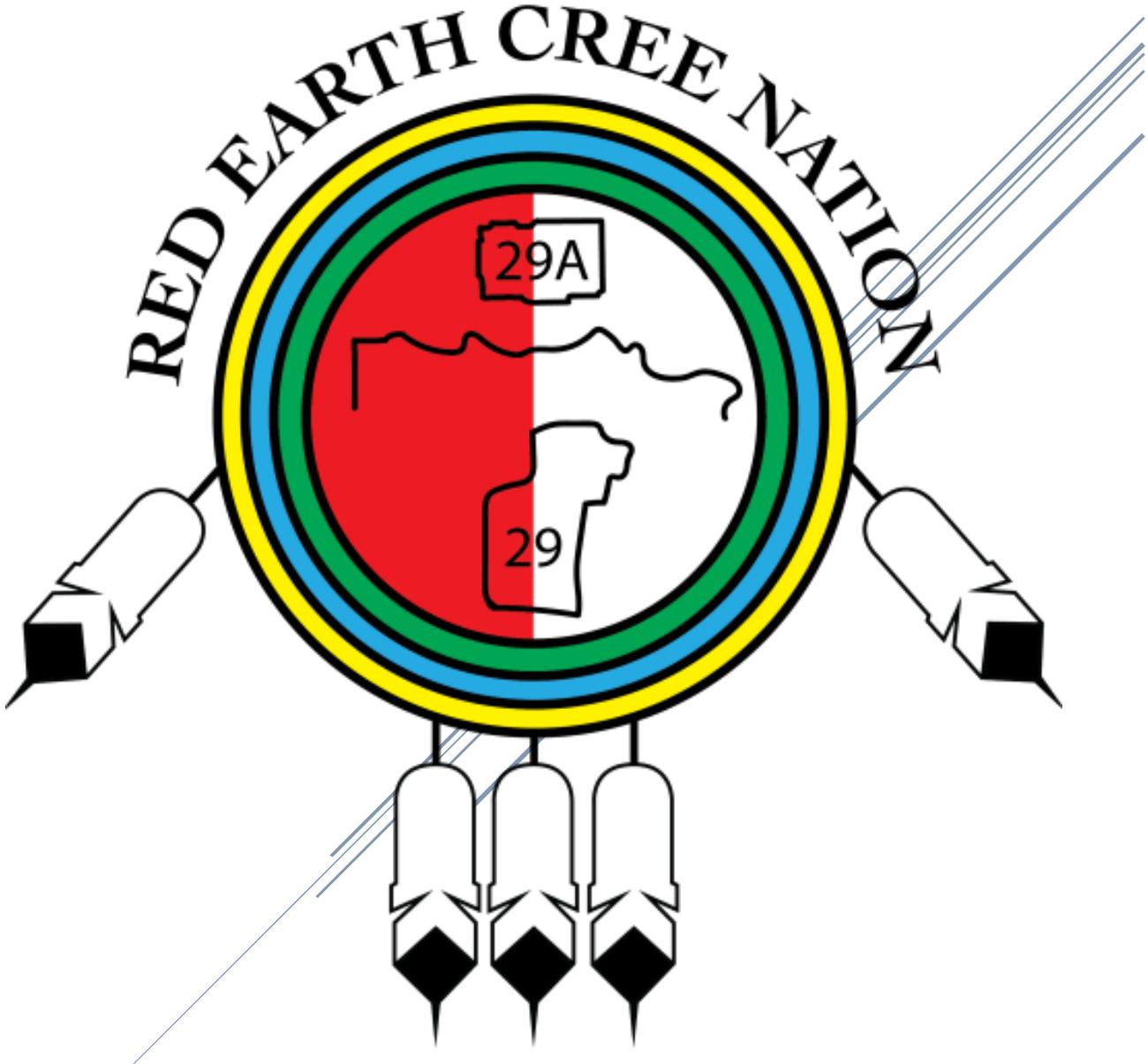


NIHYANAN OMA NEHIYAWAK OCHI  
MIHKOSKIWAKAK

Red Earth Cree Nation Legal Traditions



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Red Earth Cree Nation (RECN) is pleased to share their story and knowledge with others where the information may benefit the advancement of Indigenous Legal Traditions (ILT), encourage a better relationship between nations or bring a greater awareness to the realities of Indigenous nationhood and legal traditions.

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As taught to us by God, our Creator, and told by the people of Red Earth Cree Nation, with special thanks to Ivy Nawakayas, Leonard Whitehead, Reta Nawakayas, Roy Head Sr, Linda Head, Chief Zachary Whitecap and the Red Earth Cree Nation Councillors, Chief Fabian Head, Ian McKay, Charles Whitecap, Hendrick Head, Charlie McKay, Philip M Head, Dearld Whitecap for interpretation work, and to all the members of Mihkoskiwakak Nehiyawak.

And articulated by Jason Mercredi, of Misipawistik Cree Nation.

## Abstract

Throughout the annals of Canadian Euro-centric history there is little written about Indigenous Legal Traditions. There are no laws within our nation-to-nation relationship that speak to the tantamount sovereignty of Indigenous peoples, no policies that protect the autonomy of Indigenous nations. There is, however, ample evidence of one nation's assumed sovereignty over another, perpetrated without accountability or honour. This colonial narrative has been so dominant that nearly every one of us has systematically adopted the idea that Indigenous people are subjects of the Canadian state. This paper begins a vitally necessary discussion that the subjugation, suppression, and oppression of Indigenous Legal Traditions is not only egregious but irrational. The argument—as if one is necessary considering the current status quo and overrepresentation issues of Indigenous peoples in the state's judicial and correctional systems—is that Indigenous Legal Traditions continue to exist and deserve paramountcy of law in a true nation-to-nation sense. This paper is the beginning of a longstanding conversation that has been ignored by the state since the Days After Treaty.

Traditional Law stands as current law within the Red Earth Cree Nation (RECN). Traditional law is law. All laws operate on the same premise in any nation with the intention to regulate a people's conduct and correct any behaviours that fall outside of a culture, community, nation, or peoples' norms. Traditional Law is not a thing of the past and holds no significantly different values than what is scribed by the state pen as criminal or wrong. For instance, Traditional Law does not permit violence, theft, or harm of any kind. However, what is significantly different is the way in which the law is imparted to or by the people. Traditional Law is not dominated by penalty, and appreciates the need that people have for one another and their environment. The corrective conduct of RECN is not embodied by prison or punishment, it is embodied by the need to heal and help one another, the need to be with family and community, integrated with the hope for prosperity that only those who genuinely care for you can provide.

RECN Traditional Law is not governed by individuals but by every member of the Nation. Law is a shared responsibility we have with one another to prevent harms and wrongs of all kinds. The creation of laws is not developed by single acting entities or separate bodies; laws are constructed from the needs and desires of the people themselves. RECN laws are purposeful, collective, and based on lived experience and spirituality.

Colonial law is not RECN's own; it is not written nor controlled by them, and is barely present in the Nation of RECN—there are no police, legal firms or courts situated in RECN. A law that is not properly governed has no tangible impact on the people, and is not inherently familiar to them—this can only be understood as the root cause of the problems that have persisted between our nations' legal realities.

The power to create, implement and enforce RECN laws is an inherent right granted by God, our Creator. This is a right that cannot be delegated as a privilege by any foreign state. RECN laws apply to all RECN people, resources, and lands. The RECN government exercises separate and concurrent jurisdiction in relation to the federal and provincial governments with whom we hold a treaty. This is the inherent and treaty right of RECN that has yet to be honoured, recognized, affirmed, and fulfilled.

## Nihkan oma (First, this)

Kinanaskomitinawow, Okimakan, Onikaniwak ekwa Nehiyawak ochi Mihkoskikwakak.

This paper is informed by observation, participation, and most importantly, by building a relationship with the nation and its people. For that, and for the deep friendships I have made since beginning my journey along their path of justice, I will carry their teachings with honour, dignity, and pride. I am humbled to have this privilege.

