Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada

by

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A thesis submitted in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

in
Laws

Faculty of Law
University of Alberta

Abstract

The Truth and Reconciliation Commission of Canada states the revitalization and application of Indigenous laws is vital for re-establishing respectful relations in Canada. It is also vital for restoring and maintaining safety, peace and order in Indigenous communities. This thesis explores *how* to accomplish this objective. It examines current challenges, resources and opportunities for recovering, learning and practicing Indigenous laws. It develops a highly structured methodology for serious and sustained engagement with Indigenous legal traditions, based on reviewing existing methods, then combining the methods of two leading Indigenous legal scholars, John Borrows and Val Napoleon. This method approaches Indigenous stories as jurisprudence. It uses adapted legal analysis and synthesis to identify Indigenous legal principles from stories and oral histories and organize these principles into a rigorous and transparent analytical framework. These legal principles can then be readily accessed, understood and applied.

This thesis demonstrates this adapted legal analysis method is teachable, transferable and replicable, using research outcomes of Cree legal principles responding to violence, harms and conflicts. Through the example of a foundational Cree legal principle, "*wah-ko-to-win*" (our inter-relatedness), it demonstrates how this method can also deepen our understanding of background or 'meta-principles' within Indigenous legal traditions, which can help us interpret, apply and change laws in legitimate ways. It then demonstrates how the research outcomes from this method may be understood and applied by Indigenous communities, through a case study exploring the

development of a contemporary Cree criminal justice process based on Cree legal principles, by and with the *Aseniwuche Winewak*. Finally, it examines the current narratives about the appalling rates of violence against and over-incarceration of Indigenous people in Canada and the existing gap between legitimacy and enforcement. It proposes Indigenous legal reasoning as a bridge, and develops the conceit of the "reasonable Cree person" to examine whether principled Cree legal reasoning can be explicitly recognized and implemented within Canada's current political and legal systems. It concludes that, while there are many potential spaces for doing so, more intellectual work is necessary first, in which both Indigenous and non-Indigenous people engage with Indigenous laws as *laws*. It is this kind of deep engagement that is necessary to effectively and respectfully operationalize the Truth and Reconciliation Commission's compelling calls for greater recognition of Indigenous laws in Canada.

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Chapter 4: Wah-ko-to-win: Laws for a Society of Relationships

1. Introduction: Rich in Relations

"The separative self, clinging to the rights that affirm its separateness, can deny the interconnection that would implicate itself in the surrounding pain."[1]

I wrote this work embedded. Embedded in relationships. Living in love. I did not mean to live this dissertation. I intended to carve out a quiet space to work and write, but the lives of others overtook me. I had forgotten what it is to be entwined, moving in fluidity with the motion of others, weeping with their despair, resting in their warmth, laughing with their jokes, aching from their grief, and receiving quiet comfort. At times the image that possessed me was being entangled in countless living vines. These vines wrapped their way around me, slowed my steps to an excruciating crawl and left my muscles and heart aching with their stories and their struggles. They carried with them – everything – every ache and joy imaginable. Yet even this image doesn't do this justice, does disrespect. How to explain what it is to live so openly and completely in relation?

For the last three years I have lived in a community where to talk about living in relation does not require any great insight or imagination. In fact, it is no more than stating the obvious. Day to day, the fact of our human relationships is explicit and tangible at the most familiar and recognizable levels. My partner and I live in a community where we are connected to everyone, and familially related to almost everyone. Let me give you a small taste of this for illustration. My partner is one of nine

[1] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (New York: Oxford University Press, 2011) [Nedelsky, Law's Relations] at 116.

siblings, all of whom have spouses, and all of whom live in the same community as we do. We have 36 nieces and nephews and 14 great nieces and nephews at last count. With his parents, there are 70 people in this first close circle of familial relationships. And I haven't even gotten to his aunties and uncles, cousins and further extended family. We not only know all our neighbours, we are familially related to most of them. There is not one house within one hundred meters from our own that we could not just walk in to at almost any time. My partner scolds the kids that try to knock first (only white people do that). People don't visit around as much as they did in the old days, but we still go visiting or have visitors on a fairly frequent basis. Kids come in and out, especially on the weekends. There are big family dinners – Thanksgiving, Christmas, but also birthday parties, celebrations, a call late at night to come and feast because someone has just killed a moose. Our kitchens and our houses fill up regularly with people, food, love and laughter.

My sister-in-law and I will laugh ruefully at the futility of trying to explain to our respective spouses about the loneliness of elderly relatives who live alone in the city. Try as they might, neither brother can really wrap his head around the idea of someone truly living so isolated. We think we will have explained it to their satisfaction, and one or both of them suddenly think of another relative to ask about (But doesn't she have any cousins? Where are her nieces? Etc. etc.). To them, it is almost inconceivable. There may be other issues living in such close proximity in the same community for generations, but being alone is not one of them. In a world where loneliness is endemic, and there appears to be ever-increasing disconnection and dislocation, their taken for

granted background of secure thick belonging can be viewed as an immeasurable wealth and privilege.

One of my favorite stories about my late brother-in-law, James Wanyandie, who has seven children, is about when a man from town, upon seeing them all, said, 'wow, you must be rich.' James, who was not financially wealthy, laughed and replied simply, 'Yep, rich in kids." This reply resonates with me. When I would give up trying to write because my house had been filled with the chaos of a dozen children visiting, and I was too entranced by soaking in the delight of them all to kick them out so I could work, or when I would put down my book to go to the latest birthday party, I would think to myself, 'I'm rich now too, not in money, and certainly not in time, but rich in nieces and nephews, rich in kids." And maybe James' phrase is more adequate than vines. To live embedded in community is to be rich in relations.

This richness is reality, not a romanticized version of some imagined ideal community. On the flip side of the same coin, the first year I moved back to the community, there were eight funerals. Eight. By the fifth one I found myself mumbling to my long distance colleagues, almost physically unable to get the words out of my mouth that I had to cancel or postpone yet another commitment due to yet another death. In the haze of grief, I worried about being disbelieved, not because I thought they would consciously doubt my integrity, but because I didn't know how they could possibly conceive of such relentless loss, any more than my partner could conceive of such unrelenting loneliness. In sometimes what felt like waves of fear and pain, the socio-economic issues that are notoriously endemic in many Indigenous communities

sizzled through our vast connections. Suicide, homicide, family violence, sexual violence, child welfare, criminal justice, poverty, addiction. Embodied, urgently enacted by and enacted upon our loved ones.

At times I felt as if I were drowning, and would search for language – boundaries, limits, goals, compassion fatigue – to stop the flood, but these words and withdrawal were no match for it, no match for the look on a loved one's face when they asked for help, and needed it. Or didn't ask for help, and needed it. Or was beyond all help. The pain was there, in lives of people who mattered deeply to me. No matter how I chose to act in response, I could not stop their suffering from touching me. To live in relation is to be rich, and to live in relation is to be permeable.

After a couple of years of struggling with this and, in my mind, placing my academic work in opposition to it, as if these relations, in all their beauty and all their sorrow, were keeping me from my work, I finally got it. This was it. This was the work. It was precisely within in these kinds of relations Cree legal principles and procedures emerged, and when applied, implicitly or explicitly, are applied within. I let myself go, fall gracefully back in to the web, the vines, the many outstretched arms of the rich relations surrounding me, and trusted them to sustain me until the words came.[2]

[2] John Borrows, who once kindly and gently told me, "you're living your dissertation", and Val Napoleon, who empathetically and respectfully listened, often redirecting me to broader questions, guided me to this epiphany. Their complete acknowledgement and wise support opened space for reflection, rather than building tension, resentment or despair by pushing me to choose one set of responsibilities over others. The existence of this safe space permitted me to make connections rather than compartmentalize issues I had yet to reconcile internally.

2. Bringing out the Background:

Legal traditions, by their very nature, are dynamic, and constantly changing to adapt and integrate new circumstances and information. John Borrows describes how the vital processes of deliberation and interpretation allow Indigenous peoples to draw on a wide array of new and ancient sources of law to respond to novel problems and persuade each other in modern communities.[3] Yet this dynamism is not completely open-ended. When engaging with and articulating Indigenous laws, Val Napoleon points out how essential it is to do so in a way that stays mindful of the intellectual processes and interpretive bounds that enable change to occur within that legal tradition in a legitimate way that maintains it's integrity.[4] This includes understanding legal traditions as embedded in what Charles Taylor describes as a certain "irreducible background of practices and understandings.[5] As Andree Boisselle argues, it is these ""sedimented ways of making sense of…experience"[6] or "shared understandings" that "ground the meaning and legitimacy of stable legal orders."[7]

In my second chapter, I proposed a method for engaging with and articulating Indigenous laws that I demonstrated has proven to be very effective in giving people a

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[3] See John Borrows's discussion of deliberation as a source of law in John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 35-46 [Borrows, Indigenous Constitution].

[4] For further discussion in the context of Gitksan legal theory, see Val Napoleon, Ayook: Gitksan Legal Order, Law, and Legal Theory. Faculty of Law, University of Victoria Ph.D. Dissertation 2009 [unpublished] [Napoleon, Ayook]at 289- 290.

[5] Charles Taylor, "Irreducibly Social Goods" in *Philosophical Arguments* (London: Harvard University Press, 1995) at 135 and 139.

[6] Andree Boisselle, "Beyond Consent and Disagreement: Why Law's Authority is Not Just About Will" in Jeremy Webber and Colin McLeod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) at 219.

[7] *Ibid*, at 220.

'way in' to respectful and robust engagement with Indigenous laws generally and me a way to do so with Cree laws particularly. The method adapts the common-law tools of legal analysis and synthesis and results in an analytical framework outlining legal principles on a specific subject from a specific legal tradition. This framework doesn't change the legal principles identified in it, but it does organize them in a convenient, accessible form that makes them easier to access, understand and apply today. I have had the good fortune of presenting this methodology to many audiences over the past five years, and described applying it in the AJR Project in the previous chapter, the results of which I will rely on heavily throughout this dissertation. Several Indigenous groups have requested and received training in this method in order to use it to ascertain and articulate their own laws for their own goals and projects.[8] I feel confident stating that this method works to do what I say it does – no more, no less.

But can this methodology also bring out some of the background? In this chapter, I explore whether engaging with Indigenous laws through this methodology can provide more than rigor, transparency and convenience – that is – whether it can lead to understanding and articulating aspects of this vital cultural and political background. I do so by closely examining a general underlying principle in Cree legal traditions that I suspect most readers would consider fairly uncontentious, almost to the point of

[8] I have co-facilitated numerous workshops teaching this method with Dr. Val Napoleon, including the *Gitanow Legal Traditions Workshop for Gitanow Chiefs*, Gitanow, BC, Oct 16-17th, 2011, *Indigenous Laws Workshop – Central Coast First Nations,* Hakai Institute, Hakai, BC, July 29-31st 2014 and *Working with Indigenous Law Today: Supporting Indigenous Land and Marine Stewardship – Coastal Stewardship Network*, Prince Rupert, BC, Nov 25-27th 2014.

triteness – that is, that Cree laws are laws premised, not on a society of atomistic individual agents, but on a society and world of relationships, inclusive of human beings, animals, natural elements, land and spirit.

In Chapter Two, I criticized Mathew Fletcher's linguistic method as sensible but not sufficient. In this chapter, I explore the meaning of the Cree word, "Wah-ko-to-win", which refers to our relatedness, and our world of relationships. I hope to show through this discussion that this methodology can be complimentary to others,[9] and that the focus on identifying specific principles can also enable us to reach a much deeper and complex understanding of broader foundational principles.[10] This richer understanding of this foundational principle then increases our basic competency to effectively apply other Cree legal principles, and engage respectfully in crucial practices of deliberation, persuasion, interpretation and pursuing legitimate change within the Cree legal tradition.[11] It may also provide a way to respectfully raise critical theoretical and practice questions within the Cree legal tradition and evaluate the application of specific legal principles to particular or novel facts.

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[9] For examples of how students in the AJR project connected to other methods through this one, see Hadley Friedland and Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2016) 1 (1) *Lakehead Law Journal* 33 at 43 [Gathering the Threads].

[10] Both Napoleon and I identified this as a result of working through this method. Val Napoleon and Hadley Friedland, "An Inside Job – Engaging with Indigenous Legal Traditions Through Stories" (forthcoming 2016, 61 McGill Law Journal) at 17.

[11] Much as Ronald Dworkin argues certain political 'meta-principles' from liberal political theory enable legal practitioners and judges to interpret and apply the common-law in a manner congruent to the core aspirations of liberal society. See, for example, Ronald Dworkin, "Laws Ambition for Itself" (1985) 71 (2) *Virginia Law Review* 173 [Dworkin].

3. The Concern: Distortions

A common concern that I have repeatedly heard is whether my methodology might create distortions if the identified legal principles were to be used and interpreted in a way that completely abstracted them from the fundamental political debates and cultural background they are informed by and form part of. If all you knew about Cree laws was the Cree legal summary in the previous chapter where might that take you, or leave you? For some, even engaging with these laws through a modified common-law method of analysis, is seen as inherently distorting, a means that irreversibly alters the ends. Analytical jurisprudence itself, which my method undoubtedly falls within, can be seen to perpetuate the erasure of certain people's embodied acts of meaning, experiential knowledge and even, at it's worst, their humanity.[12] I think the heart of these criticisms is a fear that such an analytical approach to law can decontextualize principles from their human, cultural and political background to a dangerous degree. This is a serious question that deserves serious reflection.

Anecdotally, in my experience, this concern is raised more often by academic or professional people interested in engaging with Indigenous laws that Indigenous people in a community interested in identifying and articulating their own laws. The difference could well be attributed to the latter naturally being comfortable taking their own 'background' for granted and the former wisely being aware there is crucial context they are missing. However, this distinction cannot be broken down into simple

[12] For a compelling argument on this erasure, see William E. Conklin, " The Ghosts of Cemetery Road: Two Forgotten Indigenous Women and the Crisis of Analytical Jurisprudence" (2011) 35 *Australian Feminist Law Journal* 3 [Conklin].

insider/outsider, Indigenous /non-Indigenous dichotomies. For many historical, social and practical reasons, these two points of view exist, along with varying levels of deep knowledge, cultural immersion and community connection discussed in the Chapter Two,[13] in a continuum inside Indigenous communities and outside as well as in the multiple and overlapping spaces of the interface.[14]

Some of the issues described by Fletcher, Borrows and Napoleon in Chapter Two of this dissertation could arise if Indigenous laws are articulated as principles completely abstracted from their political and cultural context. This could lead to distortions in meanings, analogous to (or including) Fletcher's concerns about Indigenous laws being translated to English, and people missing out on crucial nuance and even correct meaning.[15] It also runs the risk of over-simplification and over-generalization Borrows and Napoleon both caution can end up reinforcing negative stereotypes.[16] This could seriously inhibit the capacity for legitimate change. Napoleon also stresses that a focus on isolated practices could lead to Indigenous laws being seen as stuck in the past or incapable of change in response to changing circumstances if they are not seen as part of a larger, comprehensive whole, which includes interpretative resources for principled change.[17] Recall Fletcher's concerns about the current "moral weight" of past laws brought forward and applied in very different present contexts.[18] He sees one of the

[13] I discuss this in Chapter Two, at 13-15, in relation to the accessibility and perceived idealness of resources for engaging with Indigenous laws.
[14] See Chapter Two at 5, Note 15 for Sekaquaptewa and Borrows' discussion on this point.
[15] Chapter Two, at 27.
[16] Chapter Two at 22.
[17] Chapter Two, at 18.
[18] Chapter Two at 21.

most important barriers to tribal court judges applying Indigenous laws is feeling hesitant, unsure of their role or incompetent to do so.[19] A list of abstracted principles alone cannot resolve such concerns, and could simply perpetuate them.

On the other hand, the paralysis around ascertaining and articulating Indigenous legal principles, though well meaning, has led to distortions of its own. First, the absence of accessible and understandable Indigenous legal materials reinforces pervasive stereotypes about an absence of law in Indigenous societies.[20] Second, the space to discuss these rich complex legal traditions is often narrowed to highly abstract, descriptive or philosophical accounts without a way to imagine how they could possibly apply in practice,[21] or into the even narrower and distorting role as idealized or utopian foils used only to critique state justice system practices and outcomes.[22] Third, Indigenous laws can be diminished into isolated cultural practices that are viewed fearfully or used as a 'culturally sensitive' gloss, rather than principles for practical reason that can adequately address the complexity of the human condition that all law must grapple with.[23] A fourth distortion, that Fletcher alludes to in Chapter Two, is emerging as the use of Indigenous laws are being encouraged and even mandated in state and tribal codes and constitutions, without the supporting scaffolding that other legal traditions rely on, such as legal education, law texts, articles and a shared or public

[19] Chapter Two, at 19-20.
[20] Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D. Dubber and Tatjana Hornle eds., The Oxford Handbook of Criminal Law (Oxford: Oxford University Press, 2014) at 227 [Roots to Renaissance].
[21] Gathering the Threads, *supra* note 8 at 37.
[22] Roots to Renaissance, *supra* note 17 at 239.
[23] Chapter Two, at 18 (Napoleon) and 20 (Fletcher).

body of legitimate authorities.[24] There is the real risk that these laws are seen as too impractical, ineffectual or inaccessible for judges to actually apply to the urgent practical problems that people bring to a court needing solutions for.[25]

It is important to note these existing distortions, because we are not starting from a neutral place, where no harm is done. The status quo is creating and perpetuating distortions about Indigenous laws, and I am striving to correct some of these distortions in my own work through engaging with Indigenous laws through this structured, transparent and rigorous methodology. Certainly there are risks, but certain risks may be well worth taking. At the same time, in areas of the world where courts are tasked with or mandated to apply Indigenous laws, one of the concerns is that the application separates so widely from the understanding within communities, they are indeed losing their claim to legitimacy, defeating the purpose of applying them in courts in the first place.[26] This illustrates the concerns raised about this methodology are, while not fatal, definitely valid. Indigenous laws could become incomprehensible, pernicious, or even meaningless without an understanding of larger narratives they embody or are a part of. Abstracted completely, they would lose any claim to legitimacy and risk inadvertently perpetuating stereotypes and undermining the integrity of the Indigenous legal tradition in question.

[24] Chapter Two, at 6 (Sekaquaptewa).
[25] Chapter Two, at 5 (Zuni Cruz, Ames, Austin and Richland) and 19-20 (Fletcher).
[26] See Fletcher's concerns about this in the American tribal court context in Chapter Two at 20. This issue is increasingly arising in South Africa and the South Pacific, where the use of customary law in courts has been constitutionalized.

Robert Covers famously describes law as "not merely a system of rules to be observed, but a world in which we live."[27] He argues "because both precept and narrative operate together to ground meaning, one cannot truly inhabit any given *nomos* without a rich understanding of its narratives".[28] A crucial aspect of the work of recovering and revitalizing Indigenous legal traditions is to recognize that participating in any legal tradition involves more than merely identifying principles and procedures. It also involves "sharing a way of speaking about the world which, like language...shapes forms and in part envelops the thought of those who speak it and think through it."[29] Stephen Kieger argues there is "no clear demarcation between a culture's rules of control and its meaning-making narratives."[30] Stories make it "humanly possible for us to provide culturally comprehensible justifications for our principled decisions and opinions."[31] Thus background societal stories are our shared understandings, and provide, at once, the tools of persuasion Borrows argues allow for necessary change and growth within Indigenous legal traditions, and the interpretative bounds Napoleon argues are required for maintaining their legitimacy and integrity.

This means the work of engaging robustly and respectfully with Indigenous legal traditions, so that they can be accessed, understood and applied today, clearly requires more than just identifying and articulating legal principles. It requires recognizing the

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[27] Robert Covers, "Nomos and Narrative" (1983) 97 *Harv L Rev* 4 at 5 [Covers].
[28] Ibid, at 4.
[29] Ibid, at 244.
[30] Stefan Kieger, "The Place of Storytelling in Legal Reasoning: Abraham Joshua Heschel's Torah Min Hashamayin" (2007) Legal Studies Research Paper Series, Research Paper No. 07-26 at 6[Kieger].
[31] Ibid, at 50.

shared language and narratives that give these legal principles meaning, that make them meaningful to us and make sense of the world around us. Can my methodology, that strips principles out of stories, and re-states them like so much dry dust into an analytical framework,[32] also help us connect or reconnect these principles deeply to these essential narratives? In this chapter, I hope to demonstrate that it can.

