IF THERE CAN ONLY BE "ONE LAW", IT MUST BE TREATY LAW. LEARNING FROM *KANAWAYANDAN D'AAKI*

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Abstract

The paper stems from a research collaboration with the Anishini or Oji-Cree community of *Kitchenuhmaykoosib Inninuwug* (KI), known as the people of Big Trout Lake in the far north of Ontario. In the face of renewed threats of encroachment by extractive industries onto their homelands, the community leadership invited our research team to visit in 2017. The community was engaged in strategic planning and reflection on the work that they have done in recent years to articulate and record their own laws for the territory, and to gain recognition for those laws from settler governments. Between 2008 and 2018, the community drafted a Declaration of Sovereignty, a Governance Framework, a Watershed Declaration, and a Consultation Protocol, amongst other "operational documents" describing their Indigenous legal order. This period of community-led legal drafting was stimulated by a dispute between the community and a mining company, Platinex, that culminated in 2008 with the jailing of the Chief, four members of Council, and another community member who became known as the "KI6". Despite community members describing their obligation to protect the land drawn from the key legal concept of *Kanawayandan D'aaki*, roughly translated as "keeping my land", the KI6 were convicted of contempt of court for disobeying a court order to provide Platinex with access for its drilling program. The courts' message to the community in 2008 was essentially that only "one law" could govern the land; the application of settler law on KI lands could not accommodate the community members' obligations under Indigenous law. In our collaboration, community members expressed an interest in exploring the question of whether the process of writing down their laws would assist the community in any future encounters with the Canadian legal system in disputes over resource extraction.

In this paper, we draw on the transcripts from workshops conducted in KI in 2017 to share insights into the motivations of the community in articulating their laws, and we explore the question of how to reinvigorate historic treaty interpretations so as to produce "one law" inclusive of Indigenous legal orders. We conclude that if there can be only "one law" on treaty territory, it must be a renewed and reinvigorated treaty law. We draw on principles and mechanisms from the modern treaty context, and positions emanating from the communities in recent regional negotiations, to explore how pressing decisions on the use of the land and resources could be made differently in Treaty 9 territory. In our vision, in situations where settler law says "yes" and Indigenous law says "no" to a resource extraction project, treaty law must provide a principled framework for moving forward.

Introduction

This research is part of a larger SSHRC-funded project entitled *Consent & Contract: Authorizing Extraction in Ontario's Ring of Fire*.[1] Both the larger project and this particular contribution are investigating the current dynamics in the far north of Ontario around contested resource extraction on Indigenous lands. Renewed threats of encroachment by extractive industries onto Indigenous homelands exist in the context of continuing controversy over the potential development of Ontario's Ring of Fire mineral deposits, sometimes called Ontario's "oil sands".[2] The Ring of Fire refers to a massive, crescent-shaped deposit of minerals including nickel, gold and most significantly chromite, for which estimates range from 20–100 years for the potential life of a mine.[3] The communities that will be immediately impacted by the development of the Ring of Fire and its associated infrastructure are small, remote Oji-Cree and Anishinaabe communities, fly-in only or with limited winter road access. These communities are struggling to overcome the trauma of residential schools, a legacy that includes a rupture in intergenerational transmission of language and laws, land and kinship relations.[4] All of these impacts are compounded by continuing colonial relations and decades of state neglect, which in some communities is manifest in youth suicide and addiction crises, and a persistent lack of access to clean drinking water.[5] The community of *Kitchenuhmaykoosib Inninuwug* (KI), although it is outside of the Ring of Fire region (see Figure 1 below) has established an alliance with some of these remote communities, and is interested in sharing its own experience of resisting extractive activities in the context of the renewed attention to mining.[6]

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* We thank the participants and organizers of the Decolonizing Law? Conference held at the University of Windsor Law School in March 2018 for their feedback and support. We are indebted to John Cutfeet (KI) and Donna Ashamock (MoCreebec) for crucial guidance and analysis throughout this work. Other collaborators on the project, broadly speaking, have included Shiri Pasternak, Jennifer Wabano, David Peerla, Deborah Cowen, and Joan Kuyek. Kitchenuhmaykoosib Inninuwug leadership contributed significantly to the conception of the research questions in this paper, and the insights and analysis shared by community members attending the workshops, as well as other collaborators, inevitably shaped the ultimate argument. The Kitchenuhmaykoosib Inninuwug retain ownership of the knowledge shared in the workshops. Research assistance has been provided by JD students Graham Reeder, Jennifer Fischer, and MES/JD student Amanda Spitzig.

[1] This grant is led by Professor Scott, and includes Professors Boisselle, Deborah McGregor, and Estair Van Wagner as co-investigators. John Cutfeet and Donna Ashamock are community-based researchers with the project and were critical leaders of the workshops in KI, as well as co-presenters of this work at the Decolonizing Law? Conference.

[2] Daniel Tencer, "Clement: Ontario 'Ring Of Fire' Will Be Canada's Next Oil Sands", *Huffington Post Canada* (26 April 2013), online: <huffingtonpost.ca>.

[3] "Clement Won't Allow Ring of Fire to Be 'Mired in Uncertainty'", *CBC News* (19 February 2013), online: <cbc.ca/news>.

[4] Michelle Daigle, "Resurging through Kishiichiwan: The Spatial Politics of Indigenous Water Relations" (2018) 7:1 Decolonization: Indigeneity, Education & Society 158 at 159–72.

[5] For example, the Neskantaga First Nation has been under a boil water advisory for 25 years; see Christina Jung, "Neskantaga FN Still Waiting to End 25-year Boil Water Advisory as Trudeau Pomises 2021", *CBC News* (28 March 2019), online: <cbc.ca/news>.

[6] Members of our team and collaborators also visited KI again in the summer of 2018, with delegations from Neskantaga First Nation and Eabametoong First Nation, for the purposes of advancing the three

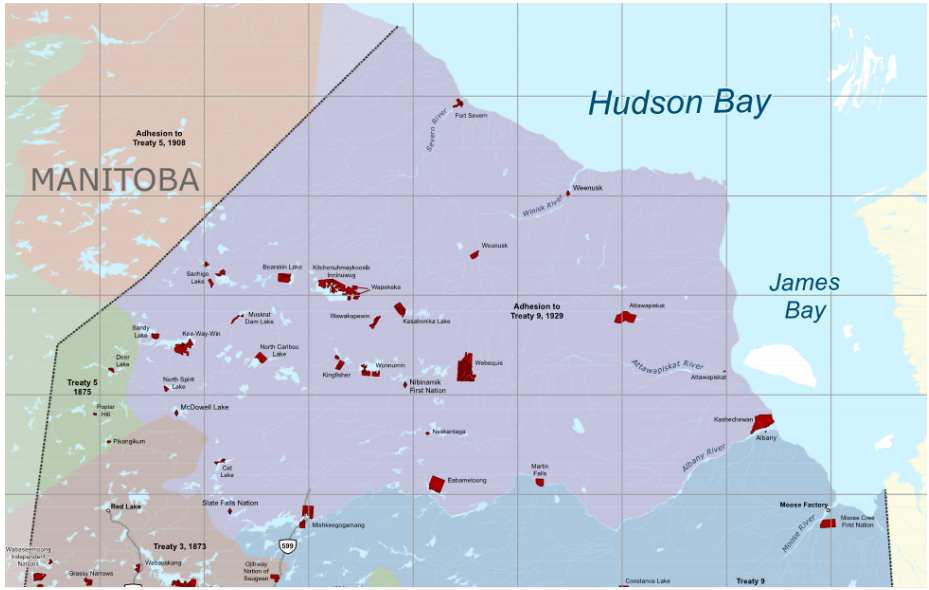

Figure 1. Ontario Ministry of Indigenous Relations and Reconciliation. © Queen's Printer for Ontario, 2017. Reproduced with Permission.

The leadership of KI reached out to members of our research collaboration and expressed an interest in exploring the question of whether the process of writing down their laws – the intense period of legal drafting that KI has engaged in over the past decade – will assist them in expected future encounters with the Canadian legal system in disputes over resource extraction. A related question is also whether a process of legal drafting similar to the one that KI has engaged in would assist Ring of Fire communities in their own defence of their homelands. We accepted the invitation to visit the community in August 2017 to facilitate the community's discussions on this topic.[7]

In this paper we draw on transcripts from the 2017 workshops to gain insight into the motivations that were driving the people of KI to articulate their laws, and we begin the investigation of the complex question of how to reinvigorate historic treaty interpretations so as to produce "one law" inclusive of Indigenous legal orders, in the specific context of Treaty 9. In Part I, we describe our theoretical orientation and methodology, in Part II we describe the context for the workshops, focussing on the 2008 dispute between KI and Platinex and the court rulings that came out of it, and in

communities' interest in working together and drawing strength from each community's experience. A political alliance emerged from that meeting, and collective work is ongoing.

[7] The workshops in 2017 were conducted mainly by Donna Ashamock and Dayna Nadine Scott, with support and assistance from John Cutfeet, and Chief James Cutfeet, along with other members of the KI Band office.

Part III we explore the question most interesting to socio-legal scholars: how can we reinvigorate historic treaty interpretations so as to produce "one law" inclusive of Indigenous legal orders on the ground? In other words, we are beginning the work towards developing a "principled answer" to the question that Hadley Friedland poses: "[w]hat happens when Indigenous laws say, 'No', and Canadian law says 'Yes' to resource extraction?"[8] Ours is a visioning project, an exercise in articulating a shift in the jurisdictional landscape for the far north; demonstrating an alternative to the current trajectory in which Indigenous and settler laws inevitably clash.[9]

Part I: Critical Legal Pluralism and Community-Based Methods

The dynamics of resource extraction in the far north of Ontario are largely, and increasingly, shaped by the negotiation of contractual agreements.[10] These exist in a variety of forms; they include resource-revenue sharing deals between tribal councils and the provincial government, impact-benefit agreements (IBAs) between communities and companies, early exploration agreements and MOUs and framework agreements between communities and various governments and agencies over infrastructure or environmental assessment funding, among others. In all cases, the negotiations are secretive and give rise to a dynamic of competition between neighboring communities, the imposition of external timelines, and the dominance of lawyers.[11]

Over the past several years, we have watched as industry has come to accept that "deal-making" with Indigenous governments is perhaps easier and more predictable than complying with the Supreme Court of Canada's consultation

[8] Hadley Friedland, quoted in Lauren Kaljur and Trevor Jang, "Why Building a Pipeline on Indigenous Land is Complicated Even If You Own It", *Huffington Post Canada* (4 July 2018), online: <huffingtonpost.ca>. The authors also provide a contemporary example of the clash of authorities in the resistance at Unisto' ot'en and the Gimiden checkpoint in 2018-2019.

[9] We have drawn inspiration from Deborah Curran's work on the Great Bear Rainforest Agreements in British Columbia, which she argues "shifted the ecological and jurisdictional landscape in British Columbia"; see Deborah Curran, "'Legalizing' the Great Bear Rainforest Agreements: Colonial Adaptations toward Reconciliation and Conservation" (2017) 62:3 McGill LJ 813 at 817.

[10] This may be true of the country as a whole; e.g., political scientists Martin Papillon & Thierry Rodon observe that we have a largely "proponent-driven model for seeking Indigenous consent" to natural resource extraction, with impact-benefit agreements between companies and Indigenous communities being the "core mechanism" for establishing the legitimacy of those projects: see "Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada" (2017) 62 Environmental Impact Assessment Rev 216 at 217.

[11] O'Faircheallaigh calls this the negotiation bubble: see Ciaran O'Faircheallaigh, "Corporate – Aboriginal Agreements on Mineral Development: The Wider Implications of Contractual Arrangements" (Paper delivered to Rethinking Extractive Industries Conference, York University, 5 March 2009). See also Irene Sosa & Karyn Keenan, "Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada" (October 2001) at 3, online (pdf): *Canadian Environmental Law Association* <cela.ca/sites/cela.ca/files/uploads/IBAeng.pdf>; Emilie Cameron & Tyler Levitan, "Impact and Benefit Agreements and the Neoliberalization of Resource Governance and Indigenous-state Relations in Northern Canada" (2014) 93:1 Studies in Political Economy 25 and; Ken J Caine & Naomi Krogman, "Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North" (2010) 23:1 Organization & Environment 76 at 85.

framework and then "rolling the dice".[12] Companies have embraced the idea of "social license", if not the spirit of corporate social responsibility, and have recognized that even approved projects are not being built because of lengthy court proceedings related to Indigenous opposition.[13] Further, savvy industry operators are said to understand well that even success in the courts is not going to ensure that projects can proceed, because of the growing legitimacy that Indigenous land defenders are garnering across the country.[14] The legal framework provided by settler law is not achieving the resource certainty that industry demands.[15] Thus, negotiating a deal has

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[12] Papillon & Rodon argue that impact-benefit agreements between industry and communities have "de facto become the main vehicle for securing Indigenous support for a project in Canada, as in other settler societies": see "Indigenous Consent and Natural Resource Extraction: Foundations for a Made-in-Canada Approach" (2017) 16 Institute for Research on Public Policy Insight 1 at 3, online (pdf): <irpp.org/wp-content/uploads/2017/07/insight-no16.pdf [Papillon & Rodon, "Indigenous Consent"]; see also Boreal Leadership Council, "Understanding Successful Approaches to Free, Prior and Informed Consent in Canada: Part I: Recent Developments and Effective Roles for Government, Industry and Indigenous Communities" (2015), online (pdf): <borealcouncil.ca/wp-content/uploads/2015/09/BLC_FPIC_Successes_Report_Sept_2015_E.pdf>; and Guillaume Peterson St-Laurent & Philippe Le Billon, "Staking Claims and Shaking Hands: Impact and Benefit Agreements as a Technology of Government in the Mining Sector" (2015) 2:3 Extractive Industries & Society 590. Ciarnan O'Faircheallaigh calls "the communities' input" the "ideology of agreement making": see "Evaluating Agreements Between Indigenous Peoples and Resource Developers" in Marcia Langton et al, eds, *Honour Among Nations? Treaties and Agreements with Indigenous Peoples* (Melbourne: Melbourne University Press) at 306.

[13] Shin Imai "Consult, Consent & Veto: International Norms and Canadian Treaties, in *Michael Coyle & John Borrows, eds, The Right Relationship, Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) [Imai, "Consult, Consent & Veto"]. This point is explained by DL Corbett J, "[the proponent's] frustration and its interests in moving forward with the Project are not valid reasons to defeat [Saugeen Ojibway Nation's] constitutional rights. When there are disagreements about consultations, providing a remedy for a First Nation will often cause delay. Thus, though the duty to consult is the Crown's, proponents have an interest in facilitating the consultation process. In this case, [the proponent] refused that role. It was entitled to do this, but one consequence of its decision is further delay to complete adequate consultations": see *Saugeen First Nation v Ontario (Minister of Natural Resources and Forestry)*, 2017 ONSC 3456 at para 8. A high-profile example of delay comes from the Federal Court of Appeal's decision to overturn the National Energy Board's approval of the TransCanada Pipeline Expansion Project (in 2013) for reasons including a failure to meet the constitutional duty to consult: see *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*].

[14] Land defenders are those on the frontlines fighting to protect Indigenous homelands and traditional territory, often against resource development or Crown activity, and have been active across Canada in standoffs such as the one against the Trans Mountain pipeline expansion and the Unist'ot'en camp opposing extractive infrastructure; see Kanahus Manuel, "Indigenous Land Defenders Denounce Canada's Criminalization at Burnaby Mountain", *Muskrat Magazine* (10 April 2018), online: <muskratmagazine.com>; and Unisto'ot'en, "Wet'suwet'en People", *Unisto'ot'en* (blog), online: <unistoten.camp>. Leanne Simpson proposes that the protection of Indigenous culture, language and tradition occurs when advocates "[put] their bodies on the land" in communities, actively practice traditions, and protect their lands from destruction; rather than in Parliament or in the context of academic research: see "Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation" (2014) 3:3 Decolonization: Indigeneity, Education & Society 1 at 21. The concept of "land defenders" has been formalized in a network of Indigenous communities and activists based in Manitoba, called Defenders of the Land, see "Defenders of the Land: Indigenous Peoples Have Clear Demands for Real Change", *Indigenous Environmental Network* (5 January 2013), online: <ienearth.org>.

[15] Eva Mackey, "Unsettling Expectations: (Un)Certainty, Settler States of Feeling, Law and Decolonization" (2014) 29 CJLS 235; Carole Blackburn, "Searching for Guarantees in the Midst of Uncertainty: Negotiating Aboriginal Rights and Title in British Columbia" (2005) 107:4 American Anthropologist 586.

become the first priority of industry interested in advancing a controversial extractive project; facilitating those deals has become a key task of state actors.[16] These negotiations between governments, industry and Indigenous communities are significant for the way that a signed deal has come to "stand-in" for expressions of consent in neoliberal frameworks. Despite the fact that there are a myriad of strong reasons for why the mere fact of a signed agreement cannot be evidence of free, prior and informed consent (FPIC) as it is understood in international law, extraction in the contemporary moment seems to be *authorized* by the signing of a contract between industry and affected communities. The successful conclusion of a deal provides both crucial legitimation for political actors supporting contested resource projects, and a valued asset for companies seeking to market their projects to potential investors.[17]

Authorizing Extraction on Indigenous Land

Extractivism, in our analysis, is not dependent on the type of resource taken, but on the underlying political economy.[18] That is, the term is not reserved for fossil fuels and mineral extraction; neither would it apply to the extraction of those materials in all contexts – it is understood as a *mode of accumulation* in which a high pace and scale of "taking" generates benefits for distant capital without generating benefits for local people.[19] It is a way of relating to lands and waters that is non-reciprocal and oriented to the short-term.

Our approach to the idea of *authorizing* extraction is influenced by the scholarship on legal pluralism. That is, we see extraction as governed by a range of overlapping and potentially conflicting norms and normative processes at the

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[16] The Boreal Leadership Council, a multi-stakeholder consortium that includes industry, Aboriginal organizations, and non-governmental organizations, in 2015 concluded that "consent is the mechanism that will offer the most certainty for proponents": Boreal Leadership Council, *supra* note 12. And as Blackburn has demonstrated, certainty, however unachievable, is a highly valued resource for industry: see Blackburn, *supra* note 15. See e.g. *Eabametoong First Nation v Minister of Northern Development and Mines,* 2018 ONSC 4316 [*Eabametoong*]. Similarly, Fidler states that impact-benefit agreements "are being viewed by the government as a means to an end for consultation": See Courtney Riley Fidler, *Aboriginal Participation in Mineral Development: Environmental Assessment and Impact and Benefit Agreements* (MASc Thesis, University of British Columbia, 2008) at 61.

[17] E.g. Kinder Morgan (the previous owner of the Trans Mountain pipeline) entered into 43 "Mutual Benefit Agreements" with Indigenous communities along the proposed expanded pipeline route: see Gary Mason, "Environmentalists' Next Opponent? First Nations", *The Globe and Mail* (17 January 2019), online: <theglobeandmail.com>. See also Papillon & Rodon, "Indigenous Consent", *supra* note 12.

[18] Henry Veltmeyer, "The Natural Resource Dynamics of Post Neoliberalism in Latin America: New Developmentalism Or Extractivist Imperialism?" (2012) 90:1 Studies in Political Economy 57 at 72.

[19] Following Veltmeyer, for whom extractivism is a specific type of development path in which the social and environmental costs of a project exceed its benefits, which tend to be highly concentrated, while the costs are disproportionately borne by poor and vulnerable local residents. In the Canadian context, affected communities are often "dispossessed from any means of social production except for their capacity to labour, that many are expected to exchange for a living wage or a job at any cost": see Henry Veltmeyer & Paul Bowles, "Extractivist Resistance: The Case of the Enbridge Oil Pipeline Project in Northern British Columbia" (2014) 1:1 Extractive Industries & Society 59 at 61.

intersection of the relevant Indigenous, settler state, and international legal orders.[20] Any contractual agreements between industry and Indigenous communities authorizing extraction on the latter's territories – the most superficial layer of those overlapping norms, and the one often now seen as evidence of "consent" to extraction – arises out of a context of constrained choices dictated by the interaction between those multiple legal orders' distinctive normative commitments. Those include the settler state's common law – from its contractual regime, to its Aboriginal rights jurisprudence under section 35 of the *Constitution Act, 1982*, which details a duty to consult and accommodate Aboriginal and Treaty rights – and settler state legislation, such as the provincial *Far North Act* and *Mining Act*; international legal norms, such as the free, prior, and informed consent (FPIC) standard in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP); and most fundamentally,[21] in the Ring of Fire area, Anishinaabe and Oji-Cree law – such as *Kanawayandan D'aaki,* the obligation to protect the land as understood by the Kitchenuhmaykoosib Inninuwug ("KI" – the People of Big Trout Lake).[22]

More than simply recognizing that law emanates from multiple sources – and approaching the state as only one of them[23] – the legal pluralist scholarship we draw on leads us to inquire into the nature of the *relationships between the contending legal orders* at play on Treaty 9 territory, in and around the Ring of Fire. In our larger research project as well as the current piece, we became particularly interested in exploring how these "inter-order" relationships are inflected by different actors and their interventions in political struggle. Our inquiry began with a general goal of understanding how certain Indigenous communities engage with/against the extractive industry, how their engagement relates to their own laws and decision-making processes, and crucially, whether and how such engagement transforms the exploitative dynamic inherent to extractivism. As our research relationships developed in the region and came to focalize in KI (as we explain in more detail below), our

[20] As Shiri Pasternak has stated, "the matter of not which law but whose law applies…on Indigenous territories" has been a neglected one in legal theory: see "Jurisdiction and Settler Colonization: Where Do Laws Meet Special Issue: Law and Decolonization" (2014) 29:2 CJLS 145 at 160. In terms of nomenclature, we adopt the term "settler law" to signal that we are speaking of laws enacted by provincial legislatures or the federal Parliament, and the common law that has emerged from provincial and federal courts. The purpose of this signal is to ensure that settler law is distinguished from Indigenous law, which encompasses the existing and evolving legal orders that emanate from and continue to govern in each Indigenous community.

[21] This stance stems from the affirmation that "prior to colonial settlement, Indigenous peoples on Turtle Island existed as diverse nations defined by their ancestral lands, kinship relations, governance structures, economic trading networks and well established yet fluid legal orders": see Michelle Daigle, "Awawanenitakik: The Spatial Politics of Recognition and Relational Geographies of Indigenous Self-determination" (2016) 60:2 The Can Geographer 259 at 260.

[22] Shiri Pasternak, *Grounded Authority: Barriere Lake Against the State* (Minneapolis: University of Minnesota Press, 2017) at 7 [Pasternak, *Grounded Authority*].

[23] In its most basic formulation, legal pluralism is the recognition that more than one legal order operates in the same social field: see Sally Engle-Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869. This mode of socio-legal scholarship dislodges the state's legal order from its unilaterally asserted position of superiority in regard to Indigenous legal orders. It defines law as the set of norms and processes that generate binding decisions and expectations within a given society, and that are used to resolve disputes peacefully therein.

deepening engagement with this community and with the range of its responses over time to extractivist incursions on their lands allowed us to develop more specific questions and arguments.

In the current piece, our inquiry focuses on the shifting relationship between the Indigenous legal order of KI and the settler state order – characterized mostly by Ontario's interventions, but involving the federal Crown as well, as a Treaty partner. Seen through this theoretical lens of critical legal pluralism, our discussion proceeds in two stages. First, we present a window into KI's interventions, which have included putting their bodies on the land and blocking access to their territory, defending their members' actions by asserting *Kanawayadan D'aaki* in the settler court system, and articulating some of their laws and protocols to make their jurisdiction cognizable to the state. Such interventions were clearly crafted to engage purposefully with the settler state's legal and political forums and aimed to shift the terms of its rapport with KI – but just as clearly, these interventions spring from KI's sense of its collective rights and responsibilities informed by its Oji-Cree legal tradition and were conceived and implemented in accordance with the norms and processes of KI's legal order.

We then turn our attention to the actions of the settler state, which include not only legislative and executive interventions with specific repercussions on KI lands, but the development of Canadian jurisprudence regarding treaties, their meaning, and the Canadian legal order's very legitimacy. Drawing on recent research pertaining to Treaty 9 specifically and to historic treaty doctrine more generally, we propose a reading of Treaty 9 as a vehicle for a decisive shift in the relationship between the Indigenous and settler legal orders in Canada: from one characterized by the state's attempted denial, destruction, or co-optation of the Indigenous legal order (epitomized in the monist claim that there can only be "one law" on KI lands), to a cooperative relationship that allows a continuous grappling with legal plurality.[24]

Community-based Research Methods

The land matters. The land, and knowledge of it, are crucial to the dynamics of extraction as they are playing out in the remote homelands of Anishinaabe and Oji-Cree nations in Ontario's far north. These lands are characterized by intricate networks of lakes and rivers, vast muskeg, and peat bogs dotted with black spruce, jack pine, and white birch. The far north is home to rare creatures such as caribou, bald eagles, and wolverines.[25] It is possibly the largest intact boreal forest remaining in the world,

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[24] Our approach to legal pluralist theory, focused on tracking (and arguing for) shifts in the type of relationship between legal orders, specifically from a combative or competitive relationship to a more cooperative one, here borrows some of its vocabulary from Geoffrey Swenson: see "Legal Pluralism in Theory and Practice" (2018) 20:3 Int'l Studies Rev 438.

[25] Far North Science Advisory Panel, "Science for a Changing North: The Report of the Far North Science Advisory Panel: A Report Submitted to the Ontario Ministry of Natural Resources" (Toronto: Queen's Printer for Ontario, 2010); Cheryl Chetkiewicz & Anastasia M Lintner, "Getting it Right in Ontario's Far North: The Need for a Regional Strategic Environmental Assessment in the Ring of Fire (*Wawangajing*)" (May 2014), online (pdf): *Wildlife Conservation Society Canada & Ecojustice* <wcscanada.org/Portals/96/Documents/RSEA_Report_WCSCanada_Ecojustice_FINAL.pdf>.

is a globally significant wetland, a massive carbon storehouse, and a landscape that has sustained the traditional ways of life of various Anishinaabe and Anishini peoples since time immemorial.[26]

The Ring of Fire, despite the recent downturn in global commodity prices, is often expected to be the main driver of Ontario's economy over the next several decades.[27] Despite the near continuous pressure from exploration companies, if a major mining hub does materialize it will present an enormous departure from the current reality. Except for the soon-closing De Beers' Victor mine, an open-pit diamond mine midway up the James Bay coast near Attawapiskat, all of Ontario's far north has been basically "off-limits" to major industry.[28] The discovery of a commercially-viable source of chromite in the Ring of Fire is poised to change this. Chromite is a relatively rare but necessary component of stainless steel not produced anywhere else in North America.[29] JP Restoule et al describe the context as one in which the region is coming to be seen from the outside as a "new frontier for extractive development" at the same time as it is also experiencing a "resurgence of Indigenous identities and cultural practices" from within.[30]

The authors are settler academics who teach in a law faculty in Toronto. The team consists of university-based legal researchers working with experienced community-based researchers, advocates and intellectuals who belong to northern communities, and who provide strategic guidance and analysis. Our collaborations grew out of other work stemming from our common interests and political commitments around advancing Indigenous jurisdiction and environmental stewardship. Our work together thus far has consisted of a year of background preparation and relationship-building, consisting mainly of short meetings in Thunder Bay, joint conference presentations, and guest lectures by the community-based researchers in Toronto; a second year of several longer community visits throughout the north consisting of workshops, feasts, interviews, time with elders, focus groups, and trips out onto the land; followed by a third year of sustained writing and reflection. We were in KI in August 2017 and August 2018.

The 2017 workshops took place over a five-day visit to the community in August. We were invited to facilitate a discussion in the community that reflected on the decade "since Platinex", in order to help to prepare community members for some

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[26] *Ibid*.

[27] Mineral exploration in the Ring of Fire discovered the potential of $60 billion worth of nickel, chromite, and other minerals, enough to "support mining operations for a hundred years": see Jessica Gamble, "What's at Stake in Ontario's Ring of Fire", *Canadian Geographic* (24 August 2017), online: <canadiangeographic.ca>.

[28] Peter Gorrie, "The Ring of Fire", *Ontario Nature Magazine* (31 August 2010) at 2, online: <onnaturemagazine.com>.

[29] *Ibid*.

[30] Jean-Paul Restoule, Sheila Gruner & Edmund Metatawabin, "Learning from Place: A Return to Traditional Mushkegowuk Ways of Knowing" (2013) 36:2 Can J of Education 68 at 73; see also Daigle, *supra* note 21.

internal strategic planning meetings that would follow our workshops. We received ethics approval from York University's Office of Research Ethics Human Participants Review Committee, and discussed the parameters for the workshops, including ownership and control of data, community control over outputs, and possible publications with the community leadership in advance of the visits, again upon arrival, and with all of the community participants at the beginning of the workshops.[31] Our intention with this research is to find ways of honouring these principles by employing methodologies that are concerned with building and sustaining respectful, reciprocal relations, as well as generating research outputs that are useful to communities and their advocates in the far north.

As part of our commitments to attempt to make our work useful to communities and advocates in the far north, we engage in a number of tangential activities with community-based partners as well. These emerge out of iterative, evolving relationships and understandings, and include contributing legal research memos, filing access-to-information requests, contacting government officials, facilitating travel of community members, and supporting community delegations for alliance-building, public awareness, and fundraising efforts. It also includes making accessible, timely interventions into relevant public policy debates. We engage in these activities out of ethical commitments to reciprocity and mutual aid, knowing that, in the end, it may be impossible to make this research as valuable to communities on the ground as it is to the university-based researchers. Thus, while our approach to the research strives towards the principles of utility, self-voicing, access, and inter-relationality as articulated by the Ontario Federation of Indigenous Friendship Centers, in the end, to a greater extent than may ever be possible through a university-based research ethics protocol, we are held accountable through these ongoing relationships.[32]

We met with Band members, council members, elders and youth in the community's hall. We provided food and coffee for participants, and others just dropping by. We provided honoraria for elders and knowledge holders. The entire discussion progressed relatively slowly, as all comments, whether offered in English or Oji-Cree, were repeated in the other language by community translators. Everything was recorded by audio-and video-recorders. The video-recordings were kept by the community for their own use, and the audio-recordings were shared with our team so that we could produce transcripts. The transcription of the days' discussions was also

[31] Band Council of KI approved these parameters, but there is no formalized "research ethics" review procedure in place in KI. In terms of a report-back mechanism, leadership changed in KI during the sustained period of refection and writing in year 3 of this project. Relationships with community-based researchers continued, and we were able to make contact and share a draft of this article with the new leadership prior to publication of this article.

[32] The OFIFC principles build on and extend the OCAP Principles referenced in the Tri-Council's Chapter 9. See Ontario Federation of Indigenous Friendship Centers, "USAI Research Framework: Utility Self-Voicing Access Inter-Relationality, Second Edition" (2016), online (pdf): <ofifc.org/sites/default/files/USAI%20Ressearch%20Framework_Second%20Edition.pdf>. We thank our colleague Karen Drake for bringing these to our attention.

provided to the community in the months following the workshops.[33] The second day of workshops culminated in a community feast and an exchange of gifts. Our team was also given the opportunity to spend time out on the land, travelling to a family's island cabin by boat, eating trout fried over a fire, and canoeing along some of Big Trout Lake's sandy beaches.

The specific research questions that we take up in this article are best conceived as having emerged from those workshop conversations, rather than as having been a pre-determined priority of the community. Framing the endeavour as one in which we work with principles of treaty re-invigoration to produce "one law" inclusive of settler and Indigenous legal orders, emerges both from the indelible mark that the Platinex dispute has left in KI and from the flavour of the jurisprudence that flowed from that conflict. In other words, we do not adhere strictly to the notion that community-based research questions must always originate with the community members and their priorities alone. Instead, we embrace the questions that emerged out of our interactions with the community and its priorities, in combination with our own inquiries and preoccupations. We believe in the generative potential of this approach in the context of shared commitments and ongoing relations.

Part II: Kitchenuhmaykoosib Inninnuwug Against the State[34]

> *Translator: [the elder] is saying that she recognizes the struggle that we have in regards to resource development and we've already gone through one with Platinex and there's going to be others coming. The problem is we own this land, we were born and raised here, this was given to us including all the river systems. These are ours.*[35]

The community of KI is located on the northern shores of Big Trout Lake, a very large headwater lake in the far northwest of Ontario.[36] Many small streams flow into the

[33] The transcripts were reviewed to pull out quotes that are illustrative of the points being made; they were not systematically analysed for themes. As a result of the workshop format, the identities of the speakers were not discernible from the transcripts. Thus, we have taken the decision here not to attribute the remarks to specific individuals, nor to try to indicate systematically which remarks have been made by which speakers. Where possible, we do offer cues in the text so as to try to give the reader a sense of the extent to which a diversity of views existed on a particular point. We do indicate where the remark being reproduced is one that is a translation from Oji-Cree made contemporaneously. Approximately 40 people from KI participated, including six elders (three of whom made extensive remarks), three members of the KI6, and four members of the then-Band council. Quotes from the workshops are set apart from the main text and printed in italics. In each corresponding footnote, we indicate the date and session of the workshop that the remark was made, and the time mark on the transcript. Transcripts are on file with authors.

[34] Drawing a deliberate parallel to Shiri Pasternak's framing in *Grounded Authority*, *supra* note 22. As we describe later in this section, Pasternak's analysis, demonstrating how the contemporary state's refusal to recognize the inherent governing authority of Indigenous peoples produces attempts to perfect its sovereignty by replacing Indigenous jurisdiction with a form of delegated state jurisdiction, aptly describes Ontario's approach to land-use planning in the far north.

[35] Community member, KI workshop (28 August 2017), morning session (1:18:40).

[36] KI First Nation occupies reserve number 84, which is approximately 29,940 hectares in size. As of May 2017, there were a total of 1,692 people registered with the band: 1,139 living on reserve, 29 on other reserves, and 521 living off reserve.

lake from the south, and the lake's waters eventually flow onwards towards Hudson Bay. The landscape is muskeg and boreal forest, punctuated by the occasional high ridge and sandy beach. The people of KI view these interlocking streams and water bodies as all connected, and this interconnection ensures that the land, as an indivisible whole, remains healthy. Days range from long and warm, to cold and short over the six seasons in the Oji-Cree calendar. For most of the year, the community is reachable only by air; there is an ice road that connects with provincial highways for a few short weeks in winter, and a permanent road that connects KI with a neighboring First Nation.

The languages spoken in the community are Anishininiimowin (commonly 'Oji-Cree') and English. Oji-Cree, or in the community's parlance "the language", ingrains the land into the people's lives and identities.[37] Most of the community elders speak very little or no English, and many people are bilingual. Younger people in the community are educated in English, although most continue to understand Oji-Cree. People continue to live off the land in KI, as many people hunt, fish, and trap in the same way their ancestors have for centuries.[38]

> The community is able to survive off of the land due to their relationship with it – it is not a passive resource from which certain things can be taken, nor is it an object to be managed by cutting it up into discrete parts such as trees, plants, minerals, rocks, water, and animals. The land provides because of how it is – as a holistic, interconnected system in which every part plays a vital role towards the survival of the people.[39]

The community's traditional legal system is referred to as *Kanawayandan D'aaki*. It provides for a duty to take care of the land. It translates to "looking after my land" and "keeping my land".[40] It is a sacred responsibility, passed down from generation to generation, and it is a duty that is regarded in KI as having ensured the survival of the people.[41]

KI is a party to the Treaty 9 Adhesion which was signed at Big Trout Lake in July 1929. As Rachel Ariss and John Cutfeet explain,

> The Treaty Commission arrived in Big Trout Lake with the papers already completed, minus the signatures – and the paper written in English only. Although the document itself was not translated at the signing, the words spoken at the time were translated, and that is what KI understood to be the content of those documents. The oral agreement is the basis for sharing the land and "all that it possesses"….The oral agreement continues to shape the

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[37] See e.g. Dianne Hiebert, Marj Heinrichs, & the People of Big Trout Lake, *We are One with the Land. A History of Kitchenuhmaykoosib Inninuwug* (Kelowna: Rosetta Projects, 2007).

[38] *Ibid*.

[39] Rachell Ariss & John Cutfeet, "Kitchenuhmaykoosib Ininuwug First Nation: Mining, Consultation, Reconciliation and Law" (2011) 10:1 Indigenous LJ 1 at 7 [Ariss & Cutfeet, "KIFN"].

[40] *Ibid*.

[41] *Ibid*.

> community's understanding of the relationship between KI, Ontario, and Canada – a relationship of sharing between equal partners, neither an extinguishment of their title, nor an ending of their relationship of protection and responsibility to the land.[42]

KI's understanding of Treaty 9 is reflected in the community's Consultation Protocol that sets out how to build community consensus on development projects that would reflect the community members' duties under *Kanawayandan D'aaki*. The KI leadership created this protocol after becoming aware of the Crown's duty to consult and accommodate where treaty rights may be impacted through Crown activity, and intended it to apply to "all external parties", including both development companies and the Crown.[43] This context – the convergence of *Kanawayandan D'aaki* and constitutionally protected section 35 rights – sets the context for the *KI v Platinex* dispute over land use and exploratory mining that informed the entire process of legal drafting that has transpired over the past decade.

KI v Platinex

KI is well-known in some legal circles in Canada for the strong stance that the community took in 2006 in defence of their authority to decide. The episode has been well-described in writings by Rachel Ariss and John Cutfeet, as well as by David Peerla.[44] The basic facts are as follows. A junior mining company, Platinex, wanted to conduct exploratory drilling for minerals on KI lands, despite the fact that KI and other Treaty 9 nations had declared a moratorium on mining exploration in 2005.[45] Ontario's *Mining Act* was (and essentially still is) a "free-entry" system, which at the time required no prior consultation to rights- or title holders (Indigenous or non-Indigenous).[46] The lands staked by Platinex were part of a Treaty Land Entitlement

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[42] *Ibid* at 27.

[43] *Ibid* at 16; see also Shin Imai, "Treaty Lands and Crown Obligations: The 'Tracts Taken Up' Provision" (2001) 27:1 Queen's LJ 1 [Imai, "Treaty Lands"]; and John Long, "How the Commissioners Explained Treaty Number Nine to the Ojibway and Cree in 1905" (2006) 98:1 Ontario History 1.

[44] Rachel Ariss & John Cutfeet, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Blackpoint, NS: Fernwood, 2012) [Ariss & Cutfeet, *Keeping the Land*]; Ariss & Cutfeet, "KIFN", *supra* note 39; David Peerla, "No Means No: The Kitchenuhmaykoosib Inninuwug and the Fight for Indigenous Resource Sovereignty" (15 December 2012), online: *SSRN* <dx.doi.org/10.2139/ssrn.2189897>. Karen Drake, WAPSHKAA MA'IINGAN (Aaron Mills), and Shin Imai have also considered the conflict in their scholarship: see Karen Drake, "The Trials and Tribulations of Ontario's *Mining Act*: The Duty to Consult and Anishinaabek Law" (2015) 11:2 JSDLP 183 at 191; WAPSHKAA MA'IINGAN (Aaron Mills), "Mills, Aki, Anishinaabek, kaye tahsh Crown" (2010) 9:1 Indigenous LJ 107 [Mills, "Mills, Aki"]; and Imai, "Consult, Consent & Veto", *supra* note 13.

[45] Peerla, *supra* note 44 at 1.

[46] As will be explored more fully later, free entry provides that all Crown land is open to staking and exploration unless expressly excluded; that prospectors have the right of entry and access without notice or consultation; and that staking can result in claims being registered without any decision or discretion on the part of the Crown. On November 1, 2012 a new regulatory regime requiring a permit and consultation for early exploration came into effect in Ontario: see *Exploration Plans and Exploration Permits*, O Reg 308/12 [*Exploration Plans and Permits*]; see also Dawn Hoogeveen, "Sub-surface Property, Free-entry Mineral Staking and Settler Colonialism in Canada" (2014) 47:1 Antipode 121; Dimitrios Panagos & J Andrew

claim that KI had filed in 2000, seeking to expand their recognized land base, based on a claim that the Crown had not provided all of the reserve lands as promised.[47] The KI community opposed the exploration and several leaders and community elders met the Platinex workers at their work camp on Nemeguisabins Lake, issued an "eviction order" and waited for the company to leave.[48] The workers were eventually withdrawn by the company, in the presence of the Ontario Provincial Police, and to Platinex's disappointment, no criminal charges were laid against the land defenders.

Platinex came back with a civil lawsuit against the community, claiming $10 billion in damages, and seeking an interlocutory injunction to prevent the community from interfering with its drilling program.[49] This first court injunction was issued in the community's favour, but it resulted in a court-mandated consultation period after which the expectation of the court was clearly that KI would have to concede to the exploration, perhaps with some accommodations to address any specific concerns.[50] The community did not change its stance, and this time the injunction went in the company's favour – KI was ordered to provide the company with access to its "assets".[51] KI did not do so; instead, Platinex representatives were issued a trespass order when they attempted to land at the KI airstrip and were forced back on to the plane. Soon after, the chief, some councilors and other community members set up a camp at Nemeguisabins Lake.[52]

The actions resulted in the conviction of six community members on contempt of court charges and their sentencing to a period of imprisonment of six

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Grant, "Constitutional Change, Aboriginal Rights, and Mining Policy in Canada" (2013) 51:4 Commonwealth & Comparative Politics 405 at 407.

[47] Ariss & Cutfeet, "KIFN", *supra* note 39 at 30–31.

[48] Peerla, *supra* note 44 at 1; *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation,* [2006] 4 CNLR 152 (Ont Sup Ct J) [*Platinex 2006*].

[49] *Platinex 2006, supra* note 48; Ariss & Cutfeet, *Keeping the Land*, *supra* note 44 at 73.

[50] Smith J held that KI could suffer irreparable harm from the drilling, because the community "may lose land that is important form a cultural and spiritual perspective. No award of damages could possibly compensate KI for this loss": see *Platinex 2006*, *supra* note 48 at para 79.

[51] Platinex representatives were issued a trespass order when they attempted to land at the KI airstrip and were forced back on to the plane. Platinex then requested a court order enjoining KI from blocking their drilling program. At the hearing for this order, in October 2007, KI FN announced that they could no longer afford to participate in court proceedings in the Platinex dispute, and they walked away from court after 18 months of litigation and negotiations. The community's position had not changed – they would not support any exploratory drilling by Platinex and would not negotiate the issue with Platinex. After walking away from court, the Judge issued an order prohibiting community members and supporters from interfering with or obstructing Platinex as they conducted their exploratory drilling on KI FN's traditional territory. On October 25, KI FN publicly announced that Platinex would not be welcome in KI FN's territory, and, as a result, Platinex brought a motion for civil contempt of court. See Chief and Council of KI, "Why We Are in Jail: From the Chief and Council of KI" (9 April 2008), *Wii'nimkiikaa* (blog), online: <wiinimkiikaa.wordpress.com/2008/04/12/why-we-are-in-jail-from-the-chief-and-council-of-ki>.

[52] Peerla, *supra* note 44; Ariss & Cutfeet, *Keeping the Land*, *supra* note 44 at 82.

months.[53] They became known as the KI6.[54] The motion judge that issued the contempt of court ruling held that since the community is a signatory to historic Treaty 9, their rights are confined to those that were not explicitly given up in the treaty. Implicit in the judge's opinion is that, having "surrendered" their lands, according to the written text of the treaty, KI is only entitled to consultation and accommodation. The motion judge's ruling emphasized that the "rule of law" must be upheld – in other words, that the community must comply with the court's order to give Platinex access to "its assets" on the land.[55] This flew in the face of explicit testimony from leaders and elders that the KI6 were compelled under their own law**,** *Kanawayandan D'aaki*, to defend the land; they explained that they had obligations to protect it, which had been passed down from generation to generation.[56]

Smith J, in 2008, stated that "contempt of court is the mechanism by which the law protects the authority of the court".[57] The court acknowledged that compliance with court orders is typically achieved through modest fines and incarceration is exceptionally rare.[58] But here, the judge noted several *aggravating factors*: KI repeatedly and publicly stated its intention to defy the order; KI broadcasted its defiance and encouraged others; the symbolism of KI's "collective defiance" by leaders was thought to be "especially dangerous"; and most remarkably, the court stated that "because the contemptors are impecunious, a fine is not a viable option".[59]

The only *mitigating factor* was that none of the KI6 had any prior history. Smith J concluded:

> to allow a break of an order to occur with impunity by one sector of society will inevitably lead to a breach by others, or to the belief that the law is unjustly partial to those that have the audacity or persistence to flout it … if two systems of law are allowed to exist – one for the aboriginals and one for the non-aboriginals, the rule of law will be replaced by chaos.[60]

And finally, with respect to the justifications for their actions that the KI community members offered, he stated: "[w]hile I understand the *principles and beliefs* that the community members hold … the rule of law must be protected at all costs".[61]

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[53] *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, [2008] 2 CNLR 301 (Ont Sup Ct J) [*Platinex 2008*].

[54] The KI6 include Chief Donny Morris, deputy Chief Jack McKay, Cecilia Begg, Samuel McKay, Bruce Sakakeep, Darryl Sainnawap.

[55] *Platinex 2006*, *supra* note 48.

[56] Ariss & Cutfeet, "KIFN", *supra* note 39.

[57] *Platinex 2006*, *supra* note 48; *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 [*Frontenac*].

[58] *Platinex 2006*, *supra* note 48.

[59] *Ibid*.

[60] *Ibid*.

[61] *Ibid*.

The KI6 were asked to stand in a Thunder Bay courtroom full of their families who had travelled over days on winter roads to support them, and they were sentenced to 6 months in prison.[62] In actual fact, the KI6 were released after 2 months on the consent of all parties.[63] The appeal of their sentence had been combined with the case of *Frontenac v Ardoch Algonquin* at the Ontario Court of Appeal (ONCA).[64] The conflict in the Ardoch Algonquin case was based on a similar set of facts. The community had placed a moratorium on drilling and then physically (through a blockade of an access road), but peacefully, prevented the company from conducting the exploration work. In that case, the former Algonquin chief, Bob Lovelace, was the only one to testify. He was asked on cross-examination, "exactly where does the authority for the moratorium lie"?[65] He answered, "[w]ith the elders, who talked to the people and the people made a decision".[66] The judge held:

> Mr. Lovelace says that while he respects the rule of law, he cannot comply because his Algonquin law is supreme. He says he finds himself in a dilemma. Sadly it is a dilemma of his own making. His apparent frustration with the Ontario government is no excuse for breaking the law. *There can only be one law, and that is the law of Canada, as expressed through this court*.[67]

On July 7, 2008, the KI6 were released from prison when the ONCA found that the sentences imposed were too harsh, holding that the motion judge had not adequately considered all of the "dimensions of the rule of law that Canadian jurisprudence had set out, such as the need for reconciliation of competing rights and interests…" and that the motion judge should have done so earlier, perhaps at the injunction stage.[68] But more crucially, the ONCA made a comment about the way that the failure to consider the historical context would only further "exacerbate the estrangement of Aboriginal peoples from the Canadian justice system, and heighten their sense of "dislocation".[69] In other words, the court locates the problem in the *past actions of the state*, rather than in a reading of Indigenous laws and legal orders and their integration within the meaning of the rule of law in Canada. The broader problem with the lower court rulings, according to the ONCA, was that the "contemptors" saw no avenues of meaningful redress *within the "Canadian" legal system* – not that they were fulfilling duties they saw as paramount under their own law. It is a dissatisfying resolution that allowed the settler courts to make some gesture towards "reconciliation", but from today's vantage point, it fails completely to take on the fundamental questions raised

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[62] Ariss & Cutfeet, *Keeping the Land*, *supra* note 44.

[63] *Platinex 2008*, *supra* note 53.

[64] *Frontenac*, *supra* note 57.

[65] *Ibid*.

[66] *Ibid*.

[67] *Ibid* at para 40 [emphasis added].

[68] *Platinex 2006*, *supra* note 48.

[69] *Ibid*.

by a parallel legal order containing norms that conflict with, or are incompatible with, the settler legal order.[70]

The Aftermath

In the immediate fallout of the KI-Platinex and Frontenac-Ardoch disputes, the *Mining Act* in Ontario was amended and made marginally better, and the Far North planning regime was established with stated intention of introducing some control for remote northern communities in land-use planning across the region.[71] In fact, mere months after the KI6 were released, when Platinex tried again to access its mining claims at Nemeguisabins Lake (which were still registered), KI again defended its jurisdiction, preventing the company's plane from landing as members of KI circled in canoes and boats on the water below. Eventually, Ontario paid Platinex $5 million to settle a lawsuit about the state's failure to facilitate access to the company's assets. The deal removed the property Platinex had staked from mineral exploration; it was widely interpreted as the price of maintaining peace in the region.[72]

While the KI-Platinex and Ardoch-Frontenac disputes had put the "free entry" system into the spotlight and the Court of Appeal judgment had made clear that the *Mining Act*, as it stood at the time of those disputes, was not upholding the Crown's constitutional duties, the province was also reacting to other significant developments by effecting those legal changes: Ontario had moved from a "have" to a "have not" province; the Ring of Fire deposits had recently been quantified; environmentalists were pressuring the province to take steps to conserve the boreal forest for climate change mitigation purposes; and the Environmental Commissioner was pressuring the province to establish a comprehensive land-use planning process for the Far North.[73] Ontario responded to this confluence of pressures with the introduction of the *Far*

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[70] For incisive analysis of the ruling from the perspective of Anishinaabe constitutionalism, see Mills, "Mills, Aki", *supra* note 44.

[71] Drake, *supra* note 44 at 204; see also *Far North Act 2010*, SO 2010, c 18, s 9 [*Far North Act*].

[72] Ontario, Ministry of Northern Development and Mines, News Release, "Ontario Resolves Litigation Dispute Over Big Trout Lake Property" (14 December 2009), online: <news.ontario.ca/mndmf/en/2009/12/ontario-resolves-litigation-dispute-over-big-trout-lake-property.html>. Ontario undertook to withdraw the lands from staking and mineral exploration for 25 years. The deal also entitled Platinex to receive a royalty of 2.5 per cent of any future mine developed on the staked lands.

[73] Ontario, Ministry of Northern Development and Mines, News Release, "Protecting the Far North: McGuinty Government Provides New Leadership Role for First Nations" (2 June 2009), online: <news.ontario.ca/mnr/en/2009/06/protecting-the-far-north.html>; Allan Britnell, "Between a Rock and a Hard Place", *The Globe and Mail* (May 14 2009), online: <theglobeandmail.com>; Rob Ferguson, "Ontario Becoming a 'Have Not'", *Toronto Star* (30 April 2008), online: <thestar.com>; Marilyn Scales, "Noront's Road to the Ring of Fire", *Canadian Mining Journal* (1 February 2017), online: <canadianminingjournal.com>; Deborah Zabarenko, "Politicians Persuaded to Save Canada Boreal Forest", *Reuters* (19 November 2008), online: <reuters.com>; Ontario, Environmental Commissioner of Ontario, *Building Resilience: Annual Report 2008-2009* (Toronto, 2009) at 42, online (pdf): < gsg.uottawa.ca/gov/Ont/ECO/Annual%20Reports%20and%20Supplements/2008_2009%20Annual%20Report.pdf>; Ontario, Ministry of Natural Resources, *Far North of Ontario Land Use Planning Initiative* (Toronto: ECO, 2 October 2015), online: <ontario.ca/page/far-north-land-use-planning-initiative>; *Far North Act*, *supra* note 71.

North Act and various *Mining Act* amendments, widely interpreted as readying the Far North for extraction.[74]

In the midst of this, trouble re-surfaced for KI in 2011 when the leadership learned that God's Lake Resources, another mining company, had acquired new claims on its homelands. KI requested that a bilateral forum with Ontario be established to discuss community concerns regarding possible environmental contamination, impacts on Aboriginal and Treaty rights, and the security of a sacred and spiritual area amongst other things. In July of that year, KI held a community referendum passing a Watershed Declaration and a Consultation Protocol, to be discussed more fully in the next section. In September, KI served a notice of eviction to God's Lake Resources for trespassing on KI's spiritual and sacred lands and secured a meeting in November with officials from three Ontario Ministries on the idea of a bilateral panel. The position that Ontario took at the meeting, however, was that there was nothing it could do to prevent God's Lake Resources from acting on their claims and leases: the government claimed to be powerless in the face of the free entry provisions of the *Mining Act*. A few months later, Ontario unilaterally withdrew over 23,000 square kilometers of the KI homelands from prospecting and mining claim staking and reached an agreement with God's Lake Resources in which the company surrendered its mining leases and claims in exchange for $3.5 million.

Of course, much of the KI homelands remained open for staking, as did the traditional territories of other First Nations throughout the far North. It was into this context that Ontario introduced the Far North Planning Strategy with the stated aims of protecting 50% of the boreal forest, "partnering" with First Nations in decision-making and revenue-sharing, and allowing for new mining developments.[75] In hindsight, many now see that while it was "lauded as an ecological victory" by some major conservation organizations, it was actually a development scheme designed to manage the increasingly troublesome claims to Indigenous governance authority across the region.[76] Not surprisingly, the initiative failed to secure the support of the northern communities. Consultations were described as rushed and under-resourced, criticized for taking place outside of the region, and condemned for not living up to

[74] While it was initially couched as part of the government's plan to fight climate change, the province later shifted to promote the Act as part of its "Open Ontario Plan" to strengthen the economy, with the government citing the "legislation's importance for future mineral development, especially in the Ring of Fire": see Christopher JA Wilkinson & Tyler Schulz, "Planning the Far North in Ontario, Canada: An Examination of the 'Far North Act, 2010'" (2012) 32:3 Natural Areas J 310 at 311; see also Isabelle Côté & Matthew I Mitchell, "The Far North Act in Ontario, Canada: A Sons of the Soil Conflict in the Making?" (2018) 56:2 Commonwealth & Comparative Politics 137.

[75] Ontario, Ministry of Natural Resources, "Far North Land Use Strategy" (2014), online: <ontario.ca/page/far-north-land-use-strategy>; "The Boreal Below: Mining Issues and Activities in Canada's Boreal Forest", online (pdf): *Northwatch & MiningWatch Canada* <miningwatch.ca/sites/default/files/Boreal_Below_2008_web.pdf>; Jordana Huber, "Ontario Moves to Protect Boreal", *Montreal Gazette* (14 July 2008), online: <montrealgazette.com>; Far North Science Advisory Panel, *supra* note 25.

[76] Gorrie, *supra* note 28.

standards for genuine consultation.[77] Ultimately, however, the problem is with the structure of the legislative regime and the broader set of assumptions upon which it is situated.

As the *Far North Act* was implemented across northern Ontario, it became clear that the regime is a central plank in Ontario's attempt to remedy the uncertainties of jurisdiction that were exposed in the KI struggle.[78] Under the scheme, communities are given funding to create community-based land-use plans that map out in detail the historical and contemporary uses of various parts of their territories.[79] Communities can identify areas of significant cultural value such as burial sites, waterways and travel routes to be protected, caribou migration routes, or fishing areas, and may designate such areas as open for — or closed to — mineral exploration.[80]

The invitation to engage in mapping itself is not controversial; many communities were doing mapping already. But, under the *Far North Act*, the community-based land-use plans must be jointly approved by the First Nation and the Ministry of Natural Resources and Forestry (MNRF). Once the final plan is approved, all decisions to authorize land-use activities must be "consistent with" the land-use designations specified in the plan.[81] The kind of mapping that is encouraged through this process, however, largely accepts "colonial imaginaries of territory": the boundaries between neighboring communities' planning areas are conceived as hard and fixed, ignoring relations of kinship and the extensive social, political, and economic ties between nations.[82] The designations are imagined as applying uniformly despite the variety of different motivations for, proponents of, or intensities of development that might be proposed within them. In contrast, each community will have its own set of complex and nuanced mechanisms for authorizing various activities on the land that rely on their specific legal order: different family groups have authority over different parts of the territory based on the locations of harvesting areas, traplines, hunting camps and cabins. In KI, there are various protocols that exist under *Kanawayandan D'Aaki* for allowing access to outsiders, for sharing resources, and for managing conflict; the elders hold a vast pool of knowledge about how those principles apply. For these reasons, communities are suspicious of the land-use planning exercise, reasoning that Ontario must hope to gain access to all of this knowledge – and then to bring the community's authority to make decisions, its *de*

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[77] Ian Ross, "McGuinty's Controversial Far North Act Passes" *Northern Ontario Business* (8 November 2010), online: <republicofmining.com/2010/11/08/mcguintys-controversial-far-north-act-passess-ian-ross/>.

[78] John Cutfeet, personal communication.

[79] *Far North Act*, *supra* note 71, ss 7(4)(b)(i), 9(20); funds to engage in the traditional land-use mapping exercise and for documenting the elders knowledge is available only to those Bands that agree to surrender to the MNRF process. It is possible, however, for Bands to withdraw at the end of any of the prescribed five stages.

[80] *Ibid*, ss 6, 9(9), 14.

[81] Accordingly, any "development" would have to be approved by minister's order if no community-based land-use plan is in place: see *ibid*, s 12(2).

[82] Daigle, *supra* note 21 at 267.

facto governance of the territory, under Ontario's jurisdiction.[83] As the Nishnawbe Aski Nation (NAN)[84] complained at the time of the Act's passing, "[despite the fact that the] Act is aimed specifically at First Nations in [NAN], who are the sole occupants of this isolated/remote area of northern Ontario", the scheme was introduced in the face of the unanimous and fundamental objections of the NAN people.[85]

The FNA ultimately gives the government unilateral power to approve mining developments and override community land use plans if the "social and economic interests of Ontario" are engaged.[86] In other words, it presents a good example of the contemporary state tactic Shiri Pasternak describes: an attempt by the Crown to replace the inherent jurisdiction of Indigenous peoples with a form of delegated state authority. As we detail in Part III of this paper, genuine joint-decision-making in which final authority is shared – of the kind that KI proposed in 2011 – would be a basic element of a renewed treaty relationship giving rise to "one law" for the far North.

Looking Back, Looking Forward: KI Reflects on the Experience a Decade Later

As mentioned, leadership of the KI community invited our research team in 2017, in the context of renewed mining pressure in the region, to join them for workshops in advance of a strategic planning session, and they indicated an interest in reflecting on where they have come in the decade since their fight with Platinex. Despite the fact that the community had spent the intervening years engaged in an intense process of legal drafting, releasing a Watershed Declaration, and a Governance Framework, amongst other documents, they asked: "Would we be any better off today? Are we in a better position now to withstand pressure from resource companies who want to access our territory?"

Reflecting on the past decade in legal scholarship and Indigenous activism, we acknowledge a remarkable resurgence and revitalization of Indigenous laws across the country. Over that period, the scholarship of John Borrows contributed immensely

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[83] Dayna Nadine Scott, "Confusion and Concern over Land-use Planning across Northern Ontario", *The Conversation* (11 March 2018), online: <theconversation.com>.

[84] According to its website, NAN is a political territorial organization representing 49 First Nation communities within northern Ontario with the total population of membership (on and off reserve) estimated around 45,000 people. These communities are grouped by Tribal Council (Windigo First Nations Council, Wabun Tribal Council, Shibogama First Nations Council, Mushkegowuk Council, Matawa First Nations, Keewaytinook Okimakanak, and Independent First Nations Alliance) according to region. Six of the 49 communities are not affiliated with a specific Tribal Council. KI is one of those independent First Nations: see Nishnawbe Aski Nation, "About Us", *Nishnawbe Aski Nation* (blog), online: <nan.on.ca/article/about-us-3.asp>.

[85] Nishnawbe Aski Nation, "Ontario's Far North Act" *Nishnawbe Aski Nation* (blog), online: <nan.on.ca/article/ontarios-far-north-act-463.asp>.

[86] *Far North Act*, *supra* note 71, s 12(4).

to the changing legal landscape in Canada.[87] Val Napoleon and Hadley Friedland foregrounded a method for approaching Indigenous narratives as caselaw and taking seriously the legal principles they contain;[88] the Indigenous Law Research Unit at the University of Victoria further developed this method in close collaboration, and at the service of communities seeking to revitalize, "ascertain and articulate" their laws.[89] Numerous other communities worked with emerging and established legal scholars and other thinkers across the country, resulting in a growing body of new resources concerning the diverse Indigenous laws and legal traditions composing Canada.

In addition to this vibrant body of research and scholarly work, the Truth and Reconciliation Commission issued its Final Report and Calls to Action – one of which, #28, calls on Canadian law schools to offer courses touching on "Indigenous law", among other topics.[90] Most importantly, Indigenous communities across the country have felt increasingly empowered to invoke their own legal orders to assert jurisdiction, and to evaluate proposed resource extraction projects themselves – forcing an interaction with the settler legal system.[91] Whether the articulation of Indigenous law in new and different forms – including written forms – is the best approach to revitalizing Indigenous laws and legal orders, or whether instead investing in land-based practices of resurgence is a preferable course of action, in light of the ongoing pressures on communities and their lands, is a matter of continuing debate within communities and among scholars.[92] For some Indigenous peoples, as we heard

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[87] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); John Borrows, *Drawing out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).

[88] Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing A Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015–2016) 1:1 Lakehead LJ 17.

[89] University of Victoria Faculty of Law, "Indigenous Law Research Unit", online (pdf): <uvic.ca/law/assets/docs/ilru/ILRU%20Vision%20and%20Scope%2009.30.16.pdf>.

[90] *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online (pdf): <trc.ca/assets/pdf/Calls_to_Action_English2.pdf>; the Canadian Council of Law Deans reports here on the various initiatives undertaken in Canadian law schools in response: see "TRC Report" (2018), online (pdf): <ccld-cdfdc.ca/wp-content/uploads/2018/07/CCLD-TRC-REPORT-V2.pdf>.

[91] In Secwepemc Territory in British Columbia, the Indigenous Network on Economies and Trade undertook its own Indigenous risk assessment of Kinder Morgan Canada's Trans Mountain Expansion Project that said failing to take into account Indigenous jurisdiction, title, and land rights was too great a risk for the expansion project to access Indigenous lands and resources: see Secwepemcul'Ecw Assembly, "Trans Mountain Expansion Project and Investors Continue to Face Untenable Risk for Failing to Recognize Indigenous Jurisdiction" (13 April 2018), *Secwepemcul'Ecw Assembly* (blog) online: <secwepemculecw.org/risk-assessment>. In British Columbia, the Tsleil-Waututh Nation invoked their legal order by completing an Independent Assessment of the Trans Mountain Expansion Project using their own legal principles, traditional knowledge, community engagement, and expert evidence on human and biophysical health impacts, anthropology, and archaeology: see Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envtl L & Prac 227. Clogg et al also cite (at 241–45) the Yinka Dene Alliance as an example of a First Nation's willingness to enforce their own legal orders in court, the boardroom, and on the land. That vigour led in part to the failure of Enbridge to carry out the Northern Gateway pipeline project.

[92] For an excellent recent collection exploring this debate, see Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018). On resurgence, see Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, ON: Oxford University Press, 1999); Taiaiake Alfred, *Wasase:*

repeatedly expressed in KI, these two broad strategies are not seen as incompatible: John Cutfeet describes how "practicing *Kanawayandan D'aaki*", learning how to live and survive on the land, is crucial to respecting it.[93]

Within the KI community, it was the dispute with Platinex that precipitated the exercise in legal drafting. In opening up an opportunity to reflect on the community's work over the past decade, it was clear even ten years after the KI6 were jailed, that the people remember the moment of the sentencing very clearly. One community member stated,

> *…after the fiasco of Platinex, during the proceedings against our people, there were several occasions when the judge publicly stated that there cannot be two laws. Right off the bat, our governance is not recognized. Our sovereignty is not recognized. Our jurisdiction over land and resources is not recognized. Then how can you have a relationship with a nation with who you signed treaties*?[94]

A member of KI6 stated:

> *[a Crown lawyer] was really trying to convince me in order to avoid going to jail that I would agree not to break their law. And I told him I understand and recognize the law and yes, I am breaking the law by doing what I am doing and I said "there is a higher law that I respect more, which comes from the Creator. You can lock me up for breaking their law, you could kill me physically for breaking their law, but I am more afraid of breaking the Creator's law because he could destroy my physical being and spiritual being. That's what I'm afraid of. You can lock me up if you want." And he did not have an answer for that when I told him that, when I was prepared to go to jail …*[95]
>
> *This is the belief of our people here at KI. There is a higher law than Canadian law. And that's the conflict that we're in. We are starting to, even though we [didn't] have written law as Indigenous law, we [had] the strong beliefs that we are willing to sacrifice our freedom to uphold, lay our lives down to uphold. But now we are in the process of documenting our laws, whether they recognize them or not … the Canadian government and industry. These are our laws. We have ownership of these laws and we will*

Indigenous Pathways of Action and Freedom (Peterborough, ON: Broadview Press, 2005); Taiaiake Alfred, "Being Indigenous: Resurgences against Contemporary Colonialism" (2005) 40:4 Government & Opposition 597; Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Durham: Duke University Press, 2014); Leanne Betasamosake Simpson, "Indigenous Resurgence and Co-Resistance" (2016) 2:2 J of the Critical Ethnic Studies Assoc 19.

[93] We recognize that this is a point of serious contention in the scholarship, and on the ground. In the scholarship, the views of those favouring a "transformative reconciliation" seem to fall closest in line with what we heard in KI: see "Introduction" in Asch, Borrows & Tully, *supra* note 92 at 3.

[94] Community member, KI workshop (28 August 2017), morning session (44:26).

[95] Community member, KI workshop (25 August 2017), morning session (1:35:30).

> *uphold these. You don't have to like it [but] we do believe we are a sovereign nation here at KI.*[96]

Yet another member stated: "*This is really important for us as a people of KI that we understand our rights given by the Creator and we uphold them, and we stand on them and honour them even if it means breaking the Canadian law*."[97]

We learned that community members in KI had heard the message that the Canadian legal system could not see, recognize nor respect *Kanawayandan D'Aaki*, and that they had responded by getting to work trying to articulate it in ways the settler system would understand.[98] In the course of the workshop, then-Chief James Cutfeet described what the community terms the "operational documents": the various legal materials that KI has produced in the years since the dispute.[99] The documentation includes:

1. Maps. These depict who lived where, what activities they engaged in to live off the land, who trapped or fished where, the locations of cabins etc.;
2. Treaty affidavits. In the affidavits that were sworn, 14 elders relayed their relations' recollections of what was exchanged in the treaty 1905/1906, signed affidavits, which were legally stamped;
3. Consultation Protocol;
4. Water Declaration;
5. Governance Framework; and
6. Declaration of Sovereignty and Governance and Assertion of Inherent and Treaty Rights.

The "Consultation Protocol" and the Governance Framework were intended to guide the community's process for collaborating with other levels of government, and to "inform the allowable activities that can be taken by non-Kitchenuhmaykoosib Inninuwug peoples upon the homelands, the processes that are required allowing such activities and the authority and jurisdiction exercised by Kitchenuhmaykoosib Inninuwug." Similarly, the Watershed Declaration (2011) provides notice that Kitchenuhmaykoosib Inninuwug peoples recognize their own "rights and responsibilities" to defend the lands and waters. It states:

> The Big Trout Lake, our home lake, is a living system that reaches far beyond its shores. It interacts with the rivers and streams that feed and drain it, the land whose waters flow into those rivers, the wetlands and muskeg which breathe, the rains, the winds, the underground seams and spring sources, the ice, snow and frost. It provides clean drinking water for all life, habitat for the fish and water life, food and travel ways for our people, and moisture for the air.

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[96] Community member, KI workshop (25 August 2017), morning session (1:45).

[97] Community member, KI workshop (25 August 2017), morning session (1:53:30).

[98] The community's "operational documents" are available in Ojibway syllabics and in English.

[99] A version of the Consultation Protocol was in place before the dispute with Platinex.

> We announce and proclaim our role as the First peoples of this territory – the original caretakers – with rights and responsibilities to defend and ensure the protection, availability and purity of the water for the survival of the present and future generations, and for all life. By the authority and responsibility given to us by the Creator we are going to make decisions related to the waters. We declare all waters that flow into and out of Big Trout Lake and all lands whose waters flow into those lake, rivers and wetlands, to be completely protected through our continued care under KI's authority, laws and protocols.[100]

In 2016, KI issued a "Declaration of Sovereignty and Governance and Assertion of Inherent and Treaty Rights".[101] Directly referencing the community's conflict with Platinex, then-Chief Cutfeet stated that the community was working with the government on an agreement to recognize KI's right to self-determination and recognition of responsibilities to its homelands. The Declaration is thought to be "anchored" in the set of sworn treaty affidavits from elders about their understanding of the treaty relationship with the Crown, and in the extensive maps of traditional and continuing land use.[102]

A Press Release from the KI Chief and Council explains the motivation for engaging in the drafting of their laws as follows:

> As a component of the right to self-determination and recognition of our responsibilities to our KI Homelands, which provides KI with its life and identity, the KI Chief and Council declared that KI going forward will use its laws, and principles of sustainability … cognizant of its special relationship with our [lands], to determine any developments or use of the KI Homelands.[103]

Several community members expressed the view that the process of legal drafting was a way of putting governments and industry "on notice" of their laws. In this vein, one community member stated, "*We are not going to allow somebody to come and push [us] around on [our] own land, tell [us] what to do, give [us] laws. We have our own.*"[104] Others felt it was a way of translating or explaining to the settler system "*how things work*" on their territory. Some community members, however, expressed skepticism of whether the process of codification of KI law could even make a difference. As an example:

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[100] Kitchenuhmaykoosib Inninuwug, "The KI Watershed Declaration" (2013), *Wildlands League* (blog), online (pdf): <wildlandsleague.org/media/WildNotes_Winter-2013-KI-Watershed.pdf>.

[101] Jody Porter, "Northern Ontario First Nation Vows to Use its Own Laws to Control Traditional Lands", *CBC News* (9 August 2016), online: <cbc.ca/news>.

[102] *Ibid*.

[103] KI Chief and Council, Press Release, "Declaration of Sovereignty and Governance and Assertion of Inherent and Treaty Rights" (4 August 2016).

[104] Community member, KI workshop (25 August 2017), morning session (1:53:30).

> *Now the lack of recognition of the KI documents is another issue because the courts have already stated you cannot have two laws in one land. We know the law in Canada from their perspective is going to be the one that is always in place. How do we overcome that? The major challenge is that they will not give up their jurisdiction or power and authority by letting us assert the documents that we have. There will always be an ongoing battle. No matter how you cut it, we've seen First Nations across Canada take their cases to the Supreme Court of Canada and win, and none of those have been implemented to the full extent that they should be implemented … The lands and resources form the basis of our foundation as a nation and that's what we're trying to protect. But I don't believe in negotiating with the government after what I went through.*[105]

We were struck by the extent to which the discussion in KI resonated with the scholarly debates on the tensions around writing down sacred laws. As scholars have articulated, Indigenous jurisprudence derives from teachings, customs, and practices that are communicated ideally through a complex and interlocking set of processes, such as storytelling and perception – using the entire sensory spectrum to communicate legal meanings which are clearly diminished when reduced to words, especially in English.[106] As one member stated,

> *We've always said that we are oral people and beginning to document the traditional knowledge of our people puts us at risk once again or puts our culture at risk. My own perspective is that once we start documenting our traditional knowledge, we put ourselves in a compromising position … Where does that lead us? I perceive ways that this process weakens us as a nation when we follow what the law says when it only goes by what is documented. I am of the opinion that the knowledge of our elders has as much power and authority as is written in law… Are we going to import our own laws into their system just to accommodate them? Or do we keep what we have? If there's no reconciliation, how do we work together and move forward? … That's the risk. To suggest we start documenting our laws, we opened up the door to be a part of a system of which we are not and we have no say in the development of that system and we were the victims of that system*.[107]

Recognizing that written English is not the ideal medium, many scholars nevertheless believe that translation into text is necessary; John Borrows, as an example, argues that translation will allow Indigenous legal traditions to come into conversation with common and civil law traditions.[108] Sylvia McAdams argues that the *Nêhiyaw* legal

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[105] Community member, KI workshop (28 August 2017), morning session (44:26).

[106] See e.g. Aaron Mills, "Rooted Constitutionalism: Building Political Communities" in Asch, Borrows & Tully, *supra* note 92 at 133.

[107] Community member, KI Workshop (25 August 2017), afternoon session (53:50).

[108] John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795.

traditions need to be written down because the language itself is disappearing and the knowledge should not also be lost.[109] This view was also expressed in KI:

> [translator] *The elder is saying that [there is one type of] sovereignty, what people want to understand as when you write something, and it is in letter form, but the true sovereignty is what the Creator gave us. We have it already, we don't have to write it. That's why we decided one day we'll start writing things now. There were about 6 things we did. Then we did the affidavits too. We understand our idea of the treaty but we never had it in writing, so we did that … We believe what we believe as a people. To let the other side know this is where we come from because they only understand the writing on the paper...*[110]

The understanding we came away from the community workshops with was that Kitchenuhmaykoosib Inninuwug people understood that it *might* matter to the settler legal system that they had gone through the process of drafting their laws and writing them down in English, but they understood and communicated clearly that it *did not matter to them*; in other words, the process of writing down in no way altered their sacred laws or their relationship to the land.[111]

A participant in the drafting process in KI reminded us that the impetus to do legal drafting "*always comes from trouble*".[112] All law is a product of its time and place.[113] Just as is the case for settler law, words on a page are drafted to solve certain pressing problems; they emerge from a particular historical and political context.[114] The language used may be abstract, imagined to apply to a broader set of circumstances than the current "mischief" they are meant to address, but the underlying motivations infuse the page. Similarly, settler law casts a long shadow in KI, and the settler colonial context inevitably influenced the drafters in what could only be a strategic engagement. Overall, however, the sense we took from the time in KI was that the community had engaged in the exercise of legal drafting in order to assert their jurisdiction, to generate respect for their own legal order, and to demand that it be respected alongside the settler order.[115] And while the people of KI will

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[109] Sylvia McAdam, *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Vancouver: UBC Press, 2015).

[110] Community member, KI Workshops (28 August 2017), afternoon session (1:07:20).

[111] We are not in a position to argue here about whether this is right, we can only report that the sentiment was strongly expressed and broadly held amongst those in the workshop. We note, however, that Aaron Mills has cautioned that we "can't simply translate laws across distinct constitutional contexts and expect it to retain its integrity and thus its functionality": see "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 2 847 at 854–55 [Mills, "The Lifeworlds of Law"].

[112] Personal communication (22 January 2019), notes on file with authors.

[113] John Borrows, "Indigenous Legal Traditions" (2005) 19 Washington UJL & Pol'y 167 at 192 [Borrows, "Indigenous Legal Traditions"].

[114] Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579.

[115] This is undeniably a complex and risky endeavour, as Mills states, "[u]nless we intentionally guard against doing so, when we bring Indigenous law into Canadian legal education, legislation, or courts, we take it out of its own lifeworld and into another": see "The Lifeworlds of Law", *supra* note 112 at 856.

continue to enact *Kanawayandan D'Aaki* regardless of whether their jurisdiction is acknowledged by the Crown, their efforts at legal drafting reveal what a renewed treaty relationship – one presenting a way forward for all the beneficiaries of Treaty 9, including the Crown – might look like.

Part III: Reinvigorating Treaty No. 9

> *They negotiated that treaty. That's a very powerful statement, those three things. As long as the sun shines, the river runs, and the grass grows. These three things they used because our people and at the times our elders were around, these things you could see. They were very powerful. At that time, our people trusted … When these treaty negotiators came here, our elders believed what they were told by them. Our elders were very trusting because somebody's word was very powerful. Whatever a person said, they would have to stand by … That was then.*[116]

The above-described legal drafting done by the KI community over the last decade finds its place in an equally evolving settler legal landscape. The community asked us to reflect on those changes, and how they articulate with the community's work to spell out aspects of their own law. What threads of settler law and legal thought can Indigenous communities currently draw on to assert their jurisdiction on historic treaty territory? In our opinion, a Canadian judge faced with the assertion that an Indigenous community's commitments and responsibilities under their own law compels them to oppose the enforcement of Canadian law on their territory, would now, a decade after *Platinex*, be equipped with doctrine and jurisprudence that would allow her to approach the resolution of this conflict differently than by doubling down on the imposition of settler law. If there can only be "one law" on treaty territory, it must be treaty law.

In this section, we explore the conundrum of historic treaties, and explore what would be required in order for Treaty 9 to help resolve situations where one group relies on Indigenous law to refuse a project, while another seeks to apply settler law to approve it. In other words, we ask: how can historic treaties be given meaning today so as to resolve conflicts of laws, by assisting in articulating "one law" authoritative from both settler and Indigenous legal perspectives? As mentioned, while the analysis in this section was generated out of the workshops in KI and initiated by the community's invitation to consider the impact of their legal drafting and its significance in light of the legal developments in the decade since Platinex, the ideas for moving forward offered in this section should not be taken as reflecting the community's position. In Part III, we offer our own ideas, drawing on the workshop transcripts supplemented by other sources emanating from communities throughout Treaty 9, for moving forward in new directions towards a re-invigorated Treaty relationship.

[116] Community member, KI Workshops (25 August 2017), afternoon session (1:28:45).

The Conundrum of Historic Treaties

The conundrum of historic treaties, simply put, is that their content is, generally speaking, neither *wholly* nor *accurately* captured by their written text – but that such text is the most readily accessible source for ascertaining their content and meaning. Let us speak to each part of those two related statements – as to the incomplete and misleading nature of historic treaty texts – in turn.

The fact that their written text is skeletal, failing to provide a full account of the understanding reached by their signatories, and of the promises they exchanged, is the cause of most of the treaty jurisprudence of the Supreme Court of Canada to date. As the Court puts it in the 2010 case of *Québec (AG) v Moses*, modern treaties such as the *James Bay and Northern Québec Agreement* considered in that case are:

> far more comprehensive in scope than either the treaties of peace and friendship or the numbered treaties considered by this Court in a number of cases in which the analytical framework for interpreting the historical treaties between certain First Nations, Canada and Great Britain was developed. [117]

Binnie J further highlights the vast gap between modern and historic treaties, noting:

> In *R. v. Badger*, Cory J. pointed out that Aboriginal "treaties are analogous to contracts, albeit of a very solemn and special, public nature" (para. 76). The contract analogy is even more apt in relation to a modern comprehensive treaty whose terms (unlike in 1899) are not constituted by an exchange of verbal promises reduced to writing in a language many of the Aboriginal signatories did not understand (paras. 52-53). The text of modern comprehensive treaties is meticulously negotiated by well-resourced parties. […] The importance and complexity of the actual text is one of the features that distinguishes the historic treaties made with Aboriginal people [sic] from the modern comprehensive agreement or treaty, of which the James Bay Treaty was the pioneer. We should therefore pay close attention to its terms.[118]

Thus, rather than detailing, as do modern treaties, the respective jurisdiction, rights, and obligations of the Crown and of Indigenous signatories – including decision-making processes regarding the care and use of the land, as well as the sharing of its wealth – the numbered treaties in particular focus on describing the boundaries of lands that the Crown purports to acquire from Indigenous signatories, and the modest, if not symbolic, counterpart offered in exchange. As such, the written component of Treaty 9 documents the "surrender" by Indigenous signatories of "all their rights, titles and privileges whatsoever" to an area of almost 250 000 square miles in exchange for an initial "present" of $8 per person, followed by $4 per person yearly.

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[117] *Québec (AG) v Moses,* 2010 SCC 17 at para 98.

[118] *Ibid* at para 7.

The need to seek out what the non-drafting, non-English-speaking parties understood to be the terms of the relationship they were agreeing to, and to at least partially correct the imbalance of power between the signatories, gave rise to the following treaty interpretation principles, summed up by Justice McLachlin in *Marshall* (*1999*): treaties must be liberally construed, and ambiguities resolved in favour of the Indigenous signatories; courts must be sensitive to the cultural and linguistic differences between the parties; technical or contractual interpretations of treaty wording must be avoided, and so must interpretations that approach treaty rights as "static" or "frozen at the date of signature".[119] The same jurisprudence states that "the goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed."[120] In this search for the common intention of the parties, the interpreter must presume that the Crown sought to behave honourably and with integrity – and thus exclude interpretations deemed incompatible with the "honour of the Crown".[121] But while construing the language of the written text "generously" in favour of Indigenous signatories, "courts cannot alter the terms of the treaty by exceeding what 'is possible on the language' or realistic."[122]

The application of these treaty interpretation principles has allowed Canadian courts to receive and take into consideration the evidence brought forth by Indigenous parties, in cases involving conflicts with the Crown regarding the interpretation of historic treaties.[123] Such cases reveal a major gap between Indigenous perspectives regarding what they were agreeing to, on the one hand, and the textual content of the agreement as drafted by Crown representatives, on the other hand.

Indeed, the historic treaty texts seek to convey the notion that the Crown is from then on, as it were, "in charge" – *the* governing authority, the one not only with *ownership of the land*, but with *exclusive territorial jurisdiction*. Rather than stating this explicitly or directly, the numbered treaties suggest it at various points in their text. A predominant example is that of the "take-up clause", which reads as follows in Treaty 9:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, *subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and*

[119] *R v Marshall*, [1999] 3 SCR 456 at para 78, 178 NSR (2d) 201 [*Marshall*].

[120] *Ibid*.

[121] *Ibid*.

[122] *Ibid*.

[123] Most recently, see *Restoule v Canada (Attorney General)*, 2018 ONSC 114 [*Restoule*]. For an outline of the legal tests, see also *Re Paulette et al and the Registrar of Titles (No 2)* (1973) WWR 115, 42 DLR (3d) 8; *R v Badger*, [1996] 1 SCR 771, 181 AR 321; *Marshall*, *supra* note 120.

> *excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes*.[124]

While this clause begins by protecting the right of Indigenous signatories and their descendants to continue living on and harvesting the land as they have always done, it also, in the same breath, seems to subject this right to the possibility of being curtailed at the sole discretion of the Crown. Similarly, while the Crown undertakes to provide for the education of Indigenous children in the territory of Treaty 9, the treaty provides discretion over whichever type of infrastructure and equipment that "*may seem advisable* to His Majesty's government of Canada" toward fulfilling this promise. The language of the treaty also allows the Crown discretion over the size of reserve lands, which simply need "not to exceed in all one square mile for each family of five", and grants "His Majesty" alone "the right to deal with any settlers within the bounds of any lands reserved for any band *as He may see fit.*"[125]

Most strikingly, Treaty 9 speaks of the Indigenous peoples with whom the Crown is concluding the treaty – and who are therefore, throughout this exchange, implicitly recognized as peoples in the sense of this term at international law – simply as "Indians inhabiting the territory hereinafter described." As the text unfolds, it refers to them as "His [Majesty's] Indian people" and "His Indian subjects". The treaty ends with a formal promise by "the undersigned Ojibeway [sic], Cree and other chiefs and headmen, on their own behalf and on behalf of all the Indians whom they represent" to "strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of His Majesty the King", and in particular to "obey and abide by the law".[126] Clearly, the "one law" contemplated here is that emanating from the Crown.

An emphasis on these aspects of the text is compatible with the evolution of the wider Canadian jurisprudence on Aboriginal rights, including title and treaty rights, as one that focuses on procedural justice for Indigenous peoples. Such jurisprudence purports to "reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty"[127] by subsuming the first within the second, insofar as it never throws into question the ultimate decision-making power of the Crown. Thus in *Grassy Narrows*, where the Supreme Court of Canada weighed in on the meaning of the "take-up clause" in Treaty 3, the focus remained on whether the provincial or federal Crown had the legal authority to take up land, rather than on the extent to which the taking-up required anything beyond mere "consultation and accommodation" on the part of the Indigenous treaty beneficiaries – especially in light of the fact that the latter were never privy to deals made between the provincial and the federal governments to alter the clear terms of their treaty.[128] Likewise, the broader

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[124] Canada, Indigenous and Northern Affairs Canada, "The James Bay Treaty – Treaty No. 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930", online: <aadnc-aandc.gc.ca/eng/1100100028863/1100100028864> [emphasis added].

[125] *Ibid* [emphasis added].

[126] *Ibid* [emphasis added].

[127] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20 [*Haida Nation*].

[128] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48.

"duty to consult" jurisprudence always protects the final say of the Crown. Even on the end of the spectrum of consultation rights where title or treaty rights provide the *most* protection to Indigenous communities' jurisdiction, the protection afforded to the Indigenous right to consent/refuse construction, extraction, or other "development" projects on their territories is subject to the Crown's "justifiable infringement."[129]

Yet, the text of historic treaties such as Treaty 9 also points to an engagement between the Crown with Indigenous signatories that supports a very different interpretation of the "common intention that best reconciles the interests of both parties at the time the treaty was signed".[130] As mentioned above, the first part of the take-up clause signals the promise made to the signatory First Nations that they would be able to continue to use their lands as they always had. Most importantly, what is being signed is construed by the Crown itself as a treaty: not a simple transaction, but the beginning of a formal, longstanding relationship between self-governing peoples, affecting their respective jurisdiction and authority to govern, and aimed at preserving peace between peoples who might otherwise come to war.

Thus, the Indigenous "chiefs and headmen" are signing the treaty "on behalf of" their people – or "bands", as the text refers to them. The treaty semi-explicitly recognizes the Indigenous nations entering into treaty not only as the possessors of the territory they are purportedly "ceding", but as self-governing entities, since they are deemed capable of "authorizing" representatives for the purposes of negotiating and posing conclusive legal and political actions in their name. And although the written text of Treaty 9 includes the above-mentioned clause to the effect that First Nation signatories will henceforth be "subjected to" and respect "the law" of the Crown, nowhere does it mention that Indigenous treaty signatories would thus be relinquishing the jurisdiction they had always exercised over themselves and their lands.

Indeed, from the representations made to them by the Crown treaty commissioners, the Cree, Ojibway, and Algonquin nations who entered into Treaty 9 understood the treaty as being "about friendship, not about cession."[131] They believed, as the Matawa Chiefs Council puts it, that they would receive "protection and assistance from a benevolent king" [132] in exchange for "a land sharing and resource sharing arrangement"[133], consistent with John Long's research findings that the people of Treaty 9 "expected the treaty to be a confirmation of the fur trade model of co-existence, a modest sharing of the land and its benefits."[134] Not only did they sign the treaty understanding that it would protect their relationship to the land, and the rights

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[129] See *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, at para 77 [*Tsilhqot'in Nation*]; *Campbell v British Columbia (Forest and Range),* 2012 BCCA 274 [*Campbell*] regarding the capacity to infringe even painstakingly negotiated modern treaty rights.

[130] *Marshall*, *supra* note 120 at para 78.

[131] Ariss & Cutfeet, *Keeping the Land*, *supra* note 44 at 25.

[132] Matawa First Nations Management, "Treaty: James Bay Treaty No. 9", online: <matawa.on.ca>.

[133] *Ibid*.

[134] Long, *supra* note 43 at 26–27.

and responsibilities they exercised according to their own laws by harvesting on it, as documented by the first part of the "take-up clause" in the written treaty text, but as Hookimaw-Witt reports, the second part of that clause was neither disclosed nor explained by the Crown representatives.[135]

Research shows that the treaty commissioners arrived at the various sites of Treaty 9 signature across northern Ontario with the text already completed – a text largely based on the model of the 1850 Robinson treaties, like the rest of the treaties signed between 1871 and 1921 – and without the authority "to change any of the wording in the document, even if their oral explanations of the treaty were not actually supported by its text."[136]

Writing with John Cutfeet, Rachel Ariss sums up the Indigenous signatories' understanding of the friendship they were formalizing with the Crown – a solemn occasion, given the Crown representatives' reference to the eternal nature of their mutual commitments, meant to last "as long as the sun shines, the rivers flow, and the grass grows"[137] – as follows:

> Community representatives who signed Treaty Nine understood that this document meant that they were willing to allow the Crown to share their traditional lands, in exchange for protection from the incursions of white loggers, miners and trappers, and certain benefits, such as treaty payments and specific reserves where newcomers would not be able to interfere with them. The "sharing" envisaged was not continuous incursions, nor a ceding of their jurisdiction, but a mutually beneficial way of living together. They saw the treaty as providing official recognition of their right to continue their way of life without interference, and providing guidance for peaceful relations between themselves and the newcomers.[138]

It is worth noting that this understanding by the Treaty 9 Cree, Ojibway, and Algonquin of the terms of their relationship with the Crown is akin to that of the Denésoliné signatories of Treaties 8 and 11 – the text of which is very similar to that

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[135] Jacqueline Hookimaw-Witt quotes the elder Moses Fidler: "when the representatives came to our village in Big Trout Lake to sign the Treaty with our leaders, we were promised that our traditional activities would be protected. They did not say that we would be regulated in the future": see *Keenebonanoh Keemoshominook Kaeshe Peemishikhik Odaskiwakh – [We Stand on the Graves of Our Ancestors] Native Interpretations of Treaty #9 with Attawapiskat Elders* (Canadian Heritage and Development Studies Masters Thesis, Trent University, 1998), online (pdf): <collectionscanada.gc.ca/obj/s4/f2/dsk2/tape15/PQDD_0016/MQ30219.pdf>.

[136] Ariss & Cutfeet, *Keeping the Land*, *supra* note 44 at 25, drawing on Imai, "Treaty Lands", *supra* note 43 at para 1. See also Ariss & Cutfeet, *Keeping the Land*, *supra* note 44 at 27; Long, *supra* note 43 at 20; Hiebert and Heinrichs, *supra* note 37 at 97; and Hookimaw-Witt, *supra* note 136 at 64.

[137] Ariss & Cutfeet, *Keeping the Land*, *supra* note 44 at 27.