In writing of legal traditions, the word “tradition” is not a reference to the past but speaks to the continuity of the ways in which the Red Earth Cree Nation (RECN) laws operate. Even with the imposition of the *Indian Act*<sup>1</sup> and numerous colonial policies, RECN laws remain within their people. Nor is this romanticizing what is often perceived as “old ways” uncharacteristic of modern realities. The foundation of RECN Legal Traditions is found in the spirit and embodiment of each nation member. As such, this paper does not validate but emphasizes the ways in which RECN continues in their own legal traditions. Further, it does not compare RECN Legal Traditions to any others. I have neither the authority, ego or right to do anything other than articulate what has been generously and kindly shared with me.

The story of RECN’s Legal Traditions begins as a sad story of recall and loss. Loss without understanding and deservedness. It speaks of a betrayed trust that hurts the heart of a people, daily. Those who wake to view the foothills of their ancestors. Where ceremony occurred, stories and dances were taught and shared, though they are now left astonished that any threat exists over them as caretakers of that land. Forbidden to follow through on their life’s purpose.

It is a much longer story of shallow and empty promises coupled with discord and control, often blatantly, more often underhandedly. Where those who asked for faith continually manipulate the inviting and kind ways of a people who deserve to care for their own. A people who, from distant lands not their own, outlawed another’s humanity, and do so to this day.

This is a story of a people raised by kindness, where virtue is their law and their interconnectedness ensures the continuity of the beauty they share and partake in. It is also a story of a people who love their lands, daughters, sons, Elders, women, and all other relatives, including the bear, moose, loon, northern pike and muskrat. An unwarranted story of survival of such unconscionable proportion and a strength of a people who have never stopped believing – though the practice of their beliefs faces arrogant resistance. A resistance equal to their own against colonization and assimilation. A story of a people whose spirits are among the gentlest and most grateful of any. It is a teaching that they have known since time immemorial, but one that Canada has yet to appreciate.

RECN, her people, her traditions, her history, is not a subject for debate. I know very little and am honoured to know as much as I do. The process of lifelong learning is very real in the teachings of RECN and so, this paper is merely a glimpse into the legal traditions of RECN. The rest of the story unfolds as a connection is formed with RECN and the complete revival of RECN’s Legal Traditions takes place.

Jason Mercredi

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<sup>1</sup> *Indian Act*, R.S.C., 1985, c. I-5.

## Introduction

The world's original nations have laws, cultures and governing authorities. They are not incorporated under the authority of a state. As Distinct Peoples, they draw their authority on the inherent powers as bestowed by God, The Creator.<sup>2</sup>

There remains much confusion on the inherent rights of RECN's people. This confusion is arguably caused by Canada's controlled dominant narrative and unilateral interpretations of the Crown. The people of RECN have their own defined inherent rights; they are not confused about this truth. As they say in RECN, "*Mamawe Kohtawihnaw kakepay ayahk Nehiyawa ota askiy*" (Our Creator put the Crees here on this earth). RECN understands that while the Crown may have limited their location and livelihood to "reserves," it is not, by any extent, Canada who can create or define their rights and existence. It is through Canada's paternalistic approach in their relationship with RECN that those true inherent rights are not properly affirmed and recognized.

The history of Canada is well documented, but the history of peoples on this land began long before colonization and remains grossly untold. Little is done regarding research on Indigenous legal systems. What does exist seems to denote an intrinsically connected legal order with the colonial regime, presuming Indigenous Legal Traditions (ILT) does not or can not exist in isolation of colonization or her Crown's interpretations. A comparison does not honour the autonomy of an Indigenous legal system.

Will it be contended that the territorial rights, political organization such as it was, or the laws and usages of Indian tribes were abrogated - that they ceased to exist when these two European nations began to trade with [A]boriginal occupants? In my opinion it is beyond controversy that they did not - that so far from being abolished, they were left in full force, and were not even modified in the slightest degree....<sup>3</sup>

The quote above speaks to Canada's knowledge of ILT survival even against such great onslaught of assimilative strategies and imposed laws and regulations against them. This knowledge is known as the *Doctrine of Continuity*. It is unfortunate that many Canadians have not had the opportunity to learn about the beauty of Indigenous culture and societies. It is far better known throughout this land that the Indigenous populations were considered savages by early settlers and their governments. Because of this disregard, Indigenous peoples have been dispossessed of their lands and ways of life. The education system, controlled by the dominant narrative of Canadian society, as it is today, perpetuates a lack of integration and inevitably carries on the oppression of Indigenous people and ways of being. Canada's education system constantly urges people to abandon their own ways and join the mainstream system, as if saying "come to our side of the river, leave your small canoe and climb aboard our great steam ship." However, this contradicts the treaties that were established with the principle of continuity in mind, as seen in the language of Treaty 5, which states, "for as long as rivers flow."

And so, rather than acknowledging the competency of Indigenous nations to govern, control and sustain their own lands and society, colonial arrogance continues to suppress and reduce Indigenous legal orders to simplistic ideologies and myths. This contributes to maintaining instead the view of a culture unremoved from savage and nomadic stereotypes: hunters, gathers, heathens, inferiors.

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<sup>2</sup> Red Earth Cree Nation Constitution Workshop, date unknown.

<sup>3</sup> *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Québec Superior Court) at page 79.

This presumption finds its roots in the colonial notion that Indigenous nations had or have no laws of their own. The concept of the noble savage being without law has led to the greatest contempt of Indigenous humanity. Everything we are as Indigenous peoples—our conduct, our behaviour, our worldview—is immersed in our law. Indigenous laws have existed long before colonial statutes, legislation, or acts. So Indigenous rights also existed well before they were defined by another, centuries before 1982 or 1867. What we see, by looking at Indigenous worldviews through non-Indigenous lenses, would be contemporary research on evolved ILT coping with the impacts of colonization and assimilation policies, as opposed to ILT themselves. Really, studying ILT from within colonial parameters promotes colonial state efforts to “civilize the Indian” and absorb them into the body politic.<sup>4</sup> Using colonial law, structures, or institutions as a base point for researching ILT delegitimizes the sovereignty of an Indigenous group’s laws and all its parts. Seemingly, we are far too accustomed to the fiction of assumed colonial authority that we tend to forget, we/they are a people of our/their own, distinct from the Crown and Canada.

Much is written about the colonial structure and reality we live in today. However, these colonial structures and institutions are not the defining parameters of ILT. If anything, they can be said to be the restricting parameters. ILT existed long before colonial impositions so to categorize ILT as “within” colonial structure is to serve further injustice to their functionality, operationalization, and distinct existence.

Relying on Canadian jurisprudence is easy. It is accessible and readable. What is difficult is finding the *Inniniwak* (Cree) truth. To do so, one must talk to the people, listen to the oral accounts of their history, their perspectives and understandings. This task has yet to reach the archives of Canada and her classrooms at any level of education.

Fortunately, respect is growing, the Canadian state and her people are learning and opening to the truer narrative that Indigenous peoples are, have been, and will continue to be grounded in their natural laws.

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<sup>4</sup> Reference to civilizing the Indian is demonstrated in the words of Duncan Campbell Scott, who stated in 1920, upon making residential school attendance mandatory, “I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone. . . . Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.” National Archives of Canada, Record Group 10, vol. 6810, file 470-2-3, vol. 7, 55 (L-3) and 63 (N-3).

## Red Earth Cree Nation

The RECN is situated east towards the Manitoba border, about 150 miles from the city of Prince Albert, Saskatchewan. It has a population of over 2,000 members. RECN are a sovereign Cree people.

RECN shares their ancestral lands with Shoal Lake Cree Nation, and traditional economy is still being practiced. The sustenance and subsistence of fishing, hunting, gathering, and trapping, are common and help maintain their harmonious relationship with the land and land resources throughout their ancestral and traditional territory.<sup>5</sup>

Although colonialism has imposed itself upon RECN governance, the traditional mandate upon the chiefs and councils, past and present, has essentially remained unchanged. The goal of RECN's people is forever the advancement of an autonomous First Nation government. As articulated by Ian McKay, RECN government is "a responsible government that serves the needs and aspirations of its people effectively and efficiently."<sup>6</sup>

The Truth and Reconciliation Commission of Canada, Calls to Action 50<sup>7</sup> bolsters RECN's goals by compelling the funding of Indigenous law institutes "for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada."

The Government of Canada has since committed to walking the shared path of reconciliation with Indigenous peoples, focussing on renewed relationships. This commitment is reflected in the "10 Principles"<sup>8</sup> of Respecting the Government of Canada's Relationship with Indigenous peoples' policy and, most recently, the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples Act*<sup>9</sup> within our shared territories now known as Canada. Funding has also been committed for the purpose of revitalizing and acknowledging the inherent legal systems and traditions of Indigenous nations.<sup>10</sup> The people of RECN want to have better, do better for themselves, by themselves. What they do not want, or need are restrictions on their inherent rights. That is, anything restored on RECN territory for the land, for the people, must necessarily be developed by the First Nation; it cannot be developed for the First Nation. Because "for" indicates a removal of authority, a removal of necessary intricacies and inclusion.

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<sup>5</sup> Red Earth Cree Nation (2020). *History and Tradition: A brief history and profile of Red Earth Cree Nation*. [Online]. Retrieved from: <https://www.redearthcreenation.com/history/>

<sup>6</sup> Ian McKay, *37<sup>th</sup> Parliament, 2<sup>nd</sup> Session, Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, Evidence*. Tuesday, February 25, 2003. Online: <https://www.ourcommons.ca/DocumentViewer/en/37-2/aanr/meeting-38/evidence>.

<sup>7</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

<sup>8</sup> Government of Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, Catalogue No. J2-476/2018E-PDF (Ottawa: Department of Justice, 2021) online (pdf): [www.justice.gc.ca/eng/csi-sjc/principles.pdf](http://www.justice.gc.ca/eng/csi-sjc/principles.pdf).

<sup>9</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

<sup>10</sup> Government of Canada, *Revitalization of Indigenous laws at centre of Government of Canada funding*, Press Release, May 17, 2021, Ottawa, Ontario, Department of Justice Canada, online: <https://www.canada.ca/en/department-justice/news/2021/05/revitalization-of-indigenous-laws-at-centre-of-government-of-canada-funding.html>.

Recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws.<sup>11</sup>

To date, RECN has enacted several pieces of legislation. RECN legislation is developed at the grassroots level, in accordance with traditional law-making protocol. The *Red Earth Cree Nation Convention*<sup>12</sup> speaks to the structure of the RECN government and how it is implemented. From that *Convention*, specific systems of government begin to emerge, such as the *Red Earth Cree First Nation Election Act*. This includes an organizational structure of RECN, which illustrates the RECN governance model and structure.

It speaks about how the political structure of the Red Earth Cree Nation government will begin to operate under systems, leadership selection systems, that will basically govern how the Red Earth people see themselves governing their lands; how the Red Earth people see governing themselves as a people; how they see themselves governing themselves and their programs and services; and how the people of Red Earth see those laws being enforced. Then we address the system based on First Nations law.<sup>13</sup>

The *Red Earth Cree Nation Convention* begins with a declaration of their inherent authority, “Whereas God, our Creator put us here as first people.” That statement reflects the inherent right and treaty rights of the people of the RECN bestowed upon them by their own belief system. Importantly, an inherent right, when properly recognized and affirmed, cannot be granted, delegated, or bestowed by any other state or power but the RECN people themselves. RECN, as a people, confirm their inherent and treaty right to govern themselves under their own system of law.

(...) the undersigned Chiefs, on their own behalf and of those of their bands would maintain peace and good order between each other, and also between themselves and other Tribes of Indians, and between themselves and others of Her Majesty’s subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts, and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere or trouble any person passing or travelling through the said tracts, or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.<sup>14</sup>

Foremost, the above clause of the Treaty can only have been made between nations. Had the RECN been subjects of the Queen there would have been no need to make treaty. Thus, the Treaty wholly represents that nations make treaty and treaties do not make nations. Further, the Treaty represents the recognized and acknowledged sovereignty of the Indigenous peoples and an exchange of goods and services, in this case primarily land, peaceful relations and co-existence in exchange for a fair share,

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<sup>11</sup> Government of Canada, *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*, Catalogue No. J2-476/2018E-PDF (Ottawa: Department of Justice, 2021) online (pdf): [www.justice.gc.ca/eng/csi-sjc/principles.pdf](http://www.justice.gc.ca/eng/csi-sjc/principles.pdf).

<sup>12</sup> *Red Earth Cree Nation Convention*, ratified 1992.

<sup>13</sup> *Supra note 3*, at 1305.

<sup>14</sup> Treaty 5 between Her Majesty the Queen and the Saulteaux and Swampy Cree tribes of Indians at Beren’s River and Norway House with Adhesions. The Queen’s Printer, Ottawa. 1969.

honour between nations and confidence that the Queen will not allow her people to encroach on Indigenous territory. As is understood in the treaty non-molestation clause and through traditional law practices, RECN respects that their laws are designed for them and do not propose, intend, suggest, or impose any of their systems, their traditions, their systems of government on any other nation. Respect, therefore, is one of the foundational principles of all RECN laws.

## Treaty 5

Kiseyinis and Cecim made an adhesion to Treaty 5 on September 7, 1876, and reserves were surveyed for them in 1884 (Red Earth) and 1894 (Carrot River). In 1875, the Crown entered treaty with the Saulteaux and Swampy Cree (Mushkegowuk) Indigenous people. The purpose of the Treaty was an agreement founded on sharing and protection, as stated in the Treaty text, to “share in the bounty and benevolence.” A new relationship between First Nations and the Crown was then established that would last “as long as the sun shines, the rivers flow and the grass grows.”

The spirit and intent of the Treaty, made between the Crown in right of Great Britain and Ireland, and Mihkoskiwakak Nehiyawak (RECN), was to protect Indigenous nations from encroachment, delineate land rights for both parties, permit occupancy and use of land, and define the rights of each nation as sovereigns. Particularly “To Continue in their Mode and Avocation of Life.”<sup>15</sup> Our treaty to “share” and to live in peace and friendship is evident of Canada’s current use of the land though the dishonouring, or ignorance, of this treaty understanding leaves us impoverished in our own lands. For example, almost immediately after treaty signing, numerous disputes over land claims arose with Indigenous peoples claiming the land was never surrendered. The Crown set out to ratify many of the numbered treaties to appease these disputes but did not satisfy many complaints from First Nation communities.

In the 1920s, adding to the lack of good faith on part of the Honour of the Crown, *Indian Act* laws were established, which made it illegal for lawyers to represent First Nation interests in courts. These laws were not repealed until 1951, leaving generations of Indigenous peoples without wherewithal to pursue land claims.

Today, the government of Canada recognizes treaties with Indigenous nations as “solemn agreements that set out long-standing promises, mutual obligations and benefits for both parties.” Not only did treaties between the Crown and Indigenous peoples allow for settler expansion to the west, and end hostilities between nations, treaties provided the foundations for what is now Canada. In effect, the treaty with RECN permits Canada usufructuary<sup>16</sup> rights to the land.

In *R v Ermineskin*, the courts include an excerpt of Alexander Morris’ accounts from the numbered treaty making processes in Western Canada. Of particular interest is the narrative of Commissioner McKay’s address by the treaty secretary, Dr. Jackes, included in paragraph 113:

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<sup>15</sup> As quoted from Indigenous and Northern Affairs, here: <https://www.aadnc-aandc.gc.ca/eng/1100100028589/1100100028591>.

<sup>16</sup> *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399, at pp 402-404, Lord Haldane describes usufructuary rights as, “A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists”. Simply, a usufructuary right is a use of land right, that “Indians” could not have held “title” to land because their relationship to land did not fit the colonial definition of “title.” So then, rather than bring colonial laws into harmony with Indigenous laws of the land, colonial society disregards that relationship and overwrites it via self-declared superiority.

Now before we rise from here it must be understood, and it must be in writing, all that you are promised by the Governor and Commissioners, and I hope you will not leave until you have thoroughly understood the meaning of every word that comes from us. We have not come here to deceive you, we have not come here to rob you, **we have not come here to take away anything that belongs to you**, and we are not here to make peace as we would to hostile Indians, because you are the children of the Great Queen as we are, and there has never been anything but peace between us. What you have not understood clearly we will do our utmost to make perfectly plain to you.<sup>17</sup>

RECN and its people unanimously assert that treaties with the Crown or Canadian state never included terms of surrender (of either land or sovereignty). The RECN claim remains that they hold a rightful stewardship relationship with the land, meaning a Creator granted responsibility to maintain the land for future generations. From this understanding, it becomes clear that the land was never theirs to sell, nor could it ever be surrendered from the hands of God and future generations yet to come.

RECN's nationhood was recognized by the Crown when treaties were made between the two nations. Treaties exemplify a First Nation's authority and ability to self-govern their own people. Nothing in recorded history purports to surrender their sovereignty. Conversely, the implementation of the *Indian Act*, 1867 ignored the inherent sovereignty of RECN, though they continuously call for recognition of their sovereignty.

Nations make Treaties, Treaties do not make Nations

Treaty with RECN has not been properly recognized and affirmed as it is considered a domestic treaty by the Canadian state. Such reasoning is unfathomable however, when one considers a state cannot, and does not, make treaty with its own subjects.

Because RECN's Sovereignty was not surrendered and is not mentioned as being surrendered in the text of the Treaty, there ought to be no hesitation nor inhibition in the reinvigoration of RECN legal, political, social, and economic systems and institutions. Favorably, sustainability of coexistence and greater care for one another, our selves, and the land will result. However, due to Canada's ongoing and insistent unilateral interpretation of the Treaty with respect to RECN sovereignty and legal orders, RECN government and people are oppressed, suppressed, and impoverished in every way (mentally, physically, spiritually, emotionally).

## Red Earth Cree Nation laws

There were no laws back in the day, basically we all lived in harmony. Everyone lived in harmony so there was no need for laws. Then laws came and things changed, our women became abused, not just by spouses but by others around.<sup>18</sup>

To clarify, the Elder quoted above acknowledges that there were not "written" laws. This statement is not to be interpreted as meaning that no written laws exist. Instead, what occurs primarily is an oral transmission of practices, commands, rules, and laws to govern affairs, correct behaviours while teaching

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<sup>17</sup> *Ermineskin Indian Band and Nation v. Canada*. 2009 SCC 9, [2009] 1 S.C.R. 222 at para 113; emphasis by the author.

<sup>18</sup> Conversation with Elder Reta Nawakayas, conducted on April 3, 2023, in RECN territory.

one another to live in balance and harmony with one another. These laws are not focussed on punitive measures but corrective measures at a community and individual level. Thus, as articulated by Professor John Borrows, Anishinaabe legal scholar, RECN laws are holistic, involving the lived experience, social, political, environmental, economic, and spiritual realities of RECN people equally.<sup>19</sup>

The power to create, implement and enforce RECN laws is an inherent right granted to us by God, the Creator. RECN laws apply to all RECN people, resources and lands and are exercised according to their own structures, systems, mechanisms, values and institutions of government. The RECN government exercises separate and concurrent jurisdiction in relation to the federal and provincial governments with whom we hold a treaty. The RECN traditional forms of government, mechanisms, structures, and values are incorporated into the RECN government.<sup>20</sup>

Laws made in RECN are purposeful, collective, and based on lived experience and spirituality. For instance, a law could have been developed from a dream or a vision. In these instances, an individual is given a vision or dream by the Creator and then shares that vision or dream with the Nation. Deliberation on its meaning would take place and they would collectively decide on how to implement that law. Teaching of the law could be in the form of a dance, depending on the instructions given to the dreamer, or they could have simply been exercised as common practice based on values and experiences. One example of a common practice is the gifting of tobacco when picking medicines. Here an exchange of tobacco is left in place of the picked medicine as a demonstration of gratitude for the harvest.

A second example, which is in practice to this day, involves the moose hunt. When a hunter catches a moose, they hang the bell of the moose and offer tobacco to show gratitude and send the moose spirit off in a good way. If a hunter kills a moose, they keep that part by which they killed it. For example, if the moose was shot in the ribs, that part of the moose would be claimed for the hunter. The hunter would also be celebrated by sitting in the front of the canoe. The hunter would simply not refuse to share as this is law, that is, the practice of harmony and providing and caring for others. Should anyone not cooperate with these laws, they would be spoken to by other parties on the hunt and corrected. This is the law of *Pahkonamakiwin*, dividing and sharing, which is not exclusive to hunting or gathering, but intended to ensure each individual's survival within the collective.

As a backgrounder, before humans arrived on earth, the animals were quite self-sufficient. When humans arrived, they brought many gifts that could be used to help the animals as well, but the humans were in more need than any other. Humans were incapable of taking care of themselves, they required clothing, food, and tools to survive. The animals and other living beings approached the Creator with their concerns for the humans. After considerations and much discussion, it was agreed that the animals and other beings would provide for the humans, in exchange for being taken care of. And so, the relationship of humans as stewards of the land began. To this day, RECN hunters hang the moose bell, to show thanks for the provisions gifted by the moose. Every aspect of the hunt or kill is used (leather, hooves, fat as oils for lamps) and tobacco is given, to show respect to the relationship and ensure an ongoing relationship.

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<sup>19</sup> John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at page 10.

<sup>20</sup> Andrew Bear Robe, *Treaty Federalism*, 1992 4-1 *Constitutional Forum* 6, 1992.

We have to share with the members and the family and the Elders. We cannot keep it for yourself – especially in summertime because meat spoiled quickly. Sometimes a moose was killed for weddings and special occasions. Everything was used or eaten including the heart and intestine and sinew, tongues are often used for feast (e.g., Christmas, Easter) and we bring berries that are collected. Nothing is wasted, all of it is used in some way, even moose hooves were even eaten.<sup>21</sup>

RECN laws are not transferred by memorization of certain “codes” of law, *stare decisis*<sup>22</sup> of another culture’s courts, or black and white letter laws placed on shelves accessible by a few learned individuals. Even if written, RECN laws are in the stories told into the ears of children. Stories and interactions that very much qualify as precedence, having been told and retold for millennial. Stories of hardship and overcoming, of trickery and lessons learned, teachings of kindness, respect, and the outcome of choosing the good paths in life. Stories based in real life and results of an environment that encouraged growth and harmony.

RECN laws are not based on the decisions or judgements of a few, but on the collective lived experiences of RECN people throughout time.

With respect to resources (sustenance, land, water, clothing, etc.), the old ones took only what they needed. Not exceeding necessity and not just for themselves, but to provide for their family and community. This demonstrates a natural law in action that prevents one from identifying as more important or better than another. A demonstration that sharing, respect, humility, kindness, were not just a common practice, but a command, a rule, a law. Further, these unwritten laws demonstrate a premise of taking care of one another. These laws are not placed on the shoulders of a few to enforce, but are a responsibility and obligation of every RECN citizen. RECN people live in harmony and understand their traditional responsibilities to one another and their environment which creates a harmonious atmosphere needless of scripted values and principles. RECN unwritten laws are teachings which daughters hear from their own mother, and fathers pass down to their sons. RECN laws create a continuity of influence over behaviours and commands, a respect for one another through interaction and interpersonal investment.

Children were raised to know what makes a good person, what qualities and values one should have and honour within themselves to be a good person; to be someone trustworthy, honest, kind. One who helps others because they understand that there is a consequence to being separated from their people.

Values were taught at home. We were taught to maintain our values. Chapan (great grandparent) would come to our home. Tea, bannock and lard were prepared before

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<sup>21</sup> Phillip M Head, RECN Elder.

<sup>22</sup> Stare decisis [Latin, "let the decision stand"] refers to the doctrine of precedent, according to which the rules formulated by judges in earlier decisions are to be similarly applied in later cases. The reason for the doctrine is that similar cases should be treated alike so as to ensure consistency and certainty in the law. It evolved in the primarily "judge-made" COMMON LAW system of the law and attained its most formal expression in late 19th-century England. Source: <https://www.thecanadianencyclopedia.ca/en/article/stare-decisis#:~:text=Stare%20decisis%20%5BLatin%2C%20%22let%20the%20decision%20stand%22%5D%20refers,to%20ensure%20consistency%20and%20certainty%20in%20the%20law.>

the Chapan began talking. When they started talking, we would listen. It was an honour for them to be there.<sup>23</sup>

This quote epitomizes the teachings of respect, patience, and honour. The stories shared by the Chapan were stories intended to teach conduct and good behaviour. Stories of *Wisikayachak's*<sup>24</sup> adventures that often-included lessons in subtle ways, which required the thoughtful processing of the story. Lessons would be about non-interference, not carrying an ego, respecting others, and remaining in harmony with all creation.

Meetings too are conducted through legal traditions. We gather to come together as one mind. There is no central character, no ruler in charge with autonomous authority. Instead, there is guidance and the practice of acting as one. Closing prayer is an action of closing the open air, releasing the spirit of the meeting, restoring individual minds to their own selves rather than remaining in a collective mindset.

## The people who make decisions

The “system” is so far away that RECN is still not familiar with it. There is no law firm housed here, no courthouse on RECN territory, no sitting judge. What we see is our people commit offence and get taken away.<sup>25</sup>

In a time before imposed judicial systems, before courts, lawyers, judges, police, or corrections, it was primarily the Elders who held the authority to make laws in RECN. Elders also acted to bring about corrections where negative behaviours or conduct required them to do so. The authority of the Elders was upheld and honoured through teachings and interactions based on the values of RECN.

An authority that has since been suppressed by Canadian lawmakers, and created division and growing loss of respect within many Indigenous nations. It is the Elders who hold the knowledge of natural law, and the responsibility to transmit that knowledge and lead the way for the next generation. Essentially, Elders held the Nation together through shared values and customs. Where Elders are to be held in highest regard and respected, their authority has been diminished, or perceivably replaced, by colonial policies of assimilation and paternalism.

Parents also have the responsibility to teach the laws and to prevent certain behaviours. The parents and the Elders were the ones who would mainly counsel people, telling them what is right and wrong. These lessons taught others to make sound decisions, ones that promoted safety for themselves and others. To assess risks that could upheave the balance between peoples. For RECN, it was not necessary to codify the message that travelling by canoe at night could be dangerous because the traveller could hit shallow rocks. Additionally, it was not necessary to codify teachings of anti-violence, to not steal, because that message was consistently conveyed. Gatherings play a significant role in conveying the RECN laws where the young people can be spoken to about the values of RECN people, Cree people, to respect, to be humble, to be kind, to love.

During moments of conflict the Elders would call the parents first, to come talk together about their son's or daughter's “mistake.” The victim's parents would be called separately. The two families would

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<sup>23</sup> RECN Elder, *Mihkoskiwakak Nehiyawak Special Assembly*, November 20, 2023.

<sup>24</sup> *Wisikayachak* is a trickster spirit in Cree belief systems that is tasked by the Creator to guide humans along the path of pimatisiwin.

<sup>25</sup> RECN member, *Mihkoskiwakak Nehiyawak Special Assembly*, November 20, 2023.

then be called together. During this meeting—through function not formality — the offender and the victim were given opportunity to state why this mistake happened or describe what happened between them. Through this process of *acimowin* (storytelling), they were told to come together and make it right. If anything was broken, they were made to replace it. If the offender could not replace or repair the broken thing, then the offender would be indebted to the victim. All involved were brought together to shake hands, demonstrative of making peace and keeping peace perpetually.

In those days, a lot of Elders used to get together over concerns within the community. Unfortunately, this practice is becoming less common as reliance on colonial bodies or expertise becomes more familiar to the Nation members – such as police, nurses, councillors, etc. For example, when someone dies, the Elders will get together and one person will take care of the body/family in need (i.e., funerals). During moments of correction, everything is mentioned by the Elders that will help repair the relationship between relatives. These moments may see Elders take active roles in counselling, giving orders, being instructive, providing stern corrective measures, and guiding the person back to their *miyo pimatisawin* (good way of life).

While there has been incremental progress in the criminal justice system, it has been just that, “in the criminal justice system.” There has been implementation of Gladue courts and funding for Indigenous court workers<sup>26</sup>, but these methods remain under the authority of Canada’s justice system. There will be no new result of these implementations as their locations remain outside of our territory and outside of our own jurisdiction. These systems understand the written appearance of an individual, but do not harness the depth of that individual as a person. That is, the relationship is based on their accusation of an offence. On the contrary, RECN knows their own people. There is a relationship which forms the foundation for helping one get their life back on track towards *miyo pimatisawin*. Without these relationships, RECN members are brought into unfamiliar courtrooms, presented before unfamiliar judges, represented by unfamiliar Canadian law advocates, and filtered through an unfamiliar system that focusses on their punishment rather than their potential. In fairness, these processes remain as unfamiliar to RECN members as the Cree language remains unfamiliar within Canada’s institutions.

In 1996, RECN Chief and Council formally established their justice council. At that time the Nation was experiencing problems with inactivity with the Royal Canadian Mounted Police and colonial courts. Through their own justice council, they established laws against drugs, alcohol, and violence. Sentencing circles occurred as an administration of justice. When students got into trouble, they were brought together in the traditional way to understand how small mistakes are forgivable and do not need to create larger troubles for the Nation. However, these efforts went without the support of colonial justice systems. When RECN made effort to engage with the provincial courts, they did not receive any responses. The then headmen sent letters requesting meetings to incorporate sentencing circles in more official forms, potentially to be included in the provincial courts themselves. However, these efforts were not fruitful, and the colonial justice system missed an opportunity to address what has been widely known for too long as an overrepresentation of Indigenous people in the justice and corrections systems. Additionally unfortunate is that First Nation by-laws are only recognized as laws existing on First Nation “reserve” lands. Therefore, RECN’s sentencing circles never reached their off-reserve citizens.

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<sup>26</sup> Alexandria Ruigrok and Darragh Dzisiak, *Gladue & Indigenous Self-Governing Courts across the Country*, Canadian Bar Association, July 28, 2022. Online: [https://www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/TRC/AppendixB\\_GladueAcrossCountry.pdf](https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/TRC/AppendixB_GladueAcrossCountry.pdf).

We need to show care for members who live off our lands, and have our laws over our people recognized by federal and provincial governments.<sup>27</sup>

## Consequence and Forgiveness

The wrongdoer didn't just do wrong to the victim but to the whole community and it was put on them to behave themselves.<sup>28</sup>

It has been said that “a house divided cannot stand.”<sup>29</sup> This is true for the peoples of RECN who understand, fundamentally, their responsibility to one another and their environment. Being a small community tightly woven together by shared values, customs and geography, the laws of RECN are based on positive relationships, reparations, reconciliation, and restoration when required. Outcomes of RECN laws in action paint a picture of a harmonious community. Not one void of issues or conflict, but one that uses its interconnectedness to bring wrongs and wrongdoers back into balance with others.