The analytical framework I use to organize Indigenous legal principles in a usable synthesis has several categories, including the authoritative decision makers, procedures, response principles, rights and obligations in any given body of law within a particular legal tradition. The final category in the framework is for general underlying principles – for identifying underlying or recurrent themes that appear to guide the expression and application of the other identified legal principles. This category is last, which follows the actual thinking involved – following this method, these emerge, for me, from stepping back and reflecting on all of the particular, from the crucial perspective that these are all parts that form part of a larger whole.[33] It is these fundamental principles that represent the 'connective tissue' in a body of law, and begin to provide glimpses into the themes and commitments of a broader background story that informs and infuses the rest.[34] To mix my metaphors, they also provide a rudimentary litmus test for the legitimacy of possible interpretations and applications. A

[32] Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, Il: Liberty Press, 1991 at 41, criticizes demanding people choke down dry lists of principles excised from their surrounding traditions, which are the "liquid in which our moral ideals were suspended."
[33] Napoleon, Ayook, *supra* note 3, at 47-48.
[34] While underlying Cree principles differ from those identified by Dworkin, my argument largely follows his interpretivist theory of law. See Ronald Dworkin, "The Model of Rules" (1967) *Yale Law School Faculty Scholarship Series*. Paper 3609. See also Dworkin, *supra* note 10.

decision ostensibly relying Cree legal principles that is incongruent with or counter to certain fundamental underlying principles, would be and should be suspect. Conversely, a decision that implicitly or explicitly upholds the same principle could be evaluated as far more legitimate. While there is more than one general underlying or foundational principle in Cree legal traditions,[35] here I focus in on one that stands out and emerged the most strongly from the particular principles identified using my methodology in the AJR project: the explicit centrality of relationships in Cree legal thought – Wah-ko-to-win – to recognize our relatedness, to live in relationship.

4. Wah-ko-to-win: Relationships as Central and Foundational:

"We all exist within larger relationships and these relationships are the foundation for everything else."[36]

In "Creating New Stories: Indigenous Legal Principles of Reconciliation", David MacPhee explains his understanding of the word, Wah-ko-to-win:

> 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. [37]

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[35] In Chapter Two, I identify underlying principles from my LLM project as: (1) the principle of reciprocity: helping the helpers, and (2) the principle of efficacy: being aware and open to all effective tools and allies (Chapter Three, at 52). In Chapter Three, I identify underlying principles from the AJR Project Cree Legal Traditions Report as: (1) Responses are Fluid and Contextualized; (2) It is important to value and acknowledge Relationships, and (3) Reciprocity and Interdependence are important (Chapter Three, at 72-76).

[36] David MacPhee, Aseniwuche Winewak Nation President, in Hadley Friedland and Lindsay Borrows, "Creating New Stories: Indigenous Legal Principles of Reconciliation" (2014) Online: https://keegitah.wordpress.com [Friedland and Borrows, Creating New Stories].

[37] David MacPhee, *ibid*.

I think I can be so bold as to state my research, engaging with Cree legal traditions through my methodology, has provided enough evidence for me to make the claim that a fundamental background societal story underlying Cree legal traditions, like many other Indigenous legal traditions, is that of a society (and world) of relationships. As MacPhee says eloquently, relationships are foundational to everything in Cree legal thought. Put another way, as Jennifer Nedelsky suggests, I believe Cree legal traditions approach the universal human and social issues that all laws are concerned with in a primarily relational way.[38] Just as the background story of individuals as atomistic units informs and permeates western legal thought and practice,[39] this narrative of each individual existing and inextricably connected within a network of relationships, informs and permeates Cree legal thought and practice.

In claiming this, I follow Nedelsky in noting what saying the Cree legal tradition is premised on a relational approach to law does *not* mean. I think it is particularly important to distinguish this when talking about Indigenous legal traditions because there are certain pan-Indigenous stereotypes that have held sway, either as dire warnings against the risk of individual human rights abuses, or as over-simplistic utopian visions of what communities need, or can currently provide, to overcome the immense social suffering and violence disproportionately inflicted on Indigenous peoples, and specifically Indigenous women and children.[40]

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[38] See generally, the relational theory of autonomy and law explicated in Nedelsky, Law's Relations, *supra* note 1.
[39] Nedelsky, Law's Relations, *supra* note 1 at 42.
[40] I discuss this reality in greater depth in Chapter 6.

First, in claiming Cree laws are fundamentally premised on and informed by a relational outlook and approach, I am *not* saying that the collective is valued over the individual in Cree legal traditions.[41] Indeed, I found very little, if any, supporting evidence of this oft asserted 'truism'. Second, I am *not* saying that, because relationships are recognized, valued and explicitly relied on in Cree legal traditions, that all existing or potential relationships are inherently beneficial or benign.[42] Recognizing the power of and even centrality of relationships within Cree legal and political thought is not the same as romanticizing them or claiming them as a cure-all.

Finally, while I maintain that a relational approach to law is an enduring feature underpinning the interpretation and implementation of Cree legal principles today, I think it is equally important to take seriously the fact that not all relationships themselves have endured and there have been profound ruptures. Those relations that have endured have necessarily changed, and new relationships have become relevant as well. If Cree laws are fundamentally informed by a relational outlook on the world, and we are to take seriously the goal of accessing, understanding and applying Cree laws today, we have to interrogate the fluid and dynamic nature of all relationships, and consider the implications of the massive changes over time (both imposed and chosen)

[41] Nedelsky, Law's Relations, *supra* note 1 at 33. See also David Milward's strong cautions against assuming there can be any straightforward tradeoff between collective good and individual freedoms in contemporary communities: David Milward, Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights (Vancouver: UBC Press, 2012) at 222.
[42] Nedlesky, Law's Relations, *supra* note 1 at 32.

that have transformed Cree people's relationships with each other, with outsiders, with animals and other non-human beings, the land and place itself.[43]

a. Living within Larger Relationships:

"*It's all centered around relationships, right?"*[44]

Relationships are both recognized and reasoned through in almost every story and interview reviewed for the Cree Legal Summary in the last chapter. In one interview, the centrality of relationships and relatedness in Cree legal thought was made explicitly at a generalized level. One community leader explained his belief that Cree legal traditions need to be understood as existing fundamentally within larger relationships. He argued that even the term, "law", can be a misleading term for Cree people, if they only associate it with the Canadian model of law, with authority relying on people in certain positions, such as police and judges. Instead, he explained his understanding that Cree law is grounded in "protocols" — the proper conduct for ceremony, hunting, interacting others, life generally, or "everything".[45] He views the importance of protocols as lying in the foundational importance of relationship between individual humans and the Creator, other humans, the land, and "nature." Protocols are simply ways of reminding us that, in respect of these relationships, "there's right ways of doing things and there's wrong ways of doing things."[46]

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[43] I discuss these critical points further in Chapter Six.
[44] Chapter Three, at 73.
[45] *Ibid.*
[46] *Ibid.*

This leader saw everything as related parts of one whole: "the language, the culture, and protocols are all so intertwined, I think if you were to take one out, it automatically starts disintegrating the other ones." He saw this as equally true for spirituality:

> in the English language like we say spirituality, but in native cultures, I don't think it was seen that way. I think it was life. It was all inclusive… And it's, like, life with the medicines, like there's life with spiritual realms. There's life with people, like, but it's all centred around relationships, right?[47]

This recognition of relationships and the interconnection of all aspects of life was reflected throughout the Cree stories and interviews, and is woven through every category in the analytical framework.

In particular, spirituality and non-human life forms did not appear to be relegated to a separate sphere or elevated below or above other life realms. For example, in conversations about legal procedures,[48] elders talked matter-of-factly about recognizing warning signs that someone was becoming dangerous to others through observations of people's behaviour and animals and the natural world,[49] and through spiritual means, such as visions or dreams, with equal equinimity.[50] One particularly knowledgable elder who practices traditional medicine, talked matter-a factly about her grandfather being warned by spirits in a dream about his sister when she was becoming dangerous,[51] about another case where the warning sign was a horse behaved oddly

[47] *Ibid.*
[48] Chapter Three, at 19-34.
[49] Chapter Three, at 20 and 22.
[50] Chapter Three, at 21.
[51] Chapter Three, at 20.

and vomiting,[52] and yet another case where she and her husband were called to a house where a woman was demonstrating several behavioral signs, such as "smiling in an odd way, wrapping herself in a black blanket, keeping her whole house dark and refusing to get out of bed."[53] To this elder, all of these warning signals were simply warning signals to be heeded, and led to further observation, offers of help, and action as necessary to keep others safe.[54]

Similarly, relevant knowledge and expertise for responding effectively to harms or resolving conflicts were gained and recognized through these various means.[55] Someone could be sought out to provide guidance due to their respected roles as good hunters and providers,[56] their special spiritual gifts or ability to communicate with spirit helpers,[57] or their close relationship with the person or people involved.[58] The response principle of healing was most often discussed as implemented through spiritual means.[59] Natural and spiritual consequences were both referred to as well.[60] In the story, *The Man Who was Bitten by Mosquitoes*, a man who is cruel to mosquitoes one year is eaten up by them the next.[61] In the story, *Killing of a Wife*, a man who kills his wife is publically confronted and exposed by a medicine man in the shaking tent, who

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[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] Chapter Three at 25-28 ((c) Seeking Guidance from those with relevant understanding and expertise) and 32-34 ((f) The appropriate decision-makers are identified and implement a response).
[56] Chapter Three, at 25.
[57] Chapter Three, at 26-28.
[58] Chapter Three, at 27.
[59] Chapter Three, at 37-38.
[60] Chapter Three, at 47-48.
[61] Chapter Three, at 47.

tells him killing is not good and warns him he does not have long to live. He dies within the year, even though no human agent takes any further action against him.[62] An elder spoke of an old man who he met walking with two canes, who told him he used medicine with bad intent and was "paying for it now."[63]

In general, relationships, between actions and consequences, between people and peoples, and between humans and the rest of the world, are assumed and permeate decision-making at many levels. One of the most interesting things about this deep understanding of relatedness is how people spoke about it influencing their reasoning and actually preventing them from making decisions that might lead to harm or further harm to themselves or others.

Robert Wanyandie, a respected hunter and guide, talked about staying safe in the bush by paying attention to squirrels warning each other of danger:

> If he's warning whatever in his surroundings and you happen to be one of them, you know, I guess I don't know, I guess you could say you're part of it, right. You're part of the relationship, I guess, because you know what he's doing, because you know, because I guess I would say when he's yapping away you know the understanding of that meaning of what he's doing.[64]

Even though Wanyandie stressed he himself did not have a relationship with the squirrel, and in fact, pointed out the squirrel would view him as a predator too, he knew it was important to pay attention to what the squirrels were saying to each other because it was related to his safety in the same area.[65] It would be foolish to ignore them.

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[62] *Ibid.*
[63] *Ibid.*
[64] Chapter Three, at 22.
[65] *Ibid.*

Wanyandie also talked about making the decision not to commit a wrong action when he was younger, based on his understanding of spiritual relationships. He was out hunting and spotted an eagle, and was about to shoot it, but something inside stopped him:

> The instinct inside me was that, you know, if I shoot it, you know, something might not work out for me, you know, like maybe a bad luck or something, you know what I mean? So I just, you know, I didn't want to, didn't want to go through that process or I didn't want to find out about it anyways, you know what I mean?[66]

Wanyandie used this knowledge of relatedness to guide his choices and actions, even when nobody was around to see him or 'catch' him killing the eagle.

One elder explained, "no matter what you do, something wrong, when you hurt somebody, especially if you're using medicine, that thing is coming back for you."[67] This can lead to people explicitly making decisions to *not* retaliate or punish someone when they do something wrong or cause harm to them. One interviewee explained:

> I think people would turn around and would say, you know, just leave it be. It''ll come back to him anyways or sometimes bad things will happen to a person, like, just one after another, whatever and people will say, oh, something is visiting him.[68]

Another elder talked about a relative being killed by a curse. The family resisted the urge to retaliate or fight back because they believed things would have just gotten worse if they did so.[69] An underlying belief that we all live in larger relationships can lead to the understanding that people will face the consequences of their actions through these, whether other people intervene or not, and it was clear many people

[66] Chapter Three, at 49.
[67] Chapter Three, at 48.
[68] *Ibid.*
[69] Chapter Three, at 49.

interviewed applied this belief in their own reasoning and decision-making in their lives.[70]

b. Recognizing the Fact of Relationships:

Many readers might understand the need to explicitly describe the recognition of humans existing in larger relationships in Cree legal thought, when these larger relationships encompass and understanding of relationships with non-human elements. However, I would argue an equally important aspect of Cree legal thought, that is often overlooked or absent in western legal philosophy and political thought, is the explicit recognition of the *fact* of our human relationships and interdependence, and the *value* placed on these relationships. Relationships are not peripheral, but central to Cree legal thought.[71]

In one interview for the AJR project, an elder stressed the crucial point that, at a practical level, in small, closely-knit Cree communities, most people who harm others are not faceless, nameless wrong-doers, but rather well known loved ones living in close proximity.[72] In a an illuminating exchange, a student interviewing this very

[70] This was seen in other Indigenous legal traditions the AJR project engaged with as well. See, for example, *The AJR Project Tsilhqot'in Legal Traditions Report,* prepared for the AJR Project, the University of Victoria ILRU, the IBA, the TRC, the Ontario Law Foundation, and the partner community, Tsilhqot'in National Government (May 2014, unpublished), on file at the University of Victoria ILRU, at 35-37 and the *AJR Project Anishinabek Legal Traditions Report***,** prepared for the AJR Project, the University of Victoria ILRU, the IBA, the TRC, the Ontario Law Foundation, and the partner community, Chippewas of Nawash Unceded First nation #27 (May 2014), on file at the University of Victoria ILRU at 31-32.

[71] See Nedelsky's aspiration for moving relationship from the periphery to the centre of this in western legal and political thought and practice, Nedelsky, Law's Relations, *supra* note 1 at 3.

[72] Chapter Three, at 74.

knowledgeable elder, who practices traditional medicine, expressed his belief that, based on the published materials he read, someone who had 'turned *wetiko'* was usually killed. When he asked her about this, the elder was upset and responded quite emphatically: "probably someone who didn't know nothing and had no compassion would just go kill somebody else." She then stressed that the appropriate response was to try to help the person instead, explaining: "these are our family members".[73] This exchange captures the factual reality that most, if not all people involved in a situation of harm, even monstrous harm, exist within a network of familial and other relationships. The elder in question was not willing or able to engage in a discussion that would artificially extract an individual, even an individual turning *wetiko*, from the *fact* of their human relatedness. Yet the students were used to doing exactly that in their studies in Canadian law schools.[74]

Background societal stories impact what is looked for, and what is overlooked, in legal reasoning. A good illustration of how different societies can explain the same facts with different emphasis, depending on what they recognize and value, is found in Julie Cruikshank's comparison of written and oral accounts of the life of Skookum Jim, a Tagish and Tlingit man who gained folk hero status by discovering gold in the gold rush era. While written accounts portrayed Skookum Jim as "an individualistic frontier

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[73] *Ibid.*

[74] This raises the issue of how many forms of writing can erase human stories, just as analytical jurisprudence can. Conklin describes the absence of his ancestors' names on their gravestones making it harder to access or imagine their human and experiential reality, *supra* note 11 at 3-4. These students had never imagined talking to someone knowing wetikos as real people, some still alive today. They only knew what they had read in books.

genre…the lone prospector-trapper whose efforts are ultimately rewarded," oral accounts from his community "describe him as a man impelled by social and cultural motives – a strong sense of responsibility to his sisters and an ability to communicate with and be guided by superhuman helpers."[75] Cruikshank explains:

> Oral traditions use metaphors of connection to explain Skookum Jim's actions just as written records rely on metaphors of frontier individualism, but the explanatory narratives in each case reflect different understandings about how society works. [76]

While the non-Indigenous written accounts recognized and valorized Skookum Jim's individual effort and drive, the oral accounts recognized and valorized his relational connectedness and responsibilities as the driving force behind his success.[77]

Like the oral accounts of Skookum Jim, many of the stories and interviews in the AJR project appear to value relational connectedness and have an unspoken assumption of responsibilities, interdependence and reciprocity in all relationships. As discussed above, at a cosmological level, the acceptance that there are natural and spiritual consequences to every action informs peoples' decision making and their responses to situations of harm and conflict. On a practical level, the value seen in reciprocity and interdependence is best illustrated through the obligation of a person to help others when capable and ask for help when incapable or vulnerable,[78] the obligation to give back when asking for or receiving help,[79] and the right to receive help when incapable or

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[75] Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Nebraska: University of Nebraska Press, 1998) at 81 [Cruikshank].
[76] *Ibid*.
[77] *Ibid,* at 74-81.
[78] Chapter Three, at 53-58.
[79] Chapter Three, at 59.

vulnerable.[80] One inference supporting these rights and obligations could be that a person may never know when and how they may require help. Thus, relational connectedness and reciprocity encourages people to value interdependence, rather than privileging an ideal of independence.

Differing societal ideals of independence and interdependence can shape what is recognized and valued profoundly. In *Law's Relations*, Nedelsky asserts the "fact of human dependence" is a truth claim.[81] She gives examples of many experiences of "non-singularity" and "interconnection"[82] that are part of the human condition, and yet points out "in North America, our language, conceptual framework, metaphors and institutions serve to emphasize individual boundedness and are extremely poor at capturing the equally important interconnection."[83] She argues that a relational approach to autonomy recognizes the empirical *fact* of the "ubiquitous structures or dependence and interdependence that characterize everyone's lives" rather than privileging a "(usually illusory) independence" that is valorized in western society.[84] In other words, like the differing versions of Skookum Jim's story, the issue is not the *factual absence* of human relationships or interdependence in North America. The issue is that the bulk of western legal and political thought proceeds without recognizing or valuing these, with attendant real life consequences. [85]

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[80] Chapter Three, at 64.
[81] Nedelsky, Law Relations, *supra* note 1, at 34.
[82] *Ibid,* at 111.
[83] *Ibid.*
[84] *Ibid,* at 134.
[85] Such as undervaluing or devaluing the essential work of care. *Ibid*, at 28-29. See also Deborah Stone, "For Love nor Money: The Commodification of Care" in Martha M. Ertman, Joan C.

This is an essential point, because the Cree elder's statement about even very harmful people still being family members, and needing compassion and help, can be reduced to a false dichotomy of abstract versus concrete reasoning. But this is nonsense. Like any legal practitioner, the elder in question definitely had a keen eye toward practice, but she was perfectly capable, and indeed willing to engage in, abstract conversations about Cree law. She was just articulating her sense of the central importance of relationships in her legal reasoning process. Nedelsky states that one of her hopes for her formal articulation of a theory of relational autonomy is to "help people [who view things relationally] formulate a language for how they see the world. " This is important work because "when people's frameworks do not fit the dominant one, they can be rendered inarticulate. Indeed they can be made to feel stupid, perhaps especially in formal settings.[86] The massive failure of the Canadian justice system, which is often attributed to cultural differences in understanding human behaviour and the appropriate means of responding to incidents of harm or conflict, immediately comes to mind.[87]

Williams, eds. *Rethinking Commodification* (New York: New York University Press, 2005) at 271-290.

[86] Nedelsky, Laws Relations, *supra* note 1, at 10.

