

Learning about Treaties with the Animal People: Lessons for Treaty 8

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This article's fundamental argument is that, because treaties between Canada and Indigenous peoples establish a peaceful relationship between different legal orders, compliance with treaty promises implies compliance with Indigenous laws. Nevertheless, the laws of Indigenous parties that entered Treaty 8 have rarely shaped the processes and outcomes of environmental decision-making, one example being the Site C hydro-power project. The article examines how the Crown's use of the territory has amounted to a breach of treaty promises. It outlines legal principles through the analysis of Cree (Nêhiyaw) and Dunne-Za stories, explores the nature of treaties through the framework of relationality, and draws on various Indigenous legal orders to articulate ways in which the relationship between humans and non-human beings can guide treaty relationships.

L'argument fondamental de cet article est que, puisque les traités entre le Canada et les peuples autochtones établissent une relation paisible entre différents ordres juridiques, le respect des promesses des traités implique le respect des lois autochtones. Néanmoins, les lois des parties autochtones qui sont entrés au Traité 8 ont rarement informé les processus ou les résultats des décisions environnementales, le projet d'énergie hydroélectrique du site C comme un exemple. Cet article examine comment l'utilisation du territoire par la Couronne constitue une violation des promesses des traités. Il expose les principes juridiques par l'analyse des histoires des Cris (Nêhiyaw) et des Dunne-Za, explore la nature des traités par le cadre de la relationnalité et s'appuie sur divers ordres juridiques autochtones pour articuler les façons dont la relation entre les humains et les êtres non humains peut guider les relations établies par les traités.

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I. Introduction

Indigenous communities of the Cree (Nêhiyaw), Beaver (Dunne-Za), Chipewyan, and other legal orders signed Treaty 8 with Canada in 1899-1900 at Lesser Slave Lake, and other communities adhered at the beginning of the 1900s.¹ The region's physical, social, and political circumstances have changed significantly since then, and so have the relationships. The increase of settlers in the region and the provinces' intensive approval of mining, infrastructure, oil and gas activities, etc. have strained all aspects of the relationship (between Canada and Indigenous nations, among Indigenous nations, and between human and non-human beings). Treaty 8 territory covers much of northern Alberta, western Saskatchewan, northeast British Columbia, and the southern Northwest Territories.

In examining the impact assessment process and approval of the Site C hydropower dam for my doctoral work, I interviewed Treaty 8 First Nations members at the Peace River Watershed in northeast British Columbia. Almost every conversation shifted from questions around the specific impacts of the project to the treaty relationship between Canada and the First Nations. It was very clear that the underlying problem with that project and other industrial developments in the region was not only the exclusion of First Nations from the decision-making processes, but more fundamentally, the breaking of treaty promises.

The fundamental argument in this article is that treaties between Canada and Indigenous peoples establish a peaceful relationship between different legal orders. Therefore, compliance with treaty promises implies compliance with Indigenous and Canadian legal orders. While Canadian environmental laws and policies have recently incorporated buzz terms such as “collaboration” and “partnership” with Indigenous groups,² few prospects of collaborative frameworks for decision-making about land and resources have demonstrated a firm grounding on the legal orders represented in the Treaty. The values and goals of Indigenous parties that entered treaties, especially historic treