

The Tricksters Speak: Klooscap and Wesakechak, Indigenous Law, and the New Brunswick Land Use Negotiation

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Résumé de l'article

Le concours de plaidoirie Kawaskimhon fut tenu en 2015 à l'Université du Nouveau-Brunswick. La trame factuelle s'inspirait d'une affaire réelle: *Buctouche First Nation v. New Brunswick*. La Première nation requérante appliquait aux tribunaux pour obtenir une injonction opposant la stratégie forestière du gouvernement du Nouveau-Brunswick ayant augmenté la récolte annuelle de bois d'oeuvre et réduit la superficie des aires de conservation forestières protégées de la Couronne.

Les étudiants se virent assignés des clients qu'ils devaient représenter en prenant en compte les intérêts et perspectives propres à ces clients. Notre article présente l'argument du Conseil des Aînés et des chefs des peuples Mi'kmaq. Leurs intérêts consistent à protéger les terres traditionnelles des peuples Mi'kmaq et reconnaître que les Mi'kmaq ont une obligation légale envers les forêts dont ils dépendent. L'argument est présenté sous forme de dialogue entre deux *tricksters* autochtones : Klooscap (un *trickster* Mi'kmaq) et Wesakechak (un *trickster* Cri). Les *tricksters* avancent leur position en faisant appel au droit Mi'kmaq. Ils se concentrent en particulier sur le principe environnemental et constitutionnel *netukulimk*. *Netukulimk* est une théorie de la durabilité offerte comme cadre alternatif aux lois coloniales qui ont dominé jusqu'à date les questions juridiques autochtones canadiennes. L'utilisation du droit Mi'kmaq présente des possibilités d'auto-gouvernance en reconnaissant et mettant en pratique les obligations légales Mi'kmaq envers le monde naturel.

L'article se termine par un bref commentaire des auteurs sur l'application du droit autochtone dans ce contexte fictif et son futur en droit autochtone canadien.

THE TRICKSTERS SPEAK: KLOOSCAP AND WESAKECHAK, INDIGENOUS LAW, AND THE NEW BRUNSWICK LAND USE NEGOTIATION

*Lara Ulrich and David Gill**

In 2015, the University of New Brunswick hosted the Kawaskimhon Talking Circle Moot. The moot problem was based on the case of *Buctouche First Nation v. New Brunswick*. The applicant First Nation applied to the courts for an injunction opposing the New Brunswick government's forest strategy. The forest strategy increased the annual harvesting of softwood timber while reducing the area of Crown-protected conservation forest.

Participants were assigned clients and asked to represent these clients' interests and perspectives. This article presents the argument made on behalf of the Council of Traditional Elders and Chiefs of the Mi'kmaq peoples. Their interests consist of protecting the traditional lands of the Mi'kmaq people while recognizing that the Mi'kmaq have a legal duty to the forests upon which they depend. The argument is presented as a dialogue between two Indigenous tricksters—Klooscap (a Mi'kmaq trickster) and Wesakechak (a Cree trickster). The tricksters advance their position using Mi'kmaq law. In particular, the tricksters focus on the environmental and constitutional principle of *netukulimk*. *Netukulimk* is a theory of sustainability that is offered as an alternative framework to the colonial laws that currently dominate Canadian Aboriginal legal issues. The use of Mi'kmaq law presents opportunities for self-governance by recognizing and applying Mi'kmaq legal obligations to the natural world.

This article concludes with a brief commentary on the application of Indigenous law in this fictionalized context and its future as an influence on and alternative to Canadian Aboriginal law.

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Introduction

The Kawaskimhon Talking Circle Moot is an annual moot for Canadian law students. Founded in 1993 by the Native Law Students' Association at the University of Toronto,¹ it is hosted each year by rotating law faculties. Kawaskimhon means "speaking with knowledge."² The Kawaskimhon Moot is structured as a negotiation that allows students to come together and discuss contemporary legal and social issues facing Indigenous peoples in Canada. The moot itself is non-competitive—there is no winner.³ Instead, students are encouraged to reach a collective resolution through negotiation and collaboration.

The University of New Brunswick Faculty of Law hosted the 2015 Kawaskimhon Moot. Held over three days, there were four separate groups with each group consisting of approximately four to five moot teams. Each team represented specific goals or perspectives of a particular client.

The 2015 moot problem was based on a series of facts drawn from the case of *Buctouche First Nation v. New Brunswick*.⁴ This case arose from the New Brunswick government's March 2014 adoption of a new forest strategy. The forest strategy, amongst other things, increased the annual harvesting of softwood timber by twenty-one per cent, and reduced the area of Crown-protected conservation forest by seven per cent. In response to the adoption of this strategy, New Brunswick First Nations groups commenced litigation, seeking an injunction from the courts.

Students were given a moot problem that adopted and extended the facts of this case. In the fictional extrapolation (as in the real-life case) the province intended to adopt a new forest strategy that severely affected the traditional lands of the Mi'kmaq and Wolastoqiyik. Within each group, the negotiation developed around a single scenario. The Crown was proposing to enter into negotiations with Aboriginal peoples in a "duty to consult" style negotiation regarding the new forest strategy.⁵ There were, however, limited seats at the negotiation table with the Crown. Students

¹ See "2015 Kawaskimhon Talking Circle Moot", online: UNB Fredericton Faculty of Law <www.unb.ca/fredericton/law/current/learning/kawaskimhon.html>.

² *Ibid.*

³ See "Kawaskimhon Moot 2014", online: University of Toronto Faculty of Law <www.law.utoronto.ca/academic-programs/jd-program/mooting/kawaskimhon-moot-2014>.

⁴ (2014) 426 NBR (2d) 304, [2014] NBJ No 266.

⁵ See generally *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 14, [2014] 2 SCR 257.

were required to negotiate amongst themselves to determine which Aboriginal group or association could best represent the interests of all Aboriginal peoples in the traditional lands at stake.

What follows is the argument, reflection, and methodology used by the University of Victoria for their clients—the Council of Traditional Chiefs and Elders. Although both authors are Indigenous, neither are Mi'kmaq or Wolastoqiyik. Neither had any experience working with Mi'kmaq law or practice prior to the moot.

This article is broken into three related sections. Part I—the core of the article—is a dialogue between two Indigenous tricksters, Klooscap and Wesakechak. Val Napoleon considers tricksters to be the original Indigenous lawyers⁶—they are often the ones to model, question, and transform legal principles in the stories in which they are featured. John Borrows observes that “[c]onflict and differentiation are firmly rooted within [trickster stories], thus providing access to creative and innovative ways of recalibrating regulatory and adjudicatory decisions.”⁷ Tricksters disrupt and question the established social order, a role that we felt fit very well with our aspirations as Indigenous lawyers. We chose Klooscap because he is the main trickster figure in Mi'kmaq stories, and the best situated to understand Mi'kmaq law. We introduced Wesakechak—a Cree trickster figure with whom we were more comfortable and familiar—to represent an outside perspective, which enabled him to critique and comment on Klooscap's arguments and to reflect our own feelings as outsiders. We structured the submission as a dialogue because of the central importance of “talking it out” and fostering consensus in the operation of Mi'kmaq law.⁸ The dialogue structure was also an apt expression of the meaning of the word *kawaskimhon* itself: “speaking with knowledge.”⁹

The Conclusion provides an outline of our process in developing the dialogue and engaging with Indigenous law. It also describes how the dialogue was used and received at the Kawaskimhon moot.

Finally, we include an Appendix that contains synopses of the Mi'kmaq stories that we relied on as legal precedent in developing the dialogue. We included these stories because it is important that readers are

⁶ See Val Napoleon, “Tsilhqot'in Law of Consent” (2015) 48:3 UBC L Rev 873 at 874.

⁷ John Borrows, “Heroes, Tricksters, Monsters, and Caretakers” (2016) 61:4 McGill LJ 795 at 832 [Borrows, “Heroes, Tricksters”].

⁸ Kerry Prosper et al, “Returning to Netukulimk: Mi'kmaq Cultural and Spiritual Connections with Resource Stewardship and Self-Governance” (2011) 2:4 Intl Indigenous Policy J 1 at 13.

⁹ “Kawaskimhon Moot 2014”, *supra* note 3.

able to refer to the stories in order to critically evaluate our interpretations of the stories and the arguments that we derived from them. The stories, unlike much Canadian legislation and case law, are not readily available online. We included this section to bridge that gap.

I. Klooscap and Wesakechak Speak

KLOOSCAP¹⁰

Our people, the Mi'kmaq, face a new threat. Our forests, land, and their future sustainability face potential harm from a plan proposed by the New Brunswick government to harvest the forests throughout the *Mi'kma'ki*.¹¹ The settler people of New Brunswick are experiencing a time of *nutqw*, or insufficiency. They want to address this insufficiency by drawing on the bounty of the forest nation. I fear that they lack the wisdom and the expertise required to harvest the forest responsibly. Like "The Man Who Hated Winter",¹² they risk bringing hardship on all of us in their prideful attempt to save themselves from discomfort.

They are behaving like *Kopit*¹³ in the days when he was too broad and fat to live in harmony with the land. He built so many dams that he created great floods and displaced our people.¹⁴ They think that they can ignore the consequences of disrupting the ecological balance of *Mi'kma'ki*.