[87] There are many examples of Aboriginal and non-Aboriginal conceptions of elemental issues of justice as being set out as contradictory or dichotomous. See, for example, Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in RCAP, Aboriginal People and the Justice System: National Round Table on Aboriginal Justice Issues (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 4 [RCAP: Roundtable on Justice]. See also James Dumont, "Justice and Aboriginal People" in RCAP: Roundtable on Justice, at 42-85; Patricia A. Monture-Okanee, "Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s" in RCAP: Roundtable on Justice, at 106; Mary Ellen Turpel, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal People: Don't Fence Me In" in RCAP: Roundtable on Justice, at 173-179. Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Sask. L. Rev. 153 at 160 who argues that "if these values [of the

c. Relationships as Rationale:

"*These are our family members."*[88]

Nedelsky's work re-centering human relationships into political and legal theory serves as a useful "bridge of connection" to Cree and other Indigenous legal traditions that "are based on, or have deeply integrated a relational approach".[89] I believe this relational approach provides both the rationale and resources for many of the principled responses to harm and conflict in the Cree legal tradition. As the Cree elder above explained, recognizing the fact everyone lives in relationship provides a strong rationale behind the principle of healing as the predominant and preferred response to someone who becoming, or at risk of becoming harmful or dangerous to others.[90] Elder Joe Karakuntie told a story about a woman in the community becoming increasingly dangerous and disruptive, scaring everyone around her, until finally two elders (one was her brother) took her to a shaking tent and "healed her…healed her spirits."[91] Elders told stories about a husband seeking help for his wife, who was becoming a *wetiko*, and a man having a dream about his sister, and so seeking help and healing for her to

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Justice system] ... are not in harmony with Aboriginal values, then imposing them becomes an act of repression."

[88] Chapter Three, at 38.

[89] Nedelsky, Laws Relations, *supra* note 1, at 10.

[90] Chapter Three, at 37.

[91] *Ibid.*

prevent her from becoming a *wetiko*.[92] These loved ones were all dangerous, but could not have been reduced to faceless dangers. They were all *literally* family members.

Recognition of the reality people live in relationships similarly provides a rationale for the response principle of reintegration.[93] Like healing, reintegration provides hope that a loved one will cease causing harm and return to their relational role. The story, *The Thunderwomen*, demonstrates this Cree legal ideal. Two brothers are married to two sisters, who are actually thunderwomen. The younger brother tries to kill his older brother's wife and she flees back to her family with her sister. The older brother makes the difficult journey to his wife's family to make amends. When he returns with his wife and her sister, they find the younger brother has been crying the whole time, and he is told he must never do what he did again. They all resume living together as before. The sisters even find the arrow used in the attempted murder and give it good hunting luck, creating something positive and useful out of the ugly incident. This ideal resolution relies on the younger brother's remorse and the older brother taking responsibility. It is made clear that everyone is safe, and everyone knows this must never happen again.[94]

While the reality that people live in relationship provides a rationale for healing and reintegration being viewed as ideal, it provides an equally strong rationale for the need for these responses not to be applied in inappropriate situations or in way that is blind to real risks of recidivism. It was clear that the principle of reintegration included

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[92] I*bid*.
[93] Chapter Three, at 45-47.
[94] Chapter Three, at 45.

responsibilities of others to observe and supportively monitor the person who became harmful in the past,[95] and to warn others if they noticed warning signs the person had relapsed or was at risk of doing so.[96] In a historical example where a woman was dangerous and disruptive but refused help, elder Joe Karakuntie pointed out that, while they would have preferred to heal her, the rest of her family and community had little choice but to avoid her in order to avoid being harmed themselves. For a time, her brothers, who had some control over her, took her away from the community and separated her from everyone else completely for safety. [97] In the story, *The Hairy Hearts*, a man's wife noticed warning signs he and his son are becoming dangerous after many years of being safe productive community members. In that case, no other response was left except incapacitation.[98] Those living in close relation to a harmful person had a responsibility to prevent future harms.[99] Recognizing the reality of relationships includes recognizing the fact a person who can be dangerous is also living in relation to vulnerable others, who are equally loved and valued family or community members.

It is clear that relational thinking is not tunnel vision, where the only relationships (or lives) that matter, or are worth preserving, are those of the person causing harm. Someone living in such close proximity can cause an enormous amount of harm to those around them if the people aware of their propensity for violence or those

[95] Chapter Three, at 46-47.
[96] Chapter Three, at 61-63.
[97] Chapter Three, at 39-40.
[98] Chapter Three, at 20 and 51. .
[99] Chapter Three, at 60-61.

closest to them turn a blind eye. The cautionary counter story to *The Thunderwomen* is the story of *Mistacayawis*.[100] In this story, a woman is aware her older sister has become a *wetiko* and is killing other people. She does not warn them. After her sister has killed everyone in their camp they move to a larger camp to join relatives, and her sister kills her brother-in-law while hunting. Still, the younger sister says nothing. By the time one man realizes what is going on, almost everyone in the larger camp has been killed. The younger sister is executed once the murders are revealed. This is a rare instance where execution is explicitly *not* just used as a means for incapacitation.[101] The narrator strongly suggests the younger sister is executed because her failure to warn others about her sister was seen as so reprehensible by the group.[102] Interestingly, the older sister begs to be killed so she will not harm anyone else, and tells a younger relative the secret for doing so is cutting off her little finger (she is enormously strong and unstoppable by that point).[103] This detail suggests her younger sister's silence did not even save her from suffering.

In situations of conflict, where others were not in danger, the reality that everyone lives in a web of relationships provided a rationale for the response of avoidance or separation. In one historical situation, two cousins often fought with each other, but would then make up. This happened frequently. Many people from the community tried to talk to them, to no avail, so they simply avoided them when they

[100] At 44.
[101] In my LLM thesis, I said this was a rare instance of the principle of retribution.
[102] Chapter Three, at 61-62.
[103] Chapter Three, at 16.

were fighting, so things wouldn't escalate further through the community.[104] One interviewee told about a historical case, where a well-respected community member took his family and left the community permanently, because he disapproved of how many people were living their lives.[105] The interviewee explained this action was done in the best interests of the community, because direct confrontation with the people he disapproved of would have been understood as a confrontation with all of each person's relatives, including parents, aunts and uncles, and thus could have caused "a huge rift, not only with that family but surrounding families and everything else."[106]. Instead the man left, very publically giving his reasons why, to send a powerful message.[107] He never returned. Similarly, in the story, *Indian Laws*, when conflict escalates, the man at the centre of it branches off with his brothers and establishes his own camp away from the main camp. When he is confronted at his new camp, rather than retaliate, he declares they have no relatives.[108] In this case, however, this creates some breathing room for his father to step in and create a face saving solution for everyone involved, and he does return in the end.[109]

On a practical level, where everyone knows everyone is related, ripple effects from choices and actions by or toward one individual or family have to be taken seriously. Harms can spread fast. One can see that, while principled responses and

[104] Chapter Three, at 42.
[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*

resolutions to harms and conflicts vary, and depend on many factors, including risk assessment and the nature of the harm or conflict in question, ignoring the *fact* of the relatedness of everyone involved could easily lead to inadvertently perpetuating, escalating or compounding harms and conflicts in communities where everyone is so deeply interconnected, through generations. My sad sense is that most serious run ins with the Canadian criminal justice system, that does not operate from this underlying rationale, could provide a thousand tragic examples of this. Conversely, decision-making that keeps this reality at the forefront, while not necessarily leading to a different response to the core issue, may stop the reverberating impacts, and increase the overall community safety and wellness.

Take, for example, the case of Mayamaking, that John Borrows shares, where a man becomes a *wetiko* and the council reaches a decision that the only possible response capable of keeping the community safe is incapacitation, which, at that historic time, meant execution.[110] What is a relational approach to making and implementing a decision to kill another human being? First, Mayamaking's loved ones were involved in the decision, and it was established that there was no other way to keep everyone else, who we can assume were also loved and valued relations, safe and alive. Second, Mayamaking's best friend said he had to be the one to implement it, as he knew he would not be able to stop himself from hating someone else if they killed his best friend, despite knowing intellectually there was no choice. Third, the impact on

[110] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 82. See discussion in Chapter Two, at 45-48.

Mayamaking's other relations was also carefully considered, and responded to. He had an elderly father reliant him for support, so the father was given gifts, and his best friend agreed to take over his responsibilities in that relationship. As a result, the father would not suffer needlessly from deprivation, on top of his loss and grief. No doubt there was immense sorrow and grief for all involved, and no wonder execution was the last resort, only done when all else had failed, but perhaps the relational approach to the issue meant the burden of the awful legal necessity of inflicting suffering and violence was shared.[111] The pain of the unavoidable decisions and consequences did not unfairly and disproportionally fall on certain individuals, and keep reverberating and multiplying through Mayamaking's relations. This case also illustrates that relationships as rationale do not automatically prescribe or preclude certain results, but it does widen the legal reasoning process and require legal decision makers to consider and respond to a fuller picture.

d. Relationships as Resources:

"*Probably it wasn't really like nobody didn't listen, but there was always somebody that you would listen to*."[112]

[111] This necessity of violence and infliction of pain is an often overlooked but key point for all law. For compelling reminders of this, see Robert Cover, "Violence and the Word" (1985-1986) Yale Law Journal 1601, reminding us "Legal interpretation takes place in a field of pain and death" (at 1601) and Louis E. Wolcher, "Universal Suffering and the Ultimate Task of Law" (2006) 24 *Windsor YB Access Just* 361, stating, "even at its most banal, a legal tradition always "both remedies and causes human suffering." (at 367).

[112] Chapter Three, at 34.

In Cree legal traditions, relationships are not just recognized as fact and valued as a good, but accessed as resources to avoid, prevent or respond to harms and conflicts. Building relationships literally stopped wars and saved lives.

Family members were legitimate category of authoritative decision makers. In cases of harm, they acted to both prevent and remedy harms. In the story, *Indian Laws*, the father of the a man whose actions had created a great deal of harm and conflict in the community, publically renounced his son's actions, and offered a horse as compensation to a man who had lost his wife and children due to the son's reckless actions.[113] In the story *Thunderwomen*, discussed above, it is the older brother of the wrongdoer who confronts him and then goes on the long journey to make amends for his actions.[114] In *Mistacayawis*, the younger sister clearly was thought to have some duty to warn others about her sister, and, in the end, it is the older sister's only surviving relative, a young boy, who kills her by chopping off her finger, at her own request. [115] The Cree legal response principles often rely on relatives acting on their responsibilities. In *The Hairy Heart People*, the wife of the man noticed warning signs he was relapsing and warned others.[116] In a historical case, where a woman was becoming *wetiko*, her brother had a dream warning him of this. The elder relating this explained that this meant he had a responsibility "for her to be able to go get help. For him to take her to go get help."[117]

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[113] Chapter Three, at 16.
[114] *Ibid.*
[115] *Ibid.*
[116] Chapter Three, at 20.
[117] Chapter Three, at 21.

In cases of interpersonal conflict, family members were drawn on to take a persuasive role in resolving the conflict.[118] In a historic case, a married couple decided to separate at a time where this was seen as cause for concern. First extended family members, then elders visited them, trying to persuade them to reconcile. However, when the couple decided to separate anyway, this decision was respected.[119] In the historic case of the man who left the community, his extended family members, then elders, also visited him, trying to persuade him to stay. Again, in this case, once he decided to leave anyway, this decision was respected.[120] One community leader said these were typical processes, if not results. He explained that, where there was interpersonal conflict, it was common for extended family members, then elders, to try to help solve the problem through multiple visits. These visits allowed everyone involved or affected to talk and be heard and also served to apply social pressure to resolve things.[121]

Deciding who were the most appropriate people to seek out for guidance[122] as well as to make and implement decisions[123] in a particular situation were actually identifiable procedural steps in Cree legal process. There are obvious benefits to having access to many different people, with different gifts and connections, to seek out or draw on as resources in any specific situation. One interviewee pointed out that it

[118] Chapter Three, at 17.
[119] *Ibid.*
[120] *Ibid.*
[121] Chapter Three, at 31.
[122] Chapter Three, at 25-28.
[123] Chapter Three, at 32-34.

couldn't be assumed, for example, that every elder or person practicing traditional medicine is suited for everything. He explained that if he were looking for help or guidance, he would go to the person recognized by the community as knowledgeable in that specific area or about the specific issue.[124] One elder, who practices traditional medicine, so is often called upon to be a decision-maker, explained that discussion and deliberation in her role is important. She explains she always discusses issues involving wrongdoing or harm with her husband. If he is not available, she will seek out one of her three sons, particularly the one who "picks up what she picks up" in regard to spiritual warning signs.[125] In the historical case of the sister turning *wetiko*, her brother was monitoring her and realized she was getting worse and he couldn't help her alone, "so he knew he had to take her to somebody else who would be able to help her in a way that he couldn't help her."[126] In this case he took her to a nearby community where there was someone with the necessary power and skill to cure her.[127] People did not act alone when they had others they could turn to.

Sometimes, the power was in the connection itself. For example, a family member or elder that has a particular connection or is particularly respected by an individual will be asked to take on a persuasive role in resolving a conflict,[128] or a supervisory role in temporarily separating someone who is dangerous from others, until

[124] Chapter Three, at 28.
[125] *Ibid.*
[126] Chapter Three, at 33.
[127] *Ibid.*
[128] Chapter Three, at 34.

he or she can be healed.[129] In the above case of the sister turning *wetiko*, elder Joe Karakuntie explained that the brother and another elder were able to keep the community safe from his sister, because she respected them, and was a little afraid of them. This pre-existing respect is what enabled them to have some control over her even when she was almost completely out of control and extremely dangerous to others. For this reason, they were seen as the most appropriate people to supervise and monitor her, and eventually accompany her to a shaking tent for healing.[130]

Karakuntie also explained that this careful selection of who was most appropriate to respond to the specific situation carries over to conflicts or problems where there is less immediate risk of harm. He pointed out that different people respond better to being talked to by different family members or elders, based on their experience, personality or relationship, stating, "probably it wasn't really like nobody would listen, but there was always somebody that you would listen to."[131] This is a powerful assumption – that if a person doesn't respond to one person, the next logical step is to consider who they might respond to better, rather than automatically assuming they are uncooperative or uninterested in help. It makes intuitive sense. If I am struggling with a difficult issue, I might respond best to someone who has dealt with a similar issue so I trust will understand me without judging. If I am feeling stuck or unsure about myself, I might be able to hear advice or accept guidance from someone I particularly relate to or respect and admire. Some personalities click, and some don't.

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[129] *Ibid.*
[130] Chapter Three, at 40.
[131] Chapter Three, at 34.

What this relies on is a background that includes a rich pool of people to draw on, and deep knowledge of the person and knowledge of the people around them – their strengths and weaknesses, their personal history, experiences, relationships and connections.

The efficacy of relational thinking was not always dependent on this deep knowledge. There are powerful stories where building or re-building relationships between people literally saved lives, stopped wars and created enduring connections and change. There are the older stories, when the world was new, where animals, spiritual beings and humans communicate, connect, make deals and form relationships to everyone's eventual benefit. A good example of this is the story, *Buffalo Child*, where humans accidently leave a human child behind, and the Chief Buffalo insists on taking him in and taking care of him, saving his life, and raising him up to be his son.[132] The boy grows up thinking he is a buffalo, returns to humans for a time, then comes back to the buffalo. He struggles with the complexity of the human-buffalo relationship, and eventually transforms, by his own choice, into a special rock that is a perpetual reminder of the importance of interdependence and respect between the two peoples, who rely on each other to survive and thrive, and must take care to maintain and renew the respectful relationship between them through time.[133] Relationships are foundational.

[132] "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) 34-46.
[133] *Ibid.*

Relationships saved lives. In some stories, set in times of starvation, individuals and whole groups are saved from death by strangers intervening and caring for them for a time. In *The Starving Uncle*, the narrator describes how a stranger saves his uncle's life. The man stumbles upon his uncle's dwelling while hunting, and realizes his uncle is too weak and is starving to death. The man, who has a fresh kill, expands the dwelling and actually moves in and lives with his uncle until the spring, nursing him back to health.[134] In *The Fearful Winter*, the best hunters from a group of woodland Crees and Chipewyans, camping in the mountains, stay behind when they hear a large group of starving plains Cree are on their way. They feed them the last of their food, and travel together with them to a river where a cache of food is left, saving their lives. Those that didn't stay behind are labeled "deserters."[135] In another story, urged by his spirit helper, an old man who was left behind to starve by his own people, but is helped to survive from his spirit helper, saves them from starvation by agreeing to rebuild the relationship through feasting, giving them all his food to eat, and admonishing them to never leave him behind again.[136]

Cree elder Louis Bird shares a beautiful story called *Morning Star: A Love Story, and the Spread of the Cree Language,* where the spread of the Cree language from the

[134] This is an oral history recounted by a Whapmagoostui Cree elder, living in northern Quebec, to Naomi Adelson and reproduced in Naomi Adelson, '*Being Alive Well': Health and the Politics of Cree Well-Being* (Toronto: University of Toronto Press, 2000) at 30-33.
[135] This is true descriptive account recounted by Michel Sandy Cardinal, as told to Joseph F. Dion in Joseph F. Dion, My Tribe the Crees, ed. Hugh Dempsey, (Alberta: Glenbow-Alberta Institute, 1979) at 71-75.
[136] This was a story recounted by John Blackned, as told to Richard J. Preston in Richard J. Preston, *Cree Narrative* 2nd ed. (Montreal: McGill-Queen's University Press, 2002) at 175-180.

east, all the way across the prairies to the rocky mountains in the west, is explained as the byproduct of extraordinary love of two people, the love that surrounds them, from the woman's parents and grandparents, to their own children and grandchildren, and everyone acting on their relational responsibilities within this expansive and generous love.[137] Louis Bird states this lesson explicitly at the end of the story:

> [This is] how the Cree language spread to the far west, past the prairie land. It was Morning Star who fulfilled this job. And the man went back and fulfilled his duty as a grandfather to her grandchildren who now speak the Cree language. And that is why the language spread way out west. [138]

This story delights me, not the least because it is a beautiful, life-affirming story. When I read it, I laughed out loud at myself. I thought I was starting to be familiar enough with the background, through my research, that I should not have been so surprised to learn that the spread of the Cree language across a continent is explained, not through tales of war or conquest, but through a love story.

Building relationships stopped wars and built peace. [139] A powerful story recounted by Cree elder, Edward Ahenakew in *Voices of the Plains Cree*, told by Chief Thunderchild, describes a context of more than fifty years of attempts to end the warfare between the Blackfoot and Cree Nations. Sometimes there were short truces, and sometimes reckless young men from either Nation would break the truces by killing

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[137] "Morning Star, a Love Story, and the Spread of the Cree Language" in Louis Bird, The Spirit Lives in the Mind, ed. Susan Elaine Gray, (Montreal: McGill-Queen's University Press, 2007) at 132- 140.
[138] *Ibid,* at 140. .
[139] "Truce Making and Truce Breaking", 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) 32-35.

a peace party from the other, or raiding the other Nation to steal horses. Chief Thunderchild says a long truce occurred when a Blood chief adopted him as a son. He accomplished this by boldly walked unarmed with a friend into the Blood Chief's tent at daybreak. The surprised (and naked) Blood Chief said:

> These two young men have killed the anger in me by coming into my tent like this, in the early morning. If they are willing I will take them as my relatives. I thought that I would never be friendly with them, for they took the lives of two of my sons. But these have killed the anger in me. They will be my sons.[140]

The Blood Chief then gave them his sons' best clothing and ornaments, as well as many more things, including a gun, and Chief Thunderchild lived in the Blood Camp for a time.[141]

Chief Thunderchild concludes with a story about the great Blackfoot Chief, Chief Crowfoot and the great Cree chief, Chief Poundmaker:

> Neighbouring camps of Crees and Blackfoots could be brought close to warfare by such reckless actions. Chief Crowfoot tried to stop the horse stealing. When they would not listen to him, he said to his young men, "Then I will be Cree," and he took his tent and came to live with the Crees. There was no more trouble after then. He made Poundmaker his son.
>
> After Poundmaker was released from the white men's prison, he went to visit Crowfoot, and he died there, in the country of the Blackfoot. Crowfoot ordered that Poundmaker's body should lie in state. "First, all the Bloods will see my son before his burial." Many great men, Indian and white, came to see Poundmaker, but his death broke Crowfoot's heart. "I will not be far behind him," he said, and he died a broken-hearted and a great-hearted man.[142]

Like the origin of the Cree language spreading is attributed to a love story, peace between the Cree and Blackfoot was attributed to the brave and selfless building of

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[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.*

personal relationships between individual chiefs, for the good of all their people – Chief Thunderchild walking into the Blood Chief's tent, being adopted, and living in the Blood camp, and Chief Crowfoot coming to live with the Crees, and adopting Chief Poundmaker as his son. There is love here too. Crowfoot's heart is broken when Poundmaker dies.

In the first of a four part series of Constitution-building workshops I facilitated for the *Aseniwuche Winewak*, we talked about Cree principles for peace-building. I introduced these two stories related by Chief Thunderchild and, using Borrow's single case analysis method, asked community participants to identify how the chiefs resolved the issues and what they thought the reasons were behind the chiefs' actions.[143] Participants identified many possible reasons, including the chiefs wanting peace for their people, and between all tribes, stopping the killing and stealing of horses, so:

- "the feelings of grief, loss, and hardship would come to an end so that both groups would have life and prosper",
- "self-healing", to "end the pain",
- stop the losses, to "move forward in life," "getting out of a rut",
- wanting to "improve conditions", wanting "something better for future generations",
- to be able to "ally together to fight bigger problems",

[143] Hadley Friedland, *AWN Constitution Building Workshops Final Report*, January 2015, (unpublished, on file with author, Aseniwuche Winewak Nation and Government of Alberta, Aboriginal Relations) at 9-11.

- improve both groups wellbeing, safety and security and to be able to sleep better at night.[144]

Some reasons were more about forgiveness, protocols and spiritual principles.[145] People engaged seriously and deeply with this question.

All the elders in attendance at this workshop were in one group because of translation. Things came full circle for me when they spoke, confidently and unanimously identifying the reason behind the chiefs' actions as "the importance of relationships, building relationships between people – Wah-ko-to-win."[146]

5. Conclusion: Wah-ko-to-win

The Cree word, Wah-ko-to-win, describes the centrality and importance of relationships and building relationships in Cree legal thought. Without more, is trite to say that the Cree legal tradition, like many other Indigenous legal traditions, is premised on a world and society of relationships. However, exploring the depth, nuance and scope of this concept by connecting common themes that run through specific or particular stories, interviews or legal principles set out in the analytical framework, can deepen and complexify our understanding of it. This reinforces and illustrates the point that Wah-ko-to-win represents an essential background narrative or meta-principle for Cree laws.

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[144] *Ibid.*
[145] *Ibid.*
[146] *Ibid*, at 10.

Existing in larger relationships is foundational, recognizing the fact and value of human relationships is central, and relationships can be both rationale and resource in Cree legal thinking and practice. This broadens the scope of considerations in Cree legal reasoning and raises possibilities, but does not necessarily preclude or prescribe certain results in each case. It does give us some clues for evaluating new or novel applications of Cree law, because we know grounding questions will be relational in nature. I will draw and return to this deeper understanding of Wah-ko-to-win, or relational reasoning, throughout the rest of this dissertation.

In this chapter I retold some of the principles, stories and interview excerpts from the Cree legal summary from the previous chapter to show that my methodology for engaging with Indigenous laws can not only provide a rigorous, transparent and convenient form for restating legal principles so they can be more easily accessed, but can also bring us to a deeper exploration of the essential background narratives needed to properly understand and apply them in a bounded way that upholds the integrity of the legal tradition itself. This is an essential task in reinvigorating and revitalizing Indigenous legal traditions in a way that does not create unnecessary distortions. In the next chapter I turn to the critical task of application – can this method produce outcomes that are recognizable and acceptable within Indigenous communities and that can be usefully applied by Indigenous communities in their own goals and projects?

Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada

by

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A thesis submitted in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

in
Laws

Faculty of Law
University of Alberta

Abstract

The Truth and Reconciliation Commission of Canada states the revitalization and application of Indigenous laws is vital for re-establishing respectful relations in Canada. It is also vital for restoring and maintaining safety, peace and order in Indigenous communities. This thesis explores *how* to accomplish this objective. It examines current challenges, resources and opportunities for recovering, learning and practicing Indigenous laws. It develops a highly structured methodology for serious and sustained engagement with Indigenous legal traditions, based on reviewing existing methods, then combining the methods of two leading Indigenous legal scholars, John Borrows and Val Napoleon. This method approaches Indigenous stories as jurisprudence. It uses adapted legal analysis and synthesis to identify Indigenous legal principles from stories and oral histories and organize these principles into a rigorous and transparent analytical framework. These legal principles can then be readily accessed, understood and applied.

This thesis demonstrates this adapted legal analysis method is teachable, transferable and replicable, using research outcomes of Cree legal principles responding to violence, harms and conflicts. Through the example of a foundational Cree legal principle, "*wah-ko-to-win*" (our inter-relatedness), it demonstrates how this method can also deepen our understanding of background or 'meta-principles' within Indigenous legal traditions, which can help us interpret, apply and change laws in legitimate ways. It then demonstrates how the research outcomes from this method may be understood and applied by Indigenous communities, through a case study exploring the development of a contemporary Cree criminal justice process

based on Cree legal principles, by and with the *Aseniwuche Winewak*. Finally, it examines the current narratives about the appalling rates of violence against and over-incarceration of Indigenous people in Canada and the existing gap between legitimacy and enforcement. It proposes Indigenous legal reasoning as a bridge, and develops the conceit of the "reasonable Cree person" to examine whether principled Cree legal reasoning can be explicitly recognized and implemented within Canada's current political and legal systems. It concludes that, while there are many potential spaces for doing so, more intellectual work is necessary first, in which both Indigenous and non-Indigenous people engage with Indigenous laws as *laws*. It is this kind of deep engagement that is necessary to effectively and respectfully operationalize the Truth and Reconciliation Commission's compelling calls for greater recognition of Indigenous laws in Canada.

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Chapter 5: Creating a Cree Justice Process using Cree Legal Principles

"Maybe it's time we start researching ourselves back to life."[1]

1. Introduction:

Mathew Fletcher's compelling call to find ways to "access, understand and apply" Indigenous laws has become an overarching objective for my own work. In Chapter Two, I discussed challenges of accessing, understanding and applying Indigenous laws, and methods for approaching these challenges. I proposed a method for engaging with Indigenous legal traditions that I hoped would render Indigenous laws more accessible, understandable and applicable today. In Chapter Three, I demonstrated how this method could lead to the ability to 'restate' a specific area of law, in an accessible, transparent and convenient form, using the example of the Cree Legal Summary I prepared as part of the AJR project. In Chapter Four, I shared a common criticism and valid concern about this method – that it might dangerously abstract or decontextualize principles from their crucial background narratives. Using the example of Wah-ko-to-win, or relational theory, I demonstrated that this method could not only make Indigenous legal principles more accessible, but also, if approached thoughtfully, reflecting on the essential meta-principles and background narratives that inform and permeate any legal tradition, promote deeper understanding.

In this chapter, I demonstrate how my method may address Fletcher, Borrows and Napoleon's concerns about ensuring Indigenous laws are not frozen in

[1] A Nakota Elder's words at the workshop to shape the emerging research agenda of the Royal Commission on Aboriginal Peoples [RCAP], as related by Marlene Brant Castellano, "Ethics of Aboriginal Research" (January, 2004) Journal of Aboriginal Health 98 at 98 [Brant Castellano].

the past, but are engaged with as living principles, useful, relevant and capable of change to respond to Indigenous people's real issues today.[2] I show how my method may assist communities to build a solid and useful foundation for application that is both understandable and adaptable, through the case study of the development of a justice process proposal, at the request of the *Aseniwuche Winewak*.

Another common criticism or comment about this method is that, while using the form of a legal summary of abstract legal principles (albeit grounded in stories/oral histories), may make these principles more accessible to non-Indigenous academics and professionals, it is not necessary or desirable for Indigenous individuals and communities themselves. A related question is whether this form might actually make Indigenous laws *less* accessible to people within Indigenous communities, who have learned them through more traditional means. Might it displace or supplant an Indigenous legal tradition's pedagogies, authorities, and methods for dissemination and interpretation? These are serious issues to consider and address. Like the concern about distortion through abstraction, these are valid concerns rooted in historical and present lived experiences of Indigenous peoples. On one level, the best I can say, with complete honesty, is that *I hope not*. [3]

Val Napoleon and I have acknowledged this concern elsewhere, stressing our belief that we need many methods of engaging with Indigenous legal traditions, just as we need many methods for engaging with other legal traditions and state legal

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[2] Chapter Two, at 34-35.

[3] Larry Chartrand, in response to my concerns about publishing my LLM thesis, out of fear it would be misinterpreted and misused, very kindly but wisely told me, yes, it will be by some people. It's unavoidable. But at this point, he said he believed the potential benefits of having it publically available was greater than the potential risks of misuse (personal conversation, November, 2010).

systems. This method is intended to "supplement, not supplant" other methods of engagement with Indigenous legal traditions.[4] It is not intended to 'occupy the field' but to contribute to supporting practical application of Indigenous laws as well as making space for more respectful and symmetrical conversations between Indigenous laws and other laws.

On the other hand, like the distortion of the status quo discussed in the last chapter, it is also important to point out that, while Indigenous legal traditions exist today and are meaningful normative resources for many people, the ground is decidedly uneven.[5] There has been immense damages wrought through colonialism,[6] and as pointed out in Chapter Two, even finding appropriate resources for engaging with Indigenous laws is a real challenge at this point in history. The "radical exclusion" of even the idea of Indigenous legality by colonial forces, through force and narrative, over several generations, has created "radical absences" about and *within* Indigenous legal traditions.[7] It is highly unlikely the level of respectful and robust engagement needed to access, understand and apply Indigenous laws can be as simple as approaching people who have access to and can articulate a

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[4] Val Napoleon and Hadley Friedland, "An Inside Job – Engaging with Indigenous Legal Traditions Through Stories" (forthcoming 2016, 61 McGill Law Journal) at 23 [Inside Job], Napoleon and I argue this method, while a useful tool, "is not intended to supplant existing learning and teaching methods, but rather to supplement them. There needs to be many methods for engaging with Indigenous legal traditions."

[5] Hadley Friedland and Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2016) 1 (1) *Lakehead Law Journal* 33 at 33 [Gathering the Threads].

[6] *Ibid*, at 34.

[7] Boaventura de Sousa Santos, "Beyond Abysmal Thinking: From Global Lines to Ecologies of Knowledge" (2007) *Eurozine,* online: http://www.eurozine.com/articles/2007-06-29-santos-en.html , describes how the colonizing project depends on radical exclusion of multiple forms of knowledge and legality, and so creates radical absences of legality, condemning those on the wrong side of the line. I will discuss this at greater length in the following chapter [de Sousa Santos].

completely intact and explicit set of laws.[8] Part of engaging with Indigenous laws, at this point in history, necessarily involves "conscious and mindful acts of recovery and revitalization."[9] Doing nothing, or even passively recording statements with no further analysis, may inadvertently reinforce colonial myths of fragility, incommensurability or the absence of Indigenous legal thought.[10]

I was both eager and nervous to find out if the legal summary of Cree legal principles in Chapter Three of this dissertation would be accessible, or even *recognizable*, to Cree elders and other community members who participated in interviews for it. Would they see it as a useful tool to reclaim these principles, and apply them more explicitly today, or as something that would take away the crucial roles and traditional authority from people within the community, inadvertently furthering displacement, co-option and appropriation?

While the *Aseniwuche Winewak's* relative isolation has meant they have not been subject to a long history of research,[11] there is are long, painful and ugly

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[8] As Val Napoleon frequently says, this is not actually a realistic approach to researching any laws. Nobody would expect we could sit down and ask even the most knowledgeable and respected senior lawyers and judges to fully explain all subjects within and all procedural aspects of the state legal system (Personal Conversation, September, 2015).

[9] Gathering threads, *supra* note 5, at 34.

[10] Inside Job, *supra* note 4, at 24 and Gordon Christie, 'Indigenous Legal Theory: Some Initial Considerations' in Benjamin J. Richardson, Shin Imai & Kent McNeil (eds.), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (2009) at 213.

[11] There has been scant academic work about the Aseniwuche Winewak, and the little that exists focuses on those that identify as Métis. See, for example: Trudy Nicks and Kenneth Morgan, "Grande Cache: The historic development of an Indigenous Alberta Métis Population" in Jacqueline Peterson and Jennifer S.H. Brown, eds., *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) at 163. Richard Andre Oullette, "Tales of Empowerment: Cultural Continuity within an Evolving Identity in the Upper Athabasca Valley" (Masters of Arts Thesis, Simon Fraser University, 2003, unpublished). This created some ethical challenges for me. I knew about the long histories of appropriation and misuse, but was aware that most of the people I was talking to, particularly elders, likely did not. They were sharing openly and generously with

histories of appropriation of knowledge and the misuse of research conducted on Indigenous peoples throughout the world. There is an extensive body of literature on this subject, including developing ways to resist and address it today.[12] As Iroquois scholar, Marlene Brant Castellano has said, it is commonly said that Indigenous people are the most researched people on earth. People feel "researched to death."[13] The biggest barrier I've observed to respectful engagement with Indigenous legal traditions, in people attending workshops or talks about this method, is not what they *don't* know, but what they think they *do* know.[14] Many people rely on misleading preconceptions about Indigenous peoples and laws.

Indigenous peoples have sound and sensible reasons to be cautious, even distrustful of outside researchers on any topic. However, in recent years, the flip side of this is also becoming apparent. Research can provide useful and needed data and support for reasoned and reasonable actions and initiatives. On a general level, in Canada, many people voiced alarm at the former Harper government's decision to end the long form census, and restrict funding for research in key environmental areas.[15] Dr. John Hylton drew attention to the significant lack of evidence-based

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me, and I sometimes felt as if I needed to caution them or remind them that I was in an academic role, and explain some of the histories I was aware of, above and beyond ethics forms and requirements. Consistently, I was told that that was too bad, but this was true, and it might teach people something, it would be good to have it out there.

[12] An excellent source of information on this subject, including extensive reading lists, is the website of the IPinCH (Intellectual Property Issues in Cultural Heritage) Project, online: http://www.sfu.ca/ipinch/

[13] Brant Castellano, *supra* note 1 at 98.

[14] Recall how sure my student researchers were they understood the *wetiko* concept from books they had read. See Chapter Four at 23.

[15] See, for example, Antonia Maioni, "We Haven't Forgotten the Long-form Census" (February 6, 2015) Globe and Mail Debate, online: http://www.theglobeandmail.com/globe-debate/we-havent-forgotten-the-long-form-census/article22819338/ and Zi-An Lum, "Erosion of Science 'Reflects State Of our

research on sexual offending in Indigenous communities, and the desperate need for reliable research in this urgent area.[16] Métis scholar, Chris Anderson, has pointed out both the importance of statistical research for urban Métis populations, as well as the lack thereof.[17] He has also highlighted the reality that the otherwise right-headed approach of seeking approval for any research from community leaders can lead to the denial of research approval for projects benefiting or generated by vulnerable sub-groups within that community, inadvertently contributing to their voicelessness.[18]

Brant-Castilano talks about an elder powerfully declaring, at the start of a workshop for RCAP Indigenous researchers: "If we've been researched to death, maybe it is time we start research ourselves back to life."[19] Research, done well, can be a valuable tool for Indigenous communities to further their own goals and aspirations.[20] Increasingly, Indigenous scholars and organizations are taking control of research protocols with outside researchers, and there are emerging best practices in this area for academic researchers.[21] The Social Sciences and Humanities Research Council [SSHRC] recently released a new statement of principles regarding Aboriginal research. It starts out with, what for me, is the

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Democracy' Former Scientist says"(August 8, 2015) Huffington Post, online: http://www.huffingtonpost.ca/2015/08/05/federal-election-2015-canada-science-cuts_n_7938638.html

[16] Dr. John Hylton, *Aboriginal Sexual Offending in Canada* (Ottawa: Aboriginal Healing Foundation, Aboriginal Healing Foundation Research Series, 2006) at 70-71 and 124.

[17] Dr. Chris Anderson, personal conversation, May 2013.

[18] *Ibid*.

[19] Brant Castellano, *supra* note 1, at 98.

[20] *Ibid,* at 106 -107.

[21] See, for example, Shaun Wilson, *Research is Ceremony: Indigenous Research Methods* (Winnipeg: Fernwood Publishing, 2008) and Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: UBC Press, 2008).

pivotal change from misguided and harmful research *on or for* Aboriginal Peoples in the past, to mutually beneficial research partnerships in the present: "SSHRC is committed to supporting and promoting research *by and with* Aboriginal Peoples."[22]

Aseniwuche Winewak's goal for a proposal for a regional justice process converged with the completion of the *Cree Legal Traditions Report.* Working with the *Aseniwuche Winewak* to accomplish this goal, using the report to do address a community priority, also created an opportunity to explore the potential uses and usefulness of results produced through this method.

2. A Cree Justice Process for the *Aseniwuche Winewak* – History and Aspirations of the Proposal

How do you build an Indigenous justice process in contemporary Canadian society?[23]

In May 2013 the *Aseniwuche Winewak*, approached me about using the Cree legal principles that had been identified and articulated in the *Cree Legal Traditions Report*[24] as a foundation for a proposal for building a Cree justice initiative in the local area. The *Aseniwuche Winewak* wanted to develop and implement a credible justice process that would be acceptable and sensitive to the needs, norms and

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[22] SSHRC Aboriginal Research Statement of Principles, online: http://www.sshrc-crsh.gc.ca/about-au_sujet/policies-politiques/statements-enonces/aboriginal_research-recherche_autochtone-eng.aspx (emphasis mine).
[23] Rachelle McDonald, AWN Senior Strategic Advisor, follow-up conversation, June, 2015.
[24] *The AJR Project Cree Legal Traditions Report* (May 2014), unpublished, on file with the author, the University of Victoria ILRU, the IBA, the TRC, the Ontario Law Foundation, and the partner community *Aseniwuche Winewak*, online: http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2012/12/cree_summary.pdf [Cree Legal Traditions Report]. The legal summary in this report is reproduced in full in Chapter Three.

aspirations of the Cree communities in the local area.[25] The goals for this justice process would be to promote the personal responsibility of offenders to their communities and support community healing, with an overarching goal of contributing to the maintenance of safe, healthy and peaceful communities.[26] David MacPhee, *Aseniwuche Winewak* President, envisioned a justice process that was fair, principled and transparent, and where a record of decisions, along with the principled reasons for them, was kept and could be continually built on as precedent.[27]

There were two historical experiences to learn from and build on for such an initiative. First, the Aboriginal people of this area maintained social order within their societies for thousands of years. These social orders logically included law, and principled ways to deal with harm and conflict, and while not perfect, worked well enough over this long time period.[28] The people who are known as the *Aseniwuche Winewak* maintained traditional lifestyles, including their own social ordering, up until the early 1970s, when coal was discovered, and the town of Grande Cache established. At this time, enormous social upheaval and change occurred.[29] The Canadian justice system began to play a more influential part in the lives of the

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[25] Hadley Friedland, *Aseniwuche Winewak Justice Project Report: Creating a Cree Legal Process Using Cree Legal Principles* (October, 2015) (unpublished, on file with the author, AWN and the University of Victoria ILRU) [AWN Cree Justice Project Report] at 4.
[26] *Ibid*.
[27] *Ibid*, and David MacPhee, AWN President, Follow up Conversation, June 2015.
[28] As all Indigenous societies logically did. See Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D. Dubber and Tatjana Hornle eds., The Oxford Handbook of Criminal Law (Oxford: Oxford University Press, 2014) at 227-228 [Roots to Renaissance].
[29] Rachelle McDonald, "Introduction to Community Partner" in the Cree Legal Traditions Report, *supra* note 24 at 8.

Aseniwuche Winewak. However, up until this time, the people of this area had responded to the universal human and social issues all societies face, using the particular principles and practices they had learned from their ancestors, and the resources available to them, as all communities do. This means that elders had a lived experience of this way of life, both prior to and continuing through the forced interaction with non-Aboriginal laws and law enforcement.

The second historical experience to build upon and learn from was a "Native Court" established in the town of Grande Cache in the 1980s. Provincial Court Judge Michael Porter initiated the Native Court in Grande Cache, in response to a high incidence of Aboriginal offenders and obvious social distress.[30] This involved a panel of 3 elders, a judge and a representative from Native Counseling Services and dealt with sentencing only. Anecdotally, some people say the Native Court stopped running due to issues getting elders to participate, offenders not wanting to go through Native Court, and lawyers disliking it. Others say it was just so successful, there stopped being a high enough volume of Aboriginal offenders to run it. Whatever the reasons, it has not run in Grande Cache for many years, although it is still technically in existence.

In April 2012, Provincial Court Judge Donald Norheim, who sat on the original court, met with the *Aseniwuche Winewak* and suggested the Native Court could and should be revived. In March 2013, Provincial Court Judge John Higgerty

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[30] See Dana Wagg, "Grande Cache Natives in 'crisis' says Counsellor" (1989) 7 (17) Windspeaker at 3. Available online: http://www.ammsa.com/node/17085 and Tony Susan Goldbach, "Sentencing Circles, Clashing Worldviews and the Case of Christopher Pauchay" (2011) 10 (1) Illumine Journal for the Centre of Studies in Religion and Society Graduate Students Association 53 at 8.

and his wife, the manager of a local regional healing program, again met with and encouraged the *Aseniwuche Winewak* to develop a proposal for reviving the Native Court.[31] Everyone involved agreed that, in order to build a credible and acceptable justice process that is responsive to the community needs, sensitive to community concerns and congruent with community understandings and aspirations for justice, it would be vital to ground this work in a clear understanding of the range of opinions, beliefs, questions, concerns and within the community regarding justice, wellness, accountability and safety.[32] If it didn't have this community grounding, it would just be another 'top-down' program foisted on people, rather than a justice process that could contribute meaningfully to building and maintaining safe, healthy and peaceful communities over the long term.

3. Methodology for Community Feedback:

The *Cree Legal Traditions Report* had analyzed published stories and oral histories in conversation with elders and other knowledgeable people within the *Aseniwuche Winewak* community, to identify and articulate a synthesis or 'restatement' of Cree legal principles responding to harms and conflicts. The convenient and accessible format of this report, as well as the fact it was already grounded in the community, provided an opportune starting point for eliciting community feedback on these crucial topics. Rather than ask people impossibly broad and abstract questions about justice, or asking them to identify community problems and the many failures of the mainstream Canadian justice system, the *Cree Legal Traditions Report*

[31] Rachelle McDonald, Follow-up Conversation, June 2015.
[32] AWN Cree Justice Report, *supra* note 25 at 4.

provided a framework for a targeted and specific strength based approach to community engagement. In turn, conversations with community participants discussing Cree legal principles and how they might be explicitly applied in a contemporary and formalized justice process, led to valuable confirmation and insights about the principles themselves, key questions and nuanced, thoughtful and practical advice about applying these principles today.

Kris Statnyk,[33] one of the original researchers for the *Cree Legal Traditions Report*, Carol Wanyandie, the AJR project's community coordinator, and I met with *Aseniwuche Winewak's* leadership team, the healing program's manager, and several human services and justice system professionals, including judges, in order to understand the bigger picture issues in the region, and professionals' perceptions of community strengths, needs, challenges and opportunities. We then were faced with a real challenge of practical translation – how to prepare and conduct interviews in such a way that we kept the Cree legal principles at the fore, but also produced information that connected to the practical questions leaders and professionals needed to be able to imagine implementation, and was understandable within their current frames of reference. We were faced directly with the challenges of relevance and utility.

To take a small example that illustrates the larger challenge – in Chapter Two, and in countless academic, professional and community talks, I argue that it is critical to shift from talking broadly about "Aboriginal Justice" to talking about

[33] Then a law student, Kris is now an associate with Mandell Pinder LLP Barristers and Solicitors. http://www.mandellpinder.com/team/kris/.

"specific Indigenous legal concepts and categories." I don't think I have made a power point presentation in the last four years that doesn't include the importance of this shift. Yet, with few exceptions (notably, the *Aseniwuche Winewak* leadership), every professional we met with about a potential justice process applying Cree legal principles immediately reverted to and exclusively used the language of "Aboriginal Justice." How could we maintain the integrity of our approach to Indigenous laws, and our prior findings, which we saw as aligned with *Aseniwuche Winewak's* vision, while still producing results that key decision makers and potential partners could readily understand and endorse? Would the language of law, which I see as so important, actually be a stumbling block? There was the separate but related question of how to collect useful information about the Cree legal principles and information wanted for practical implementation issues, without overwhelming participants.

Kris, Carol and I had many long conversations grappling with these issues. Sticking with the above example, we wondered if the shift in language from 'Aboriginal Justice' to 'Indigenous legal principles' was quite as important I had made it out to be, or if it was, in the end, more of an academic, or advocacy point than a practical need in all cases. The actual translation between the Cree and English languages kept me from taking myself too seriously. The first language of all the elders and almost all adults over forty in the *Aseniwuche Winewak* community is Cree.[34] Anecdotally, my partner, who was fifty at the time of writing, has shared that he thinks and dreams mainly in Cree, while younger community members, like

[34] Follow-up Conversation, Ken McDonald, June 2015.

Carol, usually say they think and dream in both Cree and English.[35] Carol pointed out that, when she was translating, neither the word "law" nor "justice" translated perfectly into Cree. In fact, as she expressed eloquently:

> When I was talking with the law students and translating for elders being interviewed [for the AJR project], I realized I had heard many of the stories before, since I was a small child, but had never thought about them being about 'law' or 'legal principles'. To me, it just always seemed the ways things were, part of life. As I talked and listened, I started to see the 'law' in the stories. The principles in them suddenly seemed to stick out so clearly. Once I started seeing the principles, I couldn't stop 'seeing' them. I realized, of course Cree people had always had laws and practiced law. It was right there in the stories. *It just wasn't talked about as 'law', but rather, 'a way of life.'* [36]

It seemed the height of academic hubris, and a little silly, to spend too much time grappling with distinctions between the English words of 'law' and 'justice' when the vast majority of our Cree participants thought and talked about what we were talking about as neither, but rather, as a "way of life."[37]

At the same time there obviously was value, as Carol pointed out, to consciously look for and draw out specific and explicit principles from the stories. The underlying goal of the intellectual shift – a focus on specificity, and principles, was important, particularly if the goal was useful application to real life issues. Talking this through together allowed me to realize this in a fuller way. In addition,

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[35] Follow-up Conversation, Ken McDonald, June 2015, and Follow-up Conversation, Carol Wanyandie, June 2015.

[36] Carol Wanyandie, Carol shared this insight at the TRC Education Day Presentation. See Hadley Friedland and Lindsay Borrows, "Creating New Stories: Indigenous Legal Principles of Reconciliation" (2014) Online: https://keegitah.wordpress.com [Friedland and Borrows, Creating New Stories], at 12-13 (emphasis mine).

[37] The fact people do not call their guiding principles for their way of life "law" is not indicative, in itself, that these principles are not, in fact, law. See H. Patrick Glenn, "The Capture, Reconstruction and Marginalization of "Custom"" (1997) 45 *American Journal of Comparative Law* 613 at 620 and Joseph Raz, "Can There be a Theory of Law?" in eds. Martin P. Golding and William A Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing Ltd., 2005) at 331.

of course, translation from Cree to English was already happening, younger community members were growing up unilingual, inundated with popular media and culture, and almost everyone had some experience with Canadian state laws. Mainstream society is 'lousy with law' while the myth of Indigenous peoples as lawless is both pernicious and pervasive. It has been used to justify dispossession and subjugation of Indigenous peoples on a massive scale throughout the world.[38] We didn't want the language of 'law' to be a barrier to engagement by professionals, but we did want to continue to promote its use, and broaden both professional and community understanding of what the English term 'law' encompasses.

We were all learning together as we went. Eventually we settled on a questionnaire we collaboratively developed, which included targeted questions about specific Cree legal principles and about practical implementation issues. We decided it made sense to describe the overall project as a "Cree Justice Process" but stuck with using the English language of law and legal principles in the questionnaire and interviews. We did provide each participant and professional a common information package of educational information.[39] Kris prepared a brief, plain language definition of 'law', which stressed law had different forms, and included Indigenous groups' "approaches to solving problems, making decisions, creating safety and maintaining or repairing relationships."[40] We developed a short

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[38] See, for example: James Tully, *Strange Multiplicity: constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) at 65, and Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty" An Essay on R v. Sparrow" (1991) 29 Alta L Rev. 498 at 507.

[39] AWN Cree Justice Project Participant Information Package, Appendix B [AWN Information Package] .

[40] Kris Statnyk, "Indigenous Law – What are we Talking About?", *Ibid* at 1.

version of the Cree legal summary that included all the identified principles, with a brief overview statement and the sources relied on, but omitted the longer discussion of each principle.[41] We then discussed the goals for the Cree Justice process proposal and the questionnaire.[42] These packages were provided to professionals and potential community participants, as well as anyone else who expressed interest. Community participants were approached using a modified 'snowball' approach. Carol gave packages and questionnaires to people who had previously participated in the AJR project, who had expressed interest in a Cree Justice process or frustration at the mainstream justice system, expressed curiosity or strong opinions, or, to be completely honest, came visiting at certain times.

Once people had the packages, they either decided to fill the questionnaire out themselves and bring it back or to go through it with Kris and Carol, like an interview. The interview format was the preferred method for most of the participants and all of the elders. One interview typically took about two to three hours, including visiting before and after. Given the length of time each took, the short time period for the active research, and other factors beyond our control, we ended up with eighteen questionnaires filled out in total. These questionnaires were anonymous, because we were sensitive to the fact people might end up sharing more personal experiences or feelings about the current justice system, and wanted to ensure privacy. We did collect certain identifying data for interpretative purposes (for example, an elder's words might carry more weight on certain subjects), and

[41] "Short Cree Legal Synthesis", *Ibid* at 3-8. I discuss the development and use of this short synthesis in Chapter Three.
[42] "An Indigenous Justice Process: Exploring the Possibilities Today", *Ibid* at 9-10.

that the *Aseniwuche Winewak* leadership identified as important for knowing how representative the questionnaires were, insofar as gender, specific community, personal and family involvement with the justice system and local healing program.[43]

I compiled the results of the completed questionnaires, with no knowledge of who each participant was.[44] These results included reflections and opinions about using Cree legal principles in a formalized contemporary justice process, both generally and specifically, and identifying practical needs for the implementation of such a process. In total, of the eighteen participants, all were Aboriginal and from the local coops and enterprises that *Aseniwuche Winewak*'s membership comes from. The majority of participants (ten) came from Susa Creek, the co-op community where Carol and I live and Kris was based. There were three participants from Wanyandie Flats, one who currently lives in the town of Grande Cache, one from Victor Lake and three from Grande Cache Lake. Eight participants were elders. There were eleven women and seven men. Three participants were professionals in the human services field. Of the eighteen participants, eight had some personal involvement and fourteen had family members involved with the state justice system at some point. Six participants had some personal involvement with the local 'healing' program.[45] All in all, there was a fairly representative mixture of people

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[43] AWN Cree Justice Process Questionnaire Compiled Results, Appendix C [Cree Justice Process Questionnaire Compiled Results] at 1-2.
[44] Though I would be disingenuous if I do not acknowledge I could make a pretty educated guess in some instances, based on the identifying data collected. This is the reality of the limits of anonymity in small communities.
[45] Cree Justice Process Questionnaire Compiled Results, *supra* note 43 at 1.

with a variety of knowledge and experiences that informed their thinking and responses.

4. A Contemporary Cree Justice Process – General Feedback:

Using Cree legal principles, for most people using the Native Court it would be more appropriate. It has a Cree foundation. It's more in tune with the community's ways.[46]

a. Analysis:

On a general level, all participants said they would like to see Cree legal principles used within a court process.[47] The vast majority of participants (seventeen) said that they would participate in such a process, if they, a loved one or a family member were charged with an offence.[48] Participants saw many potential benefits to individuals and the community in developing and having a court process that uses Cree legal principles. There were two major themes regarding potential benefits. The majority of responses (twelve) related to the potential efficacy of such a process to actually help people in the community. As one elder said, "it would be…good to see that. Maybe we won't have to see as many people in court eventually. Elders could talk to them and help them."[49] A strong and overlapping theme in the responses (six) was that such a process would be, put simply, "our own

[46] *Ibid*, Participant #8, at 6.
[47] *Ibid* at 3.
[48] *Ibid* at 4. One participant said it would depend on the health of the decision makers, and what was best for her family or loved ones in the particular situation (Participant #6). The one who said he wouldn't approached this from the perspective of a decision maker, stating he would not want to sentence his own family (Participant #1).
[49] *Ibid*, Participant #3, at 3.

way."[50] Participants generally liked the concept of a court that was "for the Native people"[51], "Native people talking with their own people rather than white people telling us what to do and how to do it"[52], with decision-makers who "would talk and not be racist."[53] Once participant summed this up particularly eloquently:

> Using Cree legal principles, for most people using the Native Court it would be more appropriate. It has a Cree foundation. It's more in tune with the community's ways.[54]

The predominant benefit participants saw in having a Cree justice process was its efficacy. They saw it as having a huge potential for helping people within their community, and believed helping and healing would occur through:

- A process that was "more inclusive and…more complete"[55] and "more holistic and focused on reconciliation,"[56]
- A process with "resources focused on helping and restoration,"[57] that "deals more with findings solutions."[58]
- Elders and other community members talking to, guiding and "working with" offenders,[59] and
- Elders and other community members really listening and understanding offenders' stories and struggles.[60]

Participants believed a Cree justice process would provide offenders:

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[50] *Ibid*, Participant #12, at 6.
[51] *Ibid*, Participant #4, at 6.
[52] *Ibid*, Participant #3, at 6.
[53] *Ibid*, Participant #17, at 6.
[54] *Ibid*, Participant #8, at 6.
[55] *Ibid*, Participant #14, at 6.
[56] *Ibid*, Participant #6, at 6.
[57] *Ibid*, Participant #13, at 6.
[58] *Ibid*, Participant #12, at 6.
[59] *Ibid*, Participant #1, Participant #3, Participant #15 , Participant #16, and Participant #17 at 6.
[60] *Ibid,* Participant #5 and Participant #17 at 6.

- A space to "tell your own story"[61] and "access…traditional healing."[62]
- Help and support to "follow through"[63], "take responsibility"[64] and be "accountable to family and community."[65]
- "A chance to change their path"[66],
- "An opportunity to make it right"[67] and
- A way to help others in the community.[68]

While everyone saw clear potential benefits, there was also a hardheaded clarity about potential risks. There were some definite cautions offered, participants stating that it would be good only if "it was taken seriously"[69] and "as long as people were made accountable."[70] One participant stated frankly that she would only use such a process:

> As long as the people were healthy/had recovered but I would be afraid to use it. It would be dependent on the situation and what avenue is best for me, loved ones or family member.

There were a variety of different risks people identified. The single biggest risk identified (five participants) was the risk of such a process not being taken seriously, and a lack of accountability and follow through (due to poor decision-making, or if there wasn't adequate supervision or extensive enough help available

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[61] *Ibid,* Participant #5, at 6.
[62] *Ibid,* Participant #13, at 6.
[63] *Ibid,* Participant #2, at 6.
[64] *Ibid,* Participant #10, at 6.
[65] *Ibid,* Participant #13, at 6.
[66] *Ibid,* Participant #11, at 6.
[67] *Ibid,* Participant #6, at 6.
[68] *Ibid,* Participant #16, at 6.
[69] *Ibid,* Participant # 16, at 3.
[70] *Ibid,* Participant #11, at 4.

afterwards).[71] Some participants proposed ways to mitigate these risks even as they named them. For example, one woman flagged the concern of conditions not being taken seriously, then added: "Community hours need to be assigned, not giving them a choice."[72] Three participants identified a risk of family influences, interference, or biases against certain individuals or communities.[73] Three participants identified risks of whom the decision-makers are, their history, personal wellness and capacity to work well together.[74] Finally, two participants identified concerns about potential risks *to* community based decision-makers, generally, and when "helping people who are very unstable."[75]

Participants revealed a realistic understanding of the complexity of such a process, and the challenges participants and decision-makers would have to contend with due to the relational networks everyone lives within. One elder, who had sat on the original Native Court in the 1980s, said he would volunteer for a Cree Justice process if he was asked, once it was up and running[76] but that he would prefer a loved one or family member go to the "regular court" if he was the decision-maker "because it would be too hard to sentence my family."[77] Ten participants said they would have concerns about confidentiality if they, a family member or a loved one participated in such process.[78] It is clear there are genuine concerns and real

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[71] *Ibid*, Participant #10, Participant #11, Participant #13, Participant #15 and Participant #16, at 6.
[72] *Ibid*, Participant #15, at 6.
[73] *Ibid*, Participant #6, Participant #8 and Participant #14, at 6.
[74] *Ibid*, Participant #5, Participant #15 and Participant #17, at 6.
[75] *Ibid*, Participant #4 and Participant #5, at 6.
[76] *Ibid*, Participant #1, at 3.
[77] *Ibid*, Participant #1, at 4.
[78] *Ibid*, at 12.

challenges of maintaining confidentiality in a small, close-knit community where people are interconnected in so many overlapping roles and relationships. It was also clear people are experienced dealing with this challenge, as several participants also offered suggestions for mitigating their concerns.[79] Seven participants said they did not have concerns about confidentiality. One participant pointed out, "court is already pretty public"[80] and another thoughtfully said she "wouldn't want anything hidden especially if it was serious. Keeping things hidden hinders healing."[81]

There were also insights offered about how a contemporary process might take into account changing circumstances and new needs and resources.[82] For example, one participant said a potential risk of such a process was that "some Cree legal principles would not address problems today (i.e. Avoidance on its own)."[83] One elder also wondered aloud about the legal response principle of avoidance, stating, "I'm not sure about this because we all live so far apart now. It might not be as important as it used to be."[84] Another participant, a human services professional, cautioned the community would need to be "mindful of the principles that cannot apply today (i.e. incapacitation)",[85] and was cautious about applying other principles (in this case, confronting the offender) that have been acted on coming from "a place

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[79] See, for example, *Ibid*, suggestions from Participant #4, Participant #5 and Participant #17 at 12.
[80] *Ibid*, Participant #12, at 12.
[81] *Ibid*, Participant #13, at 12.
[82] This adaptability is in keeping with the findings in the AJR Project Final Report, online: http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf [AJR Project Final Report] at 13.
[83] Cree Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #12, at 6.
[84] *Ibid*, Participant 18, at 18.
[85] *Ibid*, Participant #6, at 3. I assume this was based on her conflating the *principle* of incapacitation with historical *practice* of execution. This is a good example why principles and practices need to be distinguished carefully.

of anger' and so had "done more harm than good in the past."[86] Still another participant, also a human services professional stated:

> It has to be linear. Young people and people with FASD have to understand it. More direct which is a little bit different than how stories were used in the past. Very concrete and descriptive like the Cree language.[87]

Several participants suggested that victim, family and community safety could best be maintained through partnerships with service providers and police.[88] Training, programs and resources were cited as ways to fulfill the Cree legal obligation to help prevent future harms,[89] promote healing,[90] necessary for people to meet expectations or obligations within a Cree justice process[91] and generally an essential part of the process being beneficial.[92] These thoughtful responses demonstrate how the participants were familiar and confident enough with Cree legal principles they could proficiently contemplate reform, adaption and applicability. For these participants, the Cree legal principles discussed are clearly part of a living legal tradition.[93]

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[86] *Ibid*, Participant #6, at 13.
[87] *Ibid*, Participant #5, at 3.
[88] *Ibid*, Participant #5, Participant #11 and Participant #15, at 11.
[89] *Ibid*, Participant #15, at 26.
[90] *Ibid*, Participant # 13, at 3 and 6 (saying a process would be good if there was help like "dry centres" and a benefit would be the focus on healing/helping, but the risk could be if help through programs was too short or not extensive enough). Participant 8 at 18 (saying it would be okay for an offender to be separated from the community if leaving is "necessary for the offender to access resources for healing or if its needed for the healing of the victim.")
[91] *Ibid*, Participant #2, Participant #5, Participant # 12 and Participant #15 at 31.
[92] *Ibid*, Participant #13, at 3. Participant #1, Participant #2, Participant #3, Participant #6, Participant #9, Participant #10, Participant #11, Participant #13, Participant #14, Participant #15 and Participant #18 at 30.
[93] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 1-7.

