Loons presents her retained knowledge of deer through song. As we are told, her song has many deer in it, and much knowledge of their lives. They are pleased, and they give themselves up to the people. I have written before that ceremonial aesthetics play a significant role in nêhiyaw legal ordering.[546] Aesthetics ensure the transmission of law generationally, protect it during challenges and interventions into the processes of legal ordering, serve as a mnemonic device that encodes legal knowledge, and engenders persuasive legal practices (rather than coercive ones).

These are all, of course, my personal observations and interpretation of the story. My interpretation is influenced by my journey as a legal scholar.[547] Returning to the cautions raised by Starblanket and Stark, my gender implicitly orients how I hear the story and interpret it.[548] Acknowledging these observations as personal should signal the limitations of using a singular interpretation within legal reasoning. However, it is also acknowledged that unique interpretations of situations is a valued part of legal reasoning as well. In R v S (RD) [1997] 3 SCR 484, the majority of judges of the Canadian

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[546] Darcy Lindberg, Miyo Nêhiyâwiwin (Beautiful Creeness): Ceremonial Aesthetics and Nêhiyaw Legal Pedagogy" 16/17:1 Indigenous LJ 51.

[547] I hold no pretense, nor should others, that judges within the common law are not informed by their journeys as legal scholars. See Constance Backhouse Claire L'Heureaux-Dube: A Life (Vancouver: UBC Press, 2017); Brian Dickson: A Judge's Journey (Toronto: University of Toronto Press, for sustained looks at the lifeworlds of these SCC judges, and how it shapes their respective influences and judicial work on Canada's top court.

[548] Or as Judith Butler states, the stories have a performative element that reinscribes gendered norms, but also has the power to effect change. This requires careful consideration of 'speech acts' and what social constructs they are creating. See Judith Butler, Gender Trouble (New York: Routledge, 1990).

Supreme Court held it is legitimate for a judge to use their personal knowledge and experiences to aid their decision.[549] They balanced the need for impartiality and neutrality (the judge who is 'disinterested' in the outcome) from being too narrow in this approach that a judge would have to discount their previous life experiences. Our own life experiences provide persuasive weight to our interpretations. This is why we value our *kisêyiniw* (elders, or loving protectors)[550] as an integral part of our legal tradition: their life experience provides necessary context to things us younger ones cannot see.[551]

VII. Transforming Wâhkôtowin lessons into Legal Norms

How do the constitutive principles within nêhiyaw âtayôhkêwina inform formal legal norms? Or how can we consider Wîsahkêcâhk "the legal system for the law of the people", as Pauline Johnson suggests? This is a question of normative development in general, on how legal norms arise out of social practices within a citizenry. Jeremy Webber reflects on the relationship between social normative practice and the emergence of legal norms.[552] Webber identifies this process as:

> "An interpretive relationship with practice, mediated by other participants' interpretations and actions. That reasoning is necessarily evaluative. Participants seek to weigh the impact of past norms, judge the appropriateness or acceptability of that impact—what has proven important in previous decisions,

[549] In the trial of this case, a youth court judge (Justice Corinne Sparks), upon deciding that the testimony of a youth and a police officer, and thus acquitting the youth, made this point: "I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of Mr. S. that he was told to shut up or he would be under arrest. That seems to be in keeping with the prevalent attitude of the day." See R. v. S. (R. D.) [1997] 3 SCR 484 at para. 4.
[550] See Wheeler, *Cree Intellectual Traditions, supra* note 173, at 48.
[551] The representation of authority in the story can be attributed to other power relationships as well. For example, Corey Silverstein applies the story with a similar tension, but focused on challenge of ethnographic approaches and claims of authority on Indigenous knowledges. [551] So there a multitude of other orientations that the story informs. Wîsahkêcâhk stories cannot be considered without their context. The very base weaving that I have done above requires connection with other nêhiyaw constitutive principles.
[552] Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall L.J. 167 at 196. [Webber, *Human Agency*]

> what has proven ill-conceived—and seek to revise the norms and their application accordingly."[553]

This involves "three levels of normative determination: the coordination of human interaction, the grammatical "language" structure used to express norms in a legal fashion, and the debates that utilize that grammar to negotiate the resolution of a particular situation."[554] The "second and third levels operate as somewhat of a feedback loop: where this process of expression of norms and contestation is "ongoing and perpetual."[555]

Wîsahkêcâhk stories, like other constitutive elements, cluster the grammatical language of norms within their narratives. A single story is an encoded superstructure of norms, of which the plot, setting, actions, and resolutions, reinforce, transform, or oppose previously considered norms. Rather than Webber's 'feedback loop' always being perfectly egalitarian, balanced, and proportional in its deliberativeness (i.e., that everyone gets an equal opportunity to share), Wîsahkêcâhk stories show that this process is also colored by the forces of persuasion, hindered or bolstered by varying opportunities for expression, and generally influenced by tradition, gender, and historical power relations. As a constitutive practice, a gifted story teller is privileged in their influence on the development of legal norms. Like all legal orders, cunningness and charisma still play a role in nêhiyaw law. A good storyteller has constitutive reach.

VIII. Conclusion: Circling back to our sacred stories to reclaim laws.

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[553] Webber, *Customary*, *supra* note 39, at 587.
[554] Elizabeth Anderson, "Benevolent Grandfathers and Savage Beasts: Comparative Canadian Customary Law" (2010) 15 Appeal L J 1, at 7-8.
[555] *Ibid* at 8.

I once heard a story that the storyteller linked to the Tlicho people, our Dene relatives from the Northwest Territories. I was told this story when I was working in Dene Tha territory, on a camping trip with a number of youth as part of my summer job at the time. Dene Tha member Robert Matchooyah told the story. I will not recount the story here (it is not mine to share), but will highlight his method.[556] Robert first told us the story within five or ten minutes, describing how the mother of the nation became a part of the land and a part of the people. Pausing for a moment after the telling, Robert went back into the story from the beginning, in a soft and deliberate manner. In the second retelling, he stretched out certain parts of the story, adding more details then what he had first shared. The second telling lasted twice as long, taking him a half-hour to tell. After some tea and small talk, Robert returned to the story, circling back to the beginning without us knowing. Soon we were into a third telling of the story, this time taking him well over an hour to tell. After he finished, he got up and shook our hands, thankful that he had the opportunity to tell the story in that way.

When I reflect on that experience, I acknowledge the role that the listener plays in story telling – without us listening in the right way, we wouldn't have gained access to the knowledge of the longer story. Witnessing is a reciprocal obligation and gift in our various storytelling methods. I also acknowledge the good feelings and trust that occurs in the process. If he would have concluded after the first telling I would have been grateful for what I received. To receive three stories was a very wealthy gift. Conversely, it made me wonder how long the story would go, if only I could listen better. As

[556] It was a version, but differing in some portions, of the *Woman and the Pups*, a story held by the Tlicho peoples. See Tlicho History, Woman and the Pups (2020) Online: Tlicho History <https://tlichohistory.ca/en/stories/woman-and-pups>

Cherokee storyteller Diane Glancy reminds us, "[t]here are some stories that take seven days to tell, others that take you all your life."[557] Winona Wheeler reminds us that we cannot treat our oral narratives like a library, or "a slice of tissue on a slide under a microscope of history", as "treating them like written documents has the potential to distort and misinterpret original messages."[558] The context in which our laws are discussed is as significant as what is shared.

Finally, as James Boyd White reminds us, all legal traditions are fundamentally about storying:

> "[T]he law always begins in story: usually in the story the client tells, whether he or she comes in off the street for the first time or adds in a phone call another piece of information to a narrative with which the lawyer has been long, perhaps too long, familiar. It ends in story, too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means." [559]

Our stories are relational, necessarily so if we rely upon them for law. If we continue to relearn to listen to stories, we will revitalize laws we don't even know we are missing today. Ekosi.

My key observations and conclusions in this chapter are:

a. Âtayôhkêwina and âcimowina are comprehensive intellectual devices that are resources for legal pedagogy and legal theory.
b. If we view the collection of âtayôhkêwina that describe our relations to animals as a critical legal theory on wâhkôtowin, we see we are bound in a reciprocal relationship with the animals we use for our continued nourishment and labour. Observation to

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[557] Thomas King, "The Truth About Stories: A Native Narrative" (2003) Anansi Press: Toronto, at 122.
[558] Wheeler, *Cree Intellectual Traditions, supra* note 173, at 52.
[559] James Boyd White, Heracles' Bow: Essays on the Rhetoric and the Poetics of Law (Madison, WI: University of Wisconsin Press, 1985) at 168.

ensure good living, gifting, and renewal of relationship (often by our ceremonial practices) form part of our legal responsibilities.

c. If we view the collection of wîsahkêcâhk narratives as a critical legal theory on authorities, we see that law is best practiced as a social relation rather than hierarchical method to maintain social order.
d. These narratives have specific implications contemporarily in a revitalization of nêhiyaw food security practices.

Niyananan (Five): Spirituality and Indigenous Law

A long time ago, there was a young person who saw that her community was falling into bad health. Sick in the body. Sick in the spirit. Sick in the mind. So this young person decided they would travel and look for medicine to heal their community. They first set out east, and traveled quite distance in this direction. It is said that, after some time, they encountered the wolf, who had watched their journey. Curious, the wolf asked why the young person had travelled so far. The young person shared about the illnesses in their community. The wolf said, "I am sorry to hear this, and I sympathize with you for your people. But I don't have the medicine you are looking for. But I suggest that you travel south and see if they have that type of medicine there."

And so, the young person travelled back to their community, and saw it was still sick. Taking the advice of the wolf, travelled south. They in fact completed this journey three more times, meeting a coyote in the south, maskwa (bear) in the west, and a fox in the north. Each time, they were told that the animals sympathized with the sickness in the humans, but they did not have this medicine.

So after the fourth journey, the young person returned home, and as they got there, they could see from a hill atop the community that the people were still suffering from the sickness in their bodies, in their minds, and in their spirit. So they sat on the hill, for four days, and contemplated what to do next. The kihew (the eagle) had watched them this whole time, and seeing their commitment, flew down to the young person at the end of the fourth day. The kihew spoke, "I have seen you journeying for your people, and I think that what you are doing is good. I don't have the medicine you are seeking, but I can take you to a place where you may be able to find it.

And so the kihew took the young person high into the sky, and kept flying with the boy until they reached the dark side of the moon. It was here that the young person was eventually met by seven môsoms and kôkoms. Each of these kôkoms and môsoms brought a ceremony to nêhiyaw peoples, for the young person to return with to heal their people. And so he did, and brought seven healing ceremonies to the people.[560]

This chapter is based on the need to reclaim the intellectual space within nêhiyaw ceremonial practices. As trans-systemic legal translation often results in the distortion of Indigenous legal and spiritual practices, the recognition of the intellectual energy of ceremony highlighted in this chapter is vital to protect nêhiyaw laws in situations where they are forwarded in trans-systemic disputes.

Ceremonial practices, and the norms included in them, serve as a doorway to nêhiyaw legal process and legal pedagogy. Our matotisan (sweat lodge) practices are explored in this chapter to observe how protocol provides non-human agency in legal norm creation and contestation, and how lodge-making ensures we remain within cycles with the

[560] I first heard this story at a GEN7 gathering in Winnipeg, MB in 2012.

ecological world. Finally, the tension between the need for written law, and the continuation of embedded, implicit law in our ceremonial cycles is raised from these observations.

I. Introduction: Reclaiming the Intellectual Spirit of Ceremony

Linking it to *kanâtan*, meaning tidy or clean, Métis elder Elmer Ghostkeeper talks about the meaning of the word *Canada* within nêhiyawewin as relating to *kanâtâskiy* "clean land."[561] This reminds me of a similar lesson provided by Woodland Cree elder Russell Auger. At a recent conference, he asked us to consider how our *amisk* (beaver) relations commit to creating clean lands. Beavers are great transformers of lands and waters. Pulling willows and poplars into streams, they shift the direction of waters, and in doing so, shape-shift âskiy as well. As streams, lakes, and rivers are channeled through the branches they have downed, a purification takes place as *nipîy* (water) filters through and comes out cleaner. The removed sediments collect in ponds or eddies in the river, making good ground for a complex web of aquatic and land-based insects to live. Otters, muskrat, mink, fish, and water fowl (to name a few) benefit from the plentifulness that amisk create.

Auger shared this to teach us that beavers have much to teach us about ceremonialism. The work of beavers is based on a deep understanding of their purpose on the land, a commitment to a law within them, shared within their society. Whether it is legal or instinctual force that causes beavers to craft landscapes in such a manner, the

[561]Of course, the origins of Canada is the Huron-Iroquious word for village, Kanata. While the similarity between the Huron-Iroquios word to the nêhiyawewin word may be surrendipitous, Ghostkeeper's lesson – that we view the land as clean, and have obligations towards it because of this - is widely held.

gifts they give to other animals through their work is innumerable and immeasurable.[562] Beavers are a keystone species in Canada, with others being gifted good living because of them. This is no different for nêhiyaw people. The creation of wetlands and the clean âskiy that comes from it is significant to the medicinal lives of nêhiyaw people. Much of our medicines are found in wetlands areas. Our word for medicine – *maskihkiy* – literally translates to muskeg. Many of our most important medicines, like *wihkaskwa* (sweetgrass), *wihkes* (rat root), and *kinikinikw* (tobacco from the red willow bark), are prevalent in muskeg areas.

I share this brief story in how it provides one way to contemplate our ceremonies, and the work that it takes for their continuation. In one view we can take ceremony as a natural force, a sacred phenomenon that arises in our social practices through spiritual interventions that we passively receive benefit from. Or we can view them like the tireless work of the beaver to create clean lands - that while rooted in sacred gifts, as a product of fierce intellectualism - a technology that has been taught and passed through our histories, evolving with each generation. This chapter is a contemplation on the intellectual philosophies and traditions within our ceremonial practices, and law rooted in sacred sources generally. The story I shared at the start of this chapter, of the boy travelling to the moon to receive ceremony, is illustrative of this. It required the long journeying of the boy to acquire the ceremonial knowledge to help his community. His travel in the four directions undoubtedly caused him to gather much knowledge and

[562] See Brightman, *Rock Cree, supra* note 168, for a discussion on the beliefs of cultures and laws held by non-human animals. While not the direct question of this dissertation, there is an equally fruitful question of legal theory and animal behavior cultures to entertain whether non-human animals can and do practice law. Some Nêhiyaw thinkers would say that non-human animals practice natural law. See McAdam, *Nationhood Interupted, supra* note 63.

experience. The celestial nature of the gift of ceremony is a contemplation on *kiskêyihtamowin* (knowledge and learning) as well. The providers of the ceremony are described as seven môsoms and kôkoms. It is implicitly understood that they gathered their knowledge of the ceremony they respectively gift from their own journeys through knowledge and experience, just like the boy's. If we broaden our thinking on this, we can envision ceremony as assembling an environment for non-human relations to emerge to coordinate norms together.