We know, however, that the permanent destruction of our forest lands will harm the communities. The destruction threatens *netukulimk*¹⁵ as well as the safety and well-being of the people. Like *Kopit*, they have learned that many of our people will take action to stop a threat to our sustainable life. I smashed *Kopit*'s dams and hunted him down to ensure that he would not harm us in the future.¹⁶ The settlers of New Brunswick have come to us asking to negotiate an end to our conflict and to facilitate

¹⁰ Klooscap is the trickster of a number of Algonquin peoples who live in the area known today as Atlantic Canada (see Stanley T Spicer, *Glooscap Legends* (Halifax: Nimbus, 2006) at 9). Although the spelling of his name changes often, the characteristics of this man-god do not. He is universally "portrayed as kind, benevolent, a warrior against evil and the possessor of magical powers" (*ibid*).

¹¹ This is the Mi'kmaq word for the traditional lands of the Mi'kmaq people.

¹² Alden Nowlan, *Nine Micmac Legends* (Hantsport, NS: Lancelot Press, 1983) at 21–26. See also Appendix.

¹³ This is the Mi'kmaq word for "beaver".

¹⁴ See Spicer, *supra* note 10 at 15. See also Appendix.

¹⁵ *Netukulimk* is a Mi'kmaq philosophical and legal principle. It is used in Mi'kmaq discourse to refer to sustainability and the pursuit of well-being. Translated literally into English, it means "avoiding not having enough" (Prosper et al, *supra* note 8 at 12).

¹⁶ See Spicer, *supra* note 10 at 17.

the sharing of the forest harvest under our shared *teplutakn*—the treaties of peace and friendship that form the basis of our relationship. The settlers' treaty obligation requires them to consult us before taking further action. They want us to decide amongst ourselves whom we will send to represent our laws and protect our people. It is not clear at this point whom we will choose to send to talk to the settler representatives. Many of our *wikamowi*, or nations, are in the middle of the forests that the government of New Brunswick wishes to harvest. Other Mi'kmaq and Wolastoqiyik people have left their communities for settler cities. They live away from the forest, but they retain their connections to it as well as the laws and obligations of their ancestors. All Mi'kmaq and Wolastoqiyik people must be considered when speaking to the settler government of New Brunswick.

It is not clear at this point whom we will choose to send to talk to the settler government. The Elders and *kep'tinaq*¹⁷ remember that I have a long familiarity with the laws of our people. They have retained me to make the case that they should be foremost amongst those at the table. As flattered as I am that they have such great faith in me, however, I will not allow my head to be turned by an Elder's wiles or a pile of excellent moose meat. I must ensure that the Elders' cause is valid. In order to address the threat to our forests' sustainability in a way that will not leave everything in chaos and confusion, I must do my best to reason through our laws and see that those with appropriate knowledge and skill are the ones who will handle these negotiations.

This method is in keeping with Mi'kmaq practices of decision making and conflict management. Our laws tell us that those best suited to develop the appropriate solution should be the ones who address each problem faced by an individual, family, or entire community. This practice exists to ensure that our leaders and Elders do not get too big for their moccasins. This practice is also meant to regulate authority so that it is based not on personal pride or love of power, but rather rationed proportionately according to the wisdom or expertise held by an individual in relation to a particular harm.¹⁸ To ration authority wisely, we need to figure out the extent of the mess we find ourselves in by properly characterizing the

¹⁷ *Kep-tinaq* (singular: *Kep-tin*) have been the leaders of the Mi'kmaq since time immemorial. Their role is to "show the people the good path, to help them with gifts of knowledge and goods, and to sit with the whole Mawíomi as the government of all the Mi'kmaq" (*Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 49) [*RCAP Report*].

¹⁸ See "Fetching Summer" in Ruth Holmes Whitehead, *Stories from the Six Worlds Micmac Legends* (Halifax: Nimbus, 1988) at 69–71; "The Snow Vampire" in Nowlan, *supra* note 12 at 38–42. See also Appendix.

harm. Characterizing the harm is dependent on several factors. Relevant factors to consider include the complexity, severity, and duration of the problem, the immediacy that the harm presents, and the projected impact of this harm. Once the harm is characterized appropriately, the people can choose a decision maker to address it.

There are four main decision-making groups—immediate family, extended family (in particular, the grandmothers), the Elders, and the leadership authorities.¹⁹ Each of the four decision-making groups deals with a particular kind of harm on a case-by-case basis. Problems can be tricky. A problem might initially appear simple to resolve—such as a crying child. But when it becomes apparent that the child is crying because an entire season has taken a vacation, you will then need a whole team of experts to deal with the problem. As the nature of the problem changes, people must adjust and choose new decision makers. One of our communities implemented this process when a young woman was slowly turning into a snow vampire. It became clear that her presence threatened not only her family, but also the safety of the entire community. Because her immediate family was unable to address the problem and implement the proper solution, the village Elders and chiefs stepped in to find the appropriate remedy in order to ensure the safety and well-being of all.²⁰ The nature of the harm is the same in the present negotiations. It threatens the safety and well-being of our communities, requires action beyond individual capabilities, and demands legitimate problem-solving processes in order to properly address it. The government's proposed forest strategy is not just a problem treading upon the doorsteps of individual communities. The problem is as large a threat to our collective way of life as was the snow vampire in the case above. We must treat it as such by involving the Elders and *kep'tinaq* as the authoritative decision makers.

Elders have the requisite skills and occupy the necessary position to help find an appropriate solution to this problem. In the past, communities have given Elders the role of decision maker regarding serious harms that originate outside of the family because they have the knowledge, memory, and perspective to understand a complex problem and to argue ceaselessly until they find a solution to fit a particular set of issues.

¹⁹ See Jessica Asch et al, eds, *Accessing Justice and Reconciliation: Mi'kmaq Legal Traditions Report* (Victoria: Indigenous Law Research Unit, 2013) at 10 [unpublished].

²⁰ See Nowlan, *supra* note 12 at 41.

WESAKECHAK²¹

O-ho, Klooscap! You've been talking so long that I'm about to faint from hunger. Pass me some more of that moose meat! Speaking of the moose meat, I do think you've allowed it to go to your head! Those Elders and *kep'tinaq* sure have you in the bag, don't they? They may have been able to solve problems among reasonable Algonquins, but do you really think they have what it takes to negotiate with the Crown? Ho-lee, if you think snow vampires are bad, you haven't tried to get a government bureaucrat to pick up the lunch tab lately. When you're faced with a giant, stinking skunk that wants to sit on your village, you send a wolverine, not an owly Elder!²² And the *Indian Act*-appointed chief and council—they've got claws.²³ They know how to play the game and won't get taken advantage of. They know how to play their cards close to their chests when the Crown brings out its big "good-faith" guns. Sure the Elders have knowledge, but is knowledge really useful in the mud pit of this negotiation?

KLOOSCAP

Ah, Wesakechak! Everyone always remembers the wolverine but seems to forget that it was the owls amongst us that came up with the plan to deal with that pesky skunk. And the owl was not the only one who played a part in that plan. The rabbit, the moose, and even the smallest mouse made a contribution. As I remember the story, all of the animals consulted together since they each possessed particular and relevant knowledge. It is the same today with each person having something to contribute to the practice of our laws and our lives. The result of the deliberation was a plan to engage the Giant Skunk in battle so that he would stop harming the community. Then the animals chose the appropriate actor to implement the decision.²⁴

The person who implements the response to the harm may not always be the one with the wisdom to think of the solution in the first place. It

²¹ Wesakechak is a Cree trickster-god. A colourful character, he "was used as a means to teach gently about values, ethics, and lessons for living" (John G Hansen, *Swampy Cree Justice: Researching the Ways of the People*, 2nd ed (Vernon, BC: JCharlton, 2013) at 148). A humorous deity, Wesakechak often gets himself into trouble in his never-ending search for food (see "Wee-sa-kay-jac and the Ducks", "Wee-sa-kay-jac and the Plants", and "Wee-sa-kay-jac with the Canada Geese" in James R Stevens, *Sacred Legends of the Sandy Lake Cree* (Toronto: McClelland and Stewart, 1971) at 38–41).

²² See "Mi-she-shek-kak (The Giant Skunk)" in Louis Bird, *Telling Our Stories: Omushkego Legends and Histories from Hudson Bay* (North York: University of Toronto Press, 2011) at 72. See also Appendix.

²³ See *Indian Act*, RSC 1985, c I-5, ss 74–80.

²⁴ See Bird, *supra* note 22 at 72.

was not so in your case with the Giant Skunk. Old Bear Woman did not go herself to fetch summer.²⁵ Nor was it the chiefs who shot the snow vampire, but the seven best archers in the village.²⁶ The wisest decision makers must recognize that they may have the most relevant knowledge for finding a solution, but that there are individuals better suited in terms of skill, community position, and experience to implement those decisions. So the Elders may or may not be the best negotiators we have, but their real role at the negotiation table is to share their knowledge, memory, and perspective with the people doing the negotiating.

WESAKECHAK

Ah! Yes, yes, I see. But then why all the fuss about the Elders in the first place? Everyone should have a say, like you said! Each person's voice is important, not just the Elder's voice.

KLOOSCAP

Wesakechak, that's true. We should listen to each person's voice. But we don't kiss up to the Elders all the time for no reason. If you'd looked up from your dinner once in awhile, you might have noticed that the Elders are old. That's why we call them Elders! They have many years of memory and experience from living on the land, hunting, harvesting, and seeing the consequences of right and wrong action. Many have had the opportunity to develop specialized relationships with the plant and animal nations. I like how Mi'kmaq Elder Stephen Augustine puts it:

For many generations our Mi'kmaq ancestors have been negotiating their lives with various components of the land, be they birds, plants, animals or fish. ... The characteristics and behaviour of plants, fish, birds and animals are explained to us by the Elders. The moon, the sun, the stars, the tides, the winds, the seasons and everything related to the land is part of our knowledge system developed for many generations.²⁷

Elders can help us consult and interpret what those other nations are whispering to us. Perhaps most importantly, some Elders remember what things were like when *netukulimk* was more intact as a way of life. Like

²⁵ See Whitehead, *supra* note 18.

²⁶ See Nowlan, *supra* note 12 at 41–42.

²⁷ Stephen J Augustine, "Silas T. Rand's Work Among the Mi'kmaq" in Renée Hulan & Renate Eigenbrod, eds, *Aboriginal Oral Traditions: Theory, Practice, Ethics* (Halifax: Fernwood, 2008) 45 at 45.

the hunter who dined with *Kopit*, they remember how to listen to the land when others hear nothing.²⁸

Our land is at the centre of this negotiation and it is an important source of Mi'kmaq law. By observing the ways of the land and living closely with all the nations within it—plant, animal, and human—our people have developed legal principles that allow us to make decisions that ensure our survival and the survival of the land on which we depend. In our Creation Story, the people originate from and learn from the nations of plants, animals, and earth. Our *mntu*²⁹ returns to the plants, animals, and earth when we die. My own mother, *Nikanaptekwisaw*, was born from a leaf on a tree. She embodies the guiding principles of Mi'kmaq law. She teaches our people to observe the natural world around us and encourages us to learn about the cycle of life. By coming together and sharing our observations, we can formulate rules and decision-making structures to help us anticipate and plan for the future. This kind of informed engagement can help us aspire to harmony amongst ourselves and with our environment.

These relationships are the foundation of *netukulimk* or the value system that shapes and guides all Mi'kmaq interactions with the land and with each other. As Kerry Prosper and a couple of other scholarly folk wrote, “through *netukulimk* a human and animal relationship [is] formed that allow[s] the survival of both in a sustainable manner.”³⁰ Each being, whether human, plant, or animal, has a vital spark that flows from the origin of life on Earth. These sparks are precious: “[S]ince all objects possess the sparks of life, every life form has to be given respect ... this respect requires a special consciousness that discourages carelessness about things.”³¹ If the Mi'kmaq do not consider the implications flowing from this principle of cyclical interdependence, the survival of our culture and our community is threatened. All things are connected like threads in a blanket. When one is weakened, the rest falter and the entire system unravels. This interdependence is what we meant when we speak the word *netukulimk* or avoiding not having enough. *Netukulimk* is important in the context of this negotiation because whenever we harvest resources, there is the chance that we will misjudge or succumb to greed or competition and take beyond the capacity of the land. If that happens, we will then suffer. We will exhaust our resources and we may damage our relationships with others both within and beyond our communities.

²⁸ See “Kopit Feeds the Hunter” in Whitehead, *supra* note 18 at 72–74. See also Appendix.

²⁹ This is the Mi'kmaq word for “spirit”.

³⁰ Prosper et al, *supra* note 8 at 6.

³¹ *RCAP Report*, *supra* note 17 at 47. See also Appendix.

We are not distinct from the natural world around us. Long ago, my mother fell to earth as a leaf, and in the future, our people may rise up to the sky again as trees when their *mntu* returns to the earth.³² Once a hunter came to me, afraid to die, and I showed him that immortality comes not from living forever in the same form, but from the continual cycles of transformation.³³ I played a great trick, Wesakechak! I planted his feet in the ground and turned his arms to boughs and his hair to leaves.³⁴ As a tree, the hunter would live a long life undisturbed by the passing of time. I taught him a lesson! He learned that all things are connected and that we must not fear the cycle of life. His life as a tree helped him see that by embodying the principle of *kinuk* and living as one people with all organisms on the land, he could help our people and culture renew themselves in relationship with our environment.

Many Elders have similar perspectives. Age and wisdom help you learn that the only way we live forever is through transformation since our death provides nourishment for all life around us. They have had the most time to understand and interpret the lessons taught by my mother *Nikanaptekewisaw* about how to maintain harmony by observing and understanding the forces of nature. Many Elders continue to live the principles of *netukulimk*.

WESAKECHAK

Well, I have to admit that you're right, Klooscap. You usually don't get that old without picking up a few tricks. Look at us! But why should we stop with Elders? It's not just age that brings wisdom. In our communities, there are many people with special knowledge and skill.

I know of one story that reminds us that among the *Nehiyaw*, the dancers were responsible for enforcing the law and the providers were responsible for hunting protocols where our people consulted the dancers to ask how to enforce our laws and the providers to seek their opinion on hunting protocol.³⁵ What about scientists? Surely they have something to tell us about the needs of the plant and animal nations! Doesn't *netukulimk* need to adapt to different ways of understanding our lands?

³² See *ibid* at 49.

³³ See "The Man Who Wanted to Live For Ever" in Nowlan, *supra* note 12 at 53–56. See also Appendix.

³⁴ See *ibid* at 56.

³⁵ See "Indian Laws" in Edward Ahenakew, *Voices of the Plains Cree* (Toronto: McClelland and Stewart, 1973) at 34. See also Appendix.

KLOOSCAP

Yes, Wesakechak. I'm not saying that the Elders' perspectives are the only relevant ones. In fact, it is part of the Elder's responsibility as an authoritative decision maker to gather evidence before coming up with a solution. Remember that Old Bear Woman knew that it was the little boy himself who would have the best insight into why he was crying!³⁶ But Elders are important and they have been given decision-making authority in the past because they carry the memory of our communities while helping us put everyone's contribution into perspective. Old Bear Woman had the wisdom to know who to ask about the problem, and she knew how to combine the boy's response with her knowledge of how to return summer to the land.

Our communities can use scientific wisdom to shape the meaning of Elders' understandings of our legal obligations. Stephen Augustine is explicit in his recognition of science as part of the practice of *netukulimk*. He believes that we should

take the best, what the white man has brought forward ... through his education, through his different ways of seeing the world, and our ways, and to bring those two together. We all have to learn from each other. We welcome science, but we also have to depend on this knowledge that has been evolving for thousands and thousands of years through our language and through our belief system.³⁷

Indigenous peoples often incorporate scientific wisdom into our legal orders. John Borrows tells us how his community hired an ichthyologist to help them fulfill their legal responsibility of not offending and displacing the whitefish in their territory.³⁸

WESAKECHAK

Aha, Klooscap! I knew that all along! I just know that sometimes when an Elder starts talking, it's hard for anyone else to get in a word. So are you saying that it is the Elders who have the skills necessary to identify the potential or existing harms at issue in this negotiation?

KLOOSCAP

Wesakechak, you're a good listener after all! The Elders will need to observe the problem and gather information regarding the specific opera-

³⁶ See Whitehead, *supra* note 18 at 70.

³⁷ Albert Marshall, "NETUKULIMK (UINR)" (5 March 2010), online: YouTube <www.youtube.com/watch?v=wsNVewjgKxI> at 00h:00m:24s.

³⁸ See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 32.

tion of that harm. The solution is in the problem, and they need to completely understand the problem in order to respond appropriately.

WESAKECHAK

So, what about the *kep'tinaq*? Why should they handle this issue?

KLOOSCAP

Well, in the past, the community gave the *kep'tinaq* the responsibility for addressing harms that affect individuals and the broader community.³⁹ They have the skills necessary to negotiate according to the principles of *netukulimk*. It is their role to reconcile disparate interests and perspectives in a way that ensures the greater good. They are especially well-suited to negotiate a solution in this case, as the arbitration of harvesting rights and responsibilities is central to a *kep'tin*'s role in *Mi'kmaq* society. The *kep'tinaq*'s responsibilities under *netukulimk* and *Mi'kmaq* law include taking stock of available resources, dividing them in a sustainable way, and resolving any disputes that arise during the harvest.⁴⁰ They have specific experience that goes to the heart of this negotiation, and it is essential that they are involved in facilitating this modern land-use agreement in a way that protects *netukulimk* for all.

WESAKECHAK

But how can you expect the people to *trust* their leaders when the people have no say in who gets to be a *kep'tin*? How much moose meat does it take for you to appreciate the aristocratic flavour of a bunch of stuffy old men? Wouldn't some of our people prefer the "responsible government" of their democratically elected chief and council?

KLOOSCAP

Ah, Wesakechak. I know that we have to watch those powerful people, and play a trick on them from time to time so they don't forget that their *mntu* is just one spark among many. It's not as bad as you're making it out to be. The primary role of the *kep'tinaq* is to facilitate the decision-making process. It's true that they are not elected, but their authority is not arbitrary—it comes from their ability to listen to all voices and come up with a fair outcome. The *kep'tinaq* will need to heed all voices in order to apply *netukulimk* in these negotiations and come up with a solution to

³⁹ See Asch et al, *supra* note 19 at 10.

⁴⁰ See Prosper et al, *supra* note 8 at 6.

the harm. They will need to listen to the wisdom of the Elders, and consult with the community when necessary. Our law has ways of addressing the situation of leaders who ignore their communities. If the *kep'tinaq* do not consider every interest, they risk having any resulting negotiation proposal rejected by the community. This is why our law mandates consensus when ratifying treaties. It is our form of responsible government. Like the captive who returns to his people after living in strange lands with strange customs,⁴¹ the *Indian Act* chief should still have a home in our community. We shouldn't make the mistake of rejecting *Indian Act* chief and council as enemies as the captive was by his mother's people. They are often strong advocates for the communities that chose them. And like you said, they know how to tangle with the settler government. But *Indian Act* governance relies on taking the delegated authority and imposing it back on the people. It is unlikely to create a robust solution because there is no framework for continual consultation. The elected chiefs are given power to represent their communities through elections, and they retain that power until the next election. The *kep'tinaq's* authority is contingent on their ability to persuade others and build consensus in the community.⁴² Using our own governance law will make these negotiations much more likely to result in a solution that will reflect all of the interests of our community while providing an acceptable remedy to the harm that we face.

The Elders and *kep'tinaq* must be involved in any negotiation that takes place regarding our land. The *kep'tinaq* have learned how to negotiate, facilitate, and reason through the complex relationships between the land and the people. They mediate the functioning of Mi'kmaq law when allocating the harvest of natural resources. Both Elders and *kep'tinaq* must be at the negotiation table to ensure that *teplutakn*⁴³ will be negotiated in a way that will respect the law of *netukulimk* and ensure the survival and flourishing of our people and our relations. They bring appropriate knowledge, expertise, and skills that are required to ensure that we uphold our duties and obligations to our laws, land, and the constitution given to the people by our living tree ancestors.

WESAKECHAK

Aho Klooscap, we might be able to spend ten years talking this one over with your people, but how are you going to get the settler govern-

⁴¹ See "The Captive" in Nowlan, *supra* note 12 at 33–37. See also Appendix.

⁴² See Jaime Battiste, "Understanding the Progression of Mi'kmaq Law" (2008) 31:2 Dal LJ 311 at 330.

⁴³ This is the Mi'kmaq term for "understanding".

ment to wait for all of this consultation? That giant skunk is their money maker, and it needs to eat—the way a giant skunk does by chewing up the forest and spraying its poison in the rivers. Maybe it's better if we just do things their way, by their laws. We don't want to end up annoying them so much that they stop asking for our opinion! Besides, you could use some of those profit-sharing dollars! It's not going to help *netukulimk* if you miss out on that big payout and go hungry. Speaking of which, I could sure go for some tikka masala.

KLOOSCAP

Wesakechak! Are you already hungry again? It's true that asserting our own laws and taking them seriously might cause us to suffer and it might cause some short-term conflict with the settler governments. You have to remember that these negotiations are not a response to an isolated problem. They are part of many efforts by my people to implement *netukulimk* principles in a way that is economically and politically meaningful. We have a responsibility to our land and to our communities to implement our own jurisdiction and our own nationhood. We need to think about *netukulimk* in the long term, extending many cycles and many generations into the future. Albert Marshall expresses this when he says that our "source of life comes from the forest. Our forest will bring us clean air, clean water, and it will provide us all the nourishments we need."⁴⁴ He believes that living according to *netukulimk* means that we "cannot compromise the future generations of their abilities—not just to sustain [ourselves], but also to appreciate and to maintain that connection to that source of life which is our natural world."⁴⁵ We need to ensure that if we do negotiate an agreement about our forests, this agreement is commensurate with our own laws and values, which are best geared toward promoting sustainable living on our land.

WESAKECHAK

Of course I'm hungry again. I'm always hungry! I hear what you're saying. I guess you're right, Klooscap. But I get around a lot, so I've pretty much seen it all. I've seen what's happening out there on the west coast of Turtle Island with communities trying to make their own agreements. From what I've been told, you need to start this kind of negotiation process by first defining your relationship to the Canadian state according to your own laws and obligations. If you let them define the relationship, the Canadians will make sure that your relations will be talked about only as

⁴⁴ Marshall, *supra* note 37 at 00h:01m:22s.

⁴⁵ *Ibid* at 00h:02m:05s.

“resources”. Resource extraction will be a foregone conclusion. Monetary compensation for Indigenous communities will be the only issue on the table with those guys! There are many deep political, economic, and value-based misunderstandings between Indigenous and colonial societies that emerge from these negotiations, and if you let them frame the issues, the issues are going to reflect that misunderstanding.⁴⁶

The original treaties that we all signed with settlers were about defining relationships. They allowed our own deliberative legal orders to function and ensure that our conduct, and the conduct of settler peoples, was carried out in accordance with the duties and obligations of our laws. These days, the settler governments want to sign agreements that fix our laws as “rights” instead of recognizing them for what they are—dynamic legal orders.⁴⁷ They want to tie us down and make sure that the resource extraction companies can come in, take what they want, and then transform the extraction into cash. That’s like trying to tie down a trout. Those kinds of negotiations will fail because you can’t ignore Indigenous legal obligations. These Indigenous legal obligations come from the ecosystems of our lands and communities, and no negotiation process can thrive in those ecosystems unless we ensure that the process honours those obligations.

KLOOSCAP

Well, Wesakechak, that’s another reason why it is essential for the Elders and *kep’tinaq* to be at the negotiation table. They need to ensure that the structure of the negotiation—the metaphorical “table” itself—incorporates the values, principles, and practices of *netukulimk* law. The design of the negotiation process carries implications for the way the issues are framed, the communication methods and working relationships between the parties are structured, and the solutions are contemplated during the talks.

Since this proposed negotiation concerns our land, and, more particularly, our forests, *netukulimk* principles are implicitly engaged. These principles, however, are not just engaged with regards to the harvesting of resources and our relationship to the land itself. *Netukulimk* principles are also engaged in the context of all our relationships including the proposed negotiation that will involve a complex discussion between us, the land, and the settler people of New Brunswick. Given the complex mix of interests involved, the design of the negotiation process should foster co-

⁴⁶ See Sarah Morales, Address (delivered at the Treaty Right(s): Re-Imagining Indigenous Treaties Conference, University of Victoria, 17 January 2015) [unpublished].

⁴⁷ See Johnny Mack, Address (delivered at the Treaty Right(s): Re-Imagining Indigenous Treaties Conference, University of Victoria, 17 January 2015) [unpublished].

operation. The goal should be to achieve harmony and consensus amongst everyone involved. The tradition of *netukulimk*-based governance emphasizes that agreements should be achieved through persuasion and consensus, and not through a power struggle between adversaries. A negotiation that respects *netukulimk* principles will seek to craft what Jaime Battiste calls “a common bond [or] comprehensive vision that transcends temporary interests”⁴⁸ by reaching an understanding of the long-term implications an agreement has on all engaged parties. The negotiation’s structure should draw on these *netukulimk* principles and develop a common vision through persuasion. A decision that is reached through a power struggle will likely fail to address the underlying conflicts and misunderstandings that made these negotiations necessary in the first place. A decision that is reached by developing a shared perspective is much more likely to be robust and acceptable to all parties in the long term.

Ensuring that the negotiation is structured around *netukulimk* principles will help diminish the likelihood that the deliberations will become merely a power struggle for the largest piece of the pie. If that were to happen, the negotiations could become dominated by a colonial economy that “pursue[s] and reward[s] the commercial exploitation” of natural resources.⁴⁹ Moreover, our relationships with the nations of trees and animals may be reduced to questions of money and the divisions of resources. *Netukulimk* is a fundamental part of Mi’kmaq constitutional law in that it ties the harvest of resources directly to those relationships.⁵⁰ Like *Kopit’s* dam, *netukulimk* can mediate the ebb and flow of neoliberal ambition. Using *netukulimk* as a guiding principle for structuring the talks means ensuring that relationships and not remuneration are the primary focus when reconciling interests. My friends observe that *netukulimk* can be used to reframe the demands of colonial economies. They write:

The control mechanism of *netukulimk* may be utilized to control the overwhelming demands of the free market ideology. Resources like the moose or any other resource, cannot keep up with the ever-increasing demands of humans, without better stewardship and communal responsibility.⁵¹

The negotiations must be structured to ensure these communal responsibilities are met so that our lands, resources, and relationships can be protected. A Zapotec expert I know observes that the representation of place, which stories are told, and where and why they are recounted are political

⁴⁸ Battiste, *supra* note 42 at 330.

⁴⁹ Prosper et al, *supra* note 8 at 9.

⁵⁰ See Battiste, *supra* note 42 at 328.

⁵¹ Prosper et al, *supra* note 8 at 14.

phenomena.⁵² Elders, *kep'tinaq*, and others with understanding of *netukulimk* law must be present so that the stories about nature will include our stories and the forum in which they are told will accommodate the purposes articulated in *netukulimk* law.

