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**Rooted in Mi’kmak’i: Living L’nu Constitutionalism**

Jane McMillan
This is a new beginning for us. As the first issue of a new publication on Indigenous law at McGill, Rooted is a conscious attempt to create space for Indigenous legalities, knowledge, and perspectives. Our contributors - academics, activists, artists, and leaders - offer insight into Indigenous ways of being and knowing beyond the dominant liberal paradigm. Their perspectives generously offer us a way to begin to understand Indigenous legal orders.

It is fitting that our first issue begins with a contribution from Anishinaabe legal scholar Aaron Mills, whose work inspired the project. To Mills, all constitutionalisms are situated within their respective lifeworlds - the sum of the stories that we tell to explain and situate ourselves within what surrounds us and within our own experience. As Mills explains, Indigenous laws are not only different to Canadian (liberal) constitutional orders, but are “different in kind,” at the level of lifeworlds. As such, efforts to articulate Indigenous law within dominant liberal paradigms risk distorting and erasing the lifeworlds in which these legal orders are based. In this issue, Mills writes:

In distinguishing between constitutional kinds, I prefer to speak of rooted constitutionalism and not indigenous constitutionalism. Thus I’d say that Anishinaabe constitutionalism is a species of the rooted constitutional kind. I make this discursive choice precisely to place the emphasis where it ought to be: on the kind of constitutionalism at issue, and not on the identity of the subjects who bear it ... [A]s a kind of constitutionalism, rootedness is available to anyone willing to sustain it. My hope is that enough of the world’s peoples will adopt it within a timeline that, respecting the urgency of anthropocentric global warming, allows for the continued viability of humans and of creation as we know it.

As settlers ourselves, we take this call as open to us to share in a responsibility for rooted law revitalization.

With this in mind, Rooted - and particularly, this special issue on rooted constitutionalism - offer readers an invitation to engage with Indigenous constitutional orders. In this issue, you will find explorations of Anishinaabe (Aaron Mills), Nêhiyaw (Darcy Lindberg), Métis (Kerry Sloan), and Mi'kmaw (Sákéj Henderson and Jane McMillan) constitutionalisms.

Only by engaging with Indigenous constitutionalisms and lifeworlds can we move forward, collectively, towards revitalizing Indigenous systems of law within their own constitutional frameworks. We hope that Rooted will play a role not only in making space for Indigenous law and perspectives in law schools and universities, but also beyond these spaces, out in the wider world.

It has been a real privilege to bring this vision to life. We thank our Advisory Council (Sákéj Henderson, Kirsten Anker, Hadley Friedland, and Sayre Potter) for their sage advice and the ongoing support and talent of our Associate and Managing Editors without whom this publication would not have been possible. We are also thankful to the Indigenous Law Association at McGill, the McGill Law Students Association, and the Students’ Society of McGill University Equity Fund for their generous support in funding needs-based honorariums and gifts for our contributors.

Larissa Parker & Sarah Nixon
A Preliminary Sketch of Anishinaabe (a Species of Rooted) Constitutionalism

Aaron Mills

Aaron Mills (JD Toronto, LLM Yale, PhD UVic) joined McGill Law as an Assistant Professor in 2018 and is the Canada Research Chair in Indigenous Constitutionalism and Philosophy. As a community-engaged scholar, Aaron works with indigenous individuals, communities, and organizations to revitalize indigenous law and constitutionalism, to renew treaty, and to re-centre Earth in indigenous-Canada relationships.

1. (Liberal) Constitutionalism

In its conventional prescriptive sense, constitutionalism is said to consist of fundamental law which ascribes, and reciprocally limits, certain powers to government. A government’s legitimacy consists in its observance of the fundamental law: it acts within its authority only to the extent that its actions are sourced within the fundamental law and constrained by its limitations.

On this view, constitutionalism’s ultimate purpose is to justify the exercise of governmental authority over those subjected to it. While particular accounts of what this means vary widely in their specific contentions and emphases, contemporary constitutional theorists generally agree that constitutionalism requires certain core principles. These principles, in turn, entail certain institutional arrangements.

For instance, core constitutional features which connect necessary principles with corollary institutional commitments include:

- A primary emphasis on the legal interests of individual persons, typically represented in bills of civil rights and liberties.
- The rule of law, which necessitates a separation of governmental powers into legislative, executive, and judicial branches of government. Each branch consists of those governmental institutions which, respectively, create law, implement and enforce law, and interpret law and adjudicate legal disputes. Heavy emphasis is typically placed, in particular, on the independence of the judiciary.
- Responsible government and popular sovereignty, which require that the executive order of government is ultimately responsible to an elected body of representatives, and so to the people it governs—who are the ultimate source of executive authority.

Importantly, these constitutional features presuppose certain structural and normative commitments. For instance, the first feature presupposes that the individual is the foundational moral unit in the exercise of justification that constitutionalism seeks to effect. The second feature presupposes a particular form of polity, the state, which specifies citizenship as its form of membership. The third feature presupposes a democratic electoral system and so the foundational norm of the consent of the governed.

Taken together, the presuppositions of just these three constitutional features seems already to suggest that constitutionalism requires some conception of liberty (though perhaps no particular conception thereof) and of equality (at a minimum, equality before the law). One might reasonably wonder whether constitutionalism so conceived is only for liberal political communities.

That’s an awfully specific starting point and one idiosyncratic to a particular historical experience and geography. What if a people who doesn’t share that genealogy founds their political community upon different normative commitments? What if they take community to represent a different value (and so to serve a different end) and in consequence, to require a relationship between community members based in something other than consent? Presumably such differences
would require an altogether different justification for community. Would such a community necessarily exist outside of constitutionalism? Of constitutional import, what if, despite these different starting points, this community demonstrates a degree of concern for how governmental power is (and ought to be) exercised over its members consistent with that of liberal constitutionalism?

Some might concede that all of the foregoing exists and even allow that I’m talking about a form of political community and of social control, yet deny applicability of the language of constitutionalism and of law. They may argue that these are technical terms and that their inapplicability here doesn’t reflect any moral judgment. Legal positivists, for instance, might assert that communities of this sort simply contain the wrong kind of social facts. Others might reply that communities of this sort can’t be constitutional communities if they aren’t democratic communities, since, they contend, constitutionalism is a specific democratic form. There are many like legal and political theory grounds for occlusion of such communities.

Yet if we take that the ultimate purpose of constitutionalism is to justify the exercise of governmental power in and over the lives of community members, then I think such dismissals risk moving too quickly and assuming too much. In my work, I’ve sought to provincialize the conventional prescriptive view of constitutionalism as representing but one family of conceptions of what, I argue, is a much wider concept.

2. Constitutional Kinds

Taking the justificatory purpose of constitutionalism seriously requires that we think of constitutionalism less as a noun, more as a verb. To explain constitutionalism is to justify how and why a community constitutes itself in the way that it does, and not to justify any particular institutional arrangement. To be sure, this casts the ambit of ‘constitutionalism’ (and of ‘law’, too) much wider than many theorists, and certainly most analytic philosophers, will readily support. Yet if constitutionalism is to be defined in respect of its justificatory purpose, I think the larger view is necessary.

First, a contextual contention: many (and possibly all, but obviously I can’t substantiate that intuition) pre-contact indigenous communities of Turtle Island were communities characterized by the different sort of starting points I’ve indicated. Albeit damaged and incomplete, many retain their distinct form of constitutionalism and of law today. They survive despite (often centuries of) unrelenting pressure from a colonial power determined to suppress and erase them and to occupy all the constitutional space itself.

My primary contention in this essay is that these differences amount to a difference in constitutional kind. For greater certainty, I’m saying that the relevant difference regards not just distinct constitutional orders (which I take to be obvious), but also conceptions of constitutionalism.

Because of my identity and related community experience, I focus on Anishinaabe constitutionalism. Yet I draw a vital distinction in my work. In distinguishing between constitutional kinds, I prefer to speak of rooted constitutionalism and not indigenous constitutionalism. Thus I’d say that Anishinaabe constitutionalism is a species of the rooted constitutional kind. I make this discursive choice precisely to place the emphasis where it ought to be: on the kind of constitutionalism at issue, and not on the identity of the subjects who bear it.

On the latter point, indigenous peoples are far and away rooted constitutionalism’s exemplars, but as a kind of constitutionalism, rootedness is available to anyone willing to sustain it. My hope is that enough of the world’s peoples will adopt it within a timeline that, respecting the urgency of anthropocentric global warming, allows for the continued viability of humans and of creation as we know it.

The question of central importance, then, is what defines a constitutional kind? On the verb-oriented view, constitutionalism consists of four tightly-connected aspects. The first three deal directly with what it means to constitute community: (1) a constitutional logic: the mechanism that justifies community (and upon which distinctions in constitutional kind ultimately turn); (2) the correlate structure through which that mechanism is realized and sustained in practise; (3) the form of membership internal to that structure. The fourth aspect of constitutionalism, a conception of law, regards the viability of the first three through time. As the mechanism tasked with maintaining social order (and indeed, social cooperation), we might think of law as the sustainability condition of constitutionalism. Law sustains constitutionalism through change in two senses. First, the internal sense of ongoing—indeed, permanent—difference between community members, and second, in the external sense of a ceaselessly changing world.
3. Anishinaabe Constitutionalism

In the case of Anishinaabe constitutionalism (and I think of rooted constitutionalism generally), the first three aspects are mutual aid, family, and kinship. In anishinaabemowin, the Anishinaabe language, the word most frequently used for the fourth aspect is inaakonigewin. In English, we might call it something like law as reasoned normative discernment. Given the context of this essay, I’ll provide only a skeletal sketch of each aspect and of their internal relationships, focussing on mutual aid.

Mutual aid, or wiisookodadiwin, is the beating heart of rooted constitutionalism. As a constitutional logic, it answers the question ‘why ought persons to constitute themselves as community?’ The answer it provides is that freedom requires mutual aid, and community is mutual aid’s condition of possibility. Without community, the coordinated exchange of individuals’ gifts and needs—mutual aid—isn’t possible. Note that ‘gift’ refers not only to the offering of material goods, but also to the sharing of knowledge, skill, labour, or anything which one agent beneficially shares with another.

Rooted peoples understand this to be how Earth community functions, and as such, they find themselves in always-already existing networks of mutual aid. In reproducing its logic in their own communities, rooted peoples constitute themselves in and through Earth (hence ‘rooted’).3

The foundational political theory challenge for rooted peoples, then, isn’t to justify the movement from an imagined state of nature into political community, but rather to reproduce and to sustain the general state of order which precedes human communities. That is, rather than creating the conditions of freedom through the imposition of law and government on nature, we work to preserve and develop the freedom inherent in Earth’s internal legality.

We do so by coordinating gifts and needs throughout our circle of community. The constitutional logic of mutual aid manifests through the gift → gratitude → reciprocity analytic. I receive a gift; I experience gratitude; I’m moved by my experience of gratitude to reciprocate. Vitally, reciprocity is circular, not correlative. I offer my gift ‘forward’, to wherever in the circle it’s most needed. This doesn’t preclude me from offering my gift to my original donor, because he or she is, after all, part of the circle. But I’m under no obligation to do so (i.e. my act of reciprocity isn’t correlative to my donor), and circumstance will usually direct me elsewhere. For greater certainty, in those instances where I reciprocate to my own donor, my reciprocation is an instance of gifting forward, not ‘back’. My reciprocal gift completes my participation in the immediate mutual aid exchange (it’s the third step of the analytic) but stands as the beginning (the first step) of someone else’s, triggering the cycle anew. Thus, instead of the certainty that characterizes a provisionally settled agreement (whether through the constitutional logic of contract, original position, etc.), rooted political community consists in a state of radical contingency, perpetually constituted in each act of an ever-unfolding sequence of mutual aid exchange.

All community members participate, simply trusting that in helping to meet the needs of others, the circle will provide for their needs, too. This ancillary principle of trust replaces the liberal principle of rational self-interest. This would be unfathomable from an ontology that situates the moral agency of individuals in terms of their autonomy. But individual autonomy isn’t part of the ontology that gives rise to rooted constitutionalism. Where persons are always already connected, their natural state is one of deep interdependence: well beyond any instrumentality, they’re ontologically connected, one consequence of which is that they frame purposes not only in, but as relationships.

This ontological difference from liberal constitutionalism’s starting points bespeaks a novel conception of freedom in which liberty and equality are absent, replaced by sharing and respect. Practically speaking, freedom is the capacity to gift and to be gifted (that is, to have our needs respected). Mutual aid is this conception of freedom’s condition of possibility.

The second and third aspects of rooted constitutionalism can be taken up briefly and together. What I’ve called the ‘circle of community’ (tracking the exchange mechanism of circular reciprocity) is structured as a family to which community members belong as kin (i.e. no state, no citizenship, no legacy of Westphalia). So for greater certainty, community members don’t practise mutual aid just however they may please. Rather, the giving and receiving of community-sustaining gifts is structured through kinship, or stated differently, each kinship role specifies the mutual aid analytic in a particular way. This is why kinship schema for Anishinaabeg are so highly determined. Almost every role gets its own name, because it’s characterized by unique gifting responsibilities.
Vitally, ‘family’ doesn’t refer only to community members who share common ancestry. All community members are located within the kinship schema, whether by blood, marriage, adoption, and/or metaphorical extensions of kinship roles. Within many contemporary Anishinaabemodern communities, there are still those who occupy the role of aunty, grandmother, or grandfather to the entire community, or at least to those who aren’t blood kin.

This means that within rooted communities, membership is contingent and differentiated (and so decidedly unlike citizenship). It’s contingent in the sense that community members belong only insofar as they sustain their kinships (through their practise of mutual aid). It’s differentiated in that every community member inhabits a different set of kinships, both with respect to one another and with respect to themselves, over time.

That just leaves the conception of law that rooted constitutionalism generates. As with all conceptions of constitutionalism, the value of rooted constitutionalism consists in its capacity to enable and to limit the exercise of governmental power over community members, generating the conditions for freedom. Where freedom consists in the capacity of community members to sustain and to develop positive relationships through gift exchange, then the work of law is to facilitate and to protect those relationships and the exchange which defines them.

These differences combine to render law a character which is quite distinct from the familiar sense of law as legal norms which direct behaviour (and enable plans, although I’m not contemplating that analogue aspect of rooted law here). There’s no set of abstract and externalized propositions (i.e. values, standards, principles, and paradigmatically, rules) to which I may turn to direct my behaviour. Instead, I draw from an internalized repertoire of source material (such as legends/aadizookaanan, family histories/dibajimowinan, earth teachings/akinoomaagewinan, elders’ teachings/izhituaawinin) to form judgments about how to realize my kin-defined responsibilities to share my gifts. Rooted law, then, is the deliberative process of accessing that source material and placing it in relationship with the relevant factual circumstances to result in two related judgments:

- First, given the kinships in play, what are my responsibilities?
- Second, if any, then how can I best realize them, given the relevant circumstances?

What I’ve just described is a particular kind of reasoned normative discernment. Law-generating, law-interpreting, and law-implementing institutions which map to this conception of law are markedly different in character from those associated with the liberal kind of constitutionalism. Without unpacking them, some examples include:

- Giiigoshimowin and makoosekewin (men’s and women’s coming of age ceremonies, respectively) serve to generate law insofar as they create relationships and empower their participants with gifts.
- Aadizookewin (the institution of telling legends) serves the end of interpreting law by providing community members with a repertoire of source material that exemplifies good and bad judgements, and relationships, in a myriad of contexts.
- Zagasaweidiwin (the council) is an institution in which community members deliberate as to how best to resolve or manage a situation, implementing a judgment.

4. The Determinateness of Governmental Authority Necessary for Constitutionalism: Government vs. Governance

So ends the brief sketch of my argument for a much broader concept of constitutionalism, one capable of admitting both liberal and rooted kinds of constitutional communities. Doubtless, it’s subject to numerous criticisms. One is surely as follows. Even if the foregoing sketch of rooted constitutionalism has adequately made out the case for the grassroots ascription of governmental powers directly to community members absent any notion of government, I’ve certainly failed to take seriously the other half of constitutionalism’s central purpose: to constrain the exercise of governmental power in community members’ lives. Given that deficit, at best I’ve offered a novel conception of political community, but not one constitutional in character. Finally, with the collapse of the rooted alternative, the effort to provincialize what I’ve called the liberal family of conceptions (or kind) of constitutionalism fails.

This worry disappears if we sustain our faithfulness to constitutionalism’s central purpose, to justify the exercise of governmental authority. Rooted peoples are surely just as subject to failure and frailty on this count as are the subjects of liberal constitutional orders. Likewise, rooted peoples are just as much in need of justification for the exercises of power
which they assume for themselves and which they effect over one another. All we need to accommodate the challenge—the seemingly unmediated agency of rooted community members—is to recognize that government is an over-determination of the source of governmental authority. The broader standard of governance (of which government is but one form) is sufficient.

Rooted constitutional orders—at least Anishinaabe ones—don’t have governments. Ogamaa is our word for leader in the civil sense. But ogamaa is a role, not an office, and it has no decision-making or executive power of any kind. Ogamaa mediates, facilitates, and re-articulates. Ogamaa has persuasive, but not coercive, authority.

However governance is precisely what ordinary community members enact with each mutual aid exchange that keeps community vital, contributing to any of its law-generating, law-interpreting, or law-implementing capacities. Numerous Anishinaabe elders, scholars, and others have given voice to the perspective that governance responsibility is held by each of us individually.

Nokomis, my grandmother (Bessie Mainville of Couchiching First Nation) uses the word bimiwin-itiziwin to describe this concept. Anishinaabe Elder Harry Bone explains, “That’s why we’re given that language, our teachings, our history, and the way you conduct yourself. But conducting yourself is like government, right? So it’s governing yourself.”

This literal view of self-governance is also shared in a Mishkeegogamang community book where the text immediately beneath the subheading “True Self-Government” reads “After careful teaching in childhood, people took responsibility for their own moral conduct through inner control, rather than by responding to rules or laws imposed by government or leader.”

Finally, the Anishinabek Nation (the political territorial organization in Central, Eastern, and Southern Ontario) also shares this view. In a recent report summarizing community engagement sessions on Anishinaabe law, it stated that “It was each of our own personal responsibility to strive to implement our laws and teachings within our day-to-day lives to achieve mino bimaadiziwin (a good life or living in a good way) and each of us had a responsibility to pass these laws and principles on to our children and grandchildren.”

Leanne Simpson more clearly draws out the linkage from individual to community self-governance when she explains of Anishinaabeg that “There was a belief that good governance and political relationships begin with individuals and how they relate to each other in families” and “In a real sense for the Nish-naabeg, relating to one’s immediate family, the land, the members of their clan, and their relations in the nonhuman world in a good way was the foundation of good governance in a collective sense.”

Mohawk scholar Trish Monture put the point more expressly still, explaining that for deeply interdependent kinsfolk, to be self-governing means to carefully attend to one’s relationships:

Self-determination begins with looking at yourself and your family and deciding if and when you are living responsibly. Self-determination is principally, that is first and foremost, about relationships. Communities cannot be self-governing unless members of those communities are well and living in a responsible way. It is difficult for individuals to be self-determining until they are living as part of their community.

If individual community members are to be so trusted that each is empowered to exercise governmental authority directly, then surely each ought to expect that every exercise thereof be both grounded and constrained. Through its four aspects of mutual aid, family, kinship, and inaakonigewin (or the conception of law as reasoned normative discernment), this is just what Anishinaabe constitutionalism—which is of the rooted constitutional kind—accomplishes.

As the mere sketch of an argument, I don’t presume to have persuasively made my case. But I hope to have at least opened up the possibility that we live in a world of not only distinct constitutional orders, but also of constitutionalisms which are different in kind.

Mii ih, miigwech.
Endnotes

1. This essay provides the rough contours of what will ultimately be reworked into an article.

2. It may be worth stating expressly that any given indigenous community will ordinarily contain members not of the dominant ethnonational group.


4. I say “Earth’s” and not “nature’s” deliberately. Implicit in the foregoing text is a denial of a nature/culture divide.

5. I present a lengthy list of definitions of ‘inaakonigewin’ in my dissertation. While each varies in its particulars, each gives this sense to the word. See Aaron James Mills, Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism (PhD dissertation, University of Victoria, 2019) [unpublished] at 143–44.

6. See Nicolas Perrot, Memoir on the Manners, Customs and Religion of the Savages of North America, in The Indian Tribes of the Upper Mississippi Valley and Region of the Great Lakes, ed and translated by Emma Helen Blair (Cleveland: Arthur H Clark, 1911) vol 1 at 145; Peter Jones, History of the Ojebway Indians; with Especial Reference to Their Conversion to Christianity (London: AW Bennett, 5, Bishopsgate Street Without, 1861) at 108–09.


9. Marj Heinrichs & Diane Hiebert with the people of Mishkeegogamang, Mishkeegogamang: The Land, the People & the Purpose (Rosetta Projects, 2009) at 217.


12. Ibid.

Isaac Murdoch, whose Ojibway name is Manzinapkinegego’anaabe / Bombgiizhik is from the fish clan and Serpent River First Nation. Isaac is well respected as an artist, storyteller and traditional knowledge holder. He has committed his life to the preservation of Anishinaabe cultural practices and has spent years learning directly from Elders.

“Nenaboozhoo is a spirit that was brought to the earth who is highly respected to this day by my people. They say when Nenaboozhoo was in spirit form he went through four levels of power to get to the earth. Through each power he went through, he went back to the centre saying he didn’t want to leave. But the Great Mystery told him, “keep going, keep going, you’re needed somewhere.” And Nenaboozhoo made its way through those four powers and ended up on earth. Life here on earth is magical. All the rivers, all of the mountains, all of the beautiful colours that we see, were created with Nenaboozhoo and the magical trail on earth that was left. They say one day ten men will go fasting and call Nenaboozhoo back and the world will be new again. “Nothing can stop the power that is here.”

Excerpts from Nêhiyaw Áskiy Wiyasiwêwina: Plains Cree Earth Law and Constitutional/Ecological Reconciliation

Darcy Lindberg

Darcy Lindberg is an Assistant Professor at the Faculty of Law at the University of Alberta. He has published and has publications forthcoming regarding Indigenous law and legal theory, Plains Cree constitutionalism and food sovereignty, and Indigenous citizenship orders.

In the following excerpts from his forthcoming book, he introduces a few essential elements of Nêhiyaw law, constitutionalism, and legal thought.

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

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

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

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

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

In every version of the story of wîtaskêwin, the two decide to fight but also choose to do so unarmed. In some accounts, this fight lasts for four hours. Exhausted, the two men stop their fighting for break. During this pause, the niitsitapi man brings out his ospwâkan (pipe) and loads it with tobacco to smoke. The nêhiyaw okimâw (leader, or chief), wanting to do the same, sees that his has been broken during the fight. Empathizing with the other, the niitsitapi man offers his ospwâkan, and the nêhiyaw man accepts it. In doing so, they both realize they have shared a ‘common pipe’, and thus have obligations to carry forward with each other. As a placeholder for deeper discussions further in this dissertation on what these terms mean for nêhiyaw peoples, they have a shared understanding of this event as a sacred one, and a constitutive one as well. They recognize in sharing tobacco, that their personal conflict on the hill is resolved. They also understand the larger obligations that have arisen by sharing the pipe, for each return to their respective camps and seeks out the collective advice of their communities for interpretation.

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

Nêhiyawewin: Language as an Avenue to the Heart of Treaty

Nêhiyaw wiyasiwêwina (Plains Cree law) is a living, breathing ecology. The term translates into English as the ‘act of weaving’. While the story could be interpreted on its own for lessons of inter-societal peace-making, to maintain the strength of the social fabric of nêhiyaw societies, the story requires braiding with other materials of nêhiyaw law and constitutionalism. As revitalization of Indigenous law “necessitates we find ways to hold the settler state to the original spirit and intent of our treaties,” language brings us closer to the meanings and intentions that Indigenous treaty signatories brought to them. Witaskêwin translates into ‘the place where we live on the land together’ or ‘living in peace together’. Another interpretation of the term is when “peoples establish relationships that are to be governed by the laws of wâhkôtowin and which are reflected in the kind of land-sharing arrangements created between the parties.”

Witaskêwin is also multi-dimensional, as it applies to our familial, neighborly, and societal relationships. It is also only one of many ways to describe our treaty relations. Our kêtâh-ayak (old ones, or elders) used the term iteyimikosiwiyecikewina to describe treaties with the British Crown. This translates into treaties that are inspired by the manitow (Creator) and are “grounded in the laws of miyo-wîcêtowin” or good relations. Other treaty term, translates to “agreements or arrangements establishing and organizing
good relations or relations of friendship between sovereigns.” More abstractly, miyo-wicêhtowin and wâhkô tôwin (laws that provide obligations to assist each other and that govern our relations generally) offer overlapping principles of friendship and kinship that play a role in our treaty relationships.13

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

Nêhiyaw âskiy: Land-based Law and Constitutionalism

Just as language and nêhiyaw narrative practices14 offer directions understanding wîtaskêwin, we can recall our treaty obligations by visiting the valleys and hills where treaty was made. Kiyokewin (visiting) is necessary to have a living relationship with treaty. The story I provided above is a constituting story of the land that I grew up on. I was raised in Wetaskiwin, the city on the outskirts of the Maskwacîs communities (those of the Samson, Ermineskin, Montana, and Louis Bull Cree) in Central Alberta. The city’s name is a subtle corruption of the term wîtaskêwin. Aside from my knowledge of the treaty, I know the hills in other ways as well. I have rubbed dirt from them in my hands, have been chased by bees down paths that cut through them after coming too close to hives on summer days. I have gathered at night with friends on the hills and watched stars and generally teen-aged together amongst the poplar and aspen trees. I have tobogganed down one of its bumpier trails in wintertime with my cousins. And in moments where I disregarded one of our older familial beliefs that causes us to avoid owls, I have gathered barn-owl feathers along the ground. Just as the land is stitched into a collective nêhiyaw narrative memory, my own personal history becomes a part of this context.15

Similar bundles of legal and constitutional meanings are on locations within nêhiyaw âskiy, where law remains similarly written into the land. Approaching the Neutral Hills from the vastness of the prairies, where they seem to rise like mountains above the long plains around them, provides a deeper understanding of their force in teaching the nêhiyaw and niitsitapi of loving kindness in sharing the land.16 Southeast of Wetaskiwin is paskwawi-mostos sakihikanihk (or Buffalo Lake), a lake that was said to be given as a gift to the nêhiyawak through the kindness of the buffalo nation to provide nourishment and shelter for nêhiyaw peoples, especially during the winter months.17 Southeast of paskwawi-mostos sakihikanihk, is mistasiniy (or the big stone), a large stone that our âcimowina tell us was once human who had the ability to shapeshift into a paskwawi-mostos (buffalo). Lost by his human family as a child, he was taken in and raised by buffalo peoples. Upon learning of his human roots later in life, he chooses to turn himself to stone to avoid having to hunt his own kin.18 The site of the Mistasiniy, on the elbow of the kisiskaciwani-sipi (the swift flowing, or South Saskatchewan River) was long a ceremonial gathering place for many prairie Indigenous nations.19 This is not surprising if one understands the legal principles [...] that the account of mistasiny teaches. And so on. If you were to run your finger across a map of nêhiyaw âskiy territory, you will find similar constitutive and legal events written into the land. Nêhiyaw âskiy not only shelters and nurtures, but also teaches law. It becomes constitutionally animated as it continues to nourish us through the stories of its creation.

[...]

The “Breathing Life” of Wîtaskêwin20

So, as you can see, there are a multitude of directions that wîtaskêwin can take us in an examination of Plains Cree law and constitutionalism. As constitutional and legal ordering can be comprised of multiple centers,21 nêhiyaw law and constitutionalism can be described as constellating by nature; the connection of multiple sites of constituting practices provides the strength of the constitutional fabric nêhiyaw peoples coordinate our lives together on. The ordering of our lives is determined by how we interpret the constitutive bodies hanging celestially above us, and how we relate nêhiyaw social institutions and practices to each other in complex and beautiful patterns.22

[...]

Non-human Agency in our Constitutive Relations

Such ordering of course is not strictly ‘celestial’ but is grounded within the multitude of relationships with the non-human beings and things within the ecological
world. It is this grounded voice – that of non-human agents – within our legal reasoning that animates this dissertation. It is the “original spirit and intent” of nêhiyaw treaty relationships to “uphold commitments to land, water, animals, flora and fauna.”23 As the accounts of Wîtaskêwin Sputinow and the Neutral Hills collectively speak, nêhiyaw treatymaking is not merely about setting strict governance and control of lands and waters but necessarily animates non-human entities upon nêhiyaw âskiy as active agents within treaty relationships. As the resulting relationships from treaty-making between Indigenous nations and Euro-Canadian controlled polities has generally been interpreted through Euro-centric interpretive processes, the personhood, sovereignty, and ultimately voice of non-human agents has been removed from treaties. The imposition of Eurocentric legal reasoning upon nêhiyaw âskiy has subverted kinship relationships with non-human beings and things to create merely property or commodity relationships, or to deny the existence of relationships entirely.24 I am fearful that Canadian constitutionalism’s primary focus on human-to-human relations without making constitutional and legal room for the animacy of the ecological world will continue to result in devastation to the good living of non-human beings upon nêhiyaw âskiy. As John Borrows observes, when we view our constitutive and legal dealings solely on a human-to-human level, we fail to acknowledge inherent limits to our relationships with the ecological world.25

Focused on developing the legal personhood of the environment, earth jurisprudence re-engages a relational view of the connection between humanity and the ecological world, understands that the health of humans is reliant upon the health of the earth, and thus seeks laws that aspire to reflect this relationship.26 A common trait within nêhiyaw legal thinking is this type of relationality generally. As Art Napoleon explains: “[a]n underlying assumption of this kind of relatedness is that it signifies a kinship not just to humans but also to all other living entities and spirit beings.”27 Napoleon’s use of ‘living entities’ is significant. Such relatedness within nêhiyaw tapwewin (Plains Cree truth) does not exclude lands and waters that Western thinking often holds as ‘inanimate’.

While nêhiyaw kinship relationships support this type of relationality expressed in ‘earth jurisprudence’, this dissertation distinguishes nêhiyaw pimâtisiwin from the epistemological path that earth jurisprudence takes.28 As I explore in the next chapter, the concept of the ahcâhk (or spirit)29 within nêhiyaw thinking separates nêhiyaw constitutionalism from earth jurisprudence, as it is more concerned with the recognition of the autonomy of non-human beings and things, rather than the legal standing of non-human agents in human-centric legal processes. While earth jurisprudence provides non-human agents “human-like” stature within legal dealings or constitutional mechanisms,30 Nêhiyaw pimâtisiwin treats non-human agents as autonomous beings, capable of their own culture and laws, and capable of the inter-societal practice of law. This influences our legal processes to seek treaty relationships, and how we seek consent for infringing upon the autonomy of non-human beings and things.

Concluding Thoughts

With regard to our obligations to nêhiyaw wiyasiwêwina, the old ones in our communities will often say, in one way or another, that someone living without a base in nêhiyaw pimâtisiwin is like a child caught out in a prairie winter storm, unclothed and unsheltered. I tend to think about this in a metaphysical sense, that there is necessity to be sheltered by nêhiyawâtisowin (Creeness). It recalls us to think about law as weaving […], that it is our responsibility to create a shelter through acting out nêhiyaw wiyasiwêwina. As young ones, we are bundled by nêhiyawâtisowin, furnished with teachings to shelter us from the outside storms. This is why we hold up our old ones (even while we acknowledge they are not perfect) because we have been lucky to have those older hands that are knowledgeable in working with the hides of our traditions, in sewing the strands of nêhiyawâtisowin that will furnish our cradleboards, in beading the âtayôhkêwina (spiritual stories) unto our vests. However, our cradling does not last forever. As we reach adolescence, grow into adulthood and then ultimately become these older ones, the tools for this cradle-making, shelter building, and star aligning have been turned over to us. We are given the responsibility to re-constellate our legal and social orders in our adulthood, allowing for strengthening, transforming, or even dismantling of our law and legal systems. Our four-bodied personhood31 provides us all the aspects to be full...
agents in these re-constellations, and thus our law. Lately though, I have been thinking of this refrain in a literal sense. What if a loss of nêhiyaw wiyasiwêwina means we are literally caught unsheltered? What if our loss of kinship with the ecological world means it will one day be unable to shelter and nourish us? As hard as it is to imagine, our collective constitutional unkindness towards the ecological world has already created unnourishing environments. In this sense we are experiencing ohcinêwin, or retribution for our transgressions against the natural world. So I turn to nêhiyaw law, and one lesson in particular, that teaches us against letting our collective consumptive tendencies overrun us. I turn to our whetiko stories for lessons on kindness. Whetikos are known for their consumptive intentions and actions. Within nêhiyaw âcimowina, wehtiko accounts have been the subject of a variety of angles of analysis, including as psychosis. Hadley Friedland contends they are “best understood as a complex intellectual concept with a social and legal history.” While there are historical accounts of wehtikos and community responses involving incapacitation and death, in some instances a whetiko can be healed (or have their consumptive tendencies suppressed) through a collective turn to miyo-wîcêhtowin. This is enacted through kindness and generosity, often by sharing food. As whetikowak are burdened by a freezing heart, one particularly important community action is that we bring people who are suffering this closer to fire, and ensuring they always have a spot around it. The invitation that started this chapter – to come closer to the iskotêw (fire) - is not only individual, but societal as well. In a small way, this dissertation invites the heart of Canadian constitutionalism to come closer to the iskotêw of the nêhiyawak. I hope this invitation is fruitful. There may be disagreements and some words that feel like jagged stones going down. I hope there will be some shared medicine within these words for us. Let’s seek out this warmth together.

Âstam.

Endnotes

1. The ‘our’ referring to Plains Cree peoples. I am âpihtawkosîsân nêhiyaw (mixed-rooted Cree or literally translated as ‘half-son’ Cree). I am currently not a member of a First Nation, though my family relations are from Samson Cree Nation. While the most recent changes to the Indian Act have assured me ‘Indian- status’ according to Canadian law, I account for my inclusion into Plains Cree peoples through my participation in our shared obligations as nêhiyawak, and commitment to nêhiyawisowin (Creeness).

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


5. Dempsey, supra note 3.


7. Ibid at 152.

8. Ibid.


12. *Ibid* at 121.


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

16. See the story of Neutral Hills in Anne Speight, *The Shadows of the Neutrals and Open Memory’s Door* (Coronation, AB: Old Timer’s Centennial Book Committee, 1967) at 1-3.

17. The story of creation of Buffalo Lake, passed orally in my family, involved a buffalo being hunted and producing water, not blood, out of its wound. The water continued to spill out of the wound until it became the shape of a buffalo. Communities would gather at this new lake as it became a place of refuge and was plentiful in the food and shelter provided around it.


19. The mistasiny was submerged in the damming of the South Saskatchewan River in 1967, and currently sits beneath Lake Diefenbaker.


21. However, part of the categorization of the character of Indigenous legal orders as ‘decentered’ is influenced by the inability for people outside of an Indigenous legal order to recognize and ‘read’ the texts of Indigenous law and to recognize the legal institutions within Indigenous societies.

As will be discussed in the last chapter, there is a fluidity to nêhiyaw governance that allowed for multiple centers to come together at certain periods, for example during conflicts and wars, as well as during periods of renewal in the summer.

22. These directions are by no means the only locations of law but serve as single points within a constellation of constitutive events, textualizations and institutions. Deciphering the pattern in our stars is not an individual endeavour; we require the guidance of our kehte-ayak (our old ones) and those of our ancestors accessed through the lessons they have embedded in stories and language, and through ceremonial relationships. But we also have individual agency in our interpretations, and a persuasive voice in the collective. The ordering of our stories, our ceremonies, the law written into the land, and the guidance within our language gains persuasive authority through our guided constellating; we teach it to our children and raise up those who we trust in their reading of the stars to be our leaders who will speak for us from this knowledge. It is both the multitude of constitutional and legal resources and the guided interpretative processes that make a living nêhiyaw law and constitutionalism.


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


27. Art Napoleon, *Key Terms and Concepts for Exploring Nêhiyaw Tapisinowin in the Cree Worldview* (Masters Thesis, Faculty of Humanities, University of Victoria, 2014) [Unpublished] [Key Terms] at 86.


31. Nêhiyaw translates into ‘four-directioned or four-bodied peoples, thinking of the emotional, spiritual, physical and intellectual aspects of people.


36. For example, Swift Runner, a Cree man, was sentenced to death for the deaths of his wife and children after he consumed them in the winter of 1878. See Robert Brightman, “The Windigo in the Material World” (1988) 35:4 Ethnohistory 337 at 352-3.


As a Metis legal scholar who is also a (passable) musician and a (fairly bad but enthusiastic) dancer, I've been interested in the intersections of law, music and dance for a while now. Although western formal law seems to deliberately try to erase all melodic traces, or at least Indigenous ones in the courtroom,¹ the law of the Metis has no such scruples. Music and dance are central to how we relate to other beings and to how we constitute ourselves as a nation.

The poem below represents an attempt to express the inseparability of music and dance from Metis experience – including Metis legal and political experience. In addition to referring to various musical and dance forms, I have used the metaphors of weaving and braiding: in reference to the Metis sash, or ceinture flechée; and to the Cree word (Y-dialect) that is often translated as “law”: wiyinikewina, which means “an act similar to a kind of weaving.”²

I want to be absolutely clear that, in the section entitled “Complainte,” I am not myself saying horrible things about beavers, or about people of various ethnicities or backgrounds! I am, of course, parodying these characterizations, suggesting that they have been transmitted to us through Canadian educational processes and other colonial narratives.

While footnoting a poem à la TS Eliot is not my style,³ I recognize that some ideas and references may be a little obscure for those not immersed in Metis history and culture, so a few explanations and a tiny glossary follow below.

In lieu of a bibliography, I've provided a “danceography” so you can hear and see some of the music and dance that I'm writing about.

I would also like to acknowledge three people, among the many, who were inspirations for this work: Julie Lassonde, whose LLM defence included a dance performance;⁴ Tristen Durocher, Metis fiddler and activist; and my late grandmother, Helen Venne Sloan, who sang all the time.

Explanations and Glossary⁵
Qu’Appelle is a valley region in southern Saskatchewan. The name of the region comes from a Cree story of a man who heard his dying lover’s call, although she was miles away.

Louis Riel’s possessions when he was arrested included the clothes he was wearing, a bible, pencils, and a few papers, including his marriage certificate.⁶

In Metis and various Algonquian traditions, sweetgrass is sacred and is seen as the hair of mother earth. Sweetgrass is braided and burned in ceremony for spiritual cleansing. The wearing of hair in braids can be a symbol of sweetgrass, completing the symbolic circle.

After losing their lands following the Riel resistances, many Metis people squatted on government road allowance lands, and could be moved at any time. Thus, the Metis were sometimes called “road allowance people.”

One of the many uses of the Metis (arrow) sash was as a calendar. Knots on the tassels were used to count the number of days someone was out on a trapline, for instance.⁷

Some Indigenous traditions speak of humans as being related to stars. In Metis tradition, the appearance of northern lights suggests one’s ancestors are visiting.

According to Metis oral tradition, Riel prophesized that after his death his people would “sleep for 100 years,” but when they awoke “the artists would give them their spirits back.”

∞ le bon Jeu is Michif for “God”; le Jiab is Michif for “the Devil”
∞ neepin pinesuk meskinaw is Cree for “Milky Way” (literally, “dancing summer bird’s path”)
∞ mooniyaw is Cree for “people of European descent”
∞ sooniyaw is Cree for “money”
∞ nikamon lii zistwayr is Michif for “sing the histories”
∞ nehiyaweywin is Cree for “Cree language”
∞ waniska is Cree for “wake up”
∞ ekosi is Cree for “thus/that’s it/it’s true/amen”

Some book titles are referred to: Gregory Scofield, Thunder through My Veins (1999); Melinda Marie Jetté, At the Hearth of the Crossed Races (2015).

I hope this helps. I’ll leave the rest of the interpretation to you…

Dancing the Nation
Kerry Sloan

Kerry Sloan is an Assistant Professor and former Junior Boulton Fellow at the McGill Faculty of Law. A citizen and past board (council) member of the Metis Nation of Greater Victoria, she is also connected to Metis communities in the southern BC interior.
**Gigue**

her feet touch the ground, rhythmically
  smoky moosehide flower beadwork
  striking lightly leaping

patterns pounding
  nested circles here  a cross of swords there

star-footed
  she lights my way home
  through waving grasses

**Chanson “Qu’Appelle”**

meadowlarks calling, bobbing
  tunes perched on scraping sedge
  bow of horsehair loosed on a fiddle

hawks crying, swooping
  over alkali sloughs
  wings stealthy, sussurating

grouse drumming, courting
  his joy  his pride
  bright heart in his throat

magpie chatters, persuasive
  prairie chicken kicks up the dust

**War Dance**

drums are first distant
  echoing blood
  filling, emptying, filling

booming draws nearer
  pulsing, rushing
  life spilling here

a cross of rivers
  swords

a pen also scratches
  staccato, insistent
  words

brandishing clauses

filling, emptying, filling
  a great rush of thoughts
  crashes to cadence

mighty

he stops with a flourish
  holding his breath

in his prison chamber
  for la liberté
  he calls to le bon Jeu
  flushed, yet sanguine
  for freedom
  but not from his own walls --
  for the people, the bison
  for the land that gives life
  for birds flying
    like words
    off the page

his only possessions --
  his clothes
  a bible
  pencils, paper

a warrior’s heart

no sweetgrass now
  yet he still sings our story
**Berceuse “La Pietà”**

drained, he dreams
going home, embraced
his mother sings lovingly

he strokes her long hair
braided and fragrant

**Work Song 1**

skipping past
borders

lightly sporting
contraband

*coupe de feu*

flitting fast
incognito

outrunning
title deeds

lines of medicine row on row

portaging
firewater

outgunning
buffalo bill

a few coins jingling

*coupe de grace*

**Work Song 2**

scratching existence
on allowed roads

liminal livelihoods

in texts of their history
marginalia
mere commentary

shuffle, shuffle
move along

gathering bones
*couper le foin*
to fill the pot
*encore une fois*

an education?

tap, tap
lights out please

**Round Dance “Clair de Lune”**

stars fading
we still weave fragments

belts without arrows
our new constellations

fraying fabrics
still tied, counting time

yet, even if shaded

*neepin pinesisuk meskinaw*
dancing summer bird’s path
lights us down to the river

it’s the moon
not *mooniyaw*
not *sooniyaw*
makes the world go round
Complainte

invisible? lost? forgotten?
we start it in school
with scrip money funding
our new book collection

forgotten? lost? invisible?
it’s textbook
you’ll see

the song remains the same
plus ça change

sacred ballads?

les castors
happy, gnawing and glossy
once dammed rivers
making banks
now hats tip
to the damned
heartfelt accretion

fierce natives
whooping
but stoic
dime store Indians
unmoving
yet creepy
icons in chapel
sang froid stigmata

heroic pure laine habitants
stripping land sturdily
plowing rangs joyfully

flechéed ceintures expanding
fattened on beignes and tourtières
later clogging up arteries
of the mucky interior
muskeg mugwumps

their sons
jolly voyageurs
wooing lusty or demure
brown-eyed girls
rakishly
blithely paddling
up the creek
heedlessly singing
hard working
yet indolent

building the nation
unreliably
flinging beavers aloft

unbelievably, more:
(plus ça change)

highland clearances
repeating, bleating
outlawed sheep gut lament
clannish factors progress
crediting crafty celts
but with more cred
than the “worse-than-dogs” Irish
coffin cargo
feisty fey fenians
ridiculous romantics
lilting lazily

oh, progenitors!

lost? invisible? forgotten?
it’s now academic –
raindance, riverdance
it’s all greek to me
all strains chorusing
means breeding more bastards
too brown by half
too many
yet a drop in the bucket
dime-a-dozen

pour chanter une nouvelle chanson:
(something completely different)

invisible, lost, forgotten:
out-of-tune
mixed metaphors
jagged jibes
sticks, stones
outrageous misfortune
slings and arrows
**Variations**

*en pointe et en garde*
we tread softly

nimble feet weaving
foiling penny histories
dreadful juke-box muzak
no joke
*pas de chat*

cutting past caricatures
on feline feet prancing
artfully dodging
vaudeville, slapstick
*coupé, chassée, pas de bourée*

*changement*

*riposte*

*salute*

**Denouement**

through a tanglefoot web
of Gordian proportions
we sashay
sassy, Janusian

at the heart of the crossed races
our heads splitting
yet we are one
*e pluribus unum on terra nullius*
but not one happy family

yes, we get in your blood
invisibly
we’re bred in the bone
surreptitiously
marrow breathes life
in the dry land

limb by limb
we dance paddle ride drive
through the veins of a nation
drumming
our bright heart still burns

*nikamon lii zistwayr*

sacred fire bows – arcing, blazing
sparks gather, disperse, gather

we rise
from the longest dream
glittering with starlight
Heel, Toe

whew – that was heavy, eh?

can’t you get this wood chopped?
the fire’s gone down and we need some kindling
hey girl, got two broken arms and a broken leg?
step lightly

and what happened to the laundry?
rain’s coming

peetigway ... come in
   come in and shut the door

now the fire’s banked
you go hang these shirts
over the stove, now

I’ll put the kettle on
warm whistling

Let’s have some bannock
   – and a kiss!
   (with some jam)

astum! come here!
your slippers – they’re white
you went back in the alkali pool
my little puddle jumper!

have you been through the wars?
your knees are all bruised, eh
I keep telling you to pick your battles
how can you keep jigging
with knees like that?

here – take babee

Lii Vraay Chanson 1

as always, when she works
   she hums a tune
   smiling a while
thinking of her brother’s fiddle band
the dance parties of her youth
before she raised seven children

did she think about what happened
all those years ago?
mostly, she was trying to get by

still, she taught her granddaughter
the dance
not just the steps and the figures
but the song itself

the rhythm, sometimes ragged
not fitting neatly into meter and measure
it frayed and skipped
past the borders of time
long lots overlapping sections and townships

the song itself
blended catches and ditties
and work songs and ballads
and war songs
and love songs

the song itself that wove its way through
a tapestry of tunes
   a mosaic of melody

the song itself
singing thunder in the veins
thrumming strings throughout time

in Michif, in Bungee, en français, nehiyaweywin, Saulteaux
in English, Dakota, in Dene, in Stoney

a jingle dance  a chicken dance  a break dance

clogging, jigging, flinging (with swords and sashes crossing)
waltzing, tapping, stepping, rocking

singing  drumming  flying  raging  healing

sometimes resting  sometimes listening

in time with the land and the rivers
waking from a long-time lullaby
whispering rock-a-by
in time the music wakes us
and the dancing brings us
our spirits back

*Lii Vraay Chanson 2*
the stove lids clanging
the baby cries
*waniska* – it is morning