Another example of the adept and mature legal reasoning already present at a community level was in relation to the Canadian justice system. While the mainstream justice system was referred to as unhelpful and problematic at times, it was also referred to as a resource. For example, one participant thought that decision-makers should "have a reference from the native court worker to know what the sentence would be in the mainstream justice system."[94] She also suggested that a way to maintain victim, family and community safety would be to let offenders know "this is their one chance to correct. Have it so re-offending goes to mainstream justice."[95] When talking about legal rights, one participant suggested the best approach would be to:

> Look at if there are different rights between Canadian court and Native court. Should not deny rights available under both. If they conflict go with rights that favour the offender but try to stick to traditional rights/Cree legal rights. [96]

The most interesting example of this came up in the discussion about what types of offences such a Cree Justice process could or should deal with. The majority of participants (eleven) stated that any and all offences could be dealt with.[97] Six participants said it should be only minor offences, and exclude serious offences such as rape and murder.[98] Two participants gave more nuanced answers, saying that while they believed all offences could be dealt with through such a process, in the case of serious and violent offences, it "should have to work with mainstream court

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[94] Cree Community Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #15, at 7.
[95] *Ibid*, Participant #15, at 11.
[96] *Ibid*, Participant #12, at 27.
[97] *Ibid*, at 5.
[98] *Ibid*, at 5.

system"[99] and it would be good if a "judge had final say and acted as a check in these situations" to ensure they were dealt with seriously.[100]

b. Discussion:

It is significant that every participant wanted a court process that used Cree legal principles, and that their primary reason was it's perceived efficacy relative to the current mainstream justice system. While people did like the idea of it being their own generally, they also clearly saw their own laws and ways of responding to dangerous or harmful actions as more *effective* in helping people and creating and maintaining safe healthy and peaceful communities. There are practical reasons that Cree legal principles might be more effective to maintain safety, peace and order within Cree communities that are rooted in a long history of learning from both successes and failures of Cree legal responses to universal human and social issues within Cree communities. For example, as discussed in the previous chapter, if Cree laws emerged and developed within a society of relationships, they may simply be more effective for dealing with issues that occur within unavoidable and continuing relationships of people living in close proximity, like the deeply intertwined relationships that make up most Cree communities. It makes intuitive sense that laws developed in and for a 'society of strangers' would not only be strange, but ineffective, even damaging, when applied to this very different set of circumstances.

This analysis of where resources such as training, programs, service providers, police and the mainstream justice system may fit, or even support a

[99] *Ibid*, Participant #15, at 5.
[100] *Ibid*, Participant #13, at 5.

contemporary formalized Cree justice process suggests principled discussions on specific and particular subjects may lead to real potential for harmonization between Indigenous and state based justice processes. Napoleon and I have written elsewhere about the unexamined effects of states delegitimizing and criminalizing Indigenous societies' legal responses to human vulnerability, violence, harm and safety, which are both a core foundation to any functional legal order,[101] and are the most likely to require, at least in the most urgent or extreme cases, some use of force to maintain community safety.[102] As some space has opened up within states for using Indigenous laws, under the rubric of "Aboriginal Justice", this unexamined limit has led to distortions. We say:

> Because only select aspects of certain Indigenous legal traditions are acceptable within the Canadian state, specifically, those aspects that do not require the use of coercive force or enforced separation from society, a peculiar set of assumptions develop regarding Indigenous laws related to what we broadly understand to be criminal behavior. This narrative completely and problematically conflates 'Aboriginal justice' with 'restorative justice' or rallies around the singular description of justice as 'healing'. All other aspects of Indigenous legal traditions are ignored, or described in whispers as 'uncivilized' oddities or embarrassing cultural remnants.[103]

While it is clear that healing is a key aspiration and principle in Cree legal traditions, a significant distortion flowing from states limiting 'Aboriginal justice' to *only* healing, is that both Indigenous and non-Indigenous people may now perceive Indigenous laws as inherently incapable of addressing serious offences, rather than seeing the limit as related to the state's monopoly on the use of coercive force in

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[101] H.L.A. Hart, *The Concept of Law* 2nd ed. (New York: Oxford University Press, 1994) at 194 [Hart].
[102] Roots to Renaissance, *supra* note 28 at 231.
[103] *Ibid*, at 237-238.

situations where such means are necessary for community safety.[104] In the *Aseniwuche Winewak,* where people lived their distinct way of life in relative isolation until the late 1960s, there are still elders with living memories of being called upon to deal with serious cases of harm and violence prior to police, courts or jails becoming the default response or even realistically available. Carol reflected that this reality may have influenced why so many participants believed a Cree Justice process could and should deal with all offences, even serious and violent ones.[105] Doing so was not novel to many elders.[106]

The majority of participants' willingness to contemplate addressing even serious offences in a Cree Justice process does stand out from the direction of most current Aboriginal justice or Native courts today, most of which only deal with minor non-violent offences.[107] It is worth pointing out that serious and violent crimes, particularly sexual and other forms of intimate violence are notoriously underreported within Indigenous communities (and Canadian society generally).[108]

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[104] *Ibid*, at 238.
[105] Carol Wanyandie, Follow-up Conversation, June , 2015.
[106] Of the 18 community participants, there were 8 elders who participated in community feedback about applying Cree legal principles in a Cree justice process. See Cree Justice Process Questionnaire Compiled Results, *supra* note 43 at 1.
[107] To the best of my knowledge, there are no Aboriginal courts or Community Justice initiatives that currently deal with indictable offences. Community Justice initiatives are increasingly limited and standardized. Hollow Waters is often lauded as an effective response to child sexual abuse, but it has not been replicated and it actually could not have been developed and implemented within today's restrictive guidelines. See Jonathan Rudin, "Aboriginal Justice and Restorative Justice" in Elizabeth Elliot and Robert Gordon, *New Directions in Restorative Justice: Isuses, Practice, Evaluation* (Portland: Willan Publishing, 2005).
[108] The Department of Justice found that 78% of sexual assaults are never reported. See Government of Canada, Department of Justice, Bill C-46, Records Application Post-Mills, as Case law Review, online: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p3_4.html. See also: Amnesty International, Canada, No More Stolen Sisters Campaign, online: http://www.amnesty.ca/our-work/campaigns/no-more-stolen-sisters.

For many complex social and historic reasons, police and courts are still often not a realistic or reliable option for restoring or maintaining safety or order in Indigenous communities, with or without the factor of geographic isolation.[109] One necessary implication of this reality is that, whether or not we acknowledge it, Indigenous people living in communities currently *do* deal with serious and violent offences. Individuals, families and groups currently *do* make decisions between tragic choices in terrible situations.[110] They just can't do so in a public, explicit and adequately supported and resourced way. Rather, they often do so completely disconnected from the checks, balances, and *resources* of the mainstream justice system.

We continue to ignore this reality, at the very real peril of the vulnerable. We also leave people to carry unspoken and unspeakable burdens of responsibility for

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[109] The Manitoba Justice Inquiry found that the manner in which victims were treated and the way the police responded to other women in similar situations discouraged women from going to the police for help: A.C. Hamilton and C.M. Sinclair, Commissioners, The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, online at http://www.ajic.mb.ca/volumel/chapter5.html#8 [Manitoba Justice Inquiry]. "Aboriginal Women" at 485-487. See more recently, Stonechild Inquiry, Justice D.H. Wright, Commissioner, *Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild,* October 2004, online at http://www.stonechildinquiry.ca/finalreport/Stonechild.pdf [Stonechild Inquiry] at 209-210. In a B.C. study of community justice initiatives in five Aboriginal communities, the authors found that in every focus group they held, "[w]omen's stories of police brutality and disillusionment with the criminal justice system were all too common" and that "[i]n many cases police attitudes and responses was cited as the biggest deterrent in seeking support or reporting the violence". It was generally found that "the police discriminate against Aboriginal peoples and often fail to respond when they are called": Wendy Stewart, Audrey Huntley and Fay Blaney, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* (2001), chapter IV, Online: <http://www.lcc.gc.ca/pdf/Awan.pdf > at 4.

[110] Mary Ellen Turpel Lafond, "Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System" (2005) 68 Sask L Rev 293, at 295 and Hylton, *supra* note 16 at 69, stating "all available evidence suggests the rates of violence and sexual offending in many Aboriginal communities are …as much as five times higher than Canadian rates, perhaps higher."

their own and loved ones' safety and survival.[111] Conditions of silence and virtual impunity create spaces ripe for abuses, and abusers, to flourish.[112] A man from another community captured the heart of the problem when he spoke about a long period of almost a complete breakdown in social order, where horrific crimes occurred, and elders felt both Canadian state and Indigenous laws failed people:

> I think there always was law, but probably a period when people just didn't regard it anymore and didn't care and a lot of it came when they stopped fearing and stopped respecting the leadership, the Chief, and it seemed lawless, but there is a law but all of a sudden it is not being enforced anymore.[113]

There has been, and in many cases, continues to be, a cavernous gap between legitimacy and the capability for enforcement in Indigenous communities. The two participants who proposed accessing the mainstream justice system as a resource for serious offences clearly understood the usefulness and necessity of authority and force in serious cases, and knew where and how that can be accessed today – through the state justice system. Their suggestions made eminent practical and principled sense in the current context. Their reasoning reinforces the point that how well we answer institutional level questions like harmonization will depend on how well we do the intellectual work first that is needed to approach them in the most grounded and symmetrical way possible.

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[111] Anne McGillivray and Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999) at 75.

[112] Truth and Reconciliation Committee of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, 2015), online: http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf at 202.

[113] Rick Gilbert, AJR Project Secwepemc Legal Traditions Report, (May 2014), on file at the University of Victoria ILRU at 41.

5. Using Cree Legal Principles in a Cree Justice Process- Specific Feedback

David shared his vision of a contemporary, formalized Cree Justice process that was built on, and would continue to build a repository of principled decisions. We had completed the *Cree Legal Traditions Report*, which includes a written summary of Cree legal principles related to harms and conflicts, set out in a framework I hoped could make these principles more transparent and accessible to people wanting to use them in a more formal and explicit way today. This included principles about legal processes, responses, rights and obligations, as well as the general underlying principles. This seemed like a perfect match. The question was, would elders and other community members view these principles as their own? Would they see the principles, restated in this form, rather than embedded in narrative, emerging from landmarks, or discussed over endless cups of tea, as recognizable and usable, as I hoped they could be? Could they imagine accessing them in this form and applying them to issues within a Cree justice process, as David imagined? As may already be apparent from the discussion above, the short answer is there was no problem whatsoever.

Napoleon et al argue that, critical, rigorous and practical exploration of the relevance of and application of Indigenous laws to contemporary situations are necessary if they are to be seen as more than "cultural remnants,"[114] We sought community feedback about specific Cree legal principles we had identified and articulated in the *Cree Legal Traditions Report* related to process, responses, rights

[114] Val Napoleon, Angela Cameron, Colette Arcand and Dahti Scott, "Where's the Law in Restorative Justice?" in Yale Belanger, ed., *Aboriginal Self Government in Canada: Current Trends and Issues,* 3rd edition (Saskatoon, Purich Publishing Press, 2008) [Napoleon et al] at 21.

and obligations. All participants appeared completely comfortable discussing the specific principles, and gave incredibly nuanced and thoughtful clarifications, cautions and guidance for applying them within a formalized justice process today. Despite it being possible for participants to respond to the questions without giving reasons, most explained their reasoning behind their responses. Their explicit reasoning sometimes affirmed details that were omitted from the short summary they were provided with, but were present in the full legal summary, and often broadened or deepened my own understanding of how these principles should be interpreted and applied. At the end of the interviews, Kris said he had learned so much he wished he could re-write the legal synthesis, based on the additional feedback.[115] This was exciting because it is exactly the vision for the legal synthesis –that it is like a legal memo that can be continually added to and changed or adapted as people discuss, debate, clarify and apply the principles. The following analysis will map on to the categories in the analytical framework.

i. <u>Legal Process:</u>

a. Analysis:

Decision-Makers:

A person who understands the people, a good hearted person.[116]

All eighteen participants thought all identified decision-makers from the legal synthesis, which included: (1) medicine people, (2) elders, (3) family members and

[115] Kris Statnyk, personal conversation, June 2014.
[116] Cree Community Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #17, at 8.

(4) the community as a group, should be involved in a court process that uses Cree legal principles.[117] Seven participants stressed that which decision-makers would be involved would depend on the situation, and should be determined on a case-by-case basis.[118] When explaining the reasoning behind the importance of selecting decision-makers on a case-by-case basis, one participant explained:

> Each group of decision-makers have their gifts. Have people with relevant understanding, knowledge and expertise.[119]

On a similar vein, another stated:

> Knowledge is key. Not all elders have the knowledge. Need people with knowledge. Family members would be appropriate depending on the situation.[120]

However, she went on to say honestly, that, as a family member, "I wouldn't do it. I wouldn't be comfortable with it."[121] Two elders stressed it would be most effective if all decision-makers discussed things as a group:

> Yes, but it would work better if everybody as a whole group could discuss it whether they are medicine people, elders or family members.[122]
> Yes, these ones. The best way would be to have them together as a group so they all have a say.[123]

Two participants added more decision-makers to the existing categories, stating it would be vital to include victims, offenders and support people, which might include the native court worker or a lawyer.[124] Another participant said that, while the identified decision-makers should all be involved, and all "bring their own valuable

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[117] *Ibid*, at 7.
[118] *Ibid*, Participant #4, Participant #5, Participant #7, Participant #8, Participant #11, Participant #13, and Participant # 17 at 7.
[119] *Ibid*, Participant #5, at 7.
[120] *Ibid*, Participant #13, at 7.
[121] *Ibid*, Participant #13, at 7.
[122] *Ibid*, Participant #2, at 7.
[123] *Ibid*, Participant #18, at 7.
[124] *Ibid*, Participant # 6 and Participant #15, at 7.

perspectives," she thought they "shouldn't all be the same" and a court process should "have a resource person involved as well who has a background in local history."[125]

Given the emphasis on choosing the appropriate decision-makers carefully, on case-by-case basis, from this feedback, and in the procedural steps below, how decision-makers should be selected, and their important characteristics, were crucial issues when imagining applying these principles in a court process. Seven participants emphasized asking potential decision makers and seeing if they were willing to take part.[126] As one participant pointed out, "not everyone will want to or has too many other obligations."[127] Two participants suggested having people actually apply,[128] one stressing the importance of an "extensive screening process" including criminal record and child welfare checks.[129] Two participants suggested it would be best to have a pool of people to choose from for each case.[130] The majority of participants (eleven) suggested selecting decision-makers by asking elders or seeking spiritual guidance about who would be best suited and selecting decision-makers' based on their knowledge, personal qualities and character.[131] Important characteristics of decision-makers included:

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[125] *Ibid*, Participant # 8 at 7.
[126] *Ibid*, Participant #1, Participant #2, Participant #3, Participant #4, Participant #9, Participant #10 and Participant #12 at 9.
[127] *Ibid*, Participant #4, at 9.
[128] *Ibid*, Participant #6 and #15 at 9.
[129] *Ibid*, Participant #6 at 9.
[130] *Ibid*, Participant #13 and Participant #16 at 9.
[131] *Ibid*, Participant #1, Participant #5, Participant #7, Participant #8, Participant #10, Participant #11, Participant #12, Participant #13, Participant #14, Participant #17 and Participant #18 at 9.

People living their own lives in a healthy, responsible way:

- "Somebody who is living a good life."[132] "A person who makes responsible choices in their own lives."[133] "They need to walk their talk."[134]
- "Well/healthy, objective. No criminal record or very old record."[135]
- "A person with a good lifestyle, people who have personal successes."[136]
- "Maturity in mind and character."[137]
- "Good-standing elder, role models, addiction-free, someone grounded in their faith."[138]

People bringing varied knowledge and wisdom:

- "Someone who would be able to understand the problem and be able to put it all together. People who understand the process."[139]
- "Wise people (elders), western education background for some."[140]
- "A person with lots of knowledge."[141]
- "Understands Cree laws."[142]
- "Someone wise. Elders that know and share their background."[143]

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[132] *Ibid*, Participant #4, at 8.
[133] *Ibid*, Participant #10, at 8.
[134] *Ibid*, Participant #5, at 8.
[135] *Ibid*, Participant #6, at 8.
[136] *Ibid*, Participant #11, at 8.
[137] *Ibid*, Participant #14, at 8.
[138] *Ibid*, Participant #15, at 8.
[139] *Ibid*, Participant #1, at 8.
[140] *Ibid*, Participant #8, at 8.
[141] *Ibid*, Participant #11, at 8. See also Participant #13, at 8.
[142] *Ibid*, Participant #12, at 8.
[143] *Ibid*, Participant # 16, at 8.

People with certain personal attributes and skills, such as being balanced, objective, trustworthy, and capable of follow through, while also being respectful, compassionate and non-judgmental, with good listening and communication skills:

- "Ability to be impartial," [144] objective…someone fair, able to reason."[145]
- "Trustworthy, someone who returns your respect fully."[146]
- "Non-judgmental,"[147], "Humility"[148], "honesty"[149]
- "Respected person (not gossiping or negative who put people down), reliable."[150]
- "A balanced person (not mean, not easy), somebody who will follow through, people who would be able to do."[151]
- "Ability to follow through on decisions, knows ramifications of their decisions, compassionate and stern (balanced)."[152]
- "You probably don't want to get anybody too mean. Somebody that is willing to help the younger people."[153]
- "Someone who can speak good English and Cree. Someone who can make the people understand."[154]
- "Ability for them to talk together well with each other (communication)."[155]

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[144] *Ibid*, Participant #14, at 8.
[145] *Ibid*, Participant #6, at 8.
[146] *Ibid*, Participant #7, at 8. "Trustworthy" – Participant #16, at 8.
[147] *Ibid*, Participant #8, at 8.
[148] *Ibid*, Participant #4, at 8.
[149] *Ibid*, Participant #5, at 8.
[150] *Ibid*, Participant #13, at 8.
[151] *Ibid*, Participant #11, at 8.
[152] *Ibid*, Participant #12, at 8.
[153] *Ibid*, Participant #18, at 8.
[154] *Ibid*, Participant #2, at 8.

- "Able to listen to the needs of others."[156]
- "A person who understands the people, a good hearted person."[157]

While I have separated these for clarity here, most participants identified at least two, if not all of these characteristics as important for decision-makers.[158]

Procedural Steps:

I think these are all the right steps. I can't think of anything that is missing.[159]

There were varied opinions about how important each of the procedural steps identified in the Cree legal summary were (participants were asked to rate their importance on a scale from one to five) and some people did not answer all of the questions, as will be discussed below. The procedural steps identified in the Cree legal summary were:

(1) Recognizing Warning Signs

(2) Taking Appropriate Safety Measures for Individuals and Community

(3) Seeking Guidance from those with Relevant Understanding/Expertise

(4) Confronting offenders and deliberating decisions publically

(5) Identifying appropriate decision-makers and implementing their decisions.

(1) Recognizing Warning Signs:

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[155] *Ibid*, Participant #3, at 8.
[156] *Ibid*, Participant #4, at 8.
[157] *Ibid*, Participant #17, at 8.
[158] *Ibid*, at 8.
[159] *Ibid*, Participant #3, at 13.

Thirteen participants rated this step as very important (5/5), and two rated it 4/5 for importance. Three participants commented that recognizing warning signs would be important and preventative.[160] However, one also commented that while this was important, it could be "difficult to recognize with some people."[161] Two participants commented that it would depend, and did not circle any number.[162] Obviously more discussion around this step would be necessary prior to including it in a court process today.