Kiskêyihtamowin has also guided transformations to our ceremonies as well. Often described as the 'highest' of nêhiyaw ceremonies, the thirst dance has been central to nêhiyaw ceremonial cycles. It also has been subject to change and adaptation over this time. A large period of transformation occurred between that 1885 and 1951, where the ceremony was the target of many assimilative policies of the Canadian state, including a prohibition of the ceremony.[563] Nêhiyaw communities employed many strategies to retain ceremonial knowledge during the ban. The most common was taking ceremonies 'underground' where they were held in locations where they would avoid detection by the Canadian authorities.[564] Another effective strategy was compromise. As enforcement of the *Indian Act* prohibition was left to local Indian agents and RCMP, some ceremonies where shortened to appease authorities or adapted to not offend European religious beliefs.[565] Another strategy was direct opposition. For example, at a

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[563]See Katherine Pettipas, *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994) at 107. [Pettipas, *Severing the Ties*]
[564] *Ibid* at 186.
[565] *Ibid* at 137.

thirst dance on the Sakimay reserve in 1933, a lawyer was hired by the community and present to address authorities when they inevitably came to shut them down.[566]

One of the more successful strategies was adaptation. There are stories of nêhiyaw iskwew holding sweat lodges under their kitchen tables - heating stones in their wood stoves during the ban. The thirst dance also adapted through a name change. Growing up I was told that these ceremonies were rain dances, distinctive from the Sundance ceremonies performed down south. It wasn't until I started to further practice our ceremonies that I learned that rain dance is a colonial adaptation of the original name, the thirst dance. It was changed strategically during the prohibition period to curry favor from local farmers in their advocacy for continuing the dance. As the dance was generally held at the height of summer, it was especially a dry time for farmers' crops. The name change gave the misleading understanding that the dances were for the specific purpose to bring rain. As Katherine Pettipas notes: "Felix [Panapekeesik] made thirty-nine to forty rain dances and had received support from local farmers during the Depression years. During particularly dry years of 1938 and 1939, farmers collected between thirty and forty dollars to help this medicine man to hold a rain dance".[567]

II. The Distortion of Spirituality and Indigenous Law

As the above displays, nêhiyaw spiritualities have historical methods within their practices that make them adaptive to both external and internal challenges. In my Master's thesis I argue that nêhiyaw ceremonies have the necessary processes internally to transform the gendered protocols they often employ.[568] With the resurgence of

[566] *Ibid* at 176.
[567] *Ibid* at 180.
[568] See Lindberg, *Sacred Changes, supra* note 76.

Indigenous laws within academic institutions and Canadian courts, nêhiyaw laws (like other Indigenous legal orders) are facing new external pressures for adaptation: namely to be reproduced in a form that cognizable by non-Indigenous students, lawyers, and judges. As Former B.C. Court of Appeal Chief Justice Lance Finch notes, non-Indigenous peoples come with apriori conceptions of spirituality that is "informed…by our understandings of place, kinship, and ideas about personhood."[569] Or as Borrows summarizes: Canadian state "law is a liberal god that creates religion in its own image."[570]

In terms of the spiritualities that underpin nêhiyaw legal traditions and laws, there is a very real threat of distortion to make spiritual processes palpable within Canadian legal forums. Distorting our laws (or at least how we describe them) to fit within Canadian norms, raises the potential of an intellectual severance of how we theorize the role of ceremony in law.[571] If we only bring forth legal resources that are easily cognizable and translatable to Canadian law, Indigenous spiritualities miss a vital opportunity to provide a nuanced understanding of the role of spiritual processes in legal ordering. Current discourses are dominated by Western philosophies on the interplay between law and religion.[572] This chapter examines nêhiyaw spirituality, and the role

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[569] The Honourable Chief Justice Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practicepaper presented at the "Indigenous Legal Orders and the Common Law" British Columbia Continuing Legal Education Conference in Vancouver (November 2012) at 7, online: British Columbia Continuing Legal Education.

[570] Borrows bases this on Ben Berger's observations "that law has a difficult time escaping its liberal context and understands its subject through its own values. In particular, he says, this predilection means that 'Canadian constitutional law cast religion in accordance with its own informing commitments". See Borrows, *Canada's Indigenous Consitution, supra* note 49, at 249.

[571] Within a common law context, we have seen the significance of ceremonial aspects of the Canadian legal system being diminished as mere aesthetic or form. Ceremony is certainly involved in both the creation of law in parliments and legislatures and within the courts.

[572] Ben Berger argues that it is "clear that modern Canadian constitutional law casts religion in terms compatible with its own structural assumptions, as well as symbolic and normative commitments, which are themselves informed by the contemporary political culture of liberalism." See Benjamin Berger,

ceremony plays in renewal of our treaty relationships. Aside from observing kiskêyihtamowin within nêhiyaw spiritual processes, it examines how ceremonies are integral to treaty renewal with non-human agents. Through this reflection, we can re-envision how ceremony fosters and 'legalizes' a nêhiyaw vision of equality, one that is not a human-to-human right, but extends to non-human beings and things. What is at stake if we fail to make room for a fulsome consideration of Indigenous spiritualities in trans-systemic legal dealings are distorted interpretations of treaties themselves. An interpretation of Treaty 6, without accounting for the pipe ceremonialism in its formation and the implications towards earth reconciliation that the treaty provides, has distorted our earth relationships. By failing to explore the full implication of ceremonialism on the treaty relationship, we miss vital opportunities to correct the Crown's interpretation of Treaty 6, and the inclusion of nêhiyaw âskiy as a party to it (and thus the obligations the good living of lands, waters, and other non-human beings upon it) if we fail to consider ceremony in our trans-systemic legal dealings.

a. *Ktunaxa Nation v. British Columbia* [2017] SCR 386

While much is changing in terms of the reception of Indigenous legal orders within Canadian communities and institutions, Indigenous spiritualities are still subjected to distortion within formal Canadian legal processes. The use of Indigenous laws and legal processes within the Canadian courts to advance freedoms for Indigenous peoples most often require a flattening of legal principles and cosmological beliefs to fit within the

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"Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall Law Journal 277, at 281. If Indigenous laws that are structured or have commitments to spirituality, there is a danger of distortion towards the 'culture of liberalism.' John Borrows notes, in that discourses in atheism are transforming the debate of the relationship between religion and law that are moving away from traditional philosophies of law and religion.

common/civil law-dominated court system. As much of the litigation between Indigenous nations and Canadian-state governments are conflicts regarding territory and jurisdiction, these processes are doubly violent. After rendering Indigenous legal principles into distorted versions to be presentable at court, many decisions still enable or affirm state-sanctioned violence to Indigenous territories. One of the most recent reminders of this came on November 2nd, 2017, when the Supreme Court of Canada released its decision in *Ktunaxa Nation v. British Columbia (Forest, Lands, and Resources Operations)* [2017] 2 SCR 386, upholding the British Columbia Supreme Court's trial decision to allow a ski resort to be developed in Qat'muk (as known by the Ktunaxa) or the Jumbo Valley (as known by British Columbians).[573] The Ktunaxa sought court intervention into the development partly on the grounds that development in the valley violates their freedom of religion, as Qat'muk was home to Kławła Tukłułakʔis or the "grizzly bear spirit" and its development would cause it to vacate the valley. Although the majority of judges found their belief in Kławła Tukłułakʔis to be reasonably held, the freedom of religion set out in s. 2(a) of the Canadian constitution does not protect the object of a religious practice.[574]

While the decision is troubling for its treatment of Ktunaxa spirituality and what that means for other Indigenous societies and nations seeking court protection of sacred areas, it also warns against future use of s. 2(a) to bring forward Indigenous spiritualities into the Canadian legal process. In order to make the appeal, the Ktunaxa were compelled to reveal sacred knowledges of Qat'muk and Kławła Tukłułakʔis, knowledge

[573] *Ktunaxa Nation v. British Columbia (Forest, Lands, and Resources Operations)* [2017] 2 SCR 386
[574] *Ibid* at paras. 70-2.

that otherwise would most likely remain within Ktunaxa legal processes.[575] As the knowledge of Qat'muk is held by elders within the community, its revelation was an exception to how the knowledge would normally be deliberated upon. Once out in the world, the knowledge of Qat'muk and the Grizzly Bear Spirit went from the internal protections provided by Ktunaxa socio-legal practices into the blunt and distorting rendering process of the Canadian legal system. Further, Ktunaxa beliefs in Qat'muk became publicly litigated in the minds of Canadians with the decision.

The considerations of the Ktunaxa to reveal their knowledge of Qat'muk in a wide scale manner was undoubtedly forced by the valley's continuing development. The reality is that Indigenous nations are often forced into making back-footed legal maneuvers to protect territories, rights, and practices. The narrow scope of s. 2(a) made the Ktunaxa claim difficult from the outset. While, s. 35 of the Charter theoretically offers a more assertive avenue for Indigenous nations to advance Indigenous laws as a method for territorial governance, it provides similar dangers. Courts have been cautious to interpret s.35 as broad enough to provide self-governance as a right.[576] While s. 35 provides for "a recognition of inherent jurisdiction and sovereignty which exists as sui generis within the Canadian constitutional order"[577] , its narrow interpretation,[578] the

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[575] Or as the Ktunaxa Nation provided to the Supreme Court of Canada: "Ktunaxa doctrine of secrecy regarding their spirituality includes strictures on sharing their communal religious beliefs and sacred sites with non-Ktunaxa persons, and prevents persons who have gained sacred knowledge from widely revealing it." See Appellants's Factum in *Ktunaxa Nation v. British Columbia (Forest, Lands, and Resources Operations)* [2017] 2 SCR 386 (2017) Online: Supreme Court of Canada < https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36664/FM010_Appellant_Ktunaxa-Nation-Council.pdf> at 9.
[576] For the judicial treatment of self-governance claims through s.35, see *R. v. Pamajewon [*1996] 2 SCR 821. The SCC held that the claimants' governance rights (on gambling within their First Nations) were limited to the right to participate and regulate in the activity, rather than the right to manage their lands broadly
[577] Ladner, *(Re)creating Good Governance, supra* note 157 at 2.
[578] *Ibid* at 6.

inability for the courts to recognize governance rights in a general manner,[579] and the 'cultural approach' towards Aboriginal rights[580] has made s. 35 extremely limiting in court recognition of Indigenous law. Aside from specific situations where Indigenous nations may be able to satisfy the *Van Der Peet* analysis,[581] the recognition of Indigenous legal ordering attached to a general right to self-governance will require fundamental shifts in the doctrines set by s. 35 jurisprudence. As will be furthered in the next chapter, reimagining Canadian constitutionalism in a manner that formalizes room for Indigenous constitutional and legal orders requires either constitutional amendment, formal broadening of the limits of s.35 through parliamentary action, day-to-day incremental movement, or a broader interpretation of treaty.

Indigenous spiritualities, and their integral role in the operation of Indigenous legal orders, need space and relevance in Canadian constitutional and legal arenas. I am reminded of a metaphor shared by Mi'kmaq elder Stephen Augustine when I think of approaches in revitalizing Indigenous legal orders generally. At a gathering centered on the reception of elder testimony at the Federal Court, he talked about looking for federal recognition at the court level for historical practices within Indigenous communities as 'trying to work from the smoke-hole [in a house or a lodge] downward.'[582] What he was getting at is that, the natural process and movement of the fire is upwards. Indigenous

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[579] *R. v. Pamajewon* [1996] 2 SCR 821.
[580] See *R. v. Van der Peet* 1996] 2 S.C.R. 507,
[581] See *ibid*, where the 'Integral to a distinctive culture' test is set out by the SCC to determine the existence of an Aboriginal right. As John Borrows notes: the test instills a 'frozen rights' approach to Aboriginal rights, where "aboriginal is retrospective. It is about what was, 'once upon a time', failing to acknowledge the living, breathing legal lives of Indigenous peoples. See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: U of T Press, 2002) at 60.
[582] Stephen Augustine, paraphrased from conversations at the National Elders Council Conference, Federal Court of Canada, held on the Tsartlip Nation, Vancouver Island, Nov 13-14, 2011. Though he didn't mention it, I believe he was making reference to the story held by some West Coast First Nations where Raven steals the light, going through a smokehole in the house to return the sun to the outside world.

spiritualities will vitalize our inter-societal legal ordering from our communities upwards. This is essentially the afterward to the *Ktunaxa* case, as the valley was protected not through the courts, but through the normative action on a governmental level: the Qat'muk Indigenous Protected and Conservation Area was created though municipal, First Nation and Provincial dialogue.[583]

b. Secularization through Trans-Systemic Legal Dealings

The *Ktunaxa* decision highlights a deep tension between revitalizing and holding up Indigenous legal orders in the face of the pressure of Canadian state law and maintaining the integrity of Indigenous spiritual processes. It is trite to say Indigenous spiritualities continue to play a significant role in the operation of Indigenous legal orders. While Western legal systems contemporarily operate under the veneer of a secularism that obscures laws roots or connections to sacred or spiritual practices, Indigenous legal traditions maintain connections and in some cases a centrality with spiritual or sacred beliefs and practices. As you will recall, sacred and natural laws are a significant source of Indigenous law. Some believe that spiritual and natural law (that is provided its definition from spiritual practices) serve as a supreme source of law for Indigenous societies.[584] As the demarcations between legal and social norms within Indigenous societies can be difficult to locate, or are so intertwined that there is no difference between the two,[585] spiritual processes are foundational and braided within Indigenous legal practices.

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[583] See Devon Page, "How the Qat'muk Indigenous Protected and Conserved Area will protect Jumbo Valley for good", (2020) online: Ecojustice < https://www.ecojustice.ca/how-the-qatmuk-indigenous-protected-and-conserved-area-will-protect-jumbo-valley-for-good/>

[584] As Sylvia McAdam argues, creator's laws give rise to human laws, earth laws, spiritual laws, and animal laws. See McAdam, *Nationhood Interrupted: supra note 63* at 38.