[138] *Ibid*. See also Jessie M Hohmann, "The Treaty 8 Typewriter: Tracing the Roles of Material Things in Imagining, Realising and Resisting Colonial Worlds" (2017) 5:3 London Rev of Intl L 371 at 385, describing the rituals through which the colonial and Indigenous representatives "mutually bestowed on each other … the condition of sovereign entities".

of Treaty 9.[139] In the *Paulette* case, heard in 1973, the Treaty 11 First Nations were able to produce witnesses to the representations made by the Crown prior to the signature of this treaty (given that the *Paulette* hearing took place only about fifty years after the signature of Treaty 11, this was a possibility that most other Indigenous treaty signatories did not have, or would not have for much longer). Those witnesses' testimony, to the effect that the Denésoliné did not intend nor understand that the treaty would extinguish their Aboriginal rights to the land, was accepted by the judge – a finding which was not overturned on appeal[140] and which directly resulted in negotiations toward modern treaties in the Northwest Territories for Treaty 11 signatories.[141]

In short, *what remains implicit* in the written texts of treaties such as Treaty 9, paving the way to a profoundly misleading interpretation of historic treaties as providing the Crown with the exclusive jurisdiction over the territories they cover, is that the land was meant to be *shared*. Those treaty texts therefore leave an enormous gap regarding the delineation of their signatories' respective and overlapping jurisdictions and of the decision-making processes by which the sharing should proceed.[142] Thus, if the "common intention" of historic treaties "that best reconciles the interests of the parties at the time they were signed"[143] is that of sharing the land, the way to properly fill the gap is by *mandating negotiations to delineate how this sharing will occur* – as the Ontario Superior Court has recently done when interpreting the particular language and circumstances of the Robinson Huron and Robinson Superior treaties.[144]

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[139] The differences between Treaty 9 and Treaties 8, 10 and 11 amount to more generous provisions in the latter. Indeed, the latter provide for "160 acres for individuals who chose to live outside the band." In addition, the Treaty 9 annuity is $4 instead of $5 in other numbered treaties and does not include the "distribution of ammunition or net twine, no farm implements or carpentry tools, and no salaries or clothing for the chiefs and councillors": see Canada, Crown-Indigenous Relations and Northern Affairs Canada, *The Numbered Treaties (1871-1921)*, online: <rcaanc-cirnac.gc.ca/eng/1360948213124/1544620003549>.

[140] *Paulette et al v The Queen*, [1977] 2 SCR 628, 72 DLR (3d) 161.

[141] Those agreements, concluded between 1984 and 2015 with the Inuvialuit, Gwich'in, Sahtu Dene and Métis, Salt River, Tłı̨chǫ, and Déljne nations respectively, are available on the website of the government of the Northwest Territories: aee Northwest Territories, Executive and Indigenous Affairs, "Concluding and Implementing Land Claim and Self-Government Agreements: Existing Agreements", online: <eia.gov.nt.ca/en/priorities/concluding-and-implementing-land-claim-and-self-government-agreements/existing-agreements>.

[142] The absence or insufficiency of articulated mechanisms for sharing the land and its benefits in many historic treaties should not be taking to mean that the Crown necessarily perceived treaties to be one-time transactions with Indigenous treaty signatories. The fact that all parties, Indigenous *and* Crown (as well as settlers themselves) did in fact share an understanding of treaties as long-term relations rather than mere one-time transactions – at least through the 18th Century – has been persuasively demonstrated: see e.g. David Bell, "Was Amerindian Dispossession Lawful: The Response of 19th Century Maritime Intellectuals" (2000) 23 Dalhousie LJ 168; Robert Hamilton, "After Tsilhqot'in Nation: The Aboriginal Title Question in Canada's Maritime Provinces" (2016) 67 UNBLJ 58.

[143] *Marshall, supra* note 120 at para 78.

[144] *Restoule, supra* note 124. In that case, the meaning of the annuity "augmentation clause" contained in the 1850 Robinson Huron and Robinson Superior treaties was examined by the court through a deep engagement with the treaty interpretation principles laid out in *Marshall*, *supra* note 120. The court ruled that the Crown did not have sole discretion on whether or not to share the wealth of the land, nor on how

How should we approach this work of *filling in the gaps* of historic treaty texts so as to provide relevant contemporary expression to the integration of jurisdictions that historic Crown promises and Indigenous understandings of treaties require? Such integration of jurisdictions is what the modern treaty process, which began in 1975 and continues to this day in the parts of Canada where treaties were not previously concluded, is all about. As advocates and scholars have pointed out, modern treaty negotiations, final agreements, and jurisprudence have generated principles that could be applied to the task of filling in the gaps of historic treaty texts.[145] Doing so may also go some distance towards correcting a related disparity: the deeply unjust discrepancy between historic and modern treaty rights and obligations[146] – and bring more coherence and unity to the regime of Indigenous rights that informs, at the most fundamental level, the Canadian Constitution.

In a recent article, Julie Jai, a scholar and lawyer who negotiated the Teslin Tlingit Administration of Justice Agreement on behalf of the Yukon government, synthesizes the modern treaty principles applicable to the reinvigoration of historic treaties as follows. First, *treaties provide a framework for an ongoing relationship of mutual respect and mutual benefit*.[147] Treaties are not static, one-time transactions, but living arrangements that must lay out mechanisms for ongoing, organic relations of cooperation and exchange that must be revisited in light of new and unforeseen circumstances.[148] The second principle is that of *fair dealing*, in particular, that the Crown should behave honourably and not disadvantage a First Nation because of when they signed their treaty.[149] Jai highlights how this principle has been applied in negotiations with different First Nations in the Yukon to ensure that those with less leverage would not be unfairly treated: if one of them obtained a better deal, those "who had already signed off on their agreements can open up their agreements and get the benefit of this more favourable position."[150] Finally, the third principle states that *treaties should include a fair process for resolving disputes*.[151] This principle has been used in modern treaties to define how the mediators and arbitrators of treaty disputes would be selected, to ensure they would have knowledge of applicable Indigenous

much to share. In other words, its assessment of the meaning of the augmentation clause that "best reconciles" the intention of both parties at the time of signature is that there is a treaty right to share in the proceeds of the land: see *Marshall*, *supra* note 120 at paras 14, 78, 83. Since the mechanisms of implementation of the annuity augmentation clause – an accounting of those proceeds, and the actual formula for sharing – were absent from the treaty text, the court mandated negotiations between the treaty partners to fill in this crucial gap.

[145] See Julie Jai, "Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties" in Coyle & Borrows, *supra* note 13 at 105.

[146] Bob Rae, "The Gap Between Historic Treaty Peoples and Everyone Else" (31 October 2014), *Bob Rae* (blog), online: <bobrae.ca/the-gap-between-historic-treaty-peoples-and-everyone-else/>.

[147] Jai, *supra* note 146 at 138.

[148] Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 American Indian Culture & Research J 145.

[149] *Ibid* at 141.

[150] *Ibid*.

[151] *Ibid* at 143.

laws as well as the common law, and to describe all other aspects of the dispute-resolution process.[152]

In what follows, we draw on our research with KI – and in particular, on the work the community has done since *Platinex* to articulate aspects of their laws in order to assert jurisdiction over their homelands – and on articulations of principles and visions by leaders and members of other Treaty 9 First Nations, to lay out what filling in the gaps of Treaty 9 might consist in, if approached systematically under each of the modern treaty principles laid out above. We are interested in working through how those principles and visions could be instantiated in concrete inter-societal institutions under a renewed treaty law.

A. The treaty must be understood as a framework for an ongoing relation of mutual respect and mutual benefit

As Julie Jai states, modern treaties typically contain clauses to recognize that the treaty is not just a fixed set of obligations that can be discharged in a transactional fashion, once and for all. But the notion that the parties intended to establish an ongoing relation of mutual respect and benefit is not new. It is supported by the research into Indigenous understandings of the treaties adhered to between 1850 and 1930. As Heidi Kiiwetinepinesiik Stark has demonstrated, in Anishinaabe understandings, the treaties were meant to protect the people's rights to the land and to "provide a base for a lasting relationship with the Crown".[153] "Treaties were clearly not static agreements from an Anishinaabe perspective but were contingent on each nation meeting the obligations they carried".[154] Establishing institutions of "maintenance", then, is crucial.[155]

One tool that is employed in modern treaties to accomplish this goal of ongoing relationships of mutual respect and benefit is "co-management". Co-management arrangements emerged over the past two decades, mostly in the modern treaty context, as new decision-making institutions comprised of representatives from Indigenous and settler governments were created to exercise joint authority over certain resource management decisions.[156] The precise structure of co-management varies "with the nature of the resource, the political context, the expertise of participants, the authority exercised, and the range of management decisions involved".[157] At one end of the spectrum, we might place processes for "joint decision-

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[152] *Ibid*.

[153] Stark, *supra* note 149 at 152.

[154] *Ibid* at 155.

[155] Jeffery Hewitt, "Reconsidering Reconciliation: The Long Game" (2014) 67 SCLR 282.

[156] Joseph J Spaeder & Harvey A Feit, "Co-management and Indigenous Communities: Barriers and Bridges to Decentralized Resource Management: Introduction" (2005) 47:2 Anthropologica 147; Michele-Lee Moore, Suzanne von der Porten & Heather Castleden, "Consultation is not Consent: Hydraulic Fracturing and Water Governance on Indigenous Lands in Canada" (2017) 4:1 Wiley Interdisciplinary Reviews: Water 1180.

[157] Sari Graben, "Assessing Stakeholder Participation in the Sub-Artic Co-Management: Administrative Rulemaking and Private Agreements" (2011) 29:1 Windsor YB Access Just 199; Curran, *supra* note 9.

making" as envisioned in the *Far North Act*, where final authority remains with the Crown, based on the input and mapping done by Indigenous communities. At the other end of the spectrum, we might think of a scheme in which communities exercise their inherent jurisdiction to make resource management, permitting and approval decisions themselves, based on the "grounded authority" that comes from knowing the land, and simply report those decisions to the state.[158] Between these extremes, there is obviously quite a lot of space for different structures to emerge; there would also be conceptual possibilities for exercising respective jurisdictions over different resources or parts of the territory, or various overlapping areas of distinct authority etc.[159] The latter idea is in line with the emerging notion of "collaborative consent", where a process is mutually agreed upon and where it establishes the conditions for parties to act as "co-equals".[160] Scholars developing this concept emphasize that "collaborative consent does not require any government involved to surrender authority. Nor does it mean that all governments are involved in all decisions at all times".[161]

We should not be taken as arguing that co-management in Ontario's far north would be undeniably positive for the Treaty 9 nations. The literature shows that the process of developing co-management regimes is often an exercise through which the state expands its authority, legitimacy, and capacity to govern where it presently does not possess these attributes.[162] Collaborative processes can also sometimes "enhance the role of Indigenous leaders and negotiators but not necessarily that of community members".[163] Still, the negotiation of co-management regimes can be a process through which settler institutions are forced to explicitly recognize the authority and legitimacy of Indigenous governance systems.[164] Much depends on the actual structure of the arrangements achieved, and the degree to which the Indigenous authorities

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[158] Pasternak, *Grounded Authority*, *supra* note 22.

[159] As Shiri Pasternak notes, this is in contrast to conventional understandings under settler law where territorial sovereign space is often "projected as a discrete, non-overlapping, absolute domain of space, despite how interpenetrated by capital and by competing jurisdictional claims its boundaries may be": see Pasternak, *Grounded Authority*, *supra* note 22 at 153. But as Papillon & Rodon note, this should not be so foreign a concept in a federation like Canada, "where overlapping jurisdictions between co-equal partners make unilateral actions difficult and often counterproductive": see Papillon & Rodon, "Indigenous Consent", *supra* note 12 at 6.

[160] Papillon & Rodon, "Indigenous Consent", *supra* note 12 at 15; Merrell-Ann Phare et al, "Collaborative Consent and Water in British Columbia: Towards Watershed Co-Governance" (January 2018) *Centre for Environmental Resources & POLIS project on Ecological Governance*, online (pdf): <poliswaterproject.org/files/2017/09/POLIS-CC-6b-web.pdf>.

[161] Rosie Simms et al, "Collaborative Consent as a Path to Realizing UNDRIP", *Policy Options* (11 January 2018), online: <policyoptions.irpp.org>.

[162] Harvey Feit, "Re-cognizing Co-management as Co-governance: Visions and Histories of Conservation at James Bay" (2005) 47:2 Anthropologica 267.

[163] Papillon & Rodon, "Indigenous Consent", *supra* note 12 at 15. One of the reasons this is the case relates to the fact that engaging in policy-making requires a high degree of technical expertise that many Indigenous communities do not at present possess; this is a power imbalance that is not easily compensated for by institutional design.

[164] *Ibid*; see also Paul Nadasdy, "Reevaluating Co-Management Success Story" (2003) 56:4 Arctic Institute of North America 367.

exercise meaningful control. Our position is simply that the mechanism presents an opening to destabilize the assumed exclusivity of state sovereignty and to facilitate expressions and applications of alternative legal orders, such as *Kanawayandan D'aaki*.[165]

The spirit of a meaningful ongoing treaty relationship, as understood by some of the Treaty 9 communities, has actually been the object of a recent, concrete formulation. Indeed, in the context of the Ring of Fire proposals, the nine First Nations of the Matawa Council negotiated a Regional Framework Agreement[166] with the provincial Crown in 2014, listing the following "Principles":

> Government-to-Government: Recognition of the government-to-government relationship among the Parties, with the willingness and commitment to strengthen that relationship, including through respect for and good faith intention to reconcile differences between the Parties;
>
> Positive and Long-Term Relationship: Willingness and commitment to forge a positive and long-term relationship based on the Principles herein, recognizing the past and seeking to build a more positive future;
>
> Mutual Respect: Willingness and commitment to hear each other and to act honourably and in good faith toward each other, including through meaningful appreciation of the Parties' perspectives, constraints, values and culture; and
>
> Mutual Understanding: Willingness and commitment to understand each other's cultures, responsibilities and limitations; among others.[167]

These principles present contemporary evidence not only that Treaty 9 nations continue to assert the fact that a treaty relationship involves an ongoing relationship of mutual respect and mutual benefit – but also that Ontario, at least under some governments, is ready to acknowledge this and to give shape to such a relationship.

The Regional Framework Agreement also indicates that the Parties commit to the "equitable sharing of the economic benefits" that flow from the territories.[168] Ensuring socio-economic well-being is crucial to maintaining ecological integrity for a region like the far north. Measures for ensuring socio-economic well-being should

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[165] This is not meant to minimize the very significant challenges that would remain, even at the far end of the spectrum towards inherent jurisdiction, for overcoming assumptions about "resources" and how they should be "managed" that are embedded in western scientific management worldviews: see Paul Nadasdy, "The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse and Practice" (2005) 47:2 Anthropologica 215.

[166] Ontario, Ministry of Energy, Northern Development and Mines, "This Regional Framework Agreement Effective as of the 26 Day of March", online (pdf): <mndm.gov.on.ca/sites/default/files/rof_regional_framework_agreement_2014.pdf> ["Regional Framework Agreement"]. In sub-section b below, we discuss in more detail the current fate of the Regional Framework Agreement.

[167] *Ibid* at 3–4.

[168] *Ibid* at 5.

be structural and long-term.[169] There are multiple mechanisms through which Indigenous communities may receive economic benefits from resource extraction on their ancestral homelands – the most common being resource revenue sharing, and impact-benefit agreements.[170]

Resource revenue sharing (RRS) typically occurs as governments sign agreements with specific First Nations, sometimes organized into Tribal Councils, to "share" a portion of the mining tax revenues or timber stumpage fees that the government collects from companies operating there.[171] Some First Nations in Ontario's far north, in the Mushkegowuk, Wabun, and Grand Council #3 Tribal Councils, recently negotiated resource revenue sharing deals with Ontario.[172] The government's stated intention was better relations and reconciliation.[173] While these agreements are important and could theoretically generate some badly needed revenue for community priorities,[174] the fundamental problem with them is that Ontario still exercises the unilateral authority to permit the development that will give rise to the revenues. If Ontario recognized Indigenous governing authority and the communities exercised jurisdiction to approve or reject industry permits, then RRS – with the proportions to be "shared" negotiated in this renewed treaty context, and the tax rate increased to ensure that appropriate revenues could be generated – could be a viable long-term mechanism for ensuring mutual benefit from the territory, as long as the

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[169] Curran, *supra* note 9 at 854.

[170] There is contestation related to the question of whether Band councils elected under the *Indian Act* hold the authority to enter into these agreements related to the larger traditional territories, or whether their authority is confined to decision-making specific to the reserve.

[171] Ontario, Ministry of Energy, Northern Development and Mines, "Resource Revenue Sharing" (18 July 2018), online: <mndm.gov.on.ca/en/mines-and-minerals/resource-revenue-sharing>; see also Ken Coates & Stephen Crozier, "Ontario, First Nations Take Giant Step toward Reconciliation with Revenue-Sharing Deal", *The Globe and Mail* (20 May 2018), online: <theglobeandmail.com>.

[172] Starting in the fall of 2019, partner First Nations will receive 45 per cent of government revenues from forestry stumpage fees, 40 per cent of the annual mining tax and royalties from active mines, and 45 per cent from future mines. 17 out of Ontario's 38 operating mines are located in the areas now covered by revenue-sharing deals; the Matawa First Nations are conspicuously absent.

[173] Ontario, Ministry of Energy, Northern Development and Mines, Bulletin, "Ontario Partners with First Nations to Share Forestry and Mining Revenues: Province Signs Historic Resource Revenue Sharing Agreements" (3 May 2018), online: <news.ontario.ca/mndmf/en/2018/05/ontario-partners-with-first-nations-to-share-forestry-and-mining-revenues.html>.