**Gigue: La Reprise**
all together now
our feet touch the ground, rhythmically
dancing our mother
pounding a pattern of nested circles
a cardiac confederacy
blood beating
at a crossing of rivers
at the heart of our island
we gather
meadowlarks calling
hawks swooping
grouse drumming

prairie chicken
kicks up her heels
our joy our pride
rushing forward
spilling the banks
greening the prairie

in the midst of our circles
the sweetgrass is burning
even *le Jiáb*
has kicked off his shoes

buffalo gals
are rousing the bison

we dance so long
the stars come out

as my gram’s eye twinkles
shimmering auroras
step lightly
in the sky

*ekosi*
Endnotes

1. During the trial of the *Delgamuukw v BC* case, (1991) 79 DLR (4th) 185, [1991] 5 CNLR 5 (BCSC), when Gitksan witness Mary Johnson (Antgulilibix) was preparing to sing one of the songs that formed part of an adaawk (oral law/history), McEachern J famously said to counsel for the plaintiffs, “I have a tin ear, Mr Grant, so it’s not going to do any good to sing it to me.” See John Sutton Lutz, Makúk: A New History of Aboriginal-White Relations (Vancouver: UBC Press, 2008) at 276, citing *Delgamuukw v BC* trial transcript. Similarly, in *R v Belhumeur*, 2007 SKPC 114, a Metis rights case, Crown counsel Mitch McAdam was opposed to hearing Metis witness Oliver Boulette play his fiddle in court as part of his testimony about the distinctiveness of Metis music and culture. Mr McAdam protested, “To actually have him play a song for us, this is – this is a courtroom, this is – this is a court of law, we’re here to deal with legal issues, it’s not a concert. And, quite frankly, the other concern that I have is how does this all appear on the record if this matter goes on appeal?” See Arthur J Ray, *Telling It to the Judge: Taking Native History to Court* (Montreal & Kingston: McGill-Queen’s University Press, 2011) at 116, citing *R v Belhumeur* trial transcript.


3. At the request of his publisher, TS Eliot wrote notes to his poem “The Waste Land,” but seemingly later regretted providing them, saying “… they became the remarkable exposition of bogus scholarship that is still on view today”: TS Eliot, *The Frontiers of Criticism* (Minneapolis: University of Minnesota Press, 1956) at 10.


5. Note I am only a beginning learner of Cree and Michif, so please pardon any errors.


A Partial Danceography

Some “modern” Metis-style jigging – Sagkeeng’s Finest: Brandon and Dallas Courchene, Vincent O’Laney; Michael Audette, fiddle [Anishinaabe]: https://www.youtube.com/watch?v=7_QNzF5Mbas

Robert Fish – Prairie chicken dance (Siksika/Blackfoot, later adopted by other nations): https://www.youtube.com/watch?v=6-13fkeaWTI


“Gigue Québécois” – Pierre Chartrand & Yaëlle Azoulay; Alexis Chartrand, fiddle (Québécois jigging has Irish roots): https://www.youtube.com/watch?v=xcgv9kVy29g

Rebecca Thow – Sword dance (Highland dancing is quite different from Irish): https://www.youtube.com/watch?v=-I04iH2EBWE

Note this traditional Metis variant (sash dance): “Cooking It Up Metis” – Compaigni V’ni Dansi: https://www.youtube.com/watch?v=jgSkVgfroXw

United Thunder Dancers – Metis-style square dance with jigging (the figures have French, Scottish and English roots, the steps Indigenous, African, French and Irish roots): https://www.youtube.com/watch?v=9Vh7ufqgEfoM

More of Sagkeeng’s Finest (just for fun): https://www.youtube.com/watch?v=9Ey_QQVDlaQ

“Waniska” (Cree Morning Song), sung by Iskwew: https://www.youtube.com/watch?v=UP-fezjiiQ9Zs

“Big John McNeil”, played by JJ Lavallee: https://www.youtube.com/watch?v=jkTxbxZF-0LA
The Mi’kmaw Version of Rooted Constitutionalism
James (Sákéj) Youngblood Henderson

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Since the Mi’kmaw worldview exemplifies a changing biosphere of form-in-flux (pema), the inherent constitutionalism of the Mi’kmaw can best be understood in terms of process, as a way of thinking in terms of actions rather than things. The flux of a biosphere is reflected in the verb systems of their languages, which are built on evidentiality. Evidential verbal systems represent a cognitive linguistic framework and code that reveals how the speaker and the person spoken to came to experience and know of their knowledge. The emphasis is not on the thing or event, but on how one comes to know the spirit or force of an event. This is very different from the verbal systems of many of the Indo-European languages, which set up a cognitive focus on coding an event (an entity) within a timeframe of past or future.

Bernie Francis, a Mi’kmaw linguist, says that “weji-sqalia’timk” expresses the Mi’kmaw comprehension that “they sprouted from the land.” This concept is the foundation of Mi’kmaw knowledge system and law. It is a Mi’kmaw verb infinitive in the polysynthetic verb stems or roots and inflectional prefixes and suffixes of the Mi’kmaw language. The inflectional prefixes -weji- relate the context of the appearance to the energy, motion or verb stem, and the suffixes - timk - relate the process involved with the motion. This relationship is generated in an exclusive form, “weji-sqalia’tiek,” which translates roughly into English as “we sprouted from the land,” much like the rest of the forest ecology.

“Wejiaq” is translated as “comes from it.” This concept reveals that the standing peoples, their knowledge, language and law grew from within the embodied environment. The people are rooted in the “langscape” of territory that informs the language and law. In Mi’kmaw thought, sprouting or coming up from the earth is vital to the relatedness and dependency of the Earth lodge to Mi’kmaw knowledge, humanity and law. Mi’kmaw knowledge, language and law have always been connected to the place from which they sprouted and through which they created a holistic network of relations.

This concept of rootedness as the heart of Creation is related to how Kluscap was bound to the land for a long time before becoming the guardian spirit of the Mi’kmaw, according to Hereditary Chief of Siknikt district or tribe (now New Brunswick) and Kep’tin of the Santé Mawio’mi of the Mi’kmaw Nation Stephan Augustine’s description of their “Creation Story.” Augustine’s Creation Story has many parts. The first part of the teachings of the Creation Story establishes the paramount, energetic covenants (‘n’uapskun) and relations between the Mi’kmaw and their ecology (or Mi’kmaw science). The last part of the covenants generates Mi’kmaw knowledge, humanities, and law. I have condensed the creation story for the purposes of this article.

The first part of the Mi’kmaw Creation Story took place on the other side of the Path of the Spirits, in ancient times. The force that created Mi’kmaw or Life-giver (kisu’lk) originated the firstborn energy, the day star or sun (niskam), who was brought across the spirit road or milky way (skite’kumujawti) to light the earth. Kisu’lk also sent a bolt of lightning across the sky that created the dry earth lodge (ws’tqamu) to form the keeper of life forces. Legends recount that the keeper of life lay in the earth, generating the emerging respiratory system (kamlamink) of the green growing energy (plants), and then other life energies were created. Like the various plants that sprouted from the earth, the different life processes of creation are contained in different sounds that generated the atmosphere that gave life. Kluskap was the original concept of the atmosphere and gradually became a guardian spirit, then interpreted as a standing human form. This part of the creation story reveals how the Mi’kmaw are rooted to the land and sprouted from the earth.
In many other stories, Kluskap is depicted in human form, arose from the ground and asked the Life-giver how to live in the land of the rising Sun and sister moon. In response, Kluskap was taught to give thanks to all the forms of life and to respect them. Equally important, the Life-giver told Kluskap to learn to respect the abilities and energies within the human form. The Life-giver sent various knowledge keepers to Kluskap to learn about the forces of the territory and the ecological covenants. These different energies of creation are illustrated by the changing seasons of the Atlantic forest and rivers. One of the last life forms generated was the standing human (kaqmik) that arose from the earth, bringing a sacred energy or spirit that signifies the gifts or abilities that lie within. The highest expression of this sacred energy is that placed within all forms of life is love.

As part of the covenant, and integral to the teachings of the knowledge keepers, the people are taught to respect the spiritual force of love (kesahuek) in their community and nation. The adherence to the teachings of the intimate ordering of love, and of proper bonds of relationships (kesalimkewew), informs the laws. The way of love is not entirely understood, however. Rather, it is conceptualized as similar to the energy exchanges of plants, which in English is called photosynthesis. The energy exchange of love (kesaluhuek) exists in all living forms in different but related ways. Love teaches the primacy of heart-knowledge (wijaqami) over mind-knowledge. It generates the communion, loyalty, and fidelity relations among nature and Mi'kmaw, thereby creating cohesion, belonging, friendship, solidarity, empathy, and kindness. It generates the inner strength of acceptance, nurturing, protection, caring, and healing. It generates the concept of respect, gentleness, kindness, honesty, fairness, cleanliness, sharing, and helping. Similarly, it fosters the idea of peace, harmony, and law through familial relationships and seeking to have a good mind in order to generate beautiful relations (kelul'k) and live a good life (eplewek). It creates the implicit law that urges everyone to conduct themselves such that they generate positive or good relations in all their interactions and makes one feel good inside (welkwija'luek), even in times of conflict or sadness. It provides direction and guidance for achieving self-worth, dignity, integrity, cooperation, empathy, and transformation.

Other lightning bolts created the Great Spirit fire, which generated from the ground the Spark people. This process was similar to the creation and sprouting of Kluskap as a standing person (kaqmik). These sparks are embodied in the people as the inherent spirits of living, especially the learning spirit. These sparks are often called the Creator’s flame, or soul-flames. The sparks of fire created seven couples and they developed seven families. Kluskap taught the original people who carried the spirit, called Spark people, their lessons about the duty of learning through language and loving as the way to practice of the sacred way of life. Thus, Kluskap became known as the “one who is speaking to you” or the “teacher creator.” Kluskap taught a spiritual way of life, not a religion.