[585] Clifford, *supra* note 126, at 761

However, as Indigenous legal ordering is given further systemic and academic consideration in Canada, the spiritual processes of Indigenous legal orders are facing the natural pressures of distortion and severance in the intersocietal work they are employed. These pressures come in both implicit and overt forms, like that employed by the SCC in the *Ktunaxa* decision. While maintaining that the Ktunaxa genuinely held their beliefs, they were not able to convince the SCC that land conservation was essential for their 2(a) protected right. This is contrary to the view within many Indigenous spiritualities, that spiritual belief cannot be separated from the lands and waters that it resides in or is practiced on.[586] As John Borrows observes, "if beliefs about the Earth are not informed by a multi-juridical understanding" there is the danger that Indigenous spiritualities "can be characterized outside the Constitution's informing commitments. They can be seen as being alien to Western law, politics and religion."[587]

From the nêhiyaw perspective, the pipe ceremonies that occurred during treaty signings at Fort Carleton and Fort Pitt in 1876 formed an integral part of the treaty. The presence of the ospwâkan signaled the tapwewin (truth) of the agreement and the immortality of the commitments made according to it. It is often spoken by our kisêyiniw that because of the ospwâkan, only k'se man'to has the power to break up treaty.[588]

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[586] See *Jack and Charlie v. the Queen*, [1985] 2 S.C.R, where the SCC makes a similar severance of practice from site or object of practice. In this case, Jack and Charlie were charged with violating the BC Wildlife Act through unlawful killing of deer. They contend it was to fulfill a ceremonial purpose. As Borrows notes, "[t]he court did not regard the deer's death as part of a religious ceremony…By changing the appellants' characterization of the right, and substituting an alternate practice acceptable to the Court", the judges were able separate "the deer's death from any religious significance." See Borrows, *Canada's Indigenous Constitution, supra* note 49, at 251.

[587] *Ibid* at 249.

[588] See John Taylor, Treaty Research Report Treaty Six (1876) Treaties and Historical Research Center (1985) Online: Indian and Northern Affairs <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/tre6_1100100028707_eng.pdf> at 11.

Further, the Crown's representatives were aware of the significance of the ospwâkan, and the ceremony during the signing of Treaty 6. John Taylor notes that: "[i]t is not unreasonable to suppose that the ideas involved in the trading relationship would be carried over to the negotiation of the treaties. The Indians and the commissioners had now placed the proceedings within a religious and symbolic context, each from their own perspective."[589] That is to say, this wasn't a meeting of two collective legal minds without prior legal dealings (and thus prior inter-societal modes of legal relations). The treaty commissioners understood the legal significance of the pipe ceremony, and even shared a need for the ceremonies to be carried out. During the signing of Treaty 4, Alexander Morris lamented that a pipe ceremony didn't occur prior, a turn from previous signings, and was subsequently pleased that it occurred in Treaty 6. [590]

The ospwâkan, (the pipe) and pipe ceremonialism is an underpinning practice to many of our ceremonial, social, and legal practices. As an explicit and institutional expression of wâhkôtowin, pipe ceremonialism is an overt avenue to access nêhiyaw law.[591] The use of the pipe to formalize relations between strangers or peoples who had adverse interests is just one use of the pipe. As Claire Poire notes: "Pipe smoking and

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[589] *Ibid* at 12.

[590] See John Taylor, Treaty Research Report Treaty 4 (1871) Treaties and Historical Research Center (1985) Online: Indian and Northern Affairs <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/tre4_1100100028686_eng.pdf> endnote 1; Robert Williams, *Linking arms together: American Indian treaty vision of law and peace, 1600-1800.* (Oxford: Oxford University Press, 1997

[591] For more on the link between the pipe and Cree law, see wahpimaskwasis (Little White Bear) Janice Makokis, *nêhiyaw iskwew kiskinowâtasinahikewina – paminisowin namôya tipeyimisowin: Cree Women Learning Self Determination Through Sacred Teachings of the Creator*, (2005) MA Thesis for the University of Alberta, [unpublished] at 45-6, [Makokis*, Cree Women*] and Chief Wayne Roan and Earle Waugh, "Meanings of Sacred Pipe" (2004) online: *Nature's Laws*. <http://wayback.archive-it.org/2217/20101208172609/http://www.albertasource.ca/natureslaws/traditions/ritual_meanings_pipe.html>; See Andrew Gray, "Onion Lake and the Revitilisation of Treaty Six" (1997) online: *Honour Bound: Onion Lake and the Spirit of Treaty Six*, at 35-6 <http://www.iwgia.org/iwgia_files_publications_files/0143_Honour_bound.pdf>; Robert Williams, *Linking arms together: American Indian treaty vision of law and peace, 1600-1800.* (Oxford: Oxford University Press, 1997

gift giving were common modes of establishing or creating kin within many tribes across North America, and such protocols would be repeated yearly or seasonally to ensure that peaceful relations existed between the parties."[592] Pipe ceremonies have long been a central practice of treaty-making for nêhiyawak.[593] You will recall the stories of wîtaskêwin I shared at the start of this dissertation where pipe ceremonies helped secure treaties between nêhiyaw and niitisitapi peoples. As I have noted elsewhere, carrying a pipe and its role in other ceremonies, gatherings, and social deliberations is a legal act.[594] Pipe ceremonies have acted as locations for nêhiyaw legality since time immemorial.[595] Publicly, pipe ceremonies have manifested legal responsibilities within historical treaty making processes, including those between nêhiyaw people and other Indigenous[596] and non-Indigenous nations.[597] Tapwewin, or truthfulness is a necessary precondition of any event that is supported by pipe ceremonialism, there is an expectation that those who participated in a ceremony will walk in a truthful manner in their dealings with the issue.

The heft of the legal work that carried out by the pipe and pipe ceremonies is within legal practices implicit in day-to-day nêhiyaw life. Pipe ceremonialism is the

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[592] Poirer, *Hunting Buffalo, supra* note 316, at 63.
[593] Johnson, *nêhiyaw, supra* note 8, at 125.
[594] See Andrew Gray, "Onion Lake and the Revitilisation of Treaty Six" (1997) online: *Honour Bound: Onion Lake and the Spirit of Treaty Six*, at 35-6. <http://www.iwgia.org/iwgia_files_publications_files/0143_Honour_bound.pdf>; Robert Williams, *Linking arms together: American Indian treaty vision of law and peace, 1600-1800.* (Oxford: Oxford University Press, 1997).
[595] In that the origins of the uses of pipes by Cree people is beyond our collective memory's reach.
[596]The central Alberta town of Wetaskiwin derives its name from a peace-making event between Cree and Blackfoot peoples at its location, where the inadvertent sharing of a pipe enabled a treaty to form between the two nations. A small description of this event is found at: https://www.wetaskiwin.ca/DocumentCenter/View/48. This is a story I am familiar with, and used it to describe our ongoing work with Indigenous laws in Canada in Darcy Lindberg, "Engaging in Indigenous Laws: Therein Lies the Many Meanings of Witiskiwin", (April 1, 2016) online: Apr CBA Bar Talk. <http://www.cbabc.org/BarTalk/Features/In-this-Issue/April-2016/Engaging-in-Indigenous-Laws>
[597] Pipe ceremonies played an integral role in the process of the signing of Treaty 6. See Neal MacLeod, *Cree Narrative Memory: From Treaty to* Contemporary Times (Saskatoon: Purich Press, 2007) at 52.

explicit pedagogical practice towards teaching how "relationships are foundational to everything in Cree legal thought."[598] As an instrument to teach wâhkôtowin, it more broadly enters into an interconnected web of relations between humans, families, nations, animals, spiritual beings and ecological elements. [599]

If we consider the Crown as capable of this trans-systemic legal thinking at Treaty 6, as all evidence shows this capability, then we must consider the Commissioner capable of understanding how the pipe ceremonialism also brought nêhiyaw âskiy that is the land itself, into the treaty agreement as an active, relational force.[600] As Harold Johnson notes:

> "[o]ur oral histories do not indicate that we agreed to separate ourselves from our Mother the Earth, but they are consistent with our understanding of our role as humans under the laws of the Creator, which mandates that we should be kind and generous and share the bounty of the earth with each other, with the animal nations, the plant nations and with you, Kiciwamanawak [or Euro-Canadians]"[601]

Johnson is describing wîtaskêwin, the relationship of living together on the land. Wîtaskêwin is underpinned by a sense of equality in terms of the good living it should provide, and the duties to assist others in allowing this good living.[602] This duty is not just human-to-human, but extends to non-human agents, beings, and things. By severing the ceremony from the written text, this understanding of treaty has been lost on the Canadian and provincial Crowns, distorting the treaty relationship in ways that have been

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[598] *Ibid* at 15.
[599] *Ibid* at 49.
[600] On any reading the land is a part of the treaty arrangement. The nêhiyaw view has it being an active agent, as opposed to a thing that is ceded, the view captured in the treaty's written text.
[601] Harold Johnson, *Two Families: Treaties and Government (Saskatoon: Purich Publishing, 2007)* at 41. [Johnson, *Two Families*]
[602] See Cardinal & Hildebrandt, *Treaty Elders, supra* note 1, at 70-1.

detrimental both to nêhiyaw peoples and to lands, waters, animals, plants, and other beings in Treaty 6.

III. Ceremony as Rooted Approach to Law Revitalization

Ceremony is an integral part of *rooted-upward* approach to law revitalization.[603] Ceremony is the performance of nêhiyaw law and constitutionalism. Ceremony calls upon the four aspects of the nêhiyaw person; it engages in our spiritual selves, while opening up our intellectualism; It provides safe and constructive space for our emotional aspects to thrive, and requires and often challenges our physical selves. I think specifically of our thirst ceremonies (fasts) and what the old ones tell us about them. They talk about the first day, where your body adjusts to the absence of food and water, a change from its daily routine, how this challenges your physical self. The second day, our emotional aspect comes to the fore, challenging us as our negative emotions are often released on this day. The third day, how our intellectual selves reveals itself, we can see more clearly our journey in the fast, and what came before it and what will come afterwards. And finally, the fourth day, with all of our other capacities worked out, our spiritual selves carry us to completion of our obligations.

a. Ceremony, Sources of Law, and Textualization

For some people, spiritual law occupies a central position in many peoples' conception of Indigenous legal ordering. Further, as spiritual and natural law are often linked closely together, natural laws are conceived as part of this core as well. There are varying

[603] I use this term in a similar manner to Aaron Mills' thinking on the rooted nature of Anishinaabe constitutionalism. See Aaron Mills, *Lifeworlds, supra* note 113, at 860.

philosophies on these connections, and how they connect to other types or sources of laws. John Borrows theorizes that:

> Laws can arise whenever interpersonal interactions create expectations about proper conduct. Indigenous legal traditions develop in the same way; they can be based on supernatural declarations, naturalistic observations, positivistic proclamations, deliberative practices, or local and national customs. [604]

Borrows does not position one source over another and avoids a hierarchy within these sources, a position I share.[605] Other Indigenous legal thinkers either overtly or tacitly position sacred and/or natural sources as the root for other forms of law. Sylvia McAdam considers *manitow wiyinikêwina*, or Creator's laws as to be the overarching source of four types of law, human laws, earth laws, spiritual laws, and animal laws (including water and plants).[606] Aimee Craft considers Anishinaabe legal ordering to be rooted in sacred instructions, as she notes we are born with these instructions as "we journey towards the earth" that "allows us then to see the world differently and learn from our natural environment."[607] Thus in Craft's view, spiritual law gives form to natural law.[608] For Craft, customary law arises over time from human interaction, and human law comes "in a particular form, at a moment in time, given a particular context" that is supported by

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[604] John Borrows, "Indigenous Legal Traditions in Canada", (January, 2006) online: Report for the Law Commission of Canada, at 7. <http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf>

[605] Borrows is explicit in his rejection of fundamentalist thinking, as he states: Categorical thinking can be oppressive if it prevents people from questioning orthodoxies that seem to flow from such sources. While some ideas are better than others, we cannot always place one concept at the top of the hierarchy and invariably expect that 'proper' think-ing about it will solve all our political, social, or legal problems. See Borrows, *Freedom and Indigenous Constitutionalism, supra* note 98, at 129.

[606] McAdams, *Nationhood Interrupted, supra* note 63, at 38.

[607] Aimee Craft, How UNDRIP Recognizes the Sacred Relationship with Nibi (Water) (2019), online: Center for International Governance Innovation < https://www.cigionline.org/multimedia/how-undrip-recognizes-sacred-relationship-nibi-water>

[608] Returning to his view of the interaction of laws sourced from differing avenues, Borrows states that natural law can inform spiritual law as well. See Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 98. I am generally of this view as well, that our deliberations or observations of the natural world necessarily influence our legal norms that are based on spiritual practices.

spiritual, natural and customary law.[609] Aaron Mills, in his conception of the rooted lifeworld that gives Anishinaabe constitutionalism its form, similarly positions sacred law (through creation stories) as a foundation for other sources of law.[610]

The differing sources of law, their interactions and how legal knowledge is generated from them raises questions of where knowledge comes from. As I noted earlier, Marlene Brant Castellano theorizes there are three ways of Indigenous knowledge acquisition: "traditional knowledge (passed down from generation to generation); empirical knowledge (gained from observation); and revealed knowledge (acquired through spiritual means and regarded as a gift).[611] As revealed or gifted knowledge plays a significant role in ceremony, the influence of non-human beings and things on the creation of legal knowledge requires our commitments to our ceremonial cycles.[612] A challenge with exploring law within ceremony, or law and spirituality generally, is the tension between the need for a textualization of law and the wealth that comes from implicit, unwritten legal traditions. Consider the alternative, a hypothetical codification our obligations to asinîy in our ceremony, and what this shift causes:

Part 1: Treatment of Kôkom and Môsom Asinîwak

Gathering Asinîy

1 Any person gathering asinîy for ceremonial purposes must offer tobacco, or any other prescribed medicine, according to schedule A of the regulations by:

(a) Placing the offering in the location of the asinîy when it is gathered; or
(b) In a time shortly afterwards, in a manner that signals the solemnity of the exchange.

Using Asinîy

2 Any person using asinîy for ceremonial purposes shall:

[609] Ibid.
[610] Mills, *Lifeworlds, supra* note 113, at fn 6.
[611] As noted in Deborah McGregor, Traditional Ecological Knowledge, 3:1 Ideas: the Arts and Science Review.
[612] Again, humans are not passive agents in received knowledge, there is the matter of attending to the relationships in a proper manner, and interpretation of the knowledge as well.

(a) Treat the asinîy as a kôkom or môsom;
(b) Offer medicines when they are placed on an altar for the purposes of heating them;
(c) Offer a greeting, in nêhiyawewin when they enter a lodge;
(d) Offer medicines to them when they enter a lodge; and
(e) Offer one splash of water per asinîy used in the performance of the lodge, within the first round of the lodge;

The above is obviously an absurd practice, even for the brief exploratory purposes of this dissertation. I acknowledge how distorted the purpose of protocol and our ceremonial practices become through such codification. What this exercise shows is how many of the elements involved in a lodge would need defining: gathering, asinîy, ceremonial purposes, prescribed medicine, shortly afterwards, solemnity, kôkom, môsom, altar, greeting, medicines and lodge would need further description and interpretation. Aside from this, codifying procedure and protocol around gathering and using sweat stones begins to take the form of an instruction manual. It becomes an overtly physical and intellectual exercise, obscuring the spiritual and emotional faculty required in our ceremonies. While codification theoretically provides greater consistency among practices, and authority to regulate practices, it would transform ceremonial practices where the pedagogical force of ceremony would lose much of its wealth. In the small instance above, it potentially would remove the need for accompanying narrative to teach obligation, protocol, and procedure. Nêhiyaw legal aesthetics – the performative and pedagogical significance of law moving beyond the written text – would be diminished greatly in its usefulness.