(2) Taking Appropriate Safety Measures for Individuals and Community:

Sixteen participants rated this step as very important (5/5) and two rated it 4/5 for importance. Two participants offered cautionary comments, saying this step is important "if you know how to do it"[163] and "it would be hard though."[164] When asked how a process could ensure victim, family and community safety is maintained, participants gave a wide variety of insightful suggestions. Seven participants suggested proper supervision of offenders was vital.[165] Two elders stressed this included talking to them regularly,[166] and other participants suggested supervision could be implemented by having "family or people close to them…watch over them"[167] or by "small groups" for smaller offences, as long as they were "people

[160] *Ibid*, Participant #8, Participant #9 and Participant #17 at 13-14.
[161] *Ibid*, Participant #17 at 14.
[162] *Ibid*, Participant #10 and Participant #11, at 13.
[163] *Ibid*, Participant #10, at 13.
[164] *Ibid*, Participant # 18 at 14.
[165] *Ibid*, Participant #4, Participant #8, Participant #9, Participant #13, Participant #16, Participant #17 and Participant #18 at 11.
[166] *Ibid*, Participant #9 and Participant #18, at 11.
[167] *Ibid*, Participant #17 at 11.

that take it seriously."[168] The same participant stressed it depended on the offence, and said, in the case of more serious offences, "avoidance might be best- keeping people separated."[169] Another participant said that in cases of intimate violence "then separation from victims, people at risk."[170]

Four participants said that, for safety to be maintained, the whole community needed to work past divisions and make supporting safety a priority.[171] Participants believed maintaining safety was possible with "the whole community's support"[172] and "if safety was a community priority and process."[173] One elder stated strongly: the "whole community [needs] to get together then they will be safe. That's the only way."[174] As discussed in the previous section, three participants said that partnerships with police, service providers and the mainstream justice system were vital for maintaining safety[175] One participant highlighted "substance abuse conditions"[176] and another taking "a bigger picture approach to community wellness."[177] All participants believed taking measures to keep individuals and the community safe was important. The variety of solutions offered reveals their nuanced understandings and experiences grappling with the challenges and complexity of doing so effectively today.

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[168] *Ibid*, Participant #13, at 11.
[169] *Ibid*, Participant #13, at 11. See also Participant 16, at 11, stating: "Have to watch people, can't hide things. Stay away from them, avoid them."
[170] *Ibid*, Participant #8, at 11.
[171] *Ibid*, Participant #1, Participant #2, Participant #7 and Participant #14 at 11.
[172] *Ibid*, Participant #7, at 11.
[173] *Ibid*, Participant #1, at 11.
[174] *Ibid*, Participant #2, at 11.
[175] *Ibid*, Participant #5, Participant #11 and Participant #15, at 11.
[176] *Ibid*, Participant #8, at 11.
[177] *Ibid*, Participant #6, at 11.

(3) Seeking Guidance from those with Relevant Understanding/Expertise:

Sixteen participants rated this step as very important (5/5) and two rated it 4/5 for importance. One participant commented that this step is "one of the most important."[178] Another said that this step "should happen for panel (i.e. what decision-makers are best suited for the situation"[179] while another said this "makes selection of the panel critical (having well-rounded decision-makers).[180] This reinforces the emphasis on a case-by-case selection of decision-makers discussed above.

(4) Confronting offenders and deliberating decisions publically:

Eleven participants rated this step as very important (5/5). Two rated it 3/5 and 2 rated it 1/5. Three participants didn't circle any number. Participants who commented on this step were divided, as their ratings indicate. As noted above, one participant was concerned about how this principle has been implemented in the past, from a place of anger, which did "more harm than good."[181] On the other side of the debate, another participant said confronting offenders was important, "especially if you don't know what you're doing to others."[182] He saw it as helpful to

[178] *Ibid*, Participant #12, at 13.
[179] *Ibid*, Participant #13, at 14.
[180] *Ibid*, Participant #12, at 13.
[181] *Ibid*, Participant #6, at 13.
[182] *Ibid*, Participant #10, at 13.

offenders. Two participants advocated care in confronting offenders, one advising, "see if there is another way of dealing with it first"[183] and another saying that "discretion would have to be used."[184] While these concerns and debate are congruent with the general concerns over confidentiality, this also gave me valuable feedback for how I framed this step. By combining confronting the offender and public deliberation, the one overshadowed the other. In the full Cree legal summary, it was clear that discretion was used when confronting offenders, and there were examples of people being shown how they had affected others, privately or one on one, rather than being *publically* confronted about their harmful actions. This was also very clearly the preferred method for the *Aseniwuche Winewak*.[185] As will be discussed later, public deliberation is seen as important. For these reasons, I am cautious about these results. I think this procedural step would need to be divided into two, and each discussed more thoroughly, in order to gain a more accurate understanding of the underlying principle.

(5) Identifying appropriate decision-makers and implementing their decisions:

Sixteen participants rated this step very important (5/5). One rated it 4/5 and one rated it 3/5 for importance. One participant said it would be important to "make sure everyone understands,"[186] and another commented that this was an important

[183] *Ibid*, Participant #17, at 14.
[184] *Ibid*, Participant #14, at 14.
[185] In addition to this feedback, see discussion in the Chapter Three, at 101-103.
[186] Cree Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #17, at 14.

step "because on case by case it would be different."[187] This is congruent with the feedback regarding the care taken in choosing decision-makers, and the felt need for decision-makers to be selected on a case-by-case basis.

b. Discussion:

In general, while the majority of participants thought all these procedural steps were important, and four participants affirmed these procedures as "good" or "all the right steps"[188] in specific comments, with one adding, "the steps should all work as an intervention,"[189] there is obviously more work to be done. In all the AJR project final reports, identifying procedural steps was the most challenging for student researchers and the area in which I felt the most uncertain, either as author or as editor. There could be several reasons for this. It is possible that procedure is an area of law that has been particularly damaged by the ravages of colonialism.

Procedures fall within what HLA Hart would call "secondary rules" – rules about the processes by which primary rules are interpreted, adjudicated and changed.[190] I have often wondered if a society's secondary rules may be the hardest hit by the colonial dismantling and delegitimizing of legal traditions. As Napoleon and I argue elsewhere, the analogous situation of what happened to most, if not all, Indigenous societies would be if legal actors in contemporary Canadian society (judges, court clerks, police, prison guards) suddenly were punished by powerful outsiders, despite, or *because* of, their role in maintaining familiar legal procedures

[187] *Ibid*, Participant #7, at 13.
[188] *Ibid*, Participant #3, Participant #4, Participant #11 and Participant #18 at 13-14.
[189] *Ibid*, Participant #11, at 13.
[190] Hart, *supra* note 101 at 98.

to reach and implement a legitimate decision. And not just punished, but demeaned and discredited, held up as examples of irrationality and barbarism. We say:

> Our current legal actors would be placed in an untenable position. So would we, as ordinary Canadian citizens. Those who trusted and turned to these legal actors when in need would suddenly no longer know what or who to rely on for protection from harm. We would know that our reliable, respected legal actors were punished according to the outsiders' rules for following the rules we knew. So whose rules should we trust? Neither would feel particularly solid or reliable.[191]

This crisis of legitimacy might contribute to or help explain the perception of the long period of virtual lawlessness described by the Secwepemc elders in the above section.

It is also possible that the issue is the opposite problem. It could be that this is an area so intact that people's implicit knowledge of process and procedures is taken for granted, so the challenge lies in drawing out what seems so obvious it is not articulated, in an explicit way.[192] A third possibility (and none of these are mutually exclusive) is that procedures that worked well in the past may not work as well today, and new procedures need to be added or created, due to changing circumstances.[193] For the *Aseniwuche Winewak*, who are interested in applying Cree legal principles in a court or court-like process, this may be particularly relevant and necessary. Developing a hybrid process likely entails picking and choosing essential

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[191] Roots to Renaissance, *supra* note 28 at 232.

[192] This difficulty was explored in Val Napoleon, Angela Cameron, Colette Arcand and Dahti Scott, "Where's the Law in Restorative Justice?" in Yale Belanger, ed., *Aboriginal Self Government in Canada: Current Trends and Issues,* 3rd edition (Saskatoon, Purich Publishing Press, 2008) [Napoleon et al].

[193] See the detailed and thoughtful analysis of this complex issue through investigatory, trial and sentencing phases of criminal justice in David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012). See also Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in *RCAP: Roundtable on Justice, Aboriginal People and the Justice System: National Round Table on Aboriginal Justice Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1993).

legal processes to include, while mindfully setting others aside from the formal process.

ii. Legal Responses:

a. Analysis:

Participants were asked what Cree legal responses would be important to include in a court process using Cree legal principles today. The legal responses identified in the Cree legal summary were:

(1) Healing (the offender and the victim)

(2) Supervision

(3) Temporary Avoidance or Separation

(4) Permanent Separation

(5) Acknowledgement of Responsibility

(6) Re-integration

(7) Natural and Spiritual Consequences

I added the following responses, which I intended to refer to the Criminal Code sentencing principles of denunciation and general and specific deterrence[194]:

(8) Sending a Message the offence was wrong (to the offender and to the community).

Participants were also asked what offences each particular response might be more or less appropriate for.

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[194] *Canadian Criminal Code*, RSC 1985, c C-46, S. 718 (b). For a plain language discussion of the theory of specific and general deterrence see: http://www.lawconnection.ca/content/sentencing-theory-backgrounder

(1) Healing:

Fifteen participants said including the response principle of both healing the offender and healing the victim in a court process was very important (5/5), one rated both 4/5 and two rated both 3/5 for importance. Fourteen participants commented that healing the offender would be important all of the time, for all offences.[195] One participant commented that healing was always important, but "especially important for adults." He reasoned, "If you're in court its because you've done something wrong."[196] On a similar line, one elder reasoned, "If someone's not right it's important to put them in the right mindset."[197] However, another elder did caution, "It depends on the case. Some people are easy to help, others less willing to accept it."[198] Another participant said that, while important, healing "is hard work".[199]

Twelve participants commented that healing the victim was important all the time.[200] Two participants reasoned "it is better for the community"[201] or people "need to let go of grudges"[202] Two participants referred to facilitating forgiveness and restoration.[203] One elder cautioned "each individual will respond to help differently"[204] and two participants commented, like healing for the offender,

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[195] Cree Justice Process Questionnaire Compiled Results, *supra* note 43 at 15.
[196] *Ibid*, Participant #11, at 15.
[197] *Ibid*, Participant #7, at 15.
[198] *Ibid*, Participant #1, at 15.
[199] *Ibid*, Participant #6, at 15.
[200] *Ibid*, at 16.
[201] *Ibid*, Participant #12 at 16.
[202] *Ibid,* Participant #17 at 16.
[203] *Ibid*, Participant #7 and Participant #13, at 16.
[204] *Ibid*, Participant #1, at 16.

healing for the victim was hard work. [205] This feedback is consistent with stories that illustrate the Cree ideal of healing (note the reasoning: if someone has done wrong, they need healing to put them back in their 'right' mind again), the predominance of healing in the Cree legal summary, and the findings in the *AJR Final Report* that healing, while a preferred response to harm, is not viewed as a quick fix or panacea.[206]

(2) Supervision:

Fourteen participants said the response principle of supervision of the offender in a court process was very important (5/5), two participants rated it 4/5 and one participant rated it 3/5 for importance. One participant didn't rate it at all. Participants had a lot to say about when and *how* this response principle should be applied. Seven participants commented that this principle should apply all the time, to all offences.[207] One participant added that, while it should apply to all offences, it would be even more important in cases of "violent and confrontational behavior."[208] One elder thought supervision needed to be "closer than a probation officer." She stressed, "Some people actually need to be followed around to be properly supervised. What the probation officer does is not supervision."[209] Another

[205] *Ibid*, Participant #6 and Participant #7, at 16.
[206] AJR Project Final Report, *supra* note 82, at 9.
[207] Cree Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #2, Participant #6, Participant #11, Participant #13, Participant #15, Participant #16, and Participant #18 at 17.
[208] *Ibid*, Participant #13, at 17.
[209] *Ibid*, Participant #7, at 17.

suggested having "more than one person supervising. Maybe decision-makers."[210] Some participants saw supervision as vital to "look out for you so you're not getting into trouble"[211] or so "we can ensure no-one re-offends."[212]

On the other hand, four participants thought that, while this principle was important, it would *not* be appropriate in all cases, and needed to be decided on a case-by-case basis.[213] One participant commented that, while in some cases, supervision would be "really appropriate", in others it would be "too much"[214] and another pointed out, "they need room to breathe too."[215] Participants also talked thoughtfully about *how* they believed supervision should be implemented. Two participants stressed the supervisor's main role is actually "support".[216] One participant even suggested supervision is best implemented in the "form of family support" because "they will know best"[217] Another said that if an offender was "had hurt someone, they should be supervised" but added it was important the supervisor "communicate with [the offender] throughout supervision." [218]

(3) Temporary Avoidance or Separation:

Only seven participants said including the response principle of temporary avoidance or separation of the offender in a court process was very important. Four

[210] *Ibid*, Participant # 11, at 17.
[211] *Ibid*, Participant #16, at 17.
[212] *Ibid*, Participant #18, at 17. Would that we could.
[213] *Ibid*, Participant #4, Participant #8, Participant #10 and Participant #12, at 17.
[214] *Ibid*, Participant #12, at 17.
[215] *Ibid*, Participant # 4, at 17.
[216] *Ibid*, Participant #5 and Participant 15 at 17.
[217] *Ibid*, Participant #17, at 17.
[218] *Ibid*, Participant # 10 at 17.

participants rated it 4/5, two participants rated it 3/5, one rated it 2/5 and one rated it 1/5 for importance. Four didn't rate it at all. This was the largest range in ratings for any principle.

Eleven participants commented that this principle would need to be applied on a case-by-case basis, and only in specific circumstances – particularly for serious and violent offences and until or in order for the offender to get the help they needed to heal.[219] Some participants thought temporary avoidance or separation would only be appropriate in cases of serious or very harmful offences,[220] where the community was at risk,[221] or for "repeat offenders who don't take opportunities for healing."[222] Three participants believed temporary avoidance or separation would be appropriate for cases involving physical or sexual violence, including domestic abuse and incest, saying the offender would need help or treatment before returning to the home.[223] One participant also said it would be appropriate "if it is needed for the healing of the victim."[224]

Six participants said that temporary avoidance or separation would be appropriate until or so the offender was able to get the help or healing needed.[225] One participant said that while this principle was important, the offender "would

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[219] *Ibid*, Participant #2, Participant #4, Participant #5, Participant #6, Participant #8, Participant #10, Participant #11, Participant #12, Participant #13, Participant #14 and Participant #15, at 18.
[220] *Ibid*, Participant #10, Participant #11 and Participant #13, at 18.
[221] *Ibid*, Participant #12, at 18.
[222] *Ibid*, Participant #13, at 18.
[223] *Ibid*, Participant #6, Participant 14 and Participant #15, at 18.
[224] *Ibid*, Participant #8, at 18.
[225] *Ibid*, Participant #1, Participant #3, Participant #6, Participant #8, Participant #11 and Participant #15, at 18.

have to be in a good mind to understand why."[226] Two participants stressed that, if this principle was implemented, the offender would still need support and to see their family (with supervision).[227] Two participants said they were "not sure" about this principle. One elder, as referred to above, wondered if it was as important as it used to be, due the fact "we all live so far apart now."[228]

(4) Permanent Separation:

Six participants said including the response principle of permanent separation of the offender in a court process was very important. Two participants rated it 4/4, four participants rated it 3/5 and one participant rated it 1/5 for importance. Three didn't rate it at all.

One participant stated their belief that permanent separation was "never appropriate."[229] Two participants said they were "not sure" or "would be hesitant,"[230] the latter reasoning that it was "almost too much" and "it would be judging – not my job."[231]

Eleven participants said this principle would need to be applied on a case-by-case basis, and only in very specific circumstances – particularly the most serious and violent of offences, such as murder, and where the offender is unwilling or incapable of changing, such as refusing to take responsibility or permanent

[226] *Ibid*, Participant #4, at 18.
[227] *Ibid*, Participant #17 and Participant #16, at 18.
[228] *Ibid*, Participant #18 and Participant #7, at 18.
[229] *Ibid*, Participant #8, at 19.
[230] *Ibid*, Participant #18 and Participant #12, at 19.
[231] *Ibid*, Participant #12, at 19.

instability.[232] Of these, eight participants said the seriousness of the crime as a significant factor,[233] four said the offender's inability or unwillingness to change or make amends was a significant factor,[234] and two said the offender's family was a significant factor to consider in each case.[235] Most participants listed two or more considerations, some of which could be seen to pose a possible conflict in certain cases. For example, one participant stated:

> It depends what you do. Murder or really violent crimes. If there was "no hope, no help" for them. If they were forgiven they could be alright.[236]

Another said:

> If there were no kids involved. Violent offences and offenders that aren't willing to deal with underlying issues.[237]

Participants all seemed acutely attuned to the gravity, risks and consequences of such a drastic measure. One participant cautioned: "The last two instances [temporary and permanent separation] could be at risk of quick fixes which could be more detrimental than helpful."[238] One elder said, "If it is to be done it should be done in the right way."[239]

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[232] *Ibid*, Participant #2, Participant #3, Participant #4, Participant #5, Participant #6, Participant #7, Participant #9, Participant #10, Participant #11, Participant #14 and Participant #15, at 19.
[233] *Ibid*, Participant #3, Participant #4, Participant #6, Participant #7, Participant #9, Participant #10, Participant #11 and Participant #15, at 19.
[234] *Ibid*, Participant #4, Participant #6, Participant #10 and Participant #15, at 19.
[235] *Ibid*, Participant #3 and Participant #15, at 19.
[236] *Ibid*, Participant #10, at 19.
[237] *Ibid*, Participant #15, at 19.
[238] *Ibid*, Participant #14, at 19.
[239] *Ibid*, Participant #1, at 19.

(5) Acknowledgement of Responsibility:

Fifteen participants said including the response principle of the offender acknowledging responsibility in a court process was very important. One participant rated it 4/5, one participant rated it 3/5 and one participant rated it 2/5 for importance. Two participants said this would be good or really good to see. [240] Six participants said this principle would be important all the time, for all offences.[241] One added emphatically, "it's the most important for everybody."[242]

On the other hand, one participant flagged a "concern about people taking advantage of this."[243] Some participants saw the validity of this as conditional, cautioning, "if it's sincere,"[244] "there would have to be a mutual understanding of responsibility for it to be meaningful,"[245] "amends and restitution more than apology", [246] and "as long as they came to make the proper amends, it would be appropriate."[247]

(6) Re-integration:

Thirteen participants said including the response principle of offender re-integration in a court process was very important. Three participants rated it 4/5 and two participants rated it 3/5 for importance. Two participants seemed to see

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[240] *Ibid*, Participant #1 and Participant #7, at 20.
[241] *Ibid*, Participant #3, Participant #4, Participant #9, Participant #11, Participant #14 and Participant #16, at 20.
[242] *Ibid*, Participant #16, at 20.
[243] *Ibid*, Participant #8, at 20.
[244] *Ibid*, Participant #15, at 20.
[245] *Ibid*, Participant #5, at 20.
[246] *Ibid*, Participant #6, at 20.
[247] *Ibid*, Participant #18, at 20.

this principle as an imperative to others. One elder said, "Good because they want to come back and it's good to welcome them."[248] Another participant stated, "Focus on what needs to be done to facilitate acceptance."[249] Two participants said this would be important all the time and should always be a focus.[250]

Ten participants commented that how or whether this principle applies should be decided on a case-by-case basis and would depend.[251] Factors to consider included the severity or type of the harm,[252] whether the offender has taken responsibility and addressed the underlying issues,[253] and whether it is acceptable to the victim(s).[254] For example, one participant commented, "Each case is going to be so hard and depend on the type of harm and the victim(s)."[255] Another cautioned, "But only when people have made changes in their life, taken responsibility, gotten the help they need."[256] Finally, one participant, who saw this as "important for everyone involved" and "in all offences if it is possible" stressed, "It has to be acceptable to the victims. Also reintegrating victim."[257]

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[248] *Ibid*, Participant #1, at 21.
[249] *Ibid*, Participant #6, at 21.
[250] *Ibid*, Participant #5 and Participant #12, at 21.
[251] *Ibid*, Participant #3, Participant #4, Participant #8, Participant #9, Participant #10, Participant #11, Participant #13, Participant #15, Participant #16 and Participant #18, at 21.
[252] *Ibid*, Participant #4, Participant #9, Participant #13 and Participant #16, at 21.
[253] *Ibid*, Participant #3, Participant #11 and Participant #18, at 21.
[254] *Ibid*, Participant #4, Participant #13 and Participant #15, at 21.
[255] *Ibid*, Participant #4, at 21.
[256] *Ibid*, Participant #11, at 21.
[257] *Ibid*, Participant #15, at 21.

(7) Natural and Spiritual Consequences:

Twelve participants said including the response principle of natural and spiritual consequences in a court process was very important. One rated it 1/5 for importance. Five participants didn't rate it at all.