The Life-giver sent the sacred knowledge keepers to teach the Spark people how to learn the covenants of the Earth lodge. The covenants are the first treaties with the guardian spirits and the animate forces of the Earth lodge. The stories say the knowledge keepers lived with many generations of the Spark people. They taught them how to learn and live cooperatively with the life forms and energies of the many lodges within the Earth lodge, and the Spark people learned the potency and fragility of their humanity (skwijinu’s).

As each newborn of the Spark families sprouted and awoke in a certain environment or place, they, like Kluskap when he awoke, were unaware of everything in the Earth lodge. They had to learn how to live with the covenants and to respect the intrinsic energies of the Earth lodge. Under the terms of the covenants, the Earth lodge provides the gifts of life to the people. These covenants expressed in the language are weaved into a pattern of human conduct and performance that explain Mi’kmaw constitution and law. The Mi’kmaw language is embedded with the notion of right relationships, proper conduct and persuasive law of how to maintain and restore communal balance and harmony among the families.

In the last part of the Augustine Creation story, after the passing of seven winters, the seven families that comprised the Lnu’uk – defined as “the people” in Mi’kmaw – were taught the necessity of gathering together to renew the covenants. This ceremony generated the nawio’mi (gathering). The seven families were told to return with their seven fires (pukteu) to rekindle the sparks of the original Great Fire. To renew the covenants and teachings of the Life-giver and the knowledge keepers, seven hereditary leaders represented the seven original families. These renewal ceremonies invigorated the Lnu’uk consciousnesses, knowledge and versions of the language, and were repeated for generations. Each family generated different ceremonies as they dwell with and comprehended the different forces of the living lodge.

The seven families were told to return, with their seven fires, to rekindle the sparks of the Great Fire. In order to renew the covenants and teachings of the
Life-giver, seven hereditary leaders, representing the seven original families, begin the renewal ceremony by smudging with sweet grass lit from the Great Fire. These renewal ceremonies generate the Lnu’uk consciousnesses, knowledges, versions of the language, as well as jurisprudence. The Lnu’uk search for peace, justice, righteousness, and balance is seen as occurring within the consciousness and heart knowledge of the people and is revealed in part by the ceremonies.

The families collaborated in the symbolic reanimation of the creation of the Earth lodge by the construction of a lodge of seven saplings according to teachings. The constructed lodge represents the womb of Earth lodge. After the lodge ceremony, the leaders of the gathering offered the sacred pipe ceremony and renewed covenants and treaties. The concept of fire (pukteu) among the descendants of the Spark people came to represent the concept of sovereignty and nationhood. Every fire has a beginning, but always spreads outward from its origin.

The Mi’kmaw civilization was one of the seven civilizations of Lnu’uk. The other six civilizations that sprouted from the Lnu’uk civilization, following the path of the sun and moon, are as follows: to the northwest of the Mi’kmaw, the Inuit; to the north, Innu (Montagnais, Naskapi, Attikamekw); to the southwest, the Wabanaki confederacy (Penobscot, Passamaquoddy, Maliseet, Abenaki), the Wampanoag confederacy, the Narragansett confederacy, and the Lenapi confederacy (Delaware); and to the west, the Anishinaabe confederacy (Anishinaabe, Anishinabek, Ojibwa, Chippewa), the Iynu (Cree or Eeyouchi), and the Nitsi-pol-yiksi confederacy (Blackfoot) among others.

This concept of the rooted constitution appears, in translated form, in the Mi’kmaw expression found in the British archives. In the Sipekne’katik Declaration (1720), the Sipekne’katik chiefs explained to the British Governor Phillips of Nova Scotia that they “believe that this land that God gave us, on which we could be counted even before the trees were born, does not appear to us to be disputed by anyone.”

The Governor of Ile Royale, Saint-Ovide, in 1730, attempted to explain the French King’s cession of Mi’kmaw lands to the English king in the Treaty of Peace and Friendship. When the Mi’kmaw responded, they wrote: “[L]earn from us, that we are on this earth that you tread and on which you walk, before the tree which you see began growing, it is ours and nothing can ever force us to abandon it.”

L’Abbé Antoine Simon Maillard relates Arguimaut (L’kimu or Augustine)’s version of the origins of Mi’kmaw life: “[I]n these parts [is] where God decreed we should be born and where we have grown like the grasses and the trees you see around you.” This concept of sprouting from the land is integral to the Mi’kmaw prayer recorded by L’Abbé Antoine Simon Maillard, which says to the moon: “[T]hou haft concurred to make us spring out of that earth we have inhabited from the first ages of the earth.”

Throughout the Mi’kmaw territory, the landscape is embedded with thousands of stories and shared meanings of the ecosystems that inform the unwritten constitution and laws of the Mi’kmaw nation. The role of language in maintaining the constitutional and legal order cannot be over-stressed. These grounded visions of continuity and change continually moves the allied Mi’kmaw to remember, renew, and revisit the rooted lifeways and laws endlessly and to create new visions.

Endnotes

1. Trudy Sable & Bernie Francis, The Language of this Land, Mi’kma’ki (Sydney, NS: Cape Breton University Press, 2012) at 17.
3. Sable & Francis, Language, supra note 1 at 17.
7. Charlevoix Papers, Discours fait aux Sauvages (1720), Ottawa, Library and Archives Canada, Manuscript Group 18, E-29.


“Nishke, mtig deh daa aan” (“Look, the tree has a heart”)
By Isaac Murdoch. See more on Facebook and Twitter (@bomgiizhik).
Donald Marshall, a Mi’kmaw man from Nova Scotia, was wrongfully convicted of murder in 1972. Marshall was only 17 years old. He spent 11 years in prison before he could prove his innocence. It was one of the first miscarriages of justice to gain notoriety in Canada. A Royal Commission of Inquiry into Marshall’s wrongful conviction disclosed systemic racism in policing and, more broadly, throughout the justice system. It exposed the unequal treatment of Indigenous peoples before the law, led to fundamental changes in the law of procedure and evidence, and rightly punctured the Canadian justice system’s inflated self-regard. The Commission ultimately tendered 82 recommendations to address systemic faults in the administration of justice.

In summary, it found that:

The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure is compounded by evidence that this miscarriage of justice could – and should – have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a native.²

Donald Marshall’s wrongful prosecution, conviction and denial of his appeals are emblematic of the systemic discrimination and racism experienced by Canadian Indigenous peoples during the 20th and now 21st centuries.³

 Donald Marshall Jr. and a Nation’s Constitutional Revival

I shared many wonderful years and many extraordinary experiences with Donald Marshall Junior. I moved to Mi’kma’ki, Mi’kmaw territory in August 1991. I met Donald Marshall Junior, the eldest son of Grand Chief Donald Marshall Senior and Kalolin Googoo, and soon became Donald Marshall Junior’s fishing wife.⁴ Grand Chief Marshall was a highly regarded leader of the seven districts of the Mi’kmaq Nation, a revered treaty rights advocate and nation-builder. Donald Marshall Junior, once released from prison, traced his father’s footsteps.

Junior loved to fish. He was a grateful harvester and enjoyed cooking what he caught. He embraced the solitude of wandering down the river with his fly rod or jig. Junior’s passion for fishing led us to catch eels for a living. Eels are an important facet of Mi’kmaq culture, and eel fishing a time-honoured custom. After the catch, we would take out the choice eels, and Junior would spend hours cleaning them to pass to the elders in the community. He also fished for feasts and important events like Treaty Day and mawiomi (powwows). He embodied the constitutionalism of the L’nu, the Mi’kmaq peoples, respecting the resource and sustaining honour by sharing. Fishing eels is hard, dirty work, but we liked the adventure. Every time there was a heavy rainfall during fishing season, Junior would rub his hands together and say, “Lots of eels tomorrow, baby!”, and he was always right.⁵

In fishing and selling eels, Donald Marshall Junior believed he was simply carrying out his treaty right to earn a livelihood. Others took a very different view – in particular, the federal government as successor to the Crown co-signatory to the same treaties. In short
order, his comfortable exercise of his traditional treaty rights was abruptly interrupted. In August 1993 we were charged with illegally fishing eel. Junior’s subsequent prosecution grounded a treaty test case that ultimately refurred Indigenous and settler resource relations in the Atlantic provinces of Canada. When the Department of Fisheries and Oceans (DFO) officer approached our boat and asked to see our licenses, Junior’s response was immediate: “I don’t need a license, I have the 1752 treaty” — just as his father had earlier fought for the treaty right to hunt moose. “I don’t know anything about a treaty”, said the DFO officer.6

It did not cross our minds that fishing slimy, sometimes stinky, but always yummy eels would lead, some six years later, to the transformative Supreme Court of Canada decision of R v Marshall. We were just trying to keep food on the table and gas in the boat, and with luck, have a bit left over for beers at the 123 Legion in We’koqma’q. Junior was a Mi’kmaw person whose ancestry is rooted in the land, sea and air of Mi’kmawi. He was exercising his livelihood rights as a treaty beneficiary. He was living L’nu constitutionalism actively shaping the resurgence of his Indigenous identity against the history of its oppression.7

Junior quickly understood that his fishing trial had become a crucial test of his nation’s treaty rights. He carried the burden with a heavy heart, often looking to his father’s legacy for guidance. The stress of repeatedly returning to court and the lengthy trial and appeals, along with his anxiety over the consequences for Mi’kmaw identity and livelihood if he lost the case, taxed his already fragile health. Marshall Junior left us far too soon, on August 6, 2009.

For close to thirty years, I have been a student of many generous Mi’kmaw teachers who patiently shared their stories and experiences with me. I am particularly grateful to the Marshall family and, of course, for the years I spent with Junior. Now a legal anthropologist, I am dedicated to sharing these teachings. They instil the values that frame Mi’kmaw legal principles, honour treaty relationships, mobilize L’nu constitutionalism, and respect the rights of the Mi’kmaw Nation. History changed that August day on the waters near Paqtnkek, and I am humbled by the transformative power of eels. I hope that my work honours Junior’s legacy and the Mi’kmaw Nation.