This is a significant point to a discussion of the tangible benefits for oral and experiential transmission of law over written text. I also raise it here to explain the descriptive process that this chapter takes with regards to ceremony. While I am trying to avoid ambiguity in the following descriptions of ceremony and law, they are purposely

broad to leave room for nuance to ensure that you as the reader have room to be active in your interpretations and reflections of what is described below. Returning to Borrows' reflection that "Anishinaabe approaches require readers to activate their own agency in answering the questions presented", this ethic is especially present within nêhiyaw ways of being with regards to ceremony.

IV. Preparing Matotisan: Theorizing Ceremonial Engagement as Legal Studies

As you will recall, Brian Noble describes the totality of the treaty relationship between peoples, non-human agents, as well as landscapes and waterscapes themselves as a "treaty ecology."[613] A vital practice of treaty ecology is ceremony. Considering ceremony as a normative practice that furthers our *ahcâhkomâmitonihcikan, or* spirit-mind, continual practice is integral for the renewal of treaty. This continual practice also means that we revisit ceremonial procedure and protocol, and thus re-engage and reform our legal relationships to our ecologies. For example, the protocol involved in the preparation of the matotisan, or sweat lodge, as I previously noted, "forms the basis of a system of exchange within ceremonial knowledge systems." [614] Not only just a human-to-human practice, this exchange occurs with non-human beings and things. As Mekwan Awâsis describes protocol:

> Gaining access to information within a traditional knowledge system depends on abiding by particular protocols to acquire that information. The offering of cloth and tobacco to an elder when making a request is a means of acknowledging the source of that elder's knowledge. In the offering,

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[613] Noble, *Treaty Ecology, supra* note 161.
[614] Lindberg, *Sacred Changes, supra* note 76, at 64.

> generations of ancestors who perpetuated and accumulated a wealth of sacred knowledge and ceremonial practices become immanent through the act of exchange. Following through with acts of protocol demonstrates that the one requesting information understands and respects the sacred nature of that knowledge and the laws of exchange and reciprocity that guide the process. Within this relational system of knowledge sharing, the acts of protocol themselves are equally as important as the information acquired.[615]

Protocol provides a stable environment for the host of relations involved in a ceremony to orient themselves during the ceremonial practice. As I previously wrote:

> It provides a platform of consistency that participants can rely upon in their relations within these spaces. It also provides participants with the safety and security of understanding a ceremony as legitimate, in that the ceremonial holder has learned and followed the teachings from their mentors and community. It is in this ritual that the participant is free to explore the space that ceremony provides that is often beyond our normal day-to-day relational and spiritual experience. Ceremony space is ultimately a space of vulnerability; protocol gives an indication that the space is safe for this exploration. [616]

Protocol creates a space where all relations involved are safe and provided for, where the collective action of the ceremony can take place. Or more theoretically, Claire Poirer interprets the relationship between protocol and the rest of the ceremony as "horizontal socialization" versus "vertical socialization".[617] Awâsis explains this further:

> When we prepare those ceremonies and even when we prepare a sweat everything is over here horizontally. It's horizontal, it's on the ground. Everything is laid out here, the rocks... in all our different ceremonies... when you socialize even with people, well that's the same thing you do with these, whether they're artifacts... you socialize with them, you're socializing with them.[618]

In this sense, protocol serves as the base for law to be *enacted*. Protocol allows for members and other entities to coordinate actions together in a consistent and certain

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[615]Poirer, *Drawing Lines, supra* note 26, at 294
[616] Lindberg, *Sacred Changes, supra* note 76, at 62.
[617] Poirer, *Drawing Lines, supra* note 26, at 295.
[618] *Ibid* at 295.

manner to enable legal norm creation. This is common to H.L.A. Hart's theory on primary and secondary laws generally, as in my view ceremonial protocol acts as a secondary rule. Val Napoleon further describes this theory:

> Hart's secondary rules include (1) rules of recognition which will specify the conclusive and affirmative indicator that a rule has become a rule of the group, (2) rules of change 'which will empower an individual or body of persons to introduce new primary rules for the conduct of the life of the group', and (3) rules which will empower individuals to 'make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken'.[619]

Protocol allows for the recognition of ceremony as a proper space for law to be discussed and transformed, and authority to be deliberated upon. Ceremony includes non-human elements to these legal processes. As I describe below – how ceremonial protocol seeks and provides consent with asinîy (stones) in the ceremonial relationship – I consider the procedures as integral to legal relations just as much as secondary rules are to the use and transformation of primary ones.

a. Seeking consent from kôkom and môsom asinîy

Gathering the môsomak and kôkomak (sweat stones) is one of the earliest and most significant procedural acts in the sweat ceremony. We understand the asinîy as our relatives that will be the literal animating force of the lodge, I have been taught to treat them as our 'kôkoms' or 'môsoms'.[620] One origin story describes this kinship. In this story, a boy is left by his uncles who go in search of food. After they haven't returned for four days, the young person to goes out to look for his lost uncles. He travels a long way,

[619] Val Napoleon, *Ayook, supra* note 142, at 251. Within this passage Napoleon references Hart, *Concept of* Law, *supra* note 256, at 92-3.
[620] Lindberg, *Sacred Changes, supra* note 76, at 66.

only to find a lodge his uncles had previously made. There are seven stones in the fire pit, but nothing else. As the young man sleeps in the lodge that evening, his uncles come and tell him what happened: days earlier a *mistap*ê*w* (giant) came and put their *ahcâhk* into stones, in order to eat their physical bodies. So the young man's uncles were in those seven stones.

The boy is taught how to release the spirits from the stones in his dream. He is instructed how to build a lodge frame from willow, and how to cover the lodge with the skins of animals. He is also instructed that he would need to get the rocks glowing hot to release his relatives. In the dream, he was also shown how to sing and pray in the lodge, and how to splash water on the rocks to release his uncles. In doing so (the first sweat lodge), his uncles return as lights in the lodge, and are reborn.[621]

Our procedures of gathering, preparing, and using sweat stones is guided by the understanding, as the story suggests, our ancestors reside in them.[622] The common protocol is that we exchange tobacco (or a related medicine) when we gather sweat stones. Though the procedure differs lodge to lodge, the creation of an altar and the lighting of the rocks in preparation for a lodge is a significant protocol step. We blanket the stones with wood to show our respect for the work that they will do, and as iskotêw

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[621] See Wilfred Buck, *supra* note 221, at 79-81.

[622] As Blackfoot educator Leroy Little Bear states, one of the key belief in what he describes as the 'native paradigm' is that everything "is constant motion or constant flux. The second part is everything consists of energy waves. In the native world, the energy waves are really the spirit. And it is the energy waves that know." See Don Hill, "Listening to Stones" (1 Sept 2008) Alberta Views, online: < https://albertaviews.ca/listening-to-stones/>. This line of thinking may explain how nêhiyaw people consider the animacy of non-human beings and things, through an acknowledgement of the energy within even stones. Hill also notes that "[C]ognitive archaeology is a scientific discipline that investigates how special places, particularly those designated as "sacred" throughout antiquity, might serve as an access point between consensus reality and non-ordinary states of awareness." Our fasting ceremonies are part of this scientific rigour in this manner. See ibid.

(fire) burns through, we ensure that it is always covered through constant observation and visualization. We respect the work the fire does as well; it is a common understanding that when the fire warms the *oskâpêwis* (helper/apprentice) who are tending to it, that it is doing healing work for them. When we bring asinîy into the lodge, we greet them like relations with our voices ('tawaw môsom/kôkom') and with our medicines.

The ceremonial relationship with sweat stones informs our relationship with stones throughout our life. Another shared lesson through the experience of gathering and caring for sweat stones is a requirement to work slowly. Early in my own ceremonial practice, more than once, I was admonished by lodge holders or older ones about being rough with stones as I have moved or stacked them. On one occasion, an older one sat me aside and shared an experience he had about moving stones: walking on a hillside and seeing a beautifully colored rock embedded in the ground, he picked it up and admired its marble features. After a while, he sensed a need to return to the rock to its original spot, so he did so, taking care to place back exactly as he found it.[623] A small story. Yet it provided me all I needed at the moment to correct my behavior towards a better version of wâhkôtowin with asinîy.

Ceremonial procedure allows us (or has allowed me) to return to an understanding of this relation. Ceremony returns us to a domain where asinîy has an autonomous spirit and livelihood, and in doing so reveals a new legal sphere, the autonomous rights of asinîy, independent of human rights. As Poirer notes (describing Ribstone Hill):

> Ceremony is a means of creating and sustaining networks of kinship among human and non-human entities, and the ribstones are acknowledged as having the capacity to strengthen those networks…[E]ntities that reside in different domains may not, at first, be

[623] Shared by Michael Merrier (Makoos) in May 2003 at Camp Health, Hope, and Happiness, Lake Isle, Alberta.

> able to discern one another. It takes work to make bodies mutually apparent, and as socialization among different kinds of entities unfolds, bodies may not become demarcated until the proper protocols have taken place. If human and non-human entities are not immediately apparent to one another, ceremony acts as a process of making human and non-human persons mutually distinguishable. [624]

If we consider the perspective of asinîy, tobacco signals human intention for ceremony and raises the expectation that asinîy will be treated in a manner consistent with past ceremonies, and provides consent for asinîy to transgress the autonomy of humans (through healing) during the lodge.

b. Bending Willows: The Ceremonial Structures of Wâhkôtowin

Just asinîy physically centers the lodge, the consent they provide centers the metaphysical actions of the ceremony. Or to put it another way, the ceremony is less about how we physically manipulate the environment about us (for we could conceivably have the same physical results of a lodge experience in the sauna at your local gym), but the relationships we engage in and renew on a metaphysical level. A relative authority is exchanged between humans and non-human beings by ceremonial protocol.[625] When tobacco is provided, the kinship between the person and the stones is no longer a mere possibility, it is realized in a pragmatic manner – those stones are now drawn into a person's familial circle as môsoms and kôkoms.

A similar legal relationship is created literally in the architecture of our sweat lodge ceremonies. *Nipisîy (*willow) physically structures our ceremonies. Nipisîy is a versatile being for nêhiyaw people. The inner bark of a red willow is a medicine that is

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[624] Poirer, *Hunting Buffalo, supra* note 316, at 117.
[625] See Basil Johnson, *Ojibiway Heritage* (Toronto: McClelland and Stewart, 1987) for an Anishinaabe perspective on ceremonial protocol, and how it may facilitate the relations between humans and non-humans.

used for treating pain (it has salicin, the active ingredient that treats pain). Red willow bark is also used in pipes as tobacco. Willow provides the bones for the matotisân as well. For constructing a lodge, nipisîy is gathered in *miyoskamin* (spring, or literally, good ground). This is the time when willows have received enough water from winter's break up that they are the most pliable. While there are several methods for constructing a lodge, one common tradition uses twenty-four willows. Bending willows is a practice in patience; taking care not to break any of the branches, raising a lodge is necessarily a slow and contemplative act.

Métis lodge holder Will Campbell talks about the layers that are created within the structure of the lodge, demarcated by the willows. He ascribes each level to a group of beings and things. The first level is for the 'creepy-crawlers' (a phrase describing insects that is used more widespread amongst lodge holders than you would think!) and rooted beings, the second level for the four-legged ones, the third is the two-legged sphere, and finally, the winged ones are represented in the fourth. This is not a hierarchal demarcation, but more so an explicit act of wâhkôtowin – it acknowledges all of the human and non-human beings and things place in the lodge. In a similar manner, the willows are shaped in a manner that there are four doorways into the lodge. While only one may be 'accessible' for human entry, it is understood that each lodge has four, allowing for non-human helpers from each direction to enter the lodge. In some traditions, each direction is represented by specific pawâkan and other non-human things. When a new lodge is constructed, the old one is left up, until it goes back to the earth on the weather's accord, and is regenerated in this way.

If we reflect upon this as critical legal pedagogy – specifically as experiential theory on human-to-non-human wâhkôtowin - bending willow teaches us of the strength of our inter-relatedness in architecting ceremonial spaces. Gathering nipisîy is similar to how we gather rocks, in that we provide tobacco to gain consent for taking them, and seek their assistance in running the lodge. Nipisîy teaches how our lives are layered upon each other, each integral to maintaining the strength of the lodge.

Nipisîy also teaches us of the cyclical nature of our knowledge acquisition. Just as restructuring our lodges is a cyclical act, nêhiyaw knowledge and experience is embedded in such cycles. Knowing when to restructure our lodges requires observation and knowledge of the rest of the ecological world around nipisîy. It is not only seasonal observation, but is linked with rainfall, and how other plants and animals act in concert with the changes in spring. Wâhkôtowin requires close observation. For example, as I write this in the middle of May in central Alberta, we are just entering the time of year when the willows are ready to be replaced. It has been a dry spring. The two lodges I have previously attended within the last month, the ceremonial holders both acknowledged they are observing their surroundings patiently, waiting for nipisîy to be ready, so they can be treated with kindness.

James Scott talks about the wealth of cyclical knowledge in relation to the "more general abstract knowledge deployed by the state and its technical agencies."[626] As he explains:

> "When the first European settlers in North America were wondering when and how to plant New World cultivars, such as maize, they turned to the local knowledge of their Native American neighbors for help. They were told…to plant corn when the oak leaves were the size of a squirrel's ear. Embedded in this advice, however

[626] James Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (Yale University Press: New Haven, 1999) at 311.

folkloric its ring today, is a finely observed knowledge of the succession of natural events in the New England spring. For Native Americans it was this orderly succession of, say, the skunk cabbage appearing, the willows beginning to leaf, the red-winged blackbird returning, and the first hatch of the mayfly that provided a readily observable calendar of spring. While the timing of these events might be early or later in a given year and while the pace of their succession might be more drawn out or accelerated, the sequence of events was almost never violated. As a rule of thumb it was a foolproof formula for avoiding a frost."[627]

Because such knowledge is reliant on concurring events that make up the cycle, viewing each moment in isolation obscures its value. As Scott continues:

> "We almost certainly distort Squanto's advice, as the colonists perhaps did, by reducing it to a single observation. Everything we know about indigenous technical knowledge suggests that it relies on an accumulation of many partly redundant signals. If other indications did not confirm the oak-leaf formula, a prudent planter might delay further."[628]

While Scott is undoubtedly starting from a Western view working towards an understanding of 'Indigenous knowledges' (think 'working from the smoke hole downwards'), his description is valuable. Observing *nipisîy* and gathering it at the proper time, is embedded in a cycle of ceremonialism that strengthens our wâhkôtowin. Not only is this observation a critical link in our conception of the seasons, it is also a part of the continuous ceremonial cycle of the nêhiyaw peoples. While sweats are held year-round, *miyoskamin* (spring) signals a rejuvenation of these ceremonies through the reconstruction of lodges. It also signals the season when those who are engaged in dancing in the summer start their preparations in earnest through fasting and learning songs. It also notes the pow-wow season that takes place generally all spring and summer. The middle of summer is reserved for the thirst dances, generally held around

[627] *Ibid* at 312.
[628] *Ibid* at 312.

the longest day of the year. When the fall comes it is the season for giveaway ceremonies, to prepare for the winter time, and for communities to redistribute goods amongst each other to ensure each makes it through the winter.[629] The transition from fall into winter signals the start of the round dance season that will continue until spring. With the first snowfall, also comes a time that was set aside for storytelling. And then we come into spring again, and the cycle resets.

The cyclical nature of the practice and teaching of nêhiyaw law was and is intrinsically tied into the natural, seasonal, and migratory cycles of non-human beings and things. As John Borrows notes, "[t]urning towards Indigenous law does not automatically solve our environmental and relational crises. There must be a revitalization of Indigenous law based on seasonal relationships and structural reform to generate reconciliation."[630] Nêhiyaw law is meant to be practiced in deep relation and (re)conciliation with nêhiyaw âskiy. Ceremonies are integral to this binding. As Hanne Petersen observes, ceremonial aesthetics "lead to a collapse of the separation between nature and culture. Nature becomes culturized and culture becomes naturalized" [631] Ceremonial cycles are necessarily bound with the 'natural' cycles of the ecological world. Pauline Johnson notes a tight link between observation of these cycles and the development of nêhiyaw wiyasiwêwina:

> We learned how to survive through each season but came to understand the teachings within the natural occurrence. We learned from the animals about our responsibilities and ourselves as Nêhiyawak."[632]

[629] See Jobin, *Cree Economic Relationships, supra* note 17, at 172.
[630] See John Borrows, "Earth Bound: Indigenous Law & Environmental Reconciliation" in Michael Asch, John Borrows, & James Tully (eds.) Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings (Toronto: University of Toronto, 2018) at 51. [Borrows, *Earth Bound*]
[631] Hanne Petersen, "On Law and Music: From Song Duels to Rhythmic Legal Orders?" (1998) 41 Commission on Legal Pluralism 75 at 83.
[632] Pauline Johnson, *Nêhiyaw, supra* note 8, at 161.

In a theoretical manner, Scott considers local knowledge developed through longstanding and highly codependent relationships with the ecological world as *Métis*: "a wide array of practical skills and acquired intelligence in responding to a constantly changing natural and human environment."[633] The concept of Métis (not to be confused with the people), continues to be vital to nêhiyaw law and constitutionalism, especially considering our relations with the environment. As increasing pressures on non-human beings and things causes a fluctuation in our cycles, Métis is integral to responding. The term *nahâsiwin* (full bodied learning, developing alert senses) is perhaps close to what Scott deems Métis. Our experiences pulling asinîy from fields or riversides, watching the willows for their readiness for a new lodge, building the mound outside of it, sharpens our developments of nahâsiwin.[634] Ceremony causes us to shift our perspective towards this four-bodied learning.

A contemporary application of the role of ceremony as a legal method to ensure and strengthen our land relations through four-bodied learning occurred *en masse* in the winter of 2012-2013. In response to how an omnibus bill (Bill C-45) enacted by the federal government that made key amendments to environmental protections within the

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[633] Scott, *supra* note 626, at 313.

[634] Claire Poirer discusses this in her work in assisting Mekwan Awâsis with his lodge:"To fulfill my desire to co-labour with him, Mekwan Awâsis required that my learning process take shape not within a disciplinary context, but that it be located in a space of active engagement with the living body of teachings passed on to him by his teachers. He and I both knew my research would result in a written dissertation, but he instructed me to leave my research questions behind and to undo the academic conditioning that lead me to formulate those questions to begin with. To aid in this undoing, I was given two tasks. One was to spend time each day walking through the woods just east of his house, listening to the wind, the birds, and the four-legged animals. The other task was to pick peppermint in the swampy meadows adjacent to a shed that housed the sweatlodge. The peppermint I picked would accumulate for a few days at a time, and then be tucked into the willow branches at the top of the sweatlodge structure just prior to a ceremony. I tended to these tasks every day, and gradually my perception started to shift. I became more aware of the wind's patterns, and of the permeations of peppermint scent that lingered for days after a sweatlodge ceremony. My attention gradually became less focused on written language and the spoken word, and more attuned to my immediate surroundings." Poirer, *Drawing Lines, supra* note 26, at 18.

Indian Act, Fisheries Act, Canadian Environmental Assessment Act, and the Navigable Water Act, Indigenous peoples in Canada took part in a mass social movement to protest how these amendments would affect uses and relationships with lands and waters.[635] Growing from an educational program led by four women, Idle No More blossomed into large-scale opposition to the legislation.[636]

One of the significant forms of opposition during this period was a distinctly prairie-Indigenous one: the round-dance. As a form of non-violent protest, the round-dance ensured ceremonialism guided these political acts. From a nêhiyaw perspective, this enabled the contestation made possible through Idle No More to be 'four-bodied' as well. Rather than reactive in nature, the opposition to Bill C-31 was a response of Indigenous legal ordering to Canadian law's movement away from earth relationality, through round-dancing, and other similar ceremonies. It was also within the rounddance season that this opposition occurred, thus the contemporary action was met with what many prairie Indigenous nations were engrossed in with their seasonal rounds already.

V. Balancing Written Law with Unwritten Legal Norms

This four-bodied learning is at odds with the machinations of Western legal pedagogy, where study and interpretation of written texts and past decisions, void of a full sensory experience, is the favored teaching approach. Returning to the mock codification of sweat

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[635] Specifically, the changes to the Navigable Water Act would limit protections for lakes and rivers in Canada, Indian Act changes would make it easier to access reserve lands for economic development, and the Canadian Environmental Assessment Act changes would make it easier for industrial projects to be permitted in their activities. See Glen Coulthard, *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 160.

[636] For a nuanced discussion on the positive implications and the potential negative ramifications of direct action and Indigenous rights, see John Borrows, "Civil (Dis)Obedience, Freedom, and Democracy" in *Freedom & Indigenous Constitution, supra* note 98.

lodge protocols I provided earlier in this chapter, it was of course, a' straw-person' exercise, as there is no appetite within Indigenous communities to codify ceremonial procedures as I have outlined above. There historically has been a tension to keep ceremonies and protocols out of formal deliberative spheres, only practiced, to maintain the 'four-bodied' learning that underpins ceremony. The hypothetical codification exercise above, however unrealistic at this point, reveals other dangers in formalizing legal norms that are embedded in other social relations (like those involved in ceremony) in this manner. It opens law-making, interpreting, and enforcing to the danger of becoming a narrow, elitist process. The drafting of such law is left up to a few individuals, rather than the social interaction that occurs in non-written legal norm development. This is a significant challenge as law becomes more specialized and technocratic. The relational elements of law, like persuasion and deliberation, can be obscured as written law - especially in common law jurisdictions – trends towards relying more upon authority, hierarchy, and enforcement for social adherence to a norm.[637] As the basis of most codifications of Indigenous laws is borrowed from Eurocentric legal systems (and its underlying anthropocentric orientation), there is the alive potential that codification favors humans above other species, elements, and non-living things. The development of written law within nêhiyaw communities at a First Nation and federation level has a tendency to describe the ecological world in Western property law concepts. For example, while the *First Nations Land Management Act* (S.C. 1999, c. 24) allows for

[637] The counter is that written law provides a stable standard that is easily cognizable by citizens. This aids the efficiency and certainty of legal discourses and the use of law to resolve social conflicts. These positives are of course of benefit to Indigenous people as well.

First Nation control over land use management and control, it provides little room for Indigenous communities to formalize land tenure outside of common law property norms.

Another potential consequence of the codification of law is the severed relationship between legal norm and social norm. Codification potentially removes the inherent reflexivity of legal norms to adjust to changing social norms and environments. In this way, the formal representation of a societal norm through written law may be out of step with what is practiced as a social norm. Sweat lodge norms provide a good example of the strength of the close connection (and even inseparability) of a social norm from a legal norm. Our lodges have been consistently evolving: we no longer use animal hide to cover our lodges (perhaps becoming too expensive, too time consuming or too harsh on diminished buffalo or moose populations),[638] we occasionally house lodges inside sheds and garages (to make it more bearable to sweat in the winter), and we travel to the mountains to gather lava rocks (rather than relying on the river stones from central Alberta).[639] Ceremony reflexively maintains its nuance through its ties with four-bodied learning.

I raise this not to throw out the very positive implications of the codification of laws, legal principles, and legal procedures within Indigenous communities. Written law is a fundamental need within Indigenous communities. As I noted earlier, positivistic law and norms are in many situations the most efficient use of law in the ordering of aspects

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[638] See Souta Calling Last & Rosalyn Lapier, "It Might Be Time to Decolonize Our Sweat Lodges" (2019) , Online: Native News Online <https://nativenewsonline.net/opinion/it-might-be-time-to-decolonize-our-sweat-lodges/>

[639] We have emergency alterations as well, while some lodges will use buffalo horns for splashers, others will use spruce boughs, or even cups. In one emergency lodge I was in, we used a Tim Hortons cup, as that was all the lodge holder had at the time. The procedure continued, with some humor from the lodge holder, and was held with the manner others were. Of course all of these alterations are the subject of dialogue and acceptance within communities, or put to the test with protocol and procedures within communities

of Indigenous societies.[640] The development of Indigenous constitutions, a practice that is centuries old in North America, continues to be an integral process to ensure the certain, clear, and efficient operation of law and governance within Indigenous communities.[641] The negative implications of codifying ceremonial laws raises the question: how can Indigenous communities utilize written texts to ensure the pedagogies within ceremonies are recognized and practiced?

a. *Tsilhqot'in Nation Wildlife Law*

The *Tsilhqot'in Nation Wildlife Law* is exemplary in how Indigenous nations may deal with the challenge in balancing the need to codify law (to provide certainty for its members and non-members alike) yet retaining the nuances that many Indigenous legal practices require. Coming into force in August of 2019, the law sets out standards of conduct according to *Nulh Ghah Dechen Ts'edilhtan* (Tsilhqot'in law, or literally, laying down the stick').[642] Acknowledging that legal pedagogy is a significant part of adherence to the laws, it notes that its law "is based upon education and prevention."[643] As such, the Tsilhqot'in have set out a process – the Nagubets'eneten process – to set parameters on how an offender of the wildlife law will be dealt with:

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[640] See the discussion at page 41 of this dissertation.

[641] See Borrows, *Canada's Indigenous Constitution, supra* note 49, at 72-76; William Fenton, *The Great Law and the Longhouse* (Norman: University of Oklahoma Press, 1998).

[642] These principles include including taking "only the wildlife you need and no more", respecting "the capacity of the nen [land] to give, so that it can continue to give; and ensuring "that the nen remains healthy and abundant so that it can be maintained for all" Tsilhqot'in peoples' use in the future. See Tsilhqot'in Wildlife Law, s. 2 (a)-(f). Tsilhqot'in Nation Wildlife Law, (2018) Online:Tsilhqot'in Nation. < http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/TsilhqotinNationNGDT-WildlifeLaw%20%282%29.pdf>

[643] *Ibid* at 2(f).

Nagubets'eneten process

15 The Nagubets'eneten process will include the person being referred; three representatives from Xeni Gwet'in, one of which will be an elder; and any additional persons who the referred person and the three representatives from Xeni Gwet'in jointly agree upon. Core legal principles of the Nagubets'eneten process are:

(a) to include teaching Tŝilhqot'in culture and laws in a positive way;

(b) to ensure the person is accountable for their actions by applying disciplinary measures to the person, which could range from guidance and teaching to a ban on hunting in the Declared Title Area;

(c) to ensure relationships are restored; and,

(d) to include Tŝilhqot'in ceremony.

Figure 5.1: s. 15 of the Tsilhqot'in Nation Wildlife Act

Significantly, the law references directly both relationality and ceremonial participation as part of the core legal principles of Nagutbets'eneten. Through the Wildlife Law, the Tsilhqot'in provide clear direction on the limits to their citizens' right to hunt, while leaving room for nuance in their ceremonial practices.

b. *Restoule v. Canada* 2018 ONSC 7701

The ceremony of law is also being taken up in formal legal proceedings as well. In its decision in *Restoule v. Canada* (Attorney General), 2018 ONSC 7701, the Ontario Superior Court relied upon "the Anishinaabe perspective, particularly, looking at the concepts of respect, responsibility, reciprocity, and renewal as manifested in Anishinaabe stories, governance structures, and political relationships".[644] Significantly, the court accepted a broad view of Anishinaabe treaty responsibilities, including a responsibility "to the land in all its manifestations – the animals, flora, fauna, and non-human beings

[644] Restoule v. Canada (Attorney General), 2018 ONSC 7701 at para. 411.

with whom the Anishinaabe shared the territory."[645] It relies in part on stories to support this view.[646]

Though the decision's final section is not part of its reasoning for its decision, it outlines the unique process the court took in during the trial. It offers gratitude from the Ontario Superior Court to all the people who made the hearings possible, including those who held sweat, smudge, and pipe ceremonies for the benefit of counsel and judges. As Justice Henenessy writes: "[t]he entire court party expressed their gratitude for the generosity of the many knowledge keepers who provided the teachings. I believe I speak for the counsel teams when I say that the teachings and the hospitality gave us an appreciation of the modern exercise of ancient practices. Miigwech, Miigwech, Miigwech."[647]

While the judgement is silent on the role of the ceremonies in persuading the court, I do not doubt that the ceremonial experiences allowed for greater understanding of Anishinaabe stories, the use of metaphor, and Anishinaabe law generally. While the court may not have the language to legitimize ceremonial practice as a legal process, we can see in this judgement how it positively aided a deeper understanding of Anishinaabe conceptions of treaty, and treaty obligations to lands and all that encompasses the land.