[174] As it currently stands, however, this is a regime based on what Veltmeyer & Bowles call a mere "coincidence of economic interest" – with "extraordinary profits for the companies" paired with relatively meagre additional revenues for Bands, based on the low tax rates imposed by the state authorities: *supra*, note 19 at 63. Under settler law on the constitutional division of powers, provincial governments have the power to impose mining taxes and royalties. In Ontario, as an example, mining tax is imposed on profits from the extraction of minerals raised and sold by operators of Ontario mines. The tax rate on taxable profit subject to mining tax is 10 per cent for non-remote mines, and 5 per cent for remote mines. The tax is only applied to an operator's annual profit in excess of $500,000. Further, a mining tax exemption applies on up to $10 million of profit for each new or expanded mine. The exempt period for a non-remote mine is three years, and the exempt period for a remote mine is 10 years: see *Mining Tax Act*, RSO 1990, c M.15. Thus, there are several statutory limitations on the amount of revenue that can be generated through a resource revenue system; an Indigenous governing authority may not choose to offer those same "incentives" to miners.

development was consistent with the affected communities' visions for their homelands.[175]

Impact-benefit agreements (IBAs) are another mechanism used in modern treaties for ensuring that Indigenous communities benefit economically from the wealth of the territories. We argue, however, that IBAs suffer the same fundamental flaw under current conditions.[176] In this case, the contracts are between the First Nations and the resource companies themselves, and they typically involve the company providing annual per-capita payments, certain employment or training commitments, environmental monitoring, and/or some lump-sum funding towards community priorities such as a recreation center.[177] Increasingly, they include equity stakes in the underlying business as well. In exchange, the community is typically required to provide their "support" for the project.[178] Under modern treaties, a common way of achieving relations of mutual benefit is through the requirement that any industry authorized to extract resources from the territory conclude IBAs with affected communities.

"Getting to No"[179]

While some commentators argue that IBAs are superior to RRS and other state-dependent mechanisms, because they seem to offer some acknowledgement of Indigenous territorial rights and allow communities to assert their "political autonomy from the settler-state" through "bilateral" negotiations with companies, there are several worries in relation to how a requirement for "agreements" to be concluded is or could be operating in the broader settler colonial context.[180] Strictly considering the

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[175] Communities would also, in this context, have a hand in the crafting of rules that would apply to industry activity on the land; that is, it would no longer be the case that Ontario would be the sole legislative authority. Thus the set of rules governing applicable tax rates, tax holidays, and exemptions would not be based on assumptions of underlying Crown ownership of all resources.

[176] St-Laurent & Le Billon, *supra* note 12.

[177] Ginger Gibson & Ciaran O'Faircheallaigh, "IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements" (2010), *The Walter & Duncan Gordon Foundation*, online (pdf): <ibacommunitytoolkit.ca/pdf/IBA_toolkit_March_2010_Section_1.pdf>; Sosa & Keenan, *supra* note 11; Cameron & Levitan, *supra* note 11; Caine & Krogman, *supra* note 11; David Szablowski, "Operationalizing Free, Prior and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice" (2010) 30:1–2 Rev Can d'études du développement 111. While the contracts are often seen as "private law", between two private, contracting parties, it is important to remember both that they are actually negotiated by Indigenous governments, implying a public character, and that that they are backed by the state enforcement of settler contract law and its remedies.

[178] Caine & Krogman, *supra* note 11.

[179] Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Boston: Houghton Mifflin, 1981).

[180] Jason Prno, Ben Bradshaw & Dianne Lapierre, "Impact and Benefit Agreements: Are They Working?" (Paper delivered at the Canadian Institute of Mining, Metallurgy, and Petroleum conference, Vancouver, 11 May 2010) at 1. Gabrielle Slowey has also argued that Indigenous communities are exercising jurisdictional autonomy as self-determining nations when they bypass the state and negotiate directly with industry towards goals of economic self-reliance: see *Navigating Neoliberalism: Self-Determination and the Mikisew Cree First Nation* (Vancouver: UBC Press, 2008).

current state of doctrine in settler law today, notwithstanding the adoption of UNDRIP, the idea of free, prior, and informed consent (FPIC) – and conversely, the possibility that "no" could mean "no" – is not yet a feature of Canadian jurisprudence.[181] Instead, we have the duty to consult and accommodate under section 35 of the Constitution Act, 1982 – a spectrum of consultation and accommodation rights developed by the settler courts to manage areas on which Aboriginal and Treaty rights have been claimed or recognized.[182] But as mentioned earlier, even on the end of that spectrum where title or treaty rights provide the most protection to Indigenous communities' jurisdiction, the protection afforded to the Indigenous right to consent/refuse construction, extraction, or settlement projects remains subject to the Crown's "justifiable infringement."[183]

To bring us back to the Treaty 9 context, a regulation made under the Mining Act in 2012 now requires Ontario to notify First Nations that may be affected by an application for an exploration permit, so that the community may identify any concerns. The proponent is then required to consult with the community, and Ontario may require the proponent to file a report detailing the consultation process, "including with regard to any arrangement reached with an Aboriginal community or the efforts made to reach such an arrangement, before deciding whether to issue an exploration permit".[184] One remote Ring of Fire community, Eabametoong First Nation, embroiled in a dispute with a junior mining company learned recently in a decision on a judicial review application that, in the Ontario Divisional Court's view, the duty to consult does not give the community the right to "unilaterally" insist that an agreement be in place before the permit can be granted – even where the community was trying to leverage the negotiations towards an MOU in order to achieve minimum accommodations from the company.[185] One commitment that Eabametoong First Nation was trying to extract from the company was that they would clean up and

[181] Imai, "Consult, Consent & Veto", *supra* note 13. As Papillon & Rodon state, "to this day, controversy over the meaning of the right to FPIC continues to be one of the major roadblocks to the full implementation of UNDRIP in Canada": see "Indigenous Consent", *supra* note 12 at 2. At the time of writing, Canada is poised to become the first country to fully incorporate UNDRIP in to national law, as Bill C-262, a private member's bill, is debated in the Senate. In section 4, it states: "[t]he Government of Canada, in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples": see Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples,* 42-1, 2016.

[182] *Haida Nation*, *supra* note 128; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69; *Clyde River (Hamlet) v Petroleum Geo-Services In*, 2017 SCC 40; *Tsleil-Waututh*, *supra* note 13.

[183] See *Tsilhqot'in Nation*, *supra* note 130 and *Campbell*, *supra* note 130 regarding the capacity to infringe even painstakingly negotiated modern treaty rights; see also *R v Sparrow*, [1990] 1 SCR 1075, 111 NR 241; *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15.

[184] *Exploration Plans and Permits*, *supra* note 46.

[185] *Eabametoong*, *supra* note 16. The junior mining company, for its part, was trying to leverage the MOU initially as a way of marketing their assets to investors.

remediate their previous exploration camp prior to being granted approval for another one.[186]

This example makes very clear that the problem with the current regime is not that the proponents are not required to put in place IBAs before they are given approval to proceed with extractive projects. The fundamental problem is that the Indigenous communities whose lands are affected are not recognized as holding the jurisdiction to decide whether or not permits should be granted.[187] Negotiations towards IBAs are always "premised on the assumption that the project will be approved".[188] It is a matter of deciding on the "compensation package [that will be provided] in exchange for consent".[189] Until communities actually have the power to say "yes" or "no" to extractive activities on their ancestral homelands, it is impossible to conclude that an IBA can constitute evidence of meaningful "consent" to a project.[190] There is a structural power imbalance in place, and it "results in part from the ability of companies to decide with which communities they will negotiate, to end negotiations, and more generally to get projects approved and proceed without IBAs".[191] Because communities are not in a position to envision their own projects for the territory, IBAs are often perceived as the "best (and often last) option for influencing the flow of resources back to the community", meaning that other parties' development projects become virtually "inevitable".[192] Negotiations towards IBAs never question "the nature and necessity of the project itself, [only] how it can be managed in a way that limits and mitigates its risks and negative impacts while

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[186] *Ibid*.

[187] Only a right of consultation: see Penelope C Simons & Lynda M Collins "Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective" (2010) 6:2 JSDLP. As Imai says, "[t]he problem with the *consult* standard is that the community feels powerless because they are powerless. It is difficult for people to trust a process of discussion when they know that no matter what happens, the final decision is not in their hands": see "Consult, Consent & Veto", *supra* note 13 at 385–86. Even if they were not structurally disadvantaged in this way, communities would also be in a position of inferiority in terms of negotiation power based on access to lawyers and the Crown's role as a repeat player: see Arielle Dylan et al, "Saying No to Resource Development is Not an Option" (2013) 47:1 J of Can Studies 59; Szablowski, *supra* note 178; see also Drake, *supra* note 44, who demonstrates that this problem, which persists after the recent round of alterations to the *Mining Act* and its regulations, makes the Ontario mining regime unconstitutional.

[188] Papillon & Rodon, "Indigenous Consent", *supra* note 12 at 13.

[189] *Ibid*.

[190] This engages, of course, the highly contested notion of whether Indigenous peoples, under UNDRIP, possess a right of "veto" over proposed development projects. Canada's representative to the United Nations' General Assembly in 2012 explained that Canada's opposition to UNDRIP stemmed in part from concerns over the "free, prior and informed consent standard when used as a veto": See UNGA, 61st Sess, 107th Plen Mtg, UN Doc A/61/PV.107 (2007) at 12, online: <undocs.org/en/A/61/PV.107&Lang=E>. Papillon & Rodon contributed a very useful analysis attempting to move debate beyond the question of whether FPIC constitutes a veto, arguing for a "relational model of FPIC" that incorporates the recognition of indigenous peoples as "full and equal governing partners in the decision-making process affecting their traditional lands": see "Indigenous Consent", *supra* note 12 at 3.

[191] St-Laurent & Le Billion, *supra* note 12 at 8.

[192] Caine & Krogman, *supra* note 11 at 85.

enabling high economic returns".[193] The contractual focus on the "mitigation" of environmental effects thus presumes the approval of the development from the outset of the relationship between the parties, even now with "pre-exploration agreements".[194]

The following quote by John Borrows is written in the context of evolving section 35 jurisprudence, but it applies equally to this question of governing through contract:

> To the extent First Nations succeed in rounding out the edges of this encroachment, their interests will likely be forced to align with the provinces' interests. This is called reconciliation. Such alignment might produce some marginal economic health for First Nations. However, the beads and trinkets won through reconciliation may come at the expense of their own preferred ways of living.[195]

There is also a notion of environmental sustainability built into many of the "preferred ways of living" as they are articulated by the Treaty 9 communities. "Our definition [of what should happen in the Ring of Fire]," former-NAN Grand Chief Beardy explains, "is that we're saving something today for future consideration, leaving the option for future generations to decide what they need for their survival".[196] Unfortunately, as the literature shows, IBAs have thus far not been reliable in terms of generating "future benefit streams" nor for enacting alternative visions of sustainable economic development.[197] This derives at least in part from the fact that in both of these forms of benefit sharing, RRS and IBAs, Indigenous communities become more dependent on revenues generated through extractivism in order to meet their communities' basic fiscal needs.[198] As mentioned, this mode of accumulation is non-reciprocal and oriented to the short-term, creating a situation where communities, quite rationally, fear that once the mine's life is finished, they will be left with no trace of the promised wealth and prosperity, but with the lasting legacy of a comprised homeland.

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[193] St-Laurent & Le Billion, *supra* note 12 at 9.

[194] James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Indigenous Peoples in Canada*, UNHRC, 27th Sess, UN Doc A/HRC/27/52/Add.2 (2014), online (pdf): <ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.27.52.Add.2-MissionCanada_AUV.pdf>

[195] Coyle & Borrows, *supra* note 13 at 33.

[196] Gorrie, *supra* note 28.

[197] Caine & Krogman, *supra* note 11 at 78; Cameron & Levitan, *supra* note 11.

[198] Thus, the deal-making dynamic actually undermines the practical ability of First Nations to determine desired land uses for themselves and leaves them to "self-determine" within the very narrow confines of extractive capitalism: see Jessica Dempsey, Kevin Gould & Juanita Sundberg, "Changing Land Tenure, Defining Subjects: Neo-liberalism and Property Regimes on Native Reserves" in Andrew Baldwin, Laura Cameron & Audrey Kobayashi, eds, *Re-Thinking the Great White North: Race, Nature and the Historical Geographies of Whiteness in Canada* (Vancouver: University of British Columbia Press, 2011).

As Veltmeyer and Bowles have demonstrated, "new" forms of "progressive extractivism" that incorporate benefit sharing with Indigenous communities, are often still dependent on the "destruction of both the environment and livelihoods, and [the] erosion of the territorial rights and sovereignty" of affected Indigenous communities.[199] Further, Rauna Kuokkanen has recently put forward the tentative observation, based on comparative work on Indigenous governance of extraction in the Arctic regions, that negotiated forms of self-governance often result in an increased openness to extractive activities.[200] As Indigenous authorities gain jurisdiction, she argues, they tend towards standard forms of economic development, forcing re-definition of relations with land into terms of revenues, assets and individual gain.

B. The Crown has a duty of fair dealing in relation to Indigenous people

The Crown's obligation of fair dealing in relation to Indigenous peoples is a foundational principle of Canadian law. As the Supreme Court has stated

> The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples.[201]

The source of the obligation of honourable dealing was discussed by Chief Justice McLachlin, in *Haida Nation*, where she states that the duty to consult, which was the focus of the conflict before the Supreme Court in that case:

> is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. […] This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, *"[w]ith this assertion [sovereignty]* arose an obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation."[202]

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[199] Veltmeyer & Bowles, *supra* note 19 at 62.

[200] Rauna Kuokkanen, "At the Intersection of Arctic Indigenous Governance and Extractive Industries: A Survey of Three Cases" (2019) 6:1 Extractive Industries & Society 15 at 19.

[201] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42.

[202] *Haida Nation*, *supra* note 128 at para 32 [emphasis in the original]. As noted by Professor Brian Slattery, "[t]his passage suggests that the duty of honourable dealing arose automatically upon the Crown's assertion of sovereignty over Indigenous nations. The Court does not invoke any specific Crown acts, such as the *Royal Proclamation of 1763*. Rather it portrays the duty as the inevitable by-product of the process itself. No doubt the Court would acknowledge that the Proclamation *bears witness* to the existence of the duty, but evidently it rejects the view that the Proclamation (or any other Crown Act) is its source": see "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 433 at 445 [emphasis in the original].

The constitutional obligation by the Crown of fair dealing with Indigenous peoples has important consequences for the reinvigoration of historic treaties' interpretation. Given this theme of fair dealing, and the way it often leads to a discussion of relative bargaining power, we should clarify here our acknowledgement that modern treaty negotiations are far from a level playing field. They present Indigenous communities with excruciating choices – including insidious tacit compromises regarding their very identities and legal sensibilities – causing modern treaty outcomes to be denounced by numerous thinkers and activists who have exposed the Orwellian dimension of the current vocabulary of "recognition" of Indigenous jurisdiction.[203] Pushing for the requirement that the Crown's actions, including its behaviour at the negotiating table, be held to scrutiny and to a standard of fair dealing is not naïve. KI's actions over the past decade and more demonstrate the refusal of the community, among other Treaty 9 nations, to be cynical: they are prepared to take the stand most appropriate to the defense of their territory at any given time – whether that means putting bodies on the land directly antagonistic to the state, or engaging in negotiations to reach a lasting peace within it. In that context, it is worth taking seriously what the principle of fair dealing entails for the Crown.

We argue that part of the duty of fair dealing is a requirement of transparency, or at least a restriction on using secrecy and confidentiality as tools to divide-and-conquer Indigenous communities. In relation to the far north, the open-endedness of the infrastructure decisions that need to be taken in order to make the proposed mines viable, such as the routes for access roads, contributes to a culture of secrecy and competition between neighboring nations. Because these communities are presently so isolated, the access roads may in fact have a bigger impact on their ways of life than the mining itself. The deal-making dynamic that pervades the Ring of Fire discussions raises several questions, from the perspective of implementing a duty of fair dealing.

First, there are questions about whether members of affected communities are able to fully understand the proposed terms of a contractual agreement, and their consequences, before having to register a view. This is as true with respect to agreements with governments, as it is with companies. There is a sense that the strict confidentiality clauses, which typically prohibit the communication of the contents of the contracts to anyone outside the negotiating process, inhibit "cross-community comparisons … and holistic discussion of benefits and valuable experiences among

[203] Glen Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6:4 Contemporary Political Theory 437; see also Johnny Mack, "Hoquotist: Reorienting through Storied Practice" in Jeremy HA Webber, Rebecca Johnson & Hester Lessard, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011); Stephanie Irlbacher-Fox, *Finding Dahshaa: Self-Government, Social Suffering, and Aboriginal Policy in Canada* (Vancouver: UBC Press, 2009); Vanessa Sloan Morgan, Heather Castleden and Huu-ay-aht First Nations, "'This Is Going to Affect Our Lives': Exploring Huu-ay-aht First Nations, the Government of Canada and British Columbia's New Relationship Through the Implementation of the Maa-nulth Treaty" (2018) 33:3 CJLS; and Shiri Pasternak & Tia Dafnos, "How Does a Settler State Secure the Circuitry of Capital?" (2018) 36:4 Environment & Planning D: Society & Space 739.

communities…"[204] The recent RRS deals with Ontario may be an exception to this, as they have been made publicly available, and this approach is welcome for beginning a more open and transparent conversation about mutual benefit from the territories.[205] Finally, a worry exists in relation to common non-compliance provisions in agreements that seek to prohibit "beneficiary populations" from opposing the project in any regulatory proceedings, or undertaking any actions that could impede or delay the development.[206] These "gag orders" can purport to prevent community members from voicing concerns even if new impacts come to light only after the development gets off the ground.[207]

Returning again to the promising process under the Regional Framework Agreement, it is not publicly known what progress was made over the four years of talks, since the outcomes have remained confidential. Communities have characterized them as "productive exploratory talks." But it has been reported that late in the former Ontario premier's tenure, "the whole process went into hibernation as the government shifted from trying to achieve consensus among the nine Matawa communities toward adopting a strategy of working only with the First Nations deemed "mining-ready."[208] Some of those communities have now concluded deals with the Province to become road proponents, and with the companies to share in the revenues from any future mines.[209] Other communities are left to fight the projects from the outside.

A crucial example, therefore, of how the Crown is not living up to a duty of fair dealing in the far north, is in relation to the way environmental assessment

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[204] Caine & Krogman, *supra* note 11 at 85.

[205] On the other hand, the fact that all three are identical gives rise to the suspicion that the deals were presented to the communities in a "take-it-or-leave-it" fashion.