Four participants commented that considering natural and spiritual consequence was important all the time, for all cases.[258] Some participants talked about this being good or very important, stating: "it needs acknowledgement",[259] "they have to understand and consider it [including seeking to heal the person if they ascertain bad medicine was involved]",[260] and "decision-makers should keep prayer involved before they make decisions."[261] Two participants gave reasons for its importance, stating: "it would be good because everyone should think that way. What you do today will affect you later on",[262] "if someone uses medicine in a bad way it's going to come back on them."[263]

Interestingly enough, two other participants cited their firm belief in the existence of natural and spiritual consequences, as reasons for the *opposite* proposition – that it was not necessary to include this principle in a formal court process, explaining this principle is "not applicable because it will happen anyway"[264] and "it's going to come back on him anyways."[265] A total of four participants stated this principle should not be used in a court process today. The

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[258] *Ibid*, Participant #3, Participant #8, Participant #11 and Participant #12, at 22.
[259] *Ibid*, Participant #8, at 22.
[260] *Ibid*, Participant #17, at 22.
[261] *Ibid*, Participant #11, at 22.
[262] *Ibid*, Participant #1, at 22.
[263] *Ibid*, Participant #4, at 22.
[264] *Ibid*, Participant #6, at 22.
[265] *Ibid*, Participant #16, at 22.

other reasons for this included it being "kind of dicey. Kind of like taking God's role"[266] and "that will be each individual person's – how they view on the inside."[267] One participant said this principle was important, "but not on it's own"[268] while another said, "it depends, consequences could be any other response."[269]

(8) Sending a Message the Offence was Wrong (to the offender and to the community):

Fourteen participants said that sending a message to *the offender* that the offence was wrong was very important. Three participants rated this 4/5 for importance. Six participants commented that this was important for all offences.[270] Two participants saw this as teaching "right from wrong"[271] or ensuring "a standard is set for all offences so that its not a free pass."[272] Six participants talked explicitly about how this should be applied, viewing this as talking with the offender, explaining and helping him or her understand what he or she did wrong.[273] For example, participants stressed, "Talk to their face, don't send them a message",[274] it

[266] *Ibid*, Participant #15, at 22.
[267] *Ibid*, Participant #18, at 22.
[268] *Ibid*, Participant #13, at 22.
[269] *Ibid*, Participant #10, at 22.
[270] *Ibid*, Participant #3, Participant #8, Participant #11, Participant #13, Participant #15 and Participant #16, at 23.
[271] *Ibid*, Participant #1, at 23.
[272] *Ibid*, Participant #15, at 23.
[273] *Ibid*, Participant #4, Participant #5, Participant #8, Participant #10, Participant #16 and Participant #17 at 23.
[274] *Ibid*, Participant #4, at 23.

would be "important with proper support and safety in mind"[275] and "The offender has to understand, and the elder has to understand the person."[276]

Eleven participants said that sending a message to *the community* that the offence was wrong was very important. Two participants rated this 4/5, one participant rated it 3/5 and three participants rated it 1/5 for importance. Five participants did not comment. Four commented that this was not important or appropriate,[277] two reasoning, "you would hear about it anyways"[278] or "everyone will understand"[279] and one commenting, "I'm not supposed to tell everybody that something is wrong."[280] On the other hand, nine participants stated that this would be good and important to include in a court process.[281] Reasons for this included, ""It's important to tell someone what they did was wrong",[282] to set that standard",[283] "so that community norms that are wrong are corrected",[284] and "so people will watch what they do."[285] Six participants talked explicitly about *how* this should be applied, viewing this teaching, explaining and helping the community

[275] *Ibid*, Participant #6, at 23.
[276] *Ibid*, Participant #17, at 23.
[277] *Ibid*, Participant #8, Participant #10, Participant #16 and Participant #17, at 24.
[278] *Ibid*, Participant #10, at 24.
[279] *Ibid*, Participant #17, at 24.
[280] *Ibid*, Participant #16, at 24.
[281] *Ibid*, Participant #1, Participant #2, Participant #3, Participant #4, Participant #5, Participant #7, Participant #11, Participant #15 and Participant #18, at 24.
[282] *Ibid*, Participant #18 at 24.
[283] *Ibid*, Participant #15, at 24.
[284] *Ibid*, Participant #5, at 24.
[285] *Ibid*, Participant #11, at 24.

understand.[286] One participant commented that teaching the community is "important, but practically difficult. It's hard enough to explain to one person."[287]

b. Discussion:

All participants not only recognized the identified response principles, but also were very capable and willing to work with the principles in that form. As I worked through their feedback I was struck by how similar I felt, reading their responses, to being an articling student listening to senior lawyers discuss an area of law. Not only did the community participants recognize and understand the principles, simply 'listening' to their rich discussion of them taught me more and increased my own relatively meager understanding and competency.

For example, the emphasis on supporting and teaching people who have done wrong, especially when supervision is warranted, or when 'sending a message' about community standards to the offender and community, was striking. I was humbled by participants' comments regarding a principle of 'sending a message the offence was wrong', because, as mentioned above, I intended this to be a plain language way of discussing the Criminal Code sentencing principles of denunciation and specific and general deterrence. It was very clear that participants did believe community standards needed to be set and upheld, but it was equally apparent that most participants viewed this as a something best accomplished through teaching

[286] *Ibid*, Participant #1, Participant #2, Participant #4, Participant # 5, Participant #7 and Participant #18, at 24.
[287] *Ibid*, Participant #4, at 24.

and fostering understanding, rather than assuming consequences alone can stand as an adequate deterrent, either for individuals or the community at large.

This strong emphasis on supporting, guiding and educating offenders cannot be reduced to a simple dichotomy between Cree and other Indigenous legal traditions and the common-law state responses, that often emphasize deterrence. First, the Cree emphasis on teaching and guidance takes place in conjunction with strong cautionary tales of natural and spiritual consequences of wrong actions.[288] Someone or something else deters, so it may be more accurate to say, as one participant did, that most people do not see this as a human role. Denunciation may be part of teaching. Recall in the story, *Killing of a Wife,* where a man kills his wife but claims she drowned accidently.[289] After investigating, Meskino publically confronts the man, denounces his actions and explains to the whole group that he will die because of them. He does die within a year, but from no human cause.[290] Some Indigenous legal traditions do have a principle of deterrence that, at least historically, humans were responsible for implementing. Tsilhqot'in people have quite vivid historical stories explicitly about deterrence, in addition to extensive examples of severe natural and spiritual consequences of wrong actions.[291] Coast Salish peoples also had graphic historical examples of punishment or deterrence in extreme cases.[292] Yet, in the Coast Salish Legal Summary, "teaching

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[288] See, for example, Chapter Three at 118-119.
[289] Chapter Three, at 100.
[290] Chapter Three, at 118.
[291] *The AJR Project Tsilhqot'in Legal Traditions Report* (May 2014, unpublished), on file at the University of Victoria ILRU, at 28 and 34-36.
[292] *The AJR Project Coast Salish Legal Traditions Report* (May 2014), unpublished), on file at the University of Victoria ILRU at 29-30.

responsibility/foster understanding" from a young age, through various teachings and ceremonies, was still seen as the best way of preventing harms in the first place.[293] One response principle was "providing guidance to wrongdoers." This was explained the following way:

> This is an active response but one that continues to avoid aggravating a harmful situation. Modes of providing guidance include lecturing, blanketing, one-on-one guidance, and speaking with Elders. The primary focus is to impress upon a wrongdoer why his or her behaviour is wrong and to promote an understanding of why that behaviour is wrong/harmful. It is up to the wrongdoer to change his or her ways after he or she receives these teaching and guidance.[294]

On the opposite coast of Canada, Mi'kmaq elders talked extensively of the importance of teaching offenders to develop empathy and understand their own underlying issues in order to promote responsibility and rehabilitation.[295]

Anishinabek elders also articulated an underlying belief in the efficacy of teaching and guidance to best promote community safety and wellness. Elder Jean Borrows encapsulated the Anishinabek aspiration behind this approach when she stated eloquently, "Teach them the principles, and they can govern themselves."[296] Neepitapinaysiqua opined that laws only have to be "imposed externally" on people when:

> Legal education in a community is weak and people have become alienated from the legal traditions and values…rather than the laws being part of people's identity and way of life, as they may become when people are educated in laws through stories and other means from a very young age.[297]

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[293] *Ibid*, at 26.
[294] *Ibid*, at 28.
[295] *The AJR Project Mi'kmaq Legal Traditions Report* (May 2014), unpublished), on file at the University of Victoria ILRU, at 25-27.
[296] *The AJR Project Anishinabek Legal Traditions Report* (May 2014), unpublished, on file at the University of Victoria ILRU, at 28.
[297] *Ibid*.

While education was seen as preventative and generative, like in the other legal traditions mentioned, it was also seen as valuable to speak up and educate wrongdoers as to the harmful effects of their actions.[298] In all of these Indigenous legal traditions, both aspiration and efficiency undergird the focus on guidance and education for offenders.

What stands out the most about the community feedback is the in-depth knowledge, nuance and complexity evident in each of the participant's reasoning. I was at first surprised at how many participants commented that, insofar as training needed for community members prior to a Cree Justice process being viable, very little would be needed, and would mostly entail training on regular court process, issues affecting offenders, such as abuse and FASD, and making the framework of Cree legal principles widely available.[299] One participant commented:

> They would not need much beyond making work on Cree legal principles available to them. If we were to start tomorrow I'm sure they could do it.[300]

The depth of the discussion about the Cree legal response principles indicates his confidence is not misplaced. The community participants were engaging in exactly the kind of critical, rigorous and practical exploration of Indigenous legal principles that Napoleon et al argue are essential for application. Lay-people often roll their eyes or express frustration at lawyers' apparent failure to ever give a straight yes or no answer, but legally trained people know only too well it is a rare legal question that doesn't truthfully begin with "it depends." This fluidity is why Jeremy Webber advocates for identifying, not some elusive past authentic moment in any legal

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[298] *Ibid*.
[299] Cree Justice Process Questionnaire Compiled Results, *supra* note 43, at 30.
[300] *Ibid*, Participant #12, at 30.

tradition, but rather the issues that "preoccupy public life" and the "distinctive structure of the fundamental debates" over time in a particular society.[301] All law is in constant motion, and yet moves in familiar and recognizable forms, slowly, sometimes glacially, in a conversation that takes place over generations.[302]

A good example of this was in the discussion around natural and spiritual consequences. There was no evident division among community participants about whether or not natural and spiritual consequences exist and affect human beings. Nobody indicated they did not believe this. However, participants were clearly divided about whether or how natural and spiritual consequences should play a role in a formalized justice process. The one did not follow automatically, as it is too often insinuated. Rather different people had different, but equally strong, articulate and reasoned positions on this issue, some of which would lead to the same result as the current Euro-Canadian justice system – exclusion of overt reliance on the spiritual in legal *decision-making*. Inasmuch as I want to resist and discourage simplistic dichotomies between Indigenous and state legal orders, I have to acknowledge the debate that is apparent within the community is non-existent, on these terms, within the formal Canadian justice system. It may a uniquely

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[301] Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queens University Press, 1994) at 186.

[302] For this reason, it is more useful, and more realistic, to see a tradition as "a patchwork of multiple themes and commitments, often united only by agreement about what the terms of debate over these themes and commitments will be." Katharine T. Bartlett, "Tradition, Change, and the Idea of Progress in Feminist Legal Thought" (1995) *Wisconsin Law Review* 303at at 330. Alasdair MacIntyre captures this reality by arguing "traditions, when vital, embody continuities of conflict." He defines living tradition as a "historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute the tradition." Alisdair Macintyre, *After Virtue: A Study in Moral Virtue* 3rd ed. (Indiana: University of Notre Dame Press, 2007) at 222.

Indigenous (in this case, Cree) debate. Whatever the outcome at any one point in time, in any one community,[303] it will likely remain a live debate within Cree societies.

The AJR Project Final Report findings highlighted the breadth and variety of Indigenous legal responses available, within and between Indigenous legal traditions.[304] The nuanced discussion and differing views evident in the *Aseniwuche Winewak* community feedback about applying the Cree legal response principles demonstrates, not only their recognition, but their importance, given the rich debates imagining their more formal and explicit implementation creates or re-invigorates within the community.

iii. Legal Rights and Obligations:

a. Analysis:

In the Cree legal summary, I identified five legal obligations and five legal rights, two of which were substantive and three of which were procedural in nature. The legal obligations are:

(1) Responsibility to help when asked

(2) Responsibility to ask for help when needed

(3) Responsibility to give back when helped

(4) Responsibility to prevent future harms

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[303] Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed., Living Law: Reconsidering Eugene Ehrlich (Oxford: Hart, 2008) 201, pointing out any one statement of law is always a provisional agreement reached in a backdrop of continuing disagreement.

[304] AJR Project Final Report, *supra* note 82, at 7-10.

(5) Responsibility to warn others

Participants were asked how important they thought it was to uphold or maintain these legal obligations in a formal court process today.

Legal Obligations:

Between thirteen to fifteen participants did say all these obligations were very important to maintain in a contemporary court process, with one or two ratings of 3/5 or 4/5 for importance. Fifteen participants said the responsibility to warn was very important. Three participants did not rate any of the obligations. One participant explained that she felt she "can't answer without a process in place."[305] Some participants discussed issues of implementation. One advised that, in regard to the responsibility to ask for help, "its up to the person (important but not required) voluntary better than mandatory."[306] Others advised taking care around a responsibility to give back, cautioning, "not everybody is able to give back",[307] this "could be in the form of personal success/transformation", [308] and "they give back in many ways, including appreciation."[309] One participant suggested, "programs and resources would help" to prevent future harms.[310] Two participants commented on

[305] Cree Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #6, at 25.
[306] *Ibid*, Participant #12, at 25.
[307] *Ibid*, Participant #2, at 25.
[308] *Ibid*, Participant #11, at 25.
[309] *Ibid*, Participant #16, at 26.
[310] *Ibid*, Participant #15, at 26.

warning others, one stating, "it depends on the person's track record"[311] and the other saying we "need to know who to watch out for."[312]

I also identified two substantive legal rights:

(1) Right to protection and safety

(2) Right to be helped when vulnerable

And three procedural rights:

(3) Right the share your side of the story

(4) Right to know how and why decisions are made

(5) Right to transparent decisions made with consultation

Participants were asked how important they thought it was to uphold or maintain these legal rights in a formal court process today.

Legal Rights:

Between twelve to fifteen participants did say all these rights were very important to uphold in a contemporary court process, with one to four ratings of 3/5 or 4/5 for importance. Between one and three participants did not rate all the rights. One elder said he was "not sure about the last three rights", which were the procedural ones, and did not rate any of these ones.[313] The majority of participants (twelve) did not comment at all. Those that did comment did so primarily regarding the right to share one's story, and the right to know how and why decisions are made. Some

[311] *Ibid*, Participant #11, at 25.
[312] *Ibid*, Participant #15, at 26.
[313] *Ibid*, Participant #18, at 27.

participants reinforced it was important for "that person to be able to share"[314] and everyone should have "the chance to speak."[315] One participant stressed this "makes knowledgeable decision-makers critical"[316] and another, who had experience sitting on the past Native court, reminded us "some people aren't ready to tell their side though."[317] This same elder said offenders knowing the how and why of decisions was important "because last native court offenders weren't happy with the sentence they got."[318] Two participants said this was important because the offender needs to understand the decision.[319] One agreed the offender and victim had a right to know the how and why of a decision, but said "not the community."[320]

b. Discussion:

In general, participants were less responsive and had less to say about Cree legal rights and obligations than about Cree legal process or legal responses. It is possible the language of rights and obligations did not resonate in the same way. It is also possible the rights and obligations identified were not ones that resonated strongly, or that they would require more thought to actually uphold or maintain within a formalized justice process today. While I have observed some of these obligations are deeply felt by certain people within the community, for example, the responsibility to help when asked (one elder's comment about this obligation was

[314] *Ibid*, Participant #7, at 27.
[315] *Ibid*, Participant #15, at 28.
[316] *Ibid*, Participant #11, at 27.
[317] *Ibid*, Participant #1, at 27.
[318] *Ibid*, Participant #1, at 27.
[319] *Ibid*, Participant #7 and Participant #11, at 27.
[320] *Ibid*, Participant #15, at 28.

simply, "if I can't help someone I find someone else who can"[321]), it is another question altogether if these should or could be upheld in a formal justice process. On a practical level, it is worth pointing out that, by the time participants came to questions about rights and obligations, they had already discussed a lot, from several different angles.

The little that was added did tend to enrich or reinforce previous conversations under other categories. For example, an obligation to warn others, or prevent future harms, fit within the discussions regarding the procedural step of maintaining individual and community safety as well as the emphasis on accessing help and resources for treatment in the discussion of the response principles of healing and of temporary separation. Participants did comment on the importance of the right to share one's story and to know how and why decisions are made. This fit with discussion around why and how a "native court" would be more effective at helping the community at a general level. It also reinforced the importance of the procedural step of public deliberation, suggesting the apparent hesitancy around that step may indeed relate to the aspect of publically confronting the offender. Like the other categories, participants clearly took the identified rights and obligations seriously, and approached them thoughtfully.

[321] *Ibid*, Participant 7, at 25.

Conclusion:

Cree legal principles are just scratching the surface. Need more work.[322]

In Chapter Two of this dissertation, I discussed challenges of accessing, understanding and applying Indigenous laws, and methods for approaching these challenges. I proposed a method for engaging with Indigenous legal traditions that I hoped would enable Indigenous laws to be more accessible, understandable and applicable today. In Chapter Three, I demonstrated the results of my method to make Indigenous legal principles more *accessible*, through the AJR Project and the Cree legal summary. In Chapter Four, I demonstrated, through exploring Cree relational legal theory, that this method, approached mindfully, can lead to a deeper *understanding* of not only the identified principles in the framework, but the essential background narratives within a legal tradition. In this chapter, I demonstrated how this legal research might support Indigenous communities to build a solid and useful foundation for *application*, through the case study of *Aseniwuche Winewak's* community feedback about the Cree legal principles for a proposal to develop a contemporary Cree Justice Process.

In the end, the comment that stays with me the most was from the community feedback was: "Cree legal principles are just scratching the surface. Need more work."[323] I could not agree more. And I would add, I hope they always will. The "hard work of law" that is never done, and it always needs more work.[324]

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[322] *Ibid*, Participant #12, at 13.
[323] *Ibid*, Participant #12, at 13.
[324] Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 8: "The hard work of … law is never done."

However, Indigenous peoples face even harder work due to the ravages of colonialism. Generations of invalidation and degradation have lead to "radical absences", not just in colonial society, but also within Indigenous social and legal orders.[325] Brant Castellano states:

> The language of self-government has obscured the reality that Aboriginal Peoples are engaged in a struggle to *restore ethical order in their communities and nations*. …Efforts to regain control of education, health, justice, etc. are only in part about the power to govern. They are fundamentally about restoring order to daily living in conformity with ancient and enduring principles that support life. [326]

In Chapter Two, I said I hoped legal scholars, through respectful and robust engagement with Indigenous laws, could support Indigenous communities doing the ongoing work of accessing, understanding and applying their own laws, as part of a larger political project of rebuilding citizenry and restoring peace, order and good governance.[327] The fact there are lively debates and thoughtful nuanced engagement with the Cree legal principles by members of the *Aseniwuche Winewak*, lead me to feel cautiously optimistic the framework of principles does provide solid support for Indigenous communities who are rebuilding and revitalizing ancient and enduring Indigenous legal principles that support life. I feel confident the *Aseniwuche Winewak* is up for this restorative work and this method will be useful for it. Like everything else, whether Indigenous communities choose to do this, will be and should be up to each community themselves.

Where and how can the Cree legal principles, as identified within the framework and discussed by *Aseniwuche Winewak* community members, be

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[325] de Sousa Santos, *supra* note 7.
[326] Brant Castellano, *supra* note 1, at 112 (emphasis mine).
[327] Chapter Two, at 69-70 (Sekaquaptewa and Napoleon).

reconciled and harmonized with Canadian laws, to create the necessary space for public, accountable and adequately resourced application in our profoundly intertwined societies and legal orders? In the final part of this dissertation, I examine the existing spaces and intellectual barriers for the reception, recognition and application of Indigenous legal principles within the current Canadian political and legal institutions and imaginations.