By framing the discussion according to *netukulimk* principles, plant and animal nations also become parties to the negotiation. We have pre-established relationships and obligations to these other nations that must be drawn out, deliberated on, and explained.⁵³ *Kopit's* lesson was not clear when he gave the hunter a caribou head that turned out to be useless birch bark. Eventually though, the hunter was able to understand that food could be found in many forms, and that the value of knowledge of where and how to find food was more valuable than being given a single head to eat.⁵⁴ Bear,⁵⁵ *Kopit*, and many others in the plant and animal nations have given the Mi'kmaq people many opportunities to develop essential insights into how to survive and prosper. We have a duty and obligation to maintain the peoples' well-being through sustainable land management. If we do not reciprocate and ensure the survival of the other nations, their gifts will be lost to us, the cycles of *netukulimk* will be broken, and we will fail to survive and prosper. Mi'kmaq interests in our land cannot be divorced from the interests of the plant and animal nations. We cannot negotiate based solely on what we can take from the land. We must frame negotiations in terms of relationships between humans, plants, and animals as well as how we have understood and participated in those relationships through time. The experience and knowledge of the Elders, and their critical evaluation of that experience and knowledge, can allow the interests of the plants and animals to be discussed and defined at the table and considered as a whole with human interests in the negotiation process.

By framing the negotiation in terms of relationships between different nations, *netukulimk* ensures that negotiations do not centre on the pecuniary interests of humans, but rather the interconnected interests of all parties that are affected. *Netukulimk* is not only recognition of spiritual obligations and relations between nations, but also economic and political ones. *Netukulimk* principles explain that human, animal, and plant relations are formed in a way that allows for the survival of all in a sustaina-

⁵² See Isabel Altamirano-Jiménez, *Indigenous Encounters with Neoliberalism: Place, Women, and the Environment in Canada and Mexico* (Vancouver: UBC Press, 2013) at 7.

⁵³ See Borrows, *Canada's Indigenous Constitution*, *supra* note 38 at 35.

⁵⁴ See Whitehead, *supra* note 18 at 72–74.

⁵⁵ See “Brother to the Bears” in Nowlan, *supra* note 12 at 48–52. See also Appendix.

ble manner.⁵⁶ These relationships are reinforced by values that express Mi'kmaq ways of thinking and help Mi'kmaq people understand their place in the biosphere.⁵⁷ The relationship between humans, plants, and animals must be continually relearned and renewed. Old Bear Woman taught us this lesson when she helped bring summer to the people⁵⁸—that the cycles of the natural world can help us to prosper if we work constantly to understand those cycles and our place amongst them. These negotiations must reflect our obligations to consider the interests of all our relations while living as *kinuk* or one people “in harmony with all other humans, animals, and plants.”⁵⁹ To live as *kinuk*, the interests of all must be represented. The Elders must be at the negotiation table because they are the most knowledgeable of the plant and animal nations and they are best suited to shape the discussion to ensure that those interests are considered.

WESAKECHAK

Klooscap, hey! You keep talking about living in harmony, but I don't anticipate a lot of harmony in those negotiations. And that's good, because in my humble opinion, the best Elders are like you and me: they really like to stir the mud and ask a lot of questions! What settler negotiators usually want when they invite an Elder is someone to sit there, look pretty, and smile over the proceedings to give it that veneer of authenticity. And sometimes when an Elder speaks, people don't know how to respond; they don't think an Elder's ideas can be questioned. We need to make sure that people know that Elders are still human. They're still mothers or grandfathers, kind geniuses or bloody-minded so-and-sos. They've just seen a few more things over the years. Their word is not absolute law, but more often than not, you can discover our laws by arguing with them (as long as you make sure to shut your trap and listen once in awhile)!⁶⁰

KLOOSCAP

That's true, Wesakechak. And I know you never have problems shutting up during a negotiation—as long as there's food available, that is. We do need to make sure that the settlers remember how to talk to our Elders and engage in our legal processes. We have had productive negotiations with them in the past, and Mi'kmaq law incorporates the treaties and

⁵⁶ See Prosper et al, *supra* note 8 at 6.

⁵⁷ *Ibid.*

⁵⁸ See Whitehead, *supra* note 18 at 70–71.

⁵⁹ Battiste, *supra* note 42 at 325.

⁶⁰ See Borrows, *Canada's Indigenous Constitution*, *supra* note 38 at 45, 62.

agreements of peace and friendship that we have made with the colonial state. These treaties establish pre-existing obligations and duties that we must also recognize when entering into any present negotiation with settler governments. Our peace and friendship treaties were also understood and negotiated according to principles arising from our Creation Story. *Netukulimk* governs not only our relationships with the plants and animals on the land, but also our interactions with other people, both within and outside of our communities.

WESAKECHAK

And who is it that can guide the treaty process according to *netukulimk* principles? How can you make sure that everyone in your communities is reflected in an agreement?

KLOOSCAP

The *kep'tinaq* have the experience and memory of Mi'kmaq governance. They had the responsibility of negotiating and ratifying the existing treaties. They understand the importance of the Mi'kmaq practice of consensual ratification. Even when faced with a snow vampire, a community would not ratify a course of action until everyone, from the community leaders down to individual family members, had accepted the wisdom of the decision.⁶¹ This principle of consensus was also observed when ratifying the concordat with the Holy See beginning in 1610. It took decades to consult with individual districts, families, and individuals. The treaty was not agreed to until general consent had been gained.⁶² The same procedure was followed to legitimize major treaties with the British Crown in 1726 and 1752. The Mi'kmaq practice of “talking it out” ensures that everyone is invested in agreements, and that those agreements will be more likely to endure over time.⁶³ Consensual ratification is particularly important in the case of treaties or agreements governing resource use because it helps to ensure that agreements will not be ratified unless they reflect (to the extent that such a thing is possible, given the diversity and strong-mindedness of our people) a Mi'kmaq collective understanding of their relationships with the resource, each other, and the other signatories to the agreement. The *kep'tinaq* have specialized experience in consulting with the community. They are therefore best suited to facilitate the consultation and ratification process once negotiations have produced a proposed agreement.

⁶¹ See Nowlan, *supra* note 12 at 41.

⁶² See Battiste, *supra* note 42 at 330.

⁶³ Prosper et al, *supra* note 8 at 13.

WESAKECHAK

All this talk of consensus sounds good Klooscap, but what if there is persistent disagreement? Maybe your people are different from mine, but if we all had to agree on everything, we'd be "talking it out" until the glaciers returned.

KLOOSCAP

Well, Wesakechak, consensus doesn't necessarily mean that everyone gets their way. But if we follow our legitimate, collaborative, and deliberative law in consulting our communities, we can at least ensure that everyone assents to the outcome because it was arrived at by a legitimate process. People will agree to a solution if they see their interests were considered in both the procedure and the substance of the negotiation, even if the result isn't exactly what they would have wanted to see.

WESAKECHAK

I guess it really is the same—from the dinner table to the council fire to the settler courts. All law is deliberative. But so far you've only addressed your *teplutakn*⁶⁴ obligations to your own people. How are you going to make sure that the settlers don't miss out?

KLOOSCAP

Our Elders will help ensure that the negotiation process fulfills the existing treaty obligations we have to the settler people. They are able to draw the principle values that inform and frame these obligations from our Creation Story. The Creation Story tells us that we all stand on one surface together, the surface of a drum. No one person is above or below the other, and we must all work together as we hear the heartbeat of the Earth.⁶⁵ This teaching can help remind us that the development of functional and lasting relationships with the settler people will be more likely if we work within frameworks of understanding and cooperation. This means that our obligations to the settler people go beyond sharing the land and resources with them. If we are going to live with them as *kinuk*, as one people in a sustainable way, then we must also share the wisdom of our *netukulimk* principles with them. In some ways, they are like the

⁶⁴ This is the Mi'kmaq term for "treaty".

⁶⁵ See Stephen Augustine, *Diagram for Mi'kmaq Curriculum: Mi'kmaq Teaching* (Four Directions Teachings, 2006) at 3, online: <www.fourdirectionsteachings.com/transcripts/mikmaq.pdf> [Augustine, *Diagram*].

small orphan boy in our story of “Brother to the Bears”,⁶⁶ lost in a land from which they do not originate. They lack the skills to “avoid not having enough.” Like the bears in that story, if we take the settlers as our own brothers and sisters and help them to understand how to apply *netukulimk* principles to their own endeavours, then we can prosper together. It is not enough that they merely respect or tolerate our *netukulimk* practices. We have an obligation to teach them the language of sustainability, as the bears taught the human boy the language of the bears, in order for us to be able to communicate effectively and share the land instead of simply occupying the same space. Like my mother taught us, sharing the knowledge of *netukulimk* allows us to rely on each other for survival and well-being.⁶⁷

WESAKECHAK

Besides, it seems like you have taken about as much as you can handle of their “peace and friendship”; at this juncture, it might be prudent for you to offer some more of yours to them. If the settler nations can apply *netukulimk* principles to their own resource use and their own money systems, it will not only make their lives easier, but it can only improve the neighbourhood.

KLOOSCAP

Yes. And the Elders are best suited to fulfill this happy obligation and make sure the settler people engage with learning *netukulimk* at the negotiation tables. They not only have the knowledge, but they know how to teach with subtlety. My grandmother taught me things that I’m still not even sure I fully know.

WESAKECHAK

Well, Klooscap, I’ve been talking with you for so long that I’m not sure that I know what I know. All of your fancy words are chirping away inside my head like crickets. I can’t even remember what you told me at the beginning! What exactly did we decide here today?

KLOOSCAP

Okay, Wesakechak, I’ll break it down for you so you can fit it all into your head at once. There is a potential harm facing my people as we

⁶⁶ Nowlan, *supra* note 55.

⁶⁷ See Augustine, *Diagram*, *supra* note 65 at 6.

speak. The future health and well-being of our lands and people are at stake due to a new forestry plan by the New Brunswick government. They have proposed a negotiation to reach a settlement that addresses our people's objections. The issue is who from our community should be involved in this consultation process. The answer we have come to today is that the Elders and *kep'tinaq* of the Mi'kmaq people should be foremost at the table.

Our society draws on sources of sacred stories, the natural world, and deliberative processes to inform how we address potential threats to our communities. The type of harm must be characterized in terms of severity, scope, and timeframe. Then the appropriate decision makers must be identified; the decision makers are typically those with the most pertinent knowledge, expertise, and experience to craft an appropriate solution or response to the potential harm. Once the decision makers are chosen, they have a duty to collect evidence through observation and consultation with the community or the affected parties and to come to a decision. If necessary, the decision maker may choose another person in the community to implement that solution. The negotiation proposed by the New Brunswick government has implications for the future of our forests. Any outcome of such a negotiation will affect the land on which we live, and in turn the people who live and depend on that land. There will be broad and potentially serious consequences for all people if the land is treated in ways that disrupt the cycles of *netukulimk*.

Because the potential for harm is great, Elders and *kep'tinaq* should be involved in the negotiation process. Both have the appropriate skill, knowledge, and expertise necessary to address this kind of harm. Elders have the knowledge and expertise necessary to animate *netukulimk* law; they have seen many cycles of life and the give and take between plant, animal, and human nations repeated many times over. Their wisdom and guidance will aid the *kep'tinaq*, who have expertise in facilitating consultation in our communities and arbitrating resource management according to *netukulimk* principles. This expertise means that their participation in the negotiation process is essential. The participation of Elders and *kep'tinaq* will also ensure that the negotiation will function according to Mi'kmaq laws rather than being reduced to a neoliberal framework of profit sharing and resource extraction. Structuring the negotiations so that they emphasize sustainable relationships between all parties rather than a zero-sum dispute over resources will lead to a better long-term outcome for everybody involved. Involvement in the negotiation should not be limited to Elders and *kep'tinaq*; our Creation Story tells us that each person is a spark of the sacred fire. Each has their own gifts to share with their community and to help inform the practice of Mi'kmaq law. Scientists, elected officials, and others with appropriate knowledge and skill should be engaged to find a common vision in which we can all share.

Conclusion

We received the materials for the Kawaskimhon Moot in early January 2015. When we first began working on the legal issues presented in the fact pattern, we sought to draw potential solutions from a variety of legal sources. Canadian Aboriginal law was the obvious starting point, including the Aboriginal rights in section 35 of the *Constitution Act, 1982*,⁶⁸ the Crown's duty to consult,⁶⁹ and treaty law. International agreements, such as the *United Nations Declaration of Rights of Indigenous Peoples*, were also considered.⁷⁰

However, at the suggestion of our faculty coach, Professor Val Napoleon, we ultimately decided to address the case solely through Indigenous legal orders. By focusing on Mi'kmaq law, we were able to represent the full spectrum of interests and rights of the Mi'kmaq Elders and hereditary chiefs. Because the moot was a negotiation solely between various Indigenous groups, it made sense to focus on the obligations and decision-making frameworks arising out of Indigenous law. Those laws were the best way of framing the negotiation to ensure that Indigenous interests and legitimate decision-making processes were centred beyond what Canadian law would dictate.

Both authors of this article are Indigenous. David Gill's grandfather comes from the Omushkegowuk Cree community of Opaskwayak in northern Manitoba. Lara Ulrich is Métis; she grew up in northern Alberta. Prior to this project, neither of us had worked extensively with any Indigenous legal order. Neither of us had had any experience with or personal connection to Mi'kmaq law.

This lack of experience meant that we had to build an understanding of Mi'kmaq legal orders from the ground up. We began to research Mi'kmaq law, drawing from a variety of sources. The Accessing Justice and Reconciliation Project's report on Mi'kmaq legal traditions⁷¹ was crucial in creating an understanding of Mi'kmaq authoritative decision-making processes. We also utilized academic articles by Mi'kmaq scholars, which helped contextualize the role of the *keptin'aq* in negotiating treaties and mediating land management practices. These same articles proved vital in developing our understanding of the central constitutional role of *netukulimk* sustainability law in the *Mawio'mi*. Finally, we drew on

⁶⁸ Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁶⁹ For key jurisprudence in this area, see *supra* note 5.

⁷⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007).

⁷¹ Asch et al, *supra* note 19.

Mi'kmaq stories, using Professor Napoleon's case briefing method to draw legal principles out of the stories, informed by the context of our other sources.⁷²

The process was difficult and uncomfortable for both of us. It was hard to trust that our legal training in the Canadian common law system had given us adequate tools to understand, utilize, and do justice to an Indigenous legal system from an entire continent away. This task was particularly daunting because so much of Mi'kmaq law is centred around land, language, and oral traditions—traditions that neither of us had grown up with or experienced. In fact, one particularly discouraging source cautioned that much of Mi'kmaq law “cannot be learned in books; [it is] part of the language and oral traditions.”⁷³ However, as we continued to immerse ourselves in our sources, we began to see connections between disparate concepts. Eventually we were able to construct a model of Mi'kmaq law that we could begin to apply to the moot problem.

Presenting these arguments during the negotiation provided a new set of challenges. In preparing for the moot, we practised telling the stories that formed the authorities for our arguments. At the moot itself, we told the stories as a way of engaging other parties in the room. It was a method of allowing others to construct meaning from the way in which we told the stories, when we chose to tell them, and their relationship to the particular legal and social problems at issue in the moot. We would juxtapose the telling of a story with applications of Mi'kmaq legal principles to the negotiation scenario without always drawing explicit analogies to the story. This technique forced other parties, who were working mostly with Canadian Aboriginal law, to participate in the Mi'kmaq legal framework.

It was challenging to draw the other parties into engaging with the Indigenous legal orders we provided. We encountered two reactions that were barriers to engagement. First, was the temptation to see Mi'kmaq stories and discussion of relationships with the forest and land as irrelevant to the hard economic realities of resource development. We attempted to counter this attitude by demonstrating the practical relevance of the principles reflected in the stories to sustainability and survival; the duties imposed by those principles, we argued, were therefore important and binding on the Mi'kmaq people.

⁷² See Hadley Friedland & Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015) 1:1 Lakehead LJ 16; Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” (2016) 61:4 McGill LJ 725.

⁷³ Battiste, *supra* note 42 at 324.

The other reaction was to see the legal arguments that we made as being sacred; because these stories were seen as sacred, it was not possible to challenge and work with them as laws. We personally had to overcome this second barrier in our struggle to learn how to use Mi'kmaq legal principles in crafting our submissions.

Our breakthrough in this struggle came when we realized that even when law comes from a sacred source, the principles emerging from that source are as vulnerable to criticism and deliberation as any other legal principle. We drew an analogy to Canadian law, particularly the importation of the biblical parable of the “Good Samaritan” to define the scope of the duty of care in tort law.⁷⁴ The fact that the “neighbour” legal principle had been drawn from a sacred story did not mean that it did not have to be explained or justified, nor that its application in particular cases would be uncontested. The same, we realized, applies to the principle of *netukulimk*, despite the fact that its roots are in the Mi'kmaq Creation Story itself.⁷⁵

Throughout the negotiation we encouraged other parties to engage the New Brunswick government on the terms of Indigenous people, rather than the terms that the Crown dictated to us. This issue manifested in two ways. First, on the third and final day of the negotiation, the “government” informed our group that the number of seats Indigenous peoples would be allocated at the negotiation table with the Crown would be reduced from three to two. In response, we argued that we should not accept these terms. Each of our clients had their own obligations arising out of their own laws. Those obligations should not be ignored in order to suit the government’s wishes. Our position was that our client’s ability to enforce Mi'kmaq law was not dependent on recognition by colonial authorities. We could, to paraphrase James Tully, become self-governing by being self-governing.⁷⁶

As our moot was unfolding in Atlantic Canada, the course of action we suggested was being put into practice on the other side of the country. In March of 2015, the Heiltsuk First Nation on the west coast of British Columbia enforced a closure of a herring fishery declared open by the Canadian Department of Fisheries and Oceans (DFO). The Heiltsuk occupied the DFO office and gave notice that they would blockade any fishing vessels attempting to go out on the water. They acted under the authority of

⁷⁴ See *Donoghue v Stevenson*, [1932] AC 562 at 580, [1932] All ER Rep 1 (Lord Atkin’s discussion of the neighbour principle as emanating from the Christian teaching to love thy neighbour).

⁷⁵ See *RCAP Report*, *supra* note 17 at 48–49.

⁷⁶ James Tully, “On Civic Freedom” (Keynote Speech delivered at the Civic Freedom in an Age of Diversity: James Tully’s Public Philosophy Conference, Université du Québec à Montréal, 26 April 2014) [unpublished].

their hereditary chiefs, who had determined that a commercial fishery opening this year was unsustainable. The Heiltsuk were ultimately successful in asserting their authority, and the DFO closed the fishery, sending commercial boats home with empty nets.⁷⁷ We used this event in the moot negotiation as a clear example of Indigenous authorities enforcing Indigenous law without regard to colonial recognition.

The second way in which we attempted to assert Indigenous self-determination was in deciding the issue of who had a right to consult with the government. Some groups held that only status First Nations had a right to be consulted by the government, and that non-status and off-reserve groups should not have a place at the table because the duty to consult doctrine of Canadian Aboriginal law did not require their input. Relying on Mi'kmaq law, we rejected this argument. Mi'kmaq law specifies that *netukulimk* rights and duties have a different source other than status under the *Indian Act*.⁷⁸ Anyone who has kinship ties to the Mi'kmaq people, shares a Mi'kmaq worldview, and holds a sense of belonging to the territory in question must be considered when negotiating the rights and responsibilities derived from *netukulimk* law.⁷⁹ Once these community members are identified, it is important to engage in a consultative approach that is created and agreed upon by those members in order to create a legitimate alternative to non-Indigenous laws.⁸⁰ We used the story of "The Captive" to illustrate that it is impossible to maintain an identity as a self-determining Indigenous people while allowing external colonial sources to decide who is encompassed within the Mi'kmaq group.⁸¹ As Glen Coulthard argues, a context in which "recognition" is conceived as something that is ultimately 'granted' or 'accorded' a subaltern group or entity by a dominant group or entity ... prefigures its failure to significantly modify, let alone transcend, the breadth of power at play in colonial relationships."⁸² These discussions about Indigenous identity and self-determination turned out to be extraordinarily difficult for reasons independent of the moot problem. Many moot participants were Indigenous—some status, others not. Some were from First Nations com-

⁷⁷ See Mark Hume, "Heiltsuk First Nation Claims Victory Over Disputed Herring Fishery", *The Globe and Mail* (1 April 2015), online: <www.theglobeandmail.com/news/british-columbia/heiltsuk-first-nation-claims-victory-over-disputed-herring-fishery/article23757390/>.

⁷⁸ *Supra* note 23.

⁷⁹ See Battiste, *supra* note 42 at 326.

⁸⁰ See Prosper et al, *supra* note 8 at 13.

⁸¹ *Supra* note 41.

⁸² Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 30–31.

munities, while others had grown up in urban centres. It was understandable that discussing existential questions of what it means to be Indigenous brought up intense emotions on all sides.

It is easy for a lawyer or law student to hear a problem, break down the facts, and decontextualize its elements. In doing so, we play a game—we have laws and we have facts. How can we fit them together in order to get a favourable result for ourselves and our client?

Our difficult experience at the Kawaskimhon Moot reminded us that law is never a game. Law is lived. Law is emotional. Lawyers are trained to address the problem; they are not prepared for engaging with the deeper emotional interests that inform our interpretation of the problem and how the law applies to it. The Kawaskimhon Moot was uncomfortable for us, both as law students and as Indigenous persons. That discomfort in the context of disputes involving Indigenous interests is a good thing. It is a privilege to be able to see beyond the surface of a conflict. For Indigenous lawyers, that ability is often unavoidable.

After the final day of negotiations, after all participants had dealt with difficult and emotionally exhausting issues, we were left with many lingering doubts. We had never felt completely comfortable with whether we had really understood Mi'kmaq law, and whether we had done it justice in the negotiations. We were also intimidated by our role as the representatives of Elders. We were unsure as to whether it was acceptable for us to say what our clients' perspectives were, when we certainly are not Elders ourselves.

There were two Elders present at the Kawaskimhon Moot: Imelda Perley and David Perley. Both are from the Wolastoqiyik First Nations. We told them about the arguments we had made, and about our fears about being unqualified to make them. They reassured us that we had acted appropriately as the Elders' advocates. Imelda shared a very important teaching: being an Elder is determined by role, not age alone. It is determined by the wisdom you hold and the generosity and support you show to others. It is important to note that we did not take the Elders' approval as permission or vindication of our approach. Rather, it gave us some comfort that our chosen approach was, to a degree, in line with Mi'kmaq legal principles and practice. When researching and writing our paper, we did not have any access to primary sources of Mi'kmaq law. There are many possible approaches to and interpretations of Indigenous legal orders. Accordingly, this was not an endorsement of our having done things correctly. It was a second legal opinion from people familiar with Mi'kmaq law that concurred with our own.

We left Kawaskimhon with a newfound confidence in our ability to engage meaningfully with Indigenous laws. The Mi'kmaq legal orders we learned over the course of preparing for the moot were coherent, intuitive, and accessible, as much as other systems of laws we had learned. We

were able to understand them and apply them effectively even though we had begun with no knowledge of or guide to the laws we were learning. Indigenous laws are durable, complex, and nuanced. They can stand on their own. Indigenous law has the potential to inform Canadian law beyond its relationships to Indigenous peoples, by providing robust legal and conceptual tools to develop policy or solve problems—for example, in the areas of the environment or sustainable economics. Indigenous legal orders also have the potential to function independently of Canadian law to facilitate Indigenous peoples' social ordering and nation building, and to address social problems through the exercise of their own sovereignty. As John Borrows writes, "the practice of Indigenous law can further open avenues to regulate society effectively and to resolve disputes in many spheres of human activity."⁸³ Our experience in negotiating a position based entirely on Mi'kmaq legal orders convinced us that Indigenous law has the capacity to provide robust solutions to complex social and legal problems.

⁸³ Borrows, "Heroes, Tricksters", *supra* note 7 at 807.

Appendix: Legal Precedent

*The Man Who Hated Winter*⁸⁴

Facts: There was once a warrior who hated winter; he mocked the cold, upsetting the god of winter. One year, close to spring, the god of winter tried to kill the man by knocking him into the thawing river as revenge. This attempt failed, and Winter himself was knocked into the river. The warrior laughed even harder at Winter, which infuriated the god only more. After this incident, the people of the village became fearful that the next winter would be unduly harsh.

Issue: How should the community deal with external threats to their safety?

Decision: The villagers convene and ask the warrior to leave the village so that they will not be caught in Winter's wrath.

Principle: Interfering with the natural cycle or order of the world for selfish reasons can bring harm to the community.

*Glooscap's Enemy—The Beaver*⁸⁵

Facts: Beaver had caused much trouble for Glooscap and his people, building great dams that flooded Glooscap and his people's villages. Beaver enjoyed this destruction, building many dams.

Issue: How should external harm be dealt with?

Decision: Glooscap decides to take revenge on Beaver, hunting him down. Wily Beaver escaped many times, but eventually Glooscap caught Beaver and his family, killing all except three of Beaver's children; one became an island while the other two became smaller in size similar to the beavers today.

Principle: You cannot ignore the consequences of disrupting the ecological balance just to sustain yourself, particularly if that disruption harms other peoples' way of life.

⁸⁴ Nowlan, *supra* note 12 at 21–26.

⁸⁵ Spicer, *supra* note 10 at 15–17.

Fetching Summer⁸⁶

Facts: A family is living at the base of a mountain. The mother and father both die, leaving behind their five children: a daughter, three elder brothers, and a small baby boy. Four years pass, and the baby grows. One day he asks his sister where his parents are. Upon hearing that they are dead, the child begins to cry, crying for two full days. The child's three brothers, Blue Jay, Loon, and Otter try to stop him from crying by making him a little bow and arrows, but the child keeps crying. Unable to alleviate the child's suffering, the brothers take three hide bags and travel to the place where the Sky is burning and the air is hot and beseech Sky to help them. Sky instructs them to close their bags, and to take plants and animals out of his wigwam. The brothers do so; on their return to the mountain, they open their bags, letting out hot air. As the snow melts they spread the plants and animals across the land. The child begins to smile.

Issue: How do you alleviate the child's emotional suffering? How do you respond to a need of the people?

Decision: The sister sends for Old Bear Woman, who consults with the child, learning that bringing Summer back to the people will alleviate his emotional suffering. The sister sends three brothers to fetch Summer and they release Summer.

Principles: Cycles have their place, and everything is interconnected as a whole. Cycles of the natural world can bring renewal and happiness, alleviating suffering if we recognize that humans play a role in this cycle.

Problems within the community should be addressed by those who are best positioned with the appropriate knowledge, skill, and expertise that is required by the distinct issue needing resolution. Procedurally, any solution must be crafted by (1) gathering evidence and (2) consulting with parties affected. Once a solution is found, the decision maker must select the party best suited to implement the solution.

⁸⁶ Whitehead, *supra* note 18 at 69–71.

The Snow Vampire⁸⁷

Facts: One day a man wanted to marry a girl in his village. He sent his mother to her family, but was rejected because he spoke to the dark gods, and the girl's parents did not want a wizard for a son-in-law. The man then attempted to approach the girl himself. Upon admitting that he was what her parents suspected, she became frightened and ran away, angering him.

The man takes his revenge, breaking into her wigwam and administering a sleeping powder. As the girl sleeps, he places two snowballs next to her neck. On waking, the cold has spread throughout the girl's body, and she only has interest in eating snow. She is turning into a snow vampire, a creature that eats the flesh of others and (sometimes) themselves. The girl urged her parents to kill her, but they refuse. As time passed, the girl became more and more like a snow vampire. She escapes her parents' wigwam and begins to chase children around like a ravenous wolf.

As her condition and the threat she posed became common knowledge, the chief and warriors demanded from the parents that the girl be killed. Although her parents protested, the girl agreed, stating that seven warriors each had to shoot an arrow at her, but warned that if they missed and failed to kill her, she would destroy the village.