VI. Conclusion: The Mystery of Ceremony and Deference to Our Older Ones

In the examination that has taken part in the previous chapters, I have outlined the various methods used by nêhiyaw peoples to ensure such relationality, including the use of

[645] Ibid at 416.
[646] It particularly relies upon Heidi Stark's interpretation of Woman Who Married Beaver. See Stark, *Respect, supra* note 188.
[647] *Restoule v. Canada, supra* note 644, at para. 610-1.

narratives that are in the voice of animals, practices that keep nêhiyaw peoples close to the land when making significant legal, governmental, and economic decisions, the safety and protection of ceremonial structures that seek communication with animal beings. Because of challenges in our capacities, there will always be a limit to the relationality of law. Heidi Stark and Gina Starblanket contend "that the reconnection of people with one another, and of individuals and the land isn't necessarily transformative in and of itself, but…it is the proliferation of relationships of care and nurturance, in which we see ourselves having concrete roles and responsibilities, that have the greatest promise."[648] Overcoming our separateness of spirit (thinking of our individual ahcâhk and its roots in man'to iskotew), requires *living out* the equality that relationality infers. [649] This necessarily requires us to actively listen, communicate, and renew our relationships with our animal relations.

Further, there will always be a mystery in our relations, like there is always ambiguity in law. In this way, nêhiyaw conceptions of ceremony are helpful in understanding the separateness, between human and non-human communication, that seemingly will always in some form exist. One word for ceremony, *mamâhtâwisiwin*, translates into tapping into the mystery.[650] The root of this word, *mamâhtâw*, is strangeness or mystery. [651] It is also linked to how our medicine people are described in nêhiyaw, often called, ê-mamâhtâwisit, or "s/he is spiritually powerful."[652] The link between mystery and spirituality is something that is contemplated in nêhiyaw ways of

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[648] Starblanket & Stark, *Relational Paradigm, supra* note 150, at 177.
[649] As I consider this part of Stark and Starblanket's call. *Ibid* at 177.
[650] Johnson, Nêhiyaw, *supra* note 8, at 165.
[651] Wolvengrey, *Cree supra* note 382, at 85.
[652] McLeod, *Cree Narrative, supra* note 20, at 102.

thinking, and reveals itself in nêhiyaw social and legal norms. This is one of the reasons that I resist thinking of nêhiyaw spirituality in religious terms; even in some of the most doctrinal spiritual practices and ordering, there is a sense of mystery. A common refrain I hear from ou*r ê-mamâhtâwisit/those who know something* is that our individual journeys are not for others to judge, that yours is your own with creator.

This is why we provide a significant amount of respect and deference to the kehte-ayak, the old ones. As the proposed Samson Cree Nation Constitution notes:

> No Wiyasiwêwin, law, is greater than another Wiyasiwêwin, law, and this in respect to the four colours, four directions, and four grandfathers. The Wiyasiwêwina, laws, put forward are living entities that continue our spiritual and cultural understanding of who we are as Nêhiyawak. Each Wiyasiwêwin reflects our teachings and values of our Nation through the ordinance of our sovereign leaders the Kêhtê-ayak, Elders.

Within this declaration there is an acknowledgement of the horizontal structuring of law. It implies that a deliberative process in legal norm developing interpretation. The deference to the ordinance of the old ones is an acknowledgement of their knowledge and experience in this structuring of law throughout their lives. Wâhkôtowin in this manner, is not a hierarchical process, but ensures that there is a sharing of intellectualism and imagination amongst those in the society. All of these allow us to travel to edge of the mystery, so to speak in our relationship with the ecological world. Ekosi.

My key observations and conclusions in this chapter are:

a. Ceremony continues to be a vital legal pedagogy for earth reconciliation. The maintenance of the intellectual traditions that are central part of our ceremonial practices is important to this continuation.
b. Ceremonial practices ensure that nêhiyaw legal processes are cyclical, and dependent upon close relationships and observations of parallel ecological cycles.

c. These practices also structure nêhiyaw law by providing environments necessary for the adaptation and transformation of law. Because ceremony is closely tied with the ecological world, this ensures lands, waters, and non-human entities have agency in law's development.
d. Finally, the formalization of law through written codes and constitutions can provide room for the recognition of ceremonial practices as a vital part of legal ordering, while maintaining the flexibility for ceremonies to do the nuanced work at the heart of their practices.

Nikotwasik (Six): Constitutional Kindness

"Monsters, like humans, are figures of destruction and dissolution. They can be devious, harsh and malicious. They gratify themselves at other's expense and take pleasure in the resultant degradation. They destroy their environment in ways which make it difficult for others to thrive or survive…Any legal tradition worth its salt must deal with the worst excesses of human nature. It must deal with its monsters."[653]

This chapter concludes this dissertation by applying the lessons and conclusions from the previous five chapters to provide a theory of 'constitutional kindness' based on wîtaskêwin. This constitutional approach provides an antidote to the consumptive tendencies enabled by Canadian constitutionalism. The need for treaty renewal between nêhiyaw peoples, non-Indigenous peoples, and non-human agents becomes readily apparent. As this chapter explores, a return to a modern practice of the nêhiyaw seasonal round provides a framework for the renewal of wîtaskêwin.

1. Introduction: Canada's Consumptive Constitution

The bundling and weaving of constitutive and legal resources that this dissertation has engaged in is almost done. The bundles of threads gathered to make these observations have been thick and diffuse. In the exploration of nêhiyaw placemaking in the second chapter, I concluded that place-making stories display *nêhiyaw juris-making.* Nêhiyaw jurisdiction is ensured through the renewal of this juris-making process. Implicit in this process are renewed understandings of the inspirited nature of the land. The legal principle of kiyokewin, or renewal, is a vital step to nêhiyaw jurisdiction.

As the third chapter demonstrated, the legal agency of the ecological world in nêhiyaw law and constitutionalism is animated through nêhiyawewin. The animacy displayed in the Plains Cree language orients our legal relationships with lands and

[653] John Borrows, "Heroes, Tricksters, Monsters & Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill L R 795 at 835. [Borrows, *Heroes*]

waters. Law is a verb – nêhiyaw wiyasiwêwina provides a juris-animacy to lands, waters, animals and other non-human agents.

The fourth chapter turned to âtayôhkêwina as critical legal theory and philosophy. Looking at stories this way bundles legal terms with meaning: the stories about gifting nêhiyaw peoples with our horse relations fills obligations to miyo-wicêhtowin (mutual aid and support) between humans and horses. Âtayôhkêwina also provides critical meta-narratives on law. Wîsahkêcâhk story cycles can be used as critical philosophy on law, governance, and authority. These stories call for a recognition of 'relative authority' within nêhiyaw wiyasiwêwina, affirming the normative, interactional based nature of nêhiyaw law. Non-human agency remains an integral part of the legitimation of law – âtayôhkêwina leaves room for non-human agents to provide authority for human actions in ecological management and food provision. Finally, the fifth chapter explored the intellectual rigour involved in nêhiyaw ceremonies, and spirituality generally. This intellectualism is integral to the role the ecological world plays in our constitutive practices, as ceremony is often about communication with non-human beings and things. Ceremony serves as an intermediary that allows non-human agency in legal processes and in legal pedagogy.

The observations in these previous chapters make up an ethic of constitutional kindness according to nêhiyaw law and constitutionalism. This constitutional kindness is characterized by a recognition of the inspirited nature of the land, a requirement to visit, an acknowledgement of relations and kinship, and a corresponding duty to avoid transgressions. Constitutional kindness also means that any authority provided to nêhiyaw peoples to infringe or displace the inherent autonomy of non-human beings and

things is relative; it is based on the maintenance of a critical relationality with the beings and things we rely upon for our nourishment and survival. Finally, our understandings of constitutional kindness is renewed through visiting and ceremony, each of which utilizes protocol as a legal tool that signals our commitments to include lands, waters, flora and fauna as agents within nêhiyaw wiyasiwêwina.

From the previous chapters, we can see that this constitutional kindness only finds its value in action – though enabled by narrative, these stories would be useless if they did not engender action. This final chapter thinks about this idea of constitutional kindness in the Canadian context. Specifically, it looks at a return to the spirit of wîtaskêwin through Treaty 6 as a vital avenue for the inflection of constitutional kindness in Canadian constitutionalism. Harold Cardinal reminds us that the principle of wîtaskêwin infuses these general imperatives into the Treaty 6 relationship: 1) a recognition of k'se man'to in the agreement between the nêhiyawak and the Crown, and the necessity of the k'se man'to in the continuation, renewal, and good faith upholding of the agreement, [654] 2) the "initiat[ion] and creat[ion of] perpetual familial relationship based on familial conception of *wáhkôhtowin* (good relationships)",[655] 3) the "guarantee of each other's survival and stability anchored on the principle of mutual sharing" (miyo wîcêhtowin);[656] and 4) the "guarantee to the First Nations and their citizens a continuing right to livelihood."[657] All of these necessarily imply that the Crown is bound by the same

[654] Cardinal & Hildebrandt, *Treaty Elders, supra note* 1 at 31; Treaty Commissioner Alexander Morris offered similar rhetoric when he said "[t]he lands are the Queen's under the Great Spirit." *Ibid* at 102; see also *supra*, note 59, "Interpreting *Sui Generis* Treaties," at 51.
[655] *Ibid* at 33.
[656] *Ibid* at 34-36.
[657] *Ibid* at 36. Of these four points, see Chris Wiebe, "The Rule of Law Must Prevail" (2020) (Major Paper, Juris Doctorate, University of Alberta, Faculty of Law) [Unpublished]. This summary is borrowed from Wiebe's work.

relationality to non-human beings and entities within nêhiyaw wiyasiwêwina. The challenge of constitutional kindness in the Canadian context is just as much a normative challenge than solely born through specific constitutional and legal practices. Or to provide a different angle, Canadian legal and constitutional norms are inseparable from stories. As Robert Cover notes:

> "In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations."[658]

While Canadian society favours centeredness and even hierarchy in law and constitutionalism, one of the strengths of nêhiyaw wiyasiwêwina is its recognition of the decentered nature of nêhiyaw law and governance. Harold Johnson notes that historically our leaders – our okimâwak- were put into these positions of responsibility under the knowledge that it was a fluid proposition and their time as leaders was often temporary, dependent upon context.[659] Johnson notes:

> "[T]he greatest reward we gave our [okimâw] was to let [them] become one of the people again…We recognized that authority and responsibility are onerous and should not be imposed on a person for too long. It is a heavy burden to carry the authorities and responsibilities of others, and if we give away our personal authority and responsibilities, we avoid our duty as humans".[660]

Evidence of such decentered power structuring is also found within nêhiyawewin. For example, our term for fire - iskotêw - is derived from *oteh*, or *otawêw* (heart) and *iskwêw*

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[658] Robert Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative" (1983) Harv. L. Rev. 4 at 4.
[659] Johnson, *Two Families, supra* note 601, at 77.
[660] *Ibid* at 78.

(women). These were micro-centres of governance within nêhiyaw communities, as led by iskwêwak, each family was centered around their iskotêw within their lodge. Depending upon circumstance or season, these collective of fires would gather and bundle nêhiyaw peoples as a cohesive nation.[661]

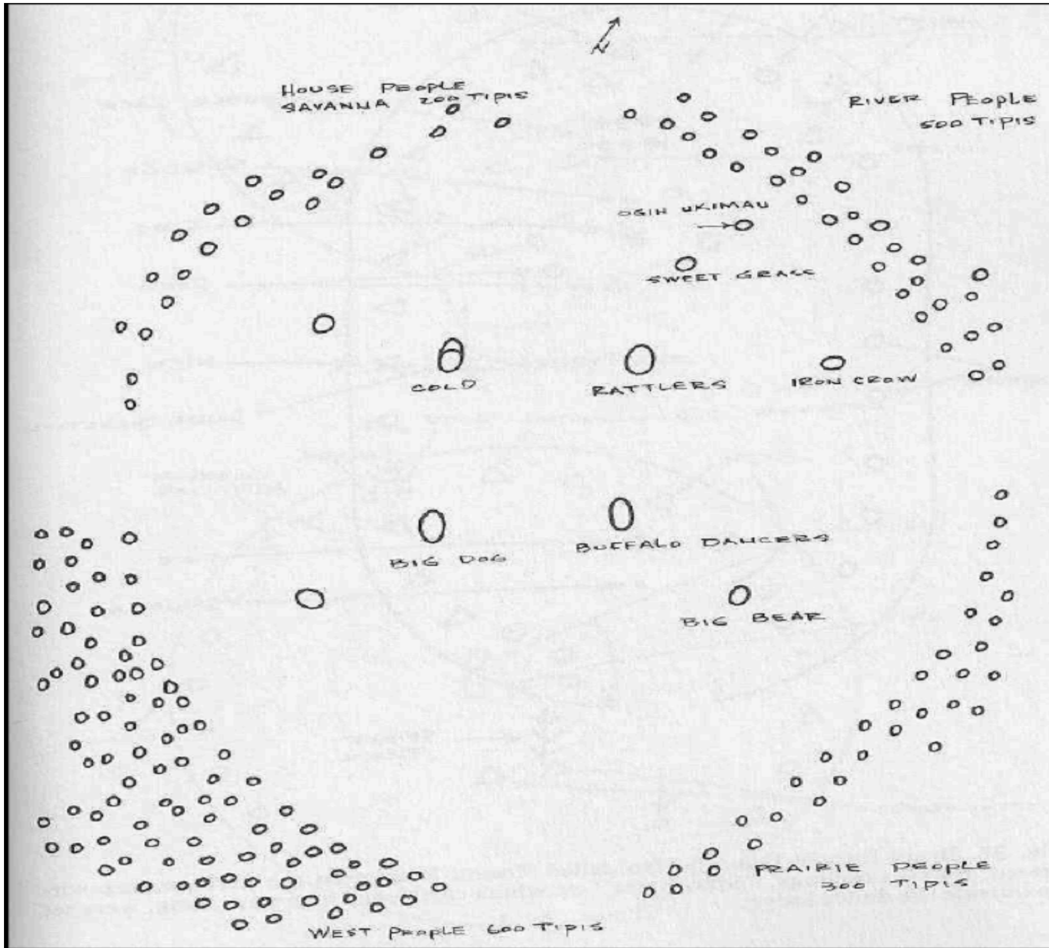

Figure 6.1: A diagram by Fine Day for anthropologist David Mandlebaum, recalling an 1870 gathering. It represents the coming together of many points of decentered governance.

[661] This is knowledge that has been orally passed amongst Plains Cree peoples, but most noteably is attributed to Tyrone Tootoosis for passing it along this generation.