Saying “sorry” was often the principal consequence. However, the apology had to also involve action—to replace what was taken, to be a better person, to humble oneself to the one they wronged and their family. Saying sorry corrected the heart and began the process of putting people back into balance with one another. Where one was caught *kimotowin* (stealing), they were made to return what they had stolen. If an individual was unable to return what was stolen, they would replace what was stolen or work for the individual until their debt was settled.

The act of “forgiveness” also showed humility and the recognition of the necessity of interconnectedness and being there for one another. The people were made to make up, to ask for forgiveness and not fight again. If, however, they did fight again, they were dealt with a little bit harsher.

If a man fights his woman, that man was—by the parents’ agreements—to separate from his partner for a time while the Elders would counsel them. The couple was then not permitted to see one another until both their parents agreed that they could come together again. Parents usually agreed to the consequences placed on the transgressor because they understood that it would cause community disruption to permit the behaviour to continue. That’s where the *achiwaykaymowin* (handshake) came into play. The handshake represented forgiveness. When people got together to meet and could not come to an understanding, the Elders and parents (and any other party involved) would support the person. These corrective measures occurred much more naturally than what we see in Canada’s legal and corrections systems today.

Traditionally, a *nakatohkew* (enforcer) would enforce the legal traditions. Again, like the Elders, this individual, or individuals, held high regard and respect within the community. It was simply not ok to disrespect the roles of others in the community. Additionally supportive to these traditional roles was, and is, the size of the nation. Being tightly quartered together and knowing their history together has existed for thousands of years, the harmony of the nation was, and is, a foremost consideration to all.

The concept of *wahkotowin* (being in relation to one another) holds no superior or inferior view over others and this balance extends into all other forms of life, including the animated and non-animated.

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<sup>27</sup> Former Chief of RECN, Phillip, *Mihkoskiwakak Nehiyawak Special Assembly*, November 20, 2023.

<sup>28</sup> Conversation with Elder Roy Head, conducted on April 3, 2023 in RECN territory.

<sup>29</sup> Neely, Mark E. Jr. 1982. *The Abraham Lincoln Encyclopedia*. New York: Da Capo Press, Inc. Illinois Republican State Convention, Springfield, Illinois June 16, 1858.

Within *wahkotowin* is the non-interference of one life into another. It is understood that each must choose their own path; when one veers from *miyo pimatisawin*, or the good path, it is the obligation of those around them to help guide them back onto the path of a good life. However, this is not done harshly; an opportunity is provided for the individual to correct themselves. Punishment was rare and reserved for uncorrectable behaviour. Lectures and policies of exclusion were primarily ways in which RECN people corrected one another.

To explain policy of exclusion further: In RECN laws are based on relationship, interaction, and collective wellbeing. To exclude an individual from the Nation would be a severe punishment as they would no longer be near their family or community. In addition, they would be cast out from the provisions of the nation and made to fend for themselves in the darkness of the lands in solitude. Those individuals who did not show rapprochement after corrective lectures by Elders and leaders in the nation would be banned or assigned to live elsewhere. Often, there would be a wigwam set out in the territory to provide shelter to those who were assigned a temporary relocation. Only once the individual had expressed that they had “learned their lesson,” and a meeting of Elders and family members occurred, would they be welcomed back into the nation. They would then be retaught the principles and virtues of RECN.

Such expression of exclusion was reserved for more serious offenses, such as murder. However, in modern times, under the colonial regime of justice and corrections, RECN people see their own people taken away for much lesser crimes. The separation from family and community not only results in broken *wahkotowin*, but creates the atmosphere that all crimes, mistakes, and wrongdoings are to be treated as severe.

Our sacred laws were here long before Canada. When I went through the court system I thought “why when these people get into trouble do they get sent away from the community.” We need a system where, if RECN people get into trouble, they can be dealt with internally instead of a foreign system. Being sent away makes one alone and without their family which has impact on the family. Maybe I would have stayed out of trouble the first time because I’d have been with my own people who understand me and what I needed to stay clear of trouble (substance use). RECN justice is for the whole community, to show we care and love each other, bring clarity, prosperity, humility, respect to our people. I know these people and they know me. A lot of my recovery has to do with my Cree.<sup>30</sup>

## Red Earth Cree Nation legal orders

Mamawe Kohtawinaw nihkimihikonan ohi; ta yapichitahyak, ta pihmachisowak, ta pamihsowak, ta wayohtisiyak, ta wiyasowatisowak, ekwa ta nahnakichisowak. (Our Creator gave us all that we would need to be self-sufficient, self-governing, to exercise self-determination and to live under our own laws).

Legacies of colonialism and racism have allowed little understanding in modern Canada about the First Nations' legal inheritances. The establishment of a new post-colonial order in Canada in 1982, where inherent and treaty rights of the Aboriginal people were made part of the supreme law of Canada, has been a first fragile step

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<sup>30</sup> RECN member, *Mihkoskiwakak Nehiyawak Special Assembly*, November 20, 2023.

toward the revitalisation of the First Nations' legal inheritances and to the maturity of Canada as a nation.<sup>31</sup>

An introduction to the principles of Cree Law can be found in the Truth and Reconciliation Commission final report<sup>32</sup> as follows; *pimâtisiwin* (life), *pimâcihowin* (livelihood), *pâstâhowin* (breaking laws against humans), *ohcinêwin* (breaking laws against anything other than a human), *kistayimowin* (respect), *mino-ohpikinâwasowin* (good childrearing), *wahkôtowin* (kinship), and *tâpowakêyihtamowin* (faith, spirituality). These eight principles confirm an identity distinct from Canadian legal systems. These principles were not institutionalized but rather internalized by the Cree individual. Acting in harmony, these foundational principles are the law. Nonetheless, these principles are a generic interpretation of Cree laws. Though similarities exist, each Cree nation reserves the right to bring forward their own distinct principles. For example, RECN would include *mihyotisiwin* (representing kindness, or the act of being kind), *kistayimowin* (to be respectful, to have respect), and *tapahayimowin* (having humility). Importantly, Nehiyew (Cree) words are not often directly translated into singular nouns or verbs, rather the meaning of the word is often better reflected as describing an action or responsibility.

Generally, Indigenous peoples transmit their laws and rules of engagement through interpersonal interactions. The value of transferring law through vis a vis engagement has become as depreciated as Indigenous contributions to the history of Canada. Perhaps by not leaving the maintenance of healthy relationships to be guided by pen and paper, Indigenous peoples made the complexity of our laws appear simple. That is, until one tries to practice Indigenous law and its intricately interwoven considerations.

For RECN, their laws are found primarily in interactions with their *total environment*.<sup>33</sup> It is from these laws that RECN takes care of themselves, their lands, and ensures collective and individual wellbeing for themselves and other beings they share the land with. From these laws they have maintained a strong and balanced society with humility, respect, and honour. RECN continues to demonstrate a continuity in their own legal systems, but requires an adaptive response from colonial legal systems to have those laws properly and fully “recognized and affirmed”—as Canada has now claimed to do so for over 40 years. Canada’s claims of Indigenous legal system revitalization must be met with the resources required to restore those legal systems, including time and funding for honoraria to knowledge keepers, researchers, and those involved in the implementation of that restored legal system. Further, Canada must amend their own laws to align with the original laws of the land, not merely to acknowledge Indigenous legal systems, but to establish reconciliation with them. This approach seeks to move away from a legal system rooted in racial superiority that was imposed without consideration for the unique identity of RECN, and other Indigenous nations. The resurgence of RECN Legal Traditions does not require permission or validation from those who came after it, ignored it entirely, or have intentionally suppressed it.

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<sup>31</sup> James Youngblood Henderson, *First Nations Legal Inheritances in Canada: The Mikmaq Model*, 1995 23 Manitoba Law Journal 1, 1995 CanLIDocs 130, <https://www.canlii.org/en/commentary/doc/1995CanLIDocs130-!fragment//BQCwhgziBcwMYgK4DsDWszlQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA>, retrieved on August 27, 2023.