Land, Sea and Air: The Sources of L’nu Constitutionalism

The L’nu have lived in Mi’kmawi, the Atlantic region of what is now Canada, since time immemorial. Over the course of 14,000 years, well before the arrival of European explorers and settlers, the Mi’kmaw peoples developed vast trading networks, sophisticated political and legal systems, and a rich social and cultural history.8 Their creation stories identify sacred connections to their territories. The stories teach Mi’kmaw peoples about their clan histories, value systems, modes of governance and their relationships with each other. Over time, the L’nu refined concepts of law and social order that protected the environment, respected their ancestors, and fostered generations of prosperity. Honouring family relations, msit no’kmaq (all my relations), is vital to Mi’kmaw daily life, guiding individual and collective interactions and their relations with the universe. It is the framework of their constitution. The Mi’kmaw believe that the spirits of their ancestors reside in the land, sea and sky. They take seriously their responsibility to honour and protect the legacies of their ancestors for future generations.

Before first contact, the Mi’kmaw were sovereign peoples subject to their own legal practices.10 At the centre of Mi’kmaw legal culture is a body of fundamental law grounded in the underlying principles of weji-sqalía’tek (we sprout from the land) and msit no’kmaq (all my relations), and the rule of honour (kepmite’tmnej). One honours relationships with other people, the ancestors, and the lands and waters and their gifts, but one does not own them. One bears a responsibility to them, not ownership over them.11 These principles connect L’nu people to each other and to their territory. They are the essence of L’nu constitutionalism.

Mi’kmaw relations with their territories are signified in their place-naming. By assigning place names, the Mi’kmaw implanted cultural meanings within collective memories, extending knowledge and experience in land use across generations.12 When Mi’kmaq peoples use a place name they quote ancestral speech, acknowledging a sacred connection and a responsibility to honour. Msit no’kmaq is a teaching that connects Mi’kmaw to each other and to the world around them. Each clan had a representative symbol, usually depicting an animal or a physical feature of the territory from which they sprouted. The family heads of each district were responsible for planning the seasonal movements of the people, confirming
and reassigning harvesting territories, delegating work to immediate relatives, and providing them with hunting dogs, canoes, provisions and reserves for expeditions. Inevitably, they reminded community members of their responsibility to share and care for one another.

The pre-settler Mi’kmaq Nation comprised seven districts divided according to the geographical landscape and natural boundaries, such as rivers. To lead the Mi’kmaq in their domestic relations, Kisu’lk (the creator) endowed a few persons from each generation with special knowledge of the woodlands, the ocean and concerns of the spirit. These people, wise and trusted, joined together in a governing body, representing the highest authority of Mi’kmaq political, economic, and spiritual organization. Mi’kmaq polity had three levels: local, district, and national. Each district had leaders who participated in a larger national political organization called Mi’kmawey Mawio’mi, the Mi’kmaq Grand Council.

The Mi’kmaq were largely maritime peoples living in diverse environments. They had access to a great variety of food, enhancing their prospect for survival when particular shortages occurred. Although there were periods of starvation, the Mi’kmaq flourished through most of their history. Prior to European settlement, up to 90% of their dietary needs were harvested from the ocean and rivers. Eels, cod, salmon, shellfish, sea vegetables, seals and whales were abundant. Evolving fishing technologies included cooperative stone weirs, basket traps, hook and line, and spearfishing.

Mi’kmaq social organization included laws governing leadership, ceremony, resource sharing and stewardship. These institutions connected people to the land through kinship, language and culture. Customs were based on shared values and were taught through oral traditions and experiential learning, within families and communities. Courtship, marriage and child rearing involved elaborate gift exchange, permission seeking, subsistence gathering and rites of passage rituals, as well as extensive counselling from respected elders, spiritually powerful people known as pouin (shaman) and specialized knowledge carriers.

The Mi’kmaw had rules for making sure society worked in an orderly way. Justice is part of a meaning system framed by culture, where symbols, rituals, and language facilitate the creation of commonsense understandings that legitimize the core values of the community and the actions needed to protect and support those values. Indigenous legal traditions are informed by Mi’kmaw spiritual belief systems, and by the political and economic practices of social organization. Spiritual sanctions and purification rituals, such as fasting and sweat lodge ceremonies, helped guide people, heal rifts between individuals, families and communities, and explain the unexplainable.

Mi’kmaq relationships with marine life were incorporated in every facet of their lives, from cosmological belief systems to political and family organization. The premises of Mi’kmaq traditional fisheries were spiritual as well as practical, focusing mainly on the wellbeing and survival of families and community members. Mi’kmaq peoples fished, hunted and collected. Their subsistence activities adhered to the concept of netukulimk, which ground harvesting practices in sustainability and co-existence.

Subsistence customs reflected the holistic interconnectedness of Mi’kmaq law embedded in tribal consciousness. They governed behaviour, particularly those bearing on survival, such as sharing, providing, honouring ancestors and celebrating procurement skill and accomplishment. Netukulimk comprehended the proper practice of seeking bounty provided by Kisu’lk for the support and well-being of the individual and the nation. Netukulimk is thus intimately tied to living L’nuk constitutionalism. One’s place to hunt and fish, taken in its broadest sense, is the tract on which one practices netukulimk. Oral histories, creation stories, myths, petroglyphs and archival records chronicle ritual practices, ceremonies and spiritual concepts relating to resource use, including extraction protocols, taboos and prohibitions, as indicators of customary stewardship.

The Mi’kmaq fisheries prospered for thousands of years.

Treaties with the Crown: The First 300 Years

Due to their proximity to Europe, the Mi’kmaq have endured one of the longest periods of colonial encounter. They have a rich history of engaging and negotiating with newcomers to their territories. The Mi’kmaq practiced treaty diplomacy, kisa’muemkewy, among their own citizens and with allies. They developed conventions of community engagement through mawiomi – formal gatherings that included storytelling, ceremonies and rituals, by which they came to a collective understanding of treaty obligations reflective of their worldviews.
1726 treaty with the British Crown laid out protections for the customary rights of the Mi’kmaq, including hunting, fishing, and planting. These understandings were reaffirmed and expanded several times between 1749 and 1778. The treaties of 1760 and 1761 instituted covenants securing Mi’kmaq rights to both harvest and sell natural resources.


The *Marshall* decision triggered a redistribution of access to natural resources, amplifying Mi’kmaq economic development and autonomy. There was now potential to replace historical patterns of dependency and subjugation with sustainable community advancement, through the exercise of affirmed treaty and Aboriginal rights and through the substantiation of traditional knowledge. It marked an unprecedented turn in colonial relations.

As held by the Supreme Court, the Mi’kmaq have the right, pursuant to treaties and Section 35 of the *Constitution Act, 1982*, to harvest and to sell fish to obtain a moderate livelihood. The Mi’kmaq Nation in Nova Scotia has worked hard to leverage the Marshall decision. The Mi’kmaq demand predictable, productive, and respectful consultation and negotiation with settlers and their governments as they implement their livelihood fisheries. However, discussions with the Department of Fisheries and Oceans have failed to generate substantive recognition, changes in fishing regulations, or the implementation of Mi’kmaw livelihood rights management protocols. “Arguably”, Anthony Davis wrote in late-2020, “from 1999 to this day, the Mi’kmaq have foregone hundreds of millions of dollars in earnings while waiting for an appropriate resolution.”

Impatient with the government’s reticence to honour its treaty obligations, some Mi’kmaw communities developed and launched their own *netukulimk* fish harvesting strategy. As in the past, Mi’kmaw fishers have been met with threats, physical assaults, seizure of their gear and harvests, torched boats and storage sheds, and even gun fire. The continuing failure of law enforcement to protect Mi’kmaw fishers and their families from routine intimidation and violence only compounds the historical injustice. Tragically and shamefully, the systemic racism epitomized by Donald Marshall’s wrongful conviction persists. The clashes of the recent lobster wars are only the most recent example. We are witnessing the inevitable consequences of a colonial regulatory regime that lacks the resolve to decolonize its jurisdiction. The repair of nation-to-nation relationships is a critical first step. The inequities borne by Mi’kmaw Nation will continue unless and until the failure to recognize, respect and implement L’nu constitutionalism and livelihood rights are corrected. To address systemic discrimination, we must have systemic change.

**Conclusion**

We live in an era of aspirational reconciliation. Assessing the distribution of jurisdiction and the interface between Canadian and Indigenous legal and constitutional orders is critical to the achieving substantive progress. The Mi’kmaq are still struggling to decolonize their legal traditions. Their cultural resilience grows stronger, as does their capacity to productively navigate external and internal pressures. They draw on culturally entrenched narratives of law to interpret their lives and their relationships. These constructions define their legal consciousness, which in turn legitimate community choices. *Netukulimk* harvesting strategies are reparative exercises in self-empowerment, autonomy and legal reification. They exemplify living L’nu constitutionalism, a path forward in which justice, sovereignty, and the right to livelihood and self-determination may become reality, at last.
Endnotes

1. I am grateful for the teachings shared with me by members of the Mi'kmaw Nation and for the transcendent editorial advice of Justice Melvyn Green.


4. My ancestors are from Scotland, Ireland and the Alsace-Lorraine region, and probably arrived in Canada in the early 1800s.


12. See Trudy Sable and Bernie Francis, The Language of this Land, Mi’kma’ki (Sydney: Cape Breton University Press, 2012).


18. See Hoffman, supra note 8; Paul, supra note 8; Denys, supra note 16.


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