In contrast, contemporary Canadian constitutionalism's ability to respond in compassionate ways towards the ecological world is fundamentally challenged by how it enables the aggregation of stories (and the power that comes with holding and telling those stories) within a few institutions. This aggregation is a result of law and governance trending away from Canada's historical constitutional and legal practices.[662] Josh Nichols notes that power was held diffusely in the early days of the Canadian dominion, as colonial governance was "made up of a seemingly endless profusion of companies, colonial governments, imperial administrators, church missions and relationships with Indigenous nations."[663] Similarly, the common law has diffuse roots as it "grew out of a society where a bewildering diversity of courts, from a broad array of cultures, enforced a wide variety of law."[664]

The aggregation of this power also allows for Canada's constitutional narratives to work against constitutional kindness.[665] This results in the lack of an express inherent limits on human uses of the ecological world similar to what we see within nêhiyaw wiyasiwêwina.[666] Where Canadian constitutionalism does express reconciliatory values towards the earth, it is often undone by these countervailing values towards exploitation

[662] This is not to discount the power of individual normative action regarding issues like climate change, as well as municipal actions.
[663] Joshua Nichols, "*Sui Generis* Sovereignties: The Relationship between Treaty Interpretation and Canadian Sovereignty," Paper No 1 in *Canada in International Law at 150 and Beyond* (Waterloo: Centre for International Governance Innovation, January 2018), at 4.
[664] John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Washington University J of Law & Policy 167 at 187.
[665] Constitutional narratives carry a certain amount of force. As Eric Adams notes, the constitutive narrative can have such force that "in some instances, [they operate] as a shadow constitution cast off at an angle from the formal one. At times, a constitutional identity can even become dominant enough to challenge the legality – *de facto* or *de jure* – of the constitution itself." See Eric Adams, "Canadian Constitutional Identities" (2015) 38:2 Dal LJ 311, at 316-32.
[666] Although John Borrows contends that treaty provides these inherent limits on the Crown. See Borrows, *Earth Bound, supra* note 630, at 50, 61-64.

and consumption.[667] In this way, the internal coherency of Canadian constitutionalism can often be skewed, where formal laws do not reflect trends and transformations in normative beliefs in practices.[668] At its worst, the constitutional narratives that show little adherence to limits on environmental uses can saturate political discourse and skew legal redress for environmental harms.[669] Normatively, this is Canada's challenge in dealing with its potential for monstrous behaviours. James Tully argues that this creates a "super predatory" disposition within Canada.[670]

This returns us to the strength of the diffusion of constitutional and governential power through multiple centers and institutions. The historical lessons provided by our homefires (iskotêw) and leadership (okimâwak) provide a clear view of the normative

[667] Counterveiling approaches by provinces and the federal government also affect the coherency of Canada' confederation as a whole. For example, the division of powers regarding environmental concerns and emergencies is currently being tested in Canadian courts through three separate cases (in Alberta, Saskatchewan, and Ontario, respectively) where the provinces are challenging federal authority to implement a national Carbon Tax. See *Reference re: Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 349; *Reference re: Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40; *Reference re: Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.

[668] Climate action is a prime example of this as the fall of 2019 saw hundreds of thousands of Canadians call for action from provincial and federal governments on human-induced climate change. See Kalina Laframboise, "We Will Not Be Bystanders: Greta Thunberg Tells Hundred of Thousands at Montreal Climate March", (27 Sept 2019) online: Global News < https://globalnews.ca/news/5957337/montreal-climate-change-march-sept-27/>

[669] For a detailed look at the diminishment of environmental law in Canada within the last 40 years, see Benjamin Richardson, Georgia Tanner & Stepan Wood, "What Ever Happened to Canadian Environmental Law?" (2010) Articles & Book Chapters. Paper 1. Online: Osgoode Hall Law School of York University. <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1000&context=scholarly_works>

[670] Tully notes this super-predatory system "depends on, and is nested within, the informal social and ecological relationships that sustain life on earth. Yet, at the same time, it preys on them in an extractive, linear, and non-reciprocal way. It treats the damage it does to them as external and independent. Like all super-predatory systems, human or non-human, it destroys the life systems that sustain it faster than they can regenerate. If "business as usual" continues, the system will destroy the social and ecological conditions that sustain life for most human beings and for hundreds of thousands of other species and ecosystems (the sixth mass extinction) – a set of processes that is well underway. When humans respond simply by trying to regulate the system by technical means of the political and legal institutions of the system, they have been unsuccessful, primarily because these institutions depend on the system's growth. If humans responded by recognizing the damage and trying to internalize the full costs to repair all the damage it was causing, the system would be shown to be unprofitable and it would collapse." See Tully, *Reconciliation, supra* note 205, at 110.

aspect of power in Canadian society as well. The Canadian state can be illuminated as a collective of a similar array of diffuse power structures. As Bob Jessop notes, if we dismantle our conception of the state as a monolith and recognize it as a collection of institutions, counter-hegemonic practices can be more effective.[671] As Jessop states:

> "Theorizing the state is further complicated because, despite recurrent tendencies to reify it as standing outside and above society, there can be no adequate theory of the state without a theory of society. For the state and political system are parts of a broad ensemble of social relations and one cannot adequately describe or explain the state apparatus, state projects, and state power without referring to their differential articulation with this ensemble."[672]

This has implications for the Treaty 6 relationship. A renewal of the spirit and intent of Treaty 6 in a manner that ensures constitutional kindness not only requires a reimagining of Canada's constitutional make up (like the cooperative/treaty federalism discussed in the next section), but is also attainable through coordinated actions amongst this 'broad ensemble of social relations', or at a normative level. The remainder of this concluding chapter will look specifically at Treaty 6 and how revitalization at these two levels can reorient Canada towards a constitutional kindness as envisioned by the observations in the previous chapters.

II. Constitutional Kindness Through Wîtaskêwin

a. Cooperative jurisdictional and s. 35 approaches

As many Indigenous scholars have noted, there is a model of federalism that is possible that recognizes Indigenous governance orders as a third order of government in

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[671] Bob Jessop, *State power: a strategic-relational approach* (Malden, MA: Cambridge Press, 2007).
[672] *Ibid* at 1.

Canada.[673] Cooperative federalist approaches have significant implications for our relationships with the ecological world. Kiera Ladner notes that jurisdictional debates in Canada have consistently ignored the necessity of including Indigenous assertions of autonomy within these debates.[674] Sakej Henderson envisions a treaty federalism that reconciles the continued practice of Indigenous constitutional orders within jurisdictional disagreements in Canada.[675] Terri-Lynn Williams-Davidson observes that the recognition of Indigenous governance orders can aid a new cooperative sovereignty framework within Canada that inevitably will enable earth reconciliation.[676] Davidson's home nation, the Haida, have practical examples of such cooperative sovereignty: they have entered into co-management agreements with Canada (the 1993 Gwaii Haanas Agreement)[677] and British Columbia (the 2009 Kunst'aa Guu-Kunst'aayah Reconciliation Protocol)[678] respectively. Such agreements are "an incremental step in the process of reconciliation", but not the final one.[679] True cooperative sovereignty would require large scale movements by federal and provincial Crowns to recognize Indigenous governance orders.

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[673] See Sarah Morales & Josh Nichols, Reconciliation beyond the Box: the UN Declaration and Plurinational Federalism in Canada (Waterloo, On: Center for International Governance Innovation, 2018); James [Sakej] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 24; Borrows, *Canada's Indigenous Constitution, supra* note 49.

[674] Kiera Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 Can J of Poli Sci 92; Kiera L. Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms." In New Trends in Canadian Federalism, 2nd edition, edited by Francois Rocher and Miriam Smith, Toronto: Broadview Press, 2003;

[675] James [Sakej] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241

[676] See Factum of the Council of the Haida Nation, Reference re Environmental Management Act (British Columbia), 2019 BCCA 181, at paras. 38 to 43.

[677] *Gwaii Haanas Agreement* (1993), online: Haida Nation ≤ http://www.haidanation.ca/wp-content/uploads/2017/03/GwaiiHaanasAgreement.pdf>.

[678] Kunst'aa Guu -Kunst'aayah Reconciliation Protocol (2009), online: Haida Nation< http://www.haidanation.ca/wp-content/uploads/2017/03/Kunstaa-guu_Kunstaayah_Agreement.pdf>. [

[679] *Ibid*, preamble.

While cooperative federalism advocates large changes, the entrenchment of aboriginal and treaty rights has begun to incrementally re-orient law in a direction towards constitutional kindness. The introduction of an inherent limit to human conduct towards lands, waters, and non-human agents has been set out in s. 35 case law. Most recently, the SCC outlined this principle in *Tsilhqot'in v. British Columbia*, holding that Aboriginal title land:

> "cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises."[680]

The inherent limit principle is explicitly paternalistic, as it constrains First Nations' use of Aboriginal title lands in a manner that Crown land isn't constrained. However, it does signal the ability for the courts to place limits to the use of lands according to specific constitutive relationships, including Crown limitations.[681] As *Tsilhqot'in* notes:

> "[T]he Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land."[682]

So we see that the judiciary is capable of conceiving of limits to our use of lands, with the assistance of Indigenous constitutive and legal practices. The ability to imagine and

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[680] *Tsilhqot'in v. British Columbia*, 2014 SCC 44, [2014] SCC 44 at para 74.
[681] See *Borrows, Earth Bound, supra* note 630, at 63.
[682] *Tsilhqot'in v British Columbia, supra* note 680, at para. 86.

implement ethical bounds towards the ecological world at a constitutional level is a valuable gift that Indigenous peoples, societies, and nations provide Canada's constitution array.

b. Normative approaches: The Seasonal Round

Treaty re-interpretation is an essential normative avenue to realize constitutional kindness towards nêhiyaw âskiy.[683] Normative revisioning through a return to a Treaty 6 relationship based on renewal, two-way dialogue, shared planning, and equality is a call shared by many advocates, grassroots activists, law and governance scholars, elders, and writers. Harold Johnson calls for a return to a familial relationship between non-Indigenous Canadians and Indigenous peoples, centered upon the equality, autonomy, and respect shared between Indigenous and non-Indigenous governments.[684] Danika Littlechild maintains that Treaty 6 can be employed "as a framework for miyo-wâhkôtowin, good relations with other Albertans and Canadians in the context of water and land-use planning, management and governance."[685] Sylvia McAdam (Saysewahum) ties a return to the areas of nêhiyaw pimacihowin (Plains Cree way of life) as essential to reclaiming nêhiyaw nationhood. McAdams notes:

> The pimacihowin that existed prior to European contact consisted of sustenance and an economy shared with other Indigenous nations from the

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[683] As John Borrows notes, treaty provides inherent limits on the parties to it. At a formal level, Borrows notes that "the reserved rights nature of treaties obviously limits the Crown's ability to claim land or governance without securing Indigenous peoples' consent to exercise these powers Borrows, *Earth Bound*, supra note 630 at 63. Borrows also notes it provides an avenue for normative reconciliation through an implicit inherent limit on the Crown, as "[i]t is apparent that treaties create mutually binding obligations, which do more than explicitly limit the parties to act in accordance with their particular promises…[they] are also a mechanism of reconciliation binding each party to act for the benefit of future generations." Ibid, at 64. For a speculative look at the opportunity of broadening an inherent limit to all Crown lands, based on the inherent limit principle developed in s. 35 jurisprudence, see David W-L Wu, "Tsilhqot'in Nation as a Gateway Towards Sustainability: Applying the Inherent Limit to Crown Land" 11 McGill International Journal of Sustainable Development Law & Policy 339.

[684] *Ibid*.

[685] *Littlechild, First Nations and Water, supra* note 57, at 51.

> land as given to the nêhiyaw people by the Creator. This inherent pimacihowin respect the land through the law of ohcinêwin and ohcinêmowin, which prevented and limited activities that may harm the environment, land and all of creation".[686]

Treaty 6 fundamentally requires seasonal renewal. In this way, treaty takes on a distinct procedural aspect. As Pauline Johnson notes,

> "[t]reaty is not easily defined as the spirit and intent is bound to levels of sacred law, traditional law, and natural law…[t]reaty and its intent not only include those present during the negotiation period but importantly…it is for our grandchildren so they may have a good future."

The idea of renewal is at the heart of much of the explorations, observations, and conclusions within this dissertation. Renewal is an implicit part of wâhkôtowin, miyo wicêhtowin, and wîtaskêwin. As all of these principles require a 'living with' ethos, renewal is a significant act to visit, check in, and understand the needs, obligations and capacities of each party at any given point of time. I am reminded of the lesson John Borrows provides on how we can observe nuanced legal obligations, like renewal, through observing Anishinaabe seasons. The warm, late spring weather is known as *aabawaa,* as when "things begin to melt and flow again, the meeting of hot and cold air masses can make it foggy and difficult to see." [687] "The word for this weather phenomenon also makes its way into the language of human relationships and legal practice: *aabawaawendam* means forgiveness" in anishinaabemowin.[688] As Borrows notes, "[w]ith forgiveness, as with the land, there are mists between people…the word

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[686] McAdam, *Nationhood Interupted,supra* note 63, at 65.
[687] Suzanne Ahearne, "Indigenous law scholar leads a quiet revolution in Canadian history" (2017), online: University of Victoria <https://www.uvic.ca/news/topics/2017+indigenous-law-scholar-john-borrows-killam-prize+ring>
[688] *Ibid.*

refers to a time when you can't see clearly. But as the ice and snows recede, it's time to begin to reconstruct your relationship given what happened in the winter of your conflict. "[689] The legal procedure Borrows is describing here – forgiveness – is ultimately one integral aspect of renewal. Borrows' linking observations of anishinaabemowin to seasons provides a powerful frame to our treaty relations: as nations we will not always travel along the same paths, gather upon the same grounds, or occupy the same bend of the river during the same time, but we can commit to a season of renewal (and forgiveness if needed), as part of our seasonal rounds.

Borrows' observations here are strengthened by an experience I had teaching within a course at the University of Alberta's Faculty of Law. Students engage with the sources, resources and methods of Indigenous legal orders, with a focus on nêhiyaw law and its responses to harms amongst individuals. In one class, as we were interpreting and analyzing nêhiyaw stories, some students were able to discern a procedural right of 'forgiveness' from the cycle of stories we were looking at. I posed this question to them: 'Can you find a corresponding principle within Canadian law?' The answer they came up with – a common one in such trans-systemic questions - was 'not necessarily.' Upon discussion, the students pointed to other principles within Canadian law - like due process, core sentencing principles (including a right for mitigating factors to be considered in a sentence), and the right to be absolved of criminal acts once a sentence is completed – as ones that may correlate, but do not necessarily constitute forgiveness.

The point is Canadian law must transform to realize the potentials in taking up wîtaskêwin. Providing procedural opportunities for renewal (of which forgiveness is one

[689] *Ibid.*

potential outcome)[690] is essential to deal with our monstrous behaviors. The nêhiyaw seasonal round provides a framework that ensures cyclical opportunities for renewal. As a jurisdictional concept, the seasonal round has been employed by other Indigenous nations to outline the sophistication in their cyclical travels on their territories, to combat simplistic views of Indigenous migratory cycles on their territories as nomadic or semi-nomadic and based on plain opportunity for hunting or gathering. As Alan Hanna forwards,

> "[t]he seasonal round is rich in complexity…the process involves resource gathering such as hunting, gathering, and fishing in small units…it also serves other functions such as providing a means of montoring the boundary for incursions by outsiders without permission or escort."[691]

Hanna notes that "[m]aintaining jurisdiction derives from engaging in the seasonal round." The seasonal round can be viewed as a multi-dimensional legal process. Similarly, the West Moberly First Nation has raised up its seasonal round to highlight their broad jurisdiction over their territory, and how it is an integral part of their treaty relationship with the Crown.[692] West Moberly links oral histories, land-based stories, ceremonies, and dreams as significant social practices and institutions to practicing its seasonal round.[693] As they state in a current legal dispute:

> "Since time immemorial, and at all material times before and after, West Moberly's seasonal round…has always been a vital and central part of

[690] My use of forgiveness here should not be considered advocacy for the position that the Canadian state is owed a duty of forgiveness from nêhiyaw peoples. As a base, forgiveness, if we are to consider it an obligation is within reciprocal legal processes that would make Canada obligated to rectification of harms, an understanding of what harms it has committed, and an obligation to not engage in the harmful behavior. As I mentioned earlier, the Indian Act will always serve as a barrier for Canada to enter into such reciprocal relationships.

[691] Alan Hanna, "Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective" (2013) 45:3 Ottawa Law Rev. 365 at 388.

[692] *West Moberly First Nation v. the Province of British Columbia* et.al. SCBC No. S195070.

[693] *Ibid.* How West Moberly provides evidence and how it is received by the court will have significant implications for Indigenous legal orders and Indigenous legal procedures and reconciliation with Canadian law.

> their mode of life. The Seasonal Round is essential to West Moberly preserving and continuing the mode of life and traditions, customs, and practices of their ancestors…The Seasonal Round is the means by which, or through which, West Moberly's managed their territory, lived on the land, and gathered resources from different areas of their territory based on their traditional knowledge of the land and waters, wildlife, and fish…This traditional knowledge encompasses: a) Dreams; b) Traditional land governance and management; and c) Ecological knowledge.[694]

West Moberly goes on to describe the significance of the Seasonal Round to hunting, fishing, trapping, and gathering,[695] as well as ceremonies, oral histories, and knowledge transfer. As the amended statement of claim sets out:

> The Seasonal Round has always been an integral part of the conveyance of oral history amongst members of West Moberly. The oral history of West Moberly is fundamentally tied to the geography, with many places being identified by the stories that are told about and in relation to those places. When places where the Seasonal Round was previously practice are flooded or otherwise made unavailable to West Moberly, or when species traditionally harvested by West Moberly are no long available to them, the transfer of oral history, traditional knowledge and management practices connected to those places and species amongst members of West Moberly and between generations is disrupted and oral history is lost. [696]

As I observed in previous chapters, nêhiyaw jurisdiction upon nêhiyaw âskiy was and is dependent upon adherence to a seasonal round. Our relationships with *âskiy* and *nipîy* were bound by our seasonal obligations and needs in relation to lands, waters, medicines, animals, fruits, berries, plants, and other non-human agents around us. Often misinterpreted as 'nomadic' journeying over nêhiyaw âskiy, our seasonal steps were patterned to the cycle of life around us in a manner that influenced nêhiyaw law and governance.

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[694] *Ibid* at paras. 45-47

[695] *Ibid* at paras. 51-58.

[696] *Ibid* at para. 65.

The seasonal round has specific lessons regarding the renewal of Treaty 6 towards a fuller view of wîtaskêwin. Historically, processes of renewal with other nations were set into our seasonal round. For example, mistasinîy, or the Buffalo Child Stone was located at a site of significant inter-societal ceremonying: the elbow of the South Saskatchewan hosted large gatherings of nêhiyaw, niitsitaapi, Saulteaux, Métis, Stoney, and Assiniboine peoples.[697] While the historical record leaves much to be speculated on the nature of these gatherings, they undoubtedly required the practice of various procedures of renewal, kinship, and forgiveness. Like *aabawaa*, these places served as a location to reconstruct relationships that have been obscured through the other seasons.

c. Buffalo is the Old and New Education: Modern Practices of Renewal

Re-engaging the Canadian state and Canadian polity with the nêhiyaw seasonal round in the modern context can and is taking place in a number of ways. The resurgence of Indigenous legal traditions, and the subsequent need for law schools across Canada to provide students this learning is one avenue. Within this, there is a recognized fundamental need to have land-based learning opportunities that provide wîtaskêwin teachings (in the nêhiyaw example) in a way that includes the land. For example, in my Indigenous Environmental Law class in the fall of 2019, I took my students for a walk through the kisiskaciwani-sipiy (North Saskatchewan) river valley. While I shared stories that set our wâhkôtowin obligations with the land, students had the brief experience of full sensory learning: while sharing stories, we watched the river flow swiftly past us on its banks, watched squirrels busy themselves with preparations for winter, we tasted

[697] See Katherine Pettipas, *Severing the Ties that Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).

chokecherries, caught the scent of recently fallen aspen leaves, felt the sun when it occasionally peaked out from behind clouds. I recognize this was a small experience, but land-based pedagogies broaden the way law schools are thinking about teaching.[698]

A more formal method for re-engaging the Canadian polity to the nêhiyaw seasonal round is through a continuation of treaty relationships. For example, *the Buffalo Treaty: A Treaty of Cooperation, Renewal, and Restoration*, is a multi-national treaty between North American Indigenous nations committing to re-engage in historical legal relations with Buffalo. As Sakej Henderson notes:

> The treaty is a historic, inspiring, multi-faceted and living agreement. It was the first treaty among the nations in the United States and Canada in more than 150 years, since the 1855 Treaty of Fort Laramie, which adjusted the jurisdiction over buffalo hunting grounds. The Buffalo Treaty is an agreement among the nations, federal and provincial governments, non-governmental organizations, corporations, conservation groups, researchers, and farming and ranching communities.[699]

This commitment includes the inclusion of paskwâwi-mostos in the economic, health, education, and research objectives and policies of the signatory nations.[700] It is also a reclamation of the buffalo as our educator.[701] The treaty also formalizes the nêhiyaw legal principle of kiyokewin, through its focus on research: [702]

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[698] John Borrows, Outsider Education: Indigenous Law and Land-Based Learning (2016) 33:1 Windsor Yearbook of Access to Justice 1.

[699] James (Sa'ke'j) Youngblood Henderson, "Wild Buffalo Recovery and Ecological Restoration of the Grasslands" in *Environmental Challenges on Indigenous Lands,* Online Essay Series, (2018) online: CIGI <https://www.cigionline.org/articles/wild-buffalo-recovery-and-ecological-restoration-grasslands>

[700] See the *Buffalo Treaty: A Treaty of Cooperation, Renewal and Restoration* (2014) online: University of Saskatchewan <https://sens.usask.ca/documents/BuffaloTreaty_2014.pdf>.

[701] As Sakej Henderson notes: "the most important teacher among the four-legged animals was the bison or buffalo, whose generous covenants with the nations provided them with their spirituality and the necessities of life. See Henderson, *supra* note 699.

[702] Non-Indigenous visiting to the ecological world continues to reveal the law and society of animal nations as well. For example, it has been observed that buffalo have significant effects on âskiy (lands) and how seasons propagate upon them. Behaving in a manner that is uncharacteristic of other herbivore land animals, buffalo, when in large enough herds, have processes that ensure their nutritional needs are met as a collective, while raising the nutrients growing on the lands, for

> Realizing that learning is a life-long process, We, collectively, agree to perpetuate knowledge gathering and knowledge-sharing according to our customs and inherent authorities revolving around BUFFALO that do not violate our traditional ethical standards as a means to expend our knowledge base regarding the environment, wildlife, plant life, water, and the role BUFFALO played in the history, spiritual, economic, and social life of our NATIONS.[703]

We will know that there is a genuine movement towards Treaty 6 when Canadian governments – federal, provincial, or municipal – are becoming signatories to these international indigenous treaties. While formal constitutional movement towards the spirit of Treaty 6 is required, such high-level movements will only be stitched together through various formalized moments of renewal, like the invitation of non-indigenous governments to enter into the Buffalo Treaty. The buffalo will be the old and new education.[704]

III. Conclusion: a kiyokewin (visiting) story

Throughout this examination, I have observed that, according to one vein of nêhiyaw epistemological thinking on wâhkôtowin, humans are only one species within a web of inspirited beings. Nêhiyaw critical legal thought acknowledges that we are reliant upon our ahcâhk-bearing relatives for survival. We are humbled, in a legal sense, by this in our

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the benefit of not only the plants they are eating, but other animals within their web of relations. In large numbers, buffalo had more effect on plant growth (and thus the other relations that relied upon it, including the nêhiyaw) than the weather.. I believe that when buffalo return in large numbers, we will observe their social ordering and return to the older understandings of how they practice their own law. I am grateful that our old ones have prepared us for these observations. I see this as an observation of the paskwâwi-mostos seasonal round. See Ed Yong, "What America Lost When It Lost the Bison" (Nov, 2019) Online, The Atlantic < https://www.theatlantic.com/science/archive/2019/11/how-bison-create-spring/602176/>.

[703] See *Buffalo Treaty, supra* note 698, at Article VI.

[704] I use this phrase as the inverse from 'education will be the new buffalo', a phrase invoked since Treaty 6 by nêhiyaw leaders to describe how education will provide for the peoples the way buffalo used to. While not discrediting the importance of formal educational systems, the resurgence of nêhiyaw law means that buffalo must remain our education as well. In the way I employ it above, I am talking of it being the new education for non-Indigneous peoples.

actions. Thus, our lives have two counter directions in our relationships with the natural world: an acknowledgement of the ahcâhk of non-human beings and things, and the need to rely upon them to survive. Nêhiyaw environmental law, if I can use such a term, is a reconciliation of these realities. The reconciliation of these realities resists a tidy and efficient relationship with ecological world. Each relationship nêhiyaw people have with non-human agents develops independently. It is difficult to formalize these relationships in a general manner, for fear of losing the nuance and reflexivity living in treaty requires. Further, the persuasive element of law, coupled with the social interaction inherent in the norm-making in nêhiyaw society results in multiple forms of nêhiyaw legal relationships with specific land-bases, waterscapes, and animals. As Mushkego storyteller Louis Bird reminds us, according to natural law, the immediate retribution shown in our stories is not necessarily a metaphor, that justice may be cumulative and often slow developing.[705]

I will offer one more story about observation, visiting, renewal, and the education of buffalo, to conclude this dissertation. I will share this without qualification or reference. I will leave it up to you to find your own interpretation of what it teaches about the legal principles of wâhkôtowin, seasonal change, visiting, and gifting. This happened in the fall of 2003. I was coming off a difficult year: my parents had both passed away, I had a failed knee surgery that left one of my feet partially paralyzed for a significant period of time, and finally at the end of the cycle, had my first real experience with professional burnout. It was in this exhausted stage that I rolled into our fall and winter ceremonial seasons – those filled with a renewed focus on sweats and round dances - relying upon our ceremonies and the community within them for healing. It was after a

[705] Bird, *supra* note 359.

particular hot lodge one evening that I had a vivid dream: all of sudden I was on the back of an elk, and it was crossing a lake. It was nighttime. I watched the water around me slowly engulf the other elk walking beside me, until they were swimming with their heads and antlers barely above the water. Finally, as they approached an island, one by one they emerged from the water. And then I woke up.

I have learned from my family to pay close attention to my dreams. I took this as an invitation to visit the paskwâwi-mostos at Elk Island National Park. Following the vague direction that my dream had provided, I drove out to the park the next afternoon, and started a long hike around one of the many lakes within it. I knew it was a dream about visiting buffalo: Elk Island is home to two species paskwâwi-mostos that move freely within the park boundaries, those that have otherwise been extirpated from the prairies. I started a walk around Tayawik Lake, a fourteen kilometre trail, occasionally running into buffalo along the way.

Each time I encountered them, a quiet agreement was reached between us: if I kept my distance, then so would they. Keeping this agreement and long into my walk, I came upon a turn to find a buffalo skull lay directly in the trail. I thought of our ceremonies, where our dancers would pierce and pull such skulls. And how we would put the skulls on the mounds of our sweats. I also thought about my parents. The 'why' questions that arise when someone passes were temporarily answered in that moment: "because". Or answered further: "because as humans, even when we try to avoid it, we are still a part of the cycle of life displayed in this park." I understood that I could be gifted to the beings within the park, and that would be an act of wîcêhtowin.

There was nothing supernatural about coming across the skull. It was a simple touchstone to my experiences of grief and ceremony. It was a healing experience. And then I got lost. Inadvertently, I had missed a turn that would have led me back to my car, and started to round a different lake, another twelve kilometers on. By now it was getting dark when I finally acknowledged my mistake. So instead of continuing on the unknown path into the coming darkness, I turned back and retraced my steps, knowing I was at least two hours away from my car. For the last hour, I walked in complete darkness. I had nothing but a walking stick I found along the way. I could hear coyotes howling, seemingly following a few hundred yards down the trail.

My only real method of protection was to sing. Knowing the biggest danger was surprising a buffalo, for the last hour I sang a drum song, hoping it would let them know I was coming down the trail. It was a new song, coming to me in those first terrifying moments of howling coyotes behind me and unseen buffalo ahead. As I cycled through it, the song revealed itself more, became more developed with each verse. And then finally, about a kilometer down the trail, a light could be faintly seen through the brush and trees. I was close. I decided to walk the rest of the way in silence, just to take in the night: the stars constellated above.

I stopped singing too soon. As I turned a bit of bend in the trail, I heard what sounded like five or six buffalo get startled by my footsteps about twenty meters in front of me. They ran what I though was straight down the path, so I would have to encounter them again. Finally, I could sense one closer on guard, and sure enough, my eyes caught the form of a buffalo maybe fifteen feet in front of me, searching through the darkness for the thing that startled the rest. I stood silent, terrified, staring at the form of the relations

that brought us to nêhiyaw âskiy and ensured our survival. I was frozen in fear, and in quiet acknowledgement of the significance of the moment. We stared at each other for a long time, I would say it was at least three minutes. Finally, it turned and walked down the trail towards the other buffalo.

All I could do is return to my song, and hope the buffalo would take pity on me and let me through. And so this is what I did, I sang my song, as loud as I could. And they did: though I couldn't see, my path was clear as I made my way finally to the parking lot. As I pulled my car out my headlights hit the trailhead. Three three coyotes, who seemingly followed me on the trail to that point, came bounding out into the parking lot.

I thought about how close I was (or perhaps not) to returning to the earth that evening the whole way home. I continued to sing the song I learned on the trail, a song I carry and sing to this day. I think about this type of visiting often, and how I might be different if I never had the heart-pounding observations of a buffalo on a dark trail in front of me, the sounds of howling coyotes behind me, the imaginings of a lake alive in the darkness somewhere beside us all, and a curiosity of the unnamed constellations waiting to be re-discovered above. *Ninaskimotin* (thank you) for listening. *Ekosi maka.*

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