<sup>32</sup> *Truth and Reconciliation Report* at page 59.

<sup>33</sup> The indigenous *total environment* is comprised of the whole being, equally and in balance (the spirit, intellect, physical, and emotional realms) living in harmony with external relations (two legged, furred, finned, feathered, animate and inanimate beings) and environment.

Prior to the arrival of the 'newcomers', the customary law and legal traditions of RECN peoples were effective and enforceable. Lamentably, the 'Day After Treaty' was not met with honour but by systematic and deliberate displacement of Indigenous identity by the Crown's self-serving legislation. RECN's peoples' lives are now controlled under a consolidated code of legislation called the *Indian Act* and subjected to other federal and provincial legislation.

The Spirit and Intent of Treaty, which was ratified under RECN customary law and legal traditions, and the Crown's constitutional legislation and legal text, creates a bi-lateral relationship between nations. With each nation delegated specific rules and having certain obligations and duties for the fulfilment of political covenants, economic wealth, judicial orderliness, and social healthiness.

RECN law is based on knowing one another, their circumstances and what is good. RECN subscribes to the notion of subsidiarity, which states that the best and most legitimate government takes place nearest to the people who are governed. Subsidiarity advocates for agreements on sharing tasks rather than authority to perform tasks.

It is not about putting our own people in prison, as though they are expendable, and making them think about what they did, like sending children into a corner. It is about communicating with them, valuing their identity, restoring their relationships, and correcting their worldview, thus bringing everyone back into harmony. How can we coexist otherwise?

Upholding the law is a responsibility of everyone, not just a body or select individuals with no personal involvement to the wrongdoer, far removed from the individual's personal life. Indigenous justice is a being, a people, a spirit, not a department. And it is not led by singular authority. It is well known that Indigenous nations, or most of them, are made up of decentralized governments. With that said, it is not about what an individual can do for the community, it's what a community can do for themselves.

The relationship between RECN and the Crown can be summarized as being treated as her Majesty's red children. Again, this misconception and interpretation has misled many to view Indigenous people as wilfully subordinate to the British monarch. RECN Legal Traditions are those formed of a matriarchal lineage. Women, in balance with men, shared in the authority and decision-making processes of the Nation. They held, and do hold, great respect under the RECN laws of *Wahkotowin* (being in relation to one another). Referring to the Queen as "the Great Mother" was symbolic of an Indigenous title of respect. However, intentionally, Alexander Morris (the then Treaty commissioner of Treaty 5, circa 1875) and others manipulated this term of respect to present the Indigenous nations as having surrendered an authority to the Crown of Britain and Ireland. The ideology that has grown from this manipulated view has created a severe imbalance in the relationship between RECN and the Crown.

Implementing RECN restored legal system is one step towards resolving those imbalances and creating a new relationship with the Crown. A true nation-to-nation, government-to-government relationship based on what our ancestors have taught us is the Spirit and Intent of the Treaty: to live in harmony, side by side, and share the responsibilities that were bestowed upon us by God, the Creator.

## Charting a new relationship

For nearly twenty years now, RECN has made consistent and focussed effort on the restoration of justice. RECN understands that they have not lost the autonomy to govern over their own affairs, and to govern fairly by their own ways of being. Unfortunately, these efforts are hindered by Canada which seems to prefer a subject-to-nation relationship over a true nation-to-nation relationship, further dishonouring our Treaty, and perpetuating the status quo of oppression and the overrepresentation of our people in Canada's justice system. A new relationship is necessary, but this path forward cannot be dominated by the Crown, as it has been, resulting in the further deficit of RECN.

This is about the Nehiyew way of being. There is no Nehiyew way of being taught within Britain, Ireland or any of what is now Canada's institutions. Yet, Nehiyew ways of being continue to be taught, understood, and practiced by Nehiyaw.

If Canada has any inherent powers, those powers only began in 1982. That is, assuming her powers are not still sourced to their origin and Canada, as a state, has its origin in Britain. Recognition of inherent rights must also recognize Indigenous sovereignty, which defines and practices those inherent rights, for where else would those inherent rights come from.

We have our own laws and always have.<sup>34</sup>

It is not necessarily resistance or confrontation that keeps Indigenous peoples from incorporating Canadian law, it is just that Canadian law does not fit; it's the wrong piece of a much more intricate working puzzle. All together colonial law does not belong with Indigenous law because colonial law does not inherently belong on this land and does not treat individuals in the same caring, compassionate, and relational way. In Canadian law, they talk about justice, in Indigenous law we provide justice, we bring justice to the individual, the family, the community. RECN's inherent authority does not come from faraway places but from within the Nation itself. In this way RECN leaders, Elders and justice system is aligned with the needs of the individual as a healthy and stable member of a vibrant and thriving Nation.

Within our shared lands known as Canada, there exists a strong example of juridical coexistence within the Akwesasne Community Justice System. Here, Akwesasne laws and fines are administered outside of a federal framework. This recognized Indigenous system oversees matters of elections, tobacco regulation, sanitation, property, and wildlife. Like the desires of RECN, Akwesasne's justice system does not focus on penalties but on the individual instead. They recognize that any individual may make a mistake and utilize that mistake as a learning opportunity. Rather than strict sentencing procedures, Akwesasne's justice system may find a way for the offender to contribute in positive ways to their community. Depending on the offender's skills, they would use those skills to restore balance to those they offended and, in turn, bring harmony back to the community. Further, the Akwesasne court does not require their advocates or judges to hold a recognized Canadian law degree or be called to Canada's Bar.

By international example, there are stark constitutional differences between Canada and New Zealand regarding the treatment and inclusion of Indigenous populations and their rights. It is largely recognized that the foundation of New Zealand is premised on the Treaty of Waitangi, while Canada's education system has only recently begun to teach their treaties in schools, despite having made over 300 treaties

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<sup>34</sup> Every RECN citizen engaged throughout the development of this paper.

with Indigenous peoples. This is an educational effort bolstered by the Royal Commission of Aboriginal People<sup>35</sup>, the recent Truth and Reconciliation Commission,<sup>36</sup> and led by independent treaty initiatives within provinces.<sup>37</sup> The Treaty of Waitangi continues to receive increasingly more constitutional and legislative recognition of the validity and importance. The difference is a striking comparison to the management and education of the treaties that formed Canada.

Today, unless the principles of the Treaty of Waitangi are expressly written within legislation, it is not considered part of the domestic law of New Zealand. To manage claims made by the Māori, the New Zealand parliament created the *Treaty of Waitangi Act* in 1975.<sup>38</sup> This Act establishes and empowers the Waitangi Tribunal to investigate the allegations brought forward by the Māori of a breach of the Treaty terms. Exclusive authority is held by the Tribunal to determine the meaning of the Treaty through inquiry into both the English and the Māori versions. However, the tribunal is not recognized as an authority and its recommendations can be readily disregarded.

The Waitangi Tribunal provides Canada with a living example of how to implement one of many recommendations from the Royal Commission on Aboriginal People:

The restoration of the treaty relationship through the making of new treaties and the implementation and renewal of existing ones will require the establishment of at least two types of independent and neutral institutions: treaty commissions and a specialized Aboriginal Lands and Treaties Tribunal. Their functions would be quite distinct, but both will be vital to the success of the proposed treaty processes. To be legitimate in the eyes of treaty nations, these institutions must be established through consultation and negotiation with the Aboriginal and treaty nations. They must also be genuinely independent of federal and provincial governments. Finally, they can have no authority to affect any rights of Aboriginal and treaty nations that have not given their clear consent to the creation of these institutions or accepted their roles.<sup>39</sup>

The intention of Treaty 5 is to share the land and her resources and allow safe passage to settlers taking up lands in the west without molesting or interfering in one another's nation's way of life. Principally, Treaty 5 established peaceful co-existence. From the understanding of RECN Elders throughout time, we know that these intentions were not understood to rid Indians of title—what Canada claims as a surrender—but rather, were meant to protect the RECN people from the incoming wave of settlers who could potentially encroach upon our land. Here, “surrendered” is the improper term, as we understood our lands to be offered protection of the Crown and not as a relinquishing of title. Again, our lands are loaned to us by the Creator for the good of future generations yet to come; such principle understanding forbids us to sever our relationship to our lands. Further, RECN laws apply to RECN and forcing our laws upon others would be a violation of one of our core laws, respect for others. Thus, we agreed to peace

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<sup>35</sup> Royal Commission of Aboriginal People, online: <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>.

<sup>36</sup> Truth and Reconciliation Commission. Reports online: <https://nctr.ca/records/reports/#trc-reports>.

<sup>37</sup> An example being “The Treaty Relationships Commission of Manitoba,” whereas: The Treaty Relations Commission of Manitoba (TRCM) is a neutral body, created through a partnership between the Assembly of Manitoba Chiefs (AMC) and Canada with a mandate to strengthen, rebuild and enhance the Treaty relationship and mutual respect between First Nations and Manitobans as envisaged by the Treaty Parties. More information here: <http://www.trcm.ca/>.

<sup>38</sup> *Treaty of Waitangi Act 1975* No 114 (as at 21 March 2017).

<sup>39</sup> *Report of the Royal Commission on Aboriginal Peoples Volume 2 - Restructuring the Relationship*. p. 85.

and friendship, not subjugation. We agreed, by nation-to-nation treaty, to continue in our mode and avocation of life.

Presumption of authority over RECN lands and people was self-granted by the Crown via section 91(24) in 1867, nine years prior to making Treaty 5 with RECN people. With legislation written to undermine and overpower RECN sovereignty, we must ask whether treaties were made in good faith. The presumption of authority over RECN, prior to entering treaty, raises deep concerns regarding the honour of the Crown, indicates an involuntary surrender of our lands and sovereignty even before Treaty 5 was offered. The assumption of the Crown, and reliance on section 91(24) and the Indian Act implies an ongoing inferiority of RECN peoples as unable to manage our own affairs, and gravely restricts our meaningful participation in the country's economy.

*Kituskinaw* is the Cree word for "our land." This is not a possessory word implying ownership, but instead is a relationship word identifying the land as an entity unto its own, an entity with purpose and meaning no greater than ourselves. In relation with *Kituskinaw* we learn an all-encompassing subsistence beyond capital gain. We learn to explore what each entity offers the other, we learn courage, character and to value life for life's sake. Land is integral to our culture, sovereignty, and identity. Land is at the very "core of Indianness" section 91(24)<sup>40</sup> purports to protect, and central to RECN laws as implied by the Supreme Court of Canada in *NIL/TU,O*.<sup>41</sup>

Considering the nation-to-nation relationship the Treaty intended to inaugurate, what benefit is it for RECN people to be fully dispossessed of their lands and governance?

The Treaty relationship describes our relations as rooted in the spirit and intent of Treaty 5 which binds us for as long as the sun shines, the grass grows and the rivers flow. We, Mihkoskiwakak Nehiyawak, are the heirs and successors to the Treaty and, being on this side of the river, we will provide for our people. You, our Treaty Partner, the Crown of Great Britain and Ireland, now in Right of Canada, on your side of the river will provide for yours. There will be times when we shall meet in the middle of the river on shared jurisdiction. Therefore, the Treaty ought to be understood as though a legal fence were built around the RECN territory, while the Crown would protect RECN land from infringement and interference; that within our territory RECN laws are paramount, and within shared territory our laws stand in relation to those of the Crown.

These interpretations, or rather RECN's understandings, are aligned with the *United Nations Declaration on the Rights of Indigenous Peoples*, and in large part, with Canada's Implementation plan.

The *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDRIP) is about the respect and recognition of the human rights of Indigenous peoples. Canada's implementation of UNDRIP boasts efforts to reinvigorate and recognize Indigenous self-governance. In our view, doing so requires the co-development of nation-to-nation mechanisms, including recognition of Indigenous laws and jurisdiction, enforcement and affirmation of Indigenous governance models. It is perceived that section 91.24 is the new *Indian Act*, but RECN can make our own laws and Canada should only recognize that law, not impose upon us anymore. Canada's royal assent of UNDRIP ought to be meant to acknowledge RECN laws and determine how Canada will cooperate or operate within those laws.

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<sup>40</sup> *Constitution Act, 1867*, s. 91(24).

<sup>41</sup> *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696.

The UNDRIP does not use the language of subjection, surrender, or conquered. The terms “between,” “relationship” and “partnership” are significant in the eyes of those who seek a true implementation of UNDRIP through the Spirit and Intent of Treaty: a harmonious and mutually beneficial relationship as nation to nation.

During the Charlottetown discussions in 1992,<sup>42</sup> section 37, which was stricken out of the Canadian *Charter*, required the federal government to consult with First Nation communities to specify the Aboriginal rights protected within the *Charter* under section 35. This consultation process would have led Canada in a new and more unified direction as the two nations set out to define Aboriginal individual rights, title rights, governance, and sharing of wealth and implementation of the newly defined rights. Unquestionably, the consultations on governance would have included Indigenous justice systems.

A new relationship, proportionate to the relationship as founding members of the country, could find its way through the development of treaty federalism. Sakej argues, “only through consolidation of treaty federalism and provincial federalism can the new order be empowered and the colonial regime end.”<sup>43</sup> Here, an argument is made for political completeness, restoration of Indigenous traditions and balance between the federal, provincial, and Indigenous governments of this land.

Duality in the legal system already exists between the provincial and federal governments; what is required to restore Indigenous sovereignty is simply an additional structure. One that would inarguably save on colonial government spending towards incarceration rates, restore Indigenous communities’ traditions and sense of belonging, and offer healing to longstanding colonial trauma. Fully reconciling the loss of sovereignty will truly bring the two founding nations of this country, now called Canada, back into balance. Restoring sovereignty will be less complicated and less harmful to Indigenous populations than continuing to assume the solution lies within the architects of the problem.

RECN laws already exist; the hindrance to put them into practice with full recognition of our autonomy is oppressive and perpetually harmful. Canada has recently been found to have discriminated against First Nation children by the Canadian Human Rights Tribunal.<sup>44</sup> This decision included the acknowledgement of harms brought against children by removing them from their homes. Similar findings were acknowledged in the Truth and Reconciliation Commission’s<sup>45</sup> work and the 2008 Apology<sup>46</sup> to the survivors of Residential Schools. It is time for Canada to acknowledge the equivalent harms caused against Indigenous nations through the forceful involvement of the colonial judicial and correctional systems on their lives. As we are currently seeing with the jurisdiction and development of First Nation child welfare laws, a new path forward can be done, and First Nations can take an autonomous lead.

To shake hands, learn from the mistakes, make amends, and move forward in a harmonious way.

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<sup>42</sup> *Charlottetown Accord*, 1992.

<sup>43</sup> James [Sakej] Youngblood Henderson, *Empowering Treaty Federalism*, 1994, Saskatchewan Law Review, 58 Sask.L.Rev.241, Copyright, at page 244.

<sup>44</sup> Canadian Human Rights Tribunal, *First Nations Child and Family Caring Society, et al, Ruling*, 2022 CHRT 8, T1340/7008.

<sup>45</sup> Truth and Reconciliation Commission of Canada. *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada*. [Ottawa]: Truth and Reconciliation Commission of Canada, 2015. Online: [IR4-7-2015-eng.pdf \(publications.gc.ca\)](https://www.trc.gc.ca/IR4-7-2015-eng.pdf).

<sup>46</sup> *Statement of apology to former students of Indian Residential Schools*. Available online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655>.