Upon the girl's death, her face became her own again, and the arrows disappeared. The chief and warriors then go to the wizard's wigwam, intending to bring him to justice.

There they find the wizard's body with seven arrows protruding from his heart.

Issue: How should harms that affect the community be resolved?

Decision: The chief chose the seven best bowmen in the village to deal with the danger created by the wizard. The girl decided to save the village through her own sacrifice because she was dangerous.

Principles: Depending on the severity of the harm, the decision maker and solution should vary. Solutions to harm should be collaborative, and, if possible, the people most affected by the harm should be involved in the decision-making process.

Depending on the solution proposed, the decision maker may be the person to implement the solution. The person(s) who implements any solution should be chosen based on his or her skill, knowledge, and position within the community.

If one intentionally brings harm upon another of the community, that one will have misfortune turned on them.

⁸⁷ Nowlan, *supra* note 12 at 38–42.

Mi-she-shek-kak (The Giant Skunk)⁸⁸

Facts: Before humans walked the Earth, there were giant animals across the land; the Giant Skunk was the oldest, largest, and most powerful of all the animals. Giant Skunk was a threat to the other animals' lives; in order to survive, the other animals gathered together as a council to talk about the problem of Giant Skunk.

Issue: How should a community deal with harm?

Decision: Council decided that Giant Skunk should be killed, however they could not come to an immediate decision because Giant Skunk was so powerful. In the interim, they made rules to ensure the survival of all animals including that no animal should cross the path walked by Giant Skunk and that animals should stay away. These rules had to be followed, otherwise the animals would be found and eaten by Giant Skunk.

Principle: Decisions about community safety should be made collectively by all affected.

(Additional) Facts: One day Weasel is hunting. Even though he knows the rules, he comes across the path of Giant Skunk. Because Weasel is tired, he reasons that he can dive under the Giant Skunk's trail. Unfortunately, Giant Skunk knows that Weasel has crossed his path. Giant Skunk feels insulted; he finds the path of Weasel, and begins to follow him. Weasel knows that the Giant Skunk is coming for him, so he runs away. Other animals begin to run with Weasel, all running away from Giant Skunk. Eventually the animals come to a giant mountain, and make a place where they can trap Giant Skunk. On trapping Giant Skunk in this place, Wolverine is selected to bite the place where Giant Skunk releases his skunk spray, and Giant Skunk is killed.

Issue: Who should deal with the immediate harm facing the community?

Decision: Wolverine kills Giant Skunk because he is the individual in the best position to deal with the danger of Giant Skunk.

Principle: Those with the most relevant skill and experience should carry out the resolution.

⁸⁸ Bird, *supra* note 22 at 69–73.

Kopit Feeds the Hunter⁸⁹

Facts: One winter there is a starving village; the hunters cannot find any game. A woman sends out her husband once more to try and locate food for the village. While walking in the woods the hunter comes across tracks in the snow. Following them, he comes to a wigwam by a lake and enters. Inside is an old man, who welcomes the hunter. Time passes, and eventually the old man's sons return to the wigwam, their sleds full of meat. The old man questions the hunter, who tells the old man that his village is starving. The old man arranges for his sons to fill a sled with meat for the hunter's village. On arriving back at his village, the hunter's wife unwraps the meat, discovering that it is not meat but poplar bark, food of the beavers. The man realizes that he had stayed with Kopit (Beaver).

From his visit with Kopit, the hunter has been given knowledge. He finds a bear, and the village eats. The man knows when to hunt whales and how to call them to him.

Issue: How can the people's starving be alleviated?

Decision: The Kopit teaches the hunter special skills so that he is able to feed the people; Kopit helps the people and the village does not starve.

Principles: The land and animals give knowledge for survival and sustainability.

Harm faced by the community should be solved by the person with the best knowledge. Those with the most relevant knowledge can alleviate the specific harm.

The Man Who Wanted to Live Forever⁹⁰

Facts: There was once a man who was scared to die, constantly searching for a solution to his mortality. He sought out the oldest man in his village, who told him that even Klooscap would probably not escape death. Reminded of Klooscap's wisdom, the man traveled to Klooscap's camp and asked Klooscap to grant him a life that never ends. On being informed that there was no solution to avoiding death, the man begged Klooscap to give him a longer life. Klooscap agreed, but warned the man that the solution may not be something that the man would like. The man persisted in asking for a lengthened life, and Klooscap agreed. The next morning, Klooscap took the man to a deserted island. When ashore, Klooscap clasped the man around his legs, lifting him and setting him back down on the Earth. When Klooscap proclaimed that the man's wish was granted, the man looked down only to find that his body was now a cedar tree. Klooscap left the island, telling the man (or tree) that no one would disturb him on the isolated island for years to come.

Issue: How do you respond to human fear of change?

Decision: Klooscap turned the man into a cedar tree so he could live longer.

Principle: We cannot escape human frailty and we have to deal with uncertainty and change.

⁸⁹ Whitehead, *supra* note 18 at 72–74.

⁹⁰ Nowlan, *supra* note 12 at 53–56.

Indian Laws⁹¹

Facts: E-pay-as steals into Blackfoot territory, stealing horses. The Blackfoot retaliate, killing a woman and child in the Cree community. The victim's husband requests compensation from E-pay-as in the form of horses, but E-pay-as refuses.

Issue: How should the community deal with multiplication of harms?

Decision: The husband consults with those in respected roles who enforce the rules for community safety and hunting, the Dancers and Providers, who are consulted for their relevant knowledge and expertise. An open, deliberative process is led by them to come to a resolution to impose on E-pay-as.

Principles: Consultation and deliberation should be undertaken with appropriate decision makers when possible.

Decision makers should consult with parties affected and the broader community in coming to a decision.

The Captive⁹²

Facts: Once a war party attacked an enemy village, killing all except for a woman and her baby son. They were taken back to the war party's village, and a chief made her his wife, treating her baby as if he were her son. Throughout his life, the boy heard whispers about his origins as a member of an enemy village. But each time he asked his mother, she denied it. On his seventeenth year, the boy's mother finally breaks, admitting their origins. The boy vows to return to his own people, refusing to listen to his mother's pleadings. He convinces her to teach him the language and history of his birth village, becoming more contemptuous of his adopted village with each passing day. One night he stole into the wigwams of the seven best warriors in the village, killing them while they slept. He also killed his foster father before fleeing into the night. The village gave chase, but did not catch the boy. The village turned on his mother, killing her (because they thought she had conspired with the boy). Finally the boy reached the land of his birth. He came across a war party, and greeted them in their language. The party, thinking that he was one of the enemy (for he spoke with an accent and was dressed in the manner of their enemy) kill the boy.

Issue: How does a community respond to community members that have been assimilated into another culture?

Decision: The boy was killed when mistaken for the enemy.

Principle: Rejecting alienated community members because they lack cultural connection results in a loss of valuable knowledge and experience.

⁹¹ Ahenakew, *supra* note 35 at 33–36.

⁹² Nowlan, *supra* note 12 at 33–37.

Brother to the Bears⁹³

Facts: An orphaned boy in the village often goes into the forest to be by himself. One day he becomes lost, eventually coming across a wigwam as darkness fell. Upon entering, he was surprised to see that the voices he had heard came not from humans but bears. The bears welcomed and fed him; thinking it was a dream, the boy ate and slept.

On waking, it was spring; the boy had slept all winter long. The boy decided to stay with the bears. All summer he learned their language and skills, playing with the bear cubs as if he too were a bear. But as time passed, the bear cubs' skills surpassed the boy. On returning, the boy did become a great warrior, eventually teaching his descendants the language of the bears.

Issue: From where does knowledge about the environment come from?

Decision: The boy decided to stay with the bears and learned their language and skills. His bear mother sent him back to his village with this knowledge, helping him to become a great warrior who brought needed skills and knowledge to his people.

Principle: Knowledge about the environment is taught by the observation of and experience with nature; this includes the animals and plants. Someone with this knowledge can bring great benefit to their communities.

Mi'kmaq Creation Story⁹⁴

Facts: The Creation of the Universe was begun by Creator. First the Sun was created and brought across the Milky Way to light Earth. Next, the Earth was created from a bolt of lightning. From that same bolt of lightning, Klooscap was created, lying on his back with his arms, head, and legs in the four directions. Another bolt of lightning created fire, animals, vegetation, and birds. Klooscap, on standing up, asks Creator: How should I live?

Issue: What principles should guide human life on Earth?

Decision: Creator gives Klooscap his grandmother who taught him how to live. Created from a rock, she was an Elder whose knowledge and wisdom were enfolded in the Mi'kmaq language. Creator gave Klooscap his nephew, who brought further knowledge about life and the natural world. Creator also gave Klooscap his mother, who had the ability to tell about the cycles of the Earth. Klooscap declares that he must leave and go north; before doing so, seven sparks form seven families from whom people on Earth today are descended. Klooscap teaches these peoples how to live from the lessons taught by grandmother, nephew, and mother; the sparks contained many gifts, each giving life to human form, and in each human form was placed the prospect of continuity.

Principle: Elders have knowledge and wisdom of the appropriate ways to live. Existence on Earth is a cycle, and humans are a part of this cycle.

⁹³ *Ibid* at 48–52.

⁹⁴ *RCAP Report*, *supra* note 17 at 48–49.