[206] While both communities and industry at present support confidentiality, this may stem in part from the background set of incentives in place, e.g., the sense of inevitability of the ultimate approval. In a situation of genuine co-management and joint dispute settlement, the secrecy that holds value for communities in a divide-and-conquer model may lose its power. While these "gag orders" are probably unenforceable against individual actors, we have also heard of variations on this clause in which the Indigenous government must indemnify the proponent for any loss suffered from unauthorized blockades or other actions. We have also heard of clauses in which the Indigenous government accepts a positive duty to defend the project against criticism in public fora.

[207] Steven A Kennett provides an example of an agreement where the community agreed not to "object to the issuance of any licenses, permits, authorizations or approvals to construct or operate the project": see "Issues and Options for a Policy on Impact and Benefit Agreements" (Paper prepared for the Mineral Resource Directorate, Department of Indian Affairs and Northern Development by the Canadian Institute of Resources Law, 27 May 1999).

[208] Northern Ontario Business, "Lack of Consultation on Ring of Fire Development Frustrates First Nation Communities", *North Bay Today* (12 November 2018), online: <baytoday.ca>.

[209] Ontario, Ministry of the Environment, Conservation and Parks, "Marten Falls Community Access Road Project", online: <ontario.ca/page/marten-falls-community-access-road-project> [Ontario, "Marten Falls"]; Ontario, Ministry of the Environment, Conservation and Parks, "Webequie Supply Road Project", online: <ontario.ca/page/webequie-supply-road-project> [Ontario, "Webequie"]; Noront Resources, "Noront Resources and Marten Falls First Nation Sign Exploration and Project Advancement Agreement" (13 April 2017), *Noront Resources* (blog), online: <norontresources.com>.

processes are being organized for the Ring of Fire developments in this context. Both the federal and provincial government have been repeatedly urged to apply a broad, regional, and strategic lens to the assessment of the cumulative impacts on the lands, waters and people of the Matawa region, and to work in partnership with the communities to set up a structure for taking the coming infrastructure and extraction decisions.[210] Instead, two discrete environmental assessments are underway for the construction of two short portions of road being put forward by specific "partnered" and presumably "mining-ready" communities. These roads will presumably eventually be linked, after separate stand-alone environmental assessments, to the mine site in the Ring of Fire.[211] Commentators complain that:

> the narrow focus of separate assessment processes … cannot address overall impacts to the region at large, and will do nothing to stave off the inevitable cumulative effects that will arise when the Ring of Fire is open for business. It is well known that mines have limited operational lives and a history of negative legacy effects in remote regions. Enabling access to new deposits and opening up First Nations' traditional lands require a more thoughtful design and approach to sustainability than has so far been considered.[212]

A leader of one of the remote Ring of Fire communities, Chief Elizabeth Atlookan, calls it a "quick and dirty approach to opening up the whole north" and questions why, for such "high stakes" decisions, a more comprehensive review cannot be undertaken.[213] In fact, "experience demonstrates that regional-scale assessments can provide greater scope for the identification, evaluation and pursuit of different futures".[214] A regional or strategic environmental assessment of the Ring of Fire developments, in fact, is the very least that is required: an Indigenous-led strategic planning process, rather than being organizing around mitigating predicted "negative environmental effects", might be oriented towards fostering discussion and community consensus on developments or economies that could be pursued that would generate lasting benefits for the communities and have an overall positive impact on sustainability in the region.[215] The Treaty 9 communities deserve to

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[210] E.g. the Matawa Nations developed a "Community Driven Regional Strategy" under which they aimed to negotiate an environmental assessment process with Ontario that would "include meaningful First Nation participation, consultation, decision making and would consider the accumulated impacts of more than one development": see Matawa First Nations Management, "Community Driven Regional Strategy" at 2, online (pdf): <matawa.on.ca/wp-content/uploads/2013/12/Regional-Strategy-Brochuresmallpdf.com_.pdf>.

[211] Ontario, "Marten Falls", *supra* note 210; Ontario, "Webequie", *supra* note 210. The Marten Falls community access road proposal links the provincial highway system to the community along what is commonly understood to be the north-south route into the potential future mine site; the Webequie supply road proposal links the community's airstrip to that site.

[212] Cheryl Chetkiewicz, Justina Ray & Richard Lindgren, "A Sustainable Plan for Ontario's Ring of Fire", *Policy Options* (17 July 2018), online: <policyoptions.irpp.org>.

[213] Northern Ontario Business, *supra* note 209.

[214] *Ibid*.

[215] See e.g. Tsleil-Waututh Nation, Treaty, Lands & Resources Department, "Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal" (2015), online (pdf): <twnsacredtrust.ca/wp-content/uploads/TWN_assessment_final_med-res_v2.pdf>.

participate in the process of visioning that will shape their lands, waters, and economies for decades to come.

In our conception of a renewed Treaty relationship in Treaty 9 territory, the Crown's duty of fair dealing would lead to transparent and open processes that do not pit one community against the other. These processes and institutions would generate insights and strategies for fostering reciprocity that can bring people into substantive, open, and continuous dialogue about visions for the future, rather than being locked into closed, static and routinized processes that aim at achieving one-off "agreements" instead of substantive outcomes.

C. There should be a mutually agreeable process for resolving disputes between the treaty beneficiaries

We now turn to the question of dispute resolution. Michael Coyle demonstrates that both parties to a treaty typically seek to ensure effective recourse in the case of dispute.[216] As Jai writes, the "critical issue is what processes will be engaged to resolve these disputes, and to what extent will they involve both treaty partners?"[217] Parties to Treaty 9 would benefit from a fair, mutually agreeable process through which not only amendments to the Treaty can be made, but also disputes can be resolved by adjudicative bodies made up of members appointed by both Indigenous and settler governments. As Coyle and Borrows state "…when disagreements arise about whether a historical treaty allows unfettered exploitation of the resources found on treaty lands, the parties usually have nowhere to turn apart from costly and adversarial contention in the [settler] courts".[218]

Why would recourse lie only to Canadian courts? Given KI's experience with the settler legal system, we agree with Gordon Christie, who notes that, with few exceptions, contemporary jurisprudence flowing from the settler courts "actually sanctions, affirms and strengthens [a] colonial conceptual framework".[219] Others note that Canadian judges appointed by settler governments have been, and will likely continue to be, "reluctant to admit claims that question the fundamental premises of their society, such as the validity of Crown assertions of sovereignty".[220]

In terms of resource extraction disputes in the far north, it is significant that the Mining & Lands Commission[221] members are appointed solely by the provincial

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[216] Coyle & Borrows, *supra* note 13.

[217] *Ibid* at 143.

[218] *Ibid* at 4. Recall, that in the KI-Platinex dispute, the community complained to the court that it could "no longer afford to participate in court proceedings": see Chief and Council of KI, *supra* note 51.

[219] Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23 Windsor YB Access Just 17 at 21.

[220] Coyle & Borrows, *supra* note 13 at 8.

[221] In 2017, the Office of the Mining and Lands Commissioner moved from the Ministry of Natural Resources and Forestry to join the Environment and Land Tribunals Ontario and became the Mining and

Crown; they are directed to apply only settler law.[222] In just one example, a decision of the Mining & Lands Commissioner affecting a remote Ring of Fire community held in a very cursory analysis that the First Nation had surrendered their land rights in Treaty 9, that the only rights that remained were those protected by section 35, to consultation and accommodation, and that, since section 2 of *Public Lands Act* clearly states that the Minister of Natural Resources has control over the disposition of public lands, the community was not even entitled to standing in the proceeding determining surface rights for a road through its traditional territory.[223]

And so we return to one of the core questions posed at the outset of this paper: What happens when Indigenous governing authorities, applying Indigenous legal principles, issue a clear refusal to a given extractive project on their traditional territory, or more generally, to a proposed land use within it? When Indigenous and settler authorities disagree as to the interpretation and interaction of their respective laws, or the scope of their respective jurisdictions? If meaningful co-management bodies, the first logical locus of authoritative reconciliation regarding Indigenous and settler views on the proper use and stewardship of the land, fail to do so, adjudicating the dispute cannot reasonably be expected to occur solely through settler law, as interpreted by one of the currently-constituted settler courts. In short, Treaty institutions cannot give voice solely to settler views, approaches, and instruments. Alternative processes and interpretive bodies, genuinely capable of taking into meaningful consideration both settler and Indigenous laws on a jurisdictionally specific basis, and thus of enjoying legitimacy in the eyes of both settler and Indigenous societies, are a necessary part of turning the current competition between State and Indigenous legal orders into a meaningful cooperation.

In respect of authorizing and monitoring resource extraction activities in Indigenous homelands – including, of course, enforcing any refusal of such activities – dispute resolution systems must be designed with jointly or separately appointed arbiters, trained in the respective instruments (and more deeply, sensibilities)[224] of the specific legal orders that apply in any given part of the country.[225] This is what having

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Lands Tribunal (MLT). Its functions – determining claims and settling disputes under the *Mining Act* – were not altered.

[222] *2274659 Ontario Inc v Canada Chrome Corporation and Minister of Natural Resources and Neskataga First Nation* (2005), MA005-12, online (pdf): ELTO <elto.gov.on.ca/wp-content/uploads/2018/04/11-2.pdf>.

[223] *Ibid*.

[224] For a study of this notion and its discussion in relation to a specific Indigenous legal order and tradition, see Andrée Boisselle, *Law's Hidden Canvas: Teasing Out the Threads of Coast Salish Legal Sensibility* (PhD Dissertation, University of Victoria, 2017), online (pdf): <dspace.library.uvic.ca/bitstream/handle/1828/8921/Boisselle_Andrée_PhD_2017.pdf>.

[225] This proposal to have Canadian jurists' formal training encompass not only the civil and common law, but also specific Indigenous legal traditions of Canada, necessitates the creation of institutions that can take up this work properly, in relation to and in support of each Indigenous nation's legal authority and knowledge. This vision was endorsed decades ago by the Royal Commission on Aboriginal Peoples: See Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Renewal: A Twenty-Year Commitment*, Vol 5 (Ottawa: Royal Commission on Aboriginal Peoples, October 1996), online (pdf): <data2.archives.ca/e/e448/e011188230-05.pdf>. Taken up by the Faculty of Law at the

"one law" actually means in Canada: a fruitful, workable, ongoing discussion and cooperation between distinct legal orders.

Conclusion

The fallout from the KI-Platinex dispute did not just point to problems with the free-entry system and the *Mining Act*, such that settler courts could require amendment to insert "consultation" and render the scheme barely constitutional under settler law.[226] The dispute actually exposed deep problems with the relationship between the Treaty parties. In this piece we have made use of the community's invitation to reflect on the significance of their legal drafting, to think systematically about how to fill the gaps that remain in the context of the historical treaties.

Taking the treaty seriously means accepting that KI's vision for desirable land uses on the territory is at least as legitimate as Ontario's, reflecting local priorities and local knowledge. In addition to recognizing Indigenous governing authority, however, it also means grappling with KI's challenge to Ontario's claim to ownership of all of the resource wealth that flows from the territory.[227] Taking the treaty seriously in fact brings into being a radically different legal order. In this new legal order, the parties would each exercise authority to grant or refuse approvals for new exploration permits in areas of respective and joint jurisdiction; arrangements for mutual benefits from the wealth of the territories would emerge from a more even playing field in which IBAs, and revenue sharing arrangements would be newly negotiated in a transparent process not premised on an assumption of underlying Crown title; dispute settlement would be jointly designed and implemented by adjudicators conversant in both legal orders.

As one Chief of a remote Treaty 9 community stated in a press release aimed at prompting Ontario to return to the bargaining table in respect of the Ring of Fire infrastructure planning, the community wishes to "arrive at a negotiated agreement with Ontario on the scale, pace and forms of development that are helpful to our people

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University of Victoria, one form that this vision has now taken is that of a new combined legal program culminating in the granting of degree in both the common law (JD) and Indigenous laws (JID). This was funded by the federal and provincial (British Columbia) governments in the spring 2018. In March 2019, the same Faculty also announced that its proposal for an Indigenous Legal Lodge had been funded by the federal government: see Katie DeRosa, "Federal budget: UVic gets $9.1M to Build National Centre for Indigenous Law" *Times Colonist* (19 March 2019), online: <timescolonist.com>.

[226] Although, as Drake has pointed out, the amendments did not in fact succeed in making the Act constitutional: *supra* note 44.

[227] We appreciate that Kent McNeil has made recent contributions to the literature that begin to unpack the complex layers embedded in legal notions of "title" to lands, distinguishing sovereignty from proprietary rights, from jurisdictional authority. We acknowledge that our argument would benefit from further study in this area and a more differentiated position on how ownership of resources and jurisdictional authority to govern could and should be shared in a renewed treaty relationship: see e.g. Kent McNeil, "The Source, Nature and Content of the Crown's Underlying Title to Aboriginal Title Lands" (2018) 96:2 Can Bar Rev 274; Kent McNeil, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions" in Julie Evans et al, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2013) 37; Kent McNeil, "Sovereignty and Indigenous Peoples in North America" (2016) 22:2 UC Davis J Intl L & Pol'y 81.

as we work towards a sustainable future".[228] The communities want to exercise their governing authority over the land. Their decisions are not pre-determined, but contingent, and they will be taken in accordance with their own protocols in Oji-Cree and Anishinaabe law. This was echoed in KI:

> [Other communities have been forced to allow industry] to be put into their community, to destroy their forests, rivers and lake, lands and fish […] I understand that, but KI still has a choice. We still have our environment, land, medicines, and all these things are related. Why would we want to risk destroying all the things we have right now just to get the minerals in the ground and be left with nothing in the long term? Yes, there may come a time in future when the people of KI might need to access those minerals in the ground to sustain themselves for future generations, but that's not for us to decide in this generation.[229]

Our analysis here has canvassed what we know about the principles and mechanisms embedded in modern treaties, and explored how those could be imported into the historic treaty re-interpretation process. We have sought to bring our grounded knowledge of the current resource extraction dynamics in Treaty 9 to fill in the gaps and suggest concrete reforms, or renewed approaches. We have looked carefully at statements, practices, and documents that have been emanating from Treaty 9 communities in order to bring forward their understandings and visions. The rationale for disclosing and disseminating the motivations for the KI work of legal drafting is to extract from that work the understandings that can facilitate the filling in of the treaty. We argue that in places like KI, and in fact throughout Treaty 9 territory, the deep knowledge and respect for the land, and the authority to govern it, should go together.[230]

The approach we are calling for in Ontario's far north would involve a continuous commitment to negotiations towards a complex set of government-to-government agreements that chip away at the colonial legal order. We are not calling for improvements to settler law; not asking the provincial government to amend its statutes to better recognize Indigenous rights. The arrangements to operationalize multiple, overlapping, shared and respective jurisdictions go beyond making amendments to settler regimes and colonial management tools.[231] They are about

[228] Friends of MiningWatch, "Neskantaga and Eabametoong First Nations Issue Declaration of Alliance and Shared Regulatory Territory", *MiningWatch* (9 November 2018), online: <miningwatch.ca>.

[229] Community member, KI Workshops (25 August 2017), morning session (1:53:30).

[230] Pasternak, *Grounded Authority*, *supra* note 22.

[231] As Curran notes, "there is little work on the specifics of w at comprehensive, negotiated reconciliation means for colonial jurisdiction in practice": *supra* note 9 at 826.

"carving out political space" for Indigenous communities to exercise their governing authority.[232] They will entail new structures and institutions for joint decision-making.

The communities throughout Ontario's far north entered into Treaty 9 as sovereign nations. The Treaty was a solemn promise. The imbalance created by the Crown's failure to live up to the terms of the promise must be remedied through the establishment of a new relationship, solidified through new institutions. The people in these communities take with the utmost seriousness their inherent right and responsibility to govern those lands and waters. While the exercise of these rights and duties *does not require written laws*, because they are rooted in specific relations and practices that connect the people to the land – in KI, the people have made an attempt to translate those laws into written form so as to make them legible to the settler legal system. Returning to the question of "what happens when Indigenous law says 'no' and settler law says 'yes' to a resource project", our answer is that a renewed treaty relationship, guided by principles and mechanisms from modern treaty making, would provide principled answers, distinct to each applicable Indigenous legal order. The crucial question to ask in Ontario's far north is: What does treaty law say?[233]

As many scholars of Indigenous law have observed, despite Canada's assertion of a uniform and exclusive jurisdictional authority over all lands and resources according to a settler constitutional order, a vast multiplicity of Indigenous governance systems continue to operate today. Each is unique to the territory, and the specific legal and political tradition, it applies to.[234] To fail to challenge the analytical paradigm that continually positions the settler legal order as a unitary and central authority, in "conflict" with Indigenous law, is in fact to perpetuate the settler colonial order. De-centering settler law, in part by reconceiving and reinvigorating historic Treaty law along the lines advocated here, participates in the vast undertaking of decolonizing Canadian law to achieve more just relationships.[235]

The Kitchenuhmaykoosib Inninuwug have a continuing right to govern and to share in the wealth generated on their territory. As the Anishinaabek scholar Leanne Betamosatake Simpson argues:

> The Canadian state has always been primarily interested in acquiring the "legal" rights to our land for settlement and for the extraction of natural resources. The removal and erasure of [our] bodies from the land make it easier for the state to acquire and maintain sovereignty over land because this not only removes physical resistance to dispossession, it also erases the

[232] *Ibid* at 835.

[233] Or, as one of our interviewees stated is more accurate: "What do people in the community hall say?"

[234] Borrows, "Indigenous Legal Traditions", *supra* note 114; Robert YELḰÁTŦE Clifford, "WSÁNEĆ Legal Theory and the Fuel Spill At SELEK̓TEL̓ (Goldstream River)" (2016) 61:4 McGill LJ 755.

[235] See Christie, *supra* note 220; Coyle & Borrows, *supra* note 13.

> political orders and relationships housed within Indigenous bodies that attach our bodies to the land.[236]

The people of KI remain willing to put their bodies on the land, and their legal and political orders into the public domain. As mentioned, they do so in strategic engagement with their Treaty partners and in the hopes of bringing into being a renewed Treaty relationship. These are acts of "generative refusal" that point the way forward: one law, treaty law.[237]

[236] Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis: The University of Minnesota Press, 2017) at 42.

[237] *Ibid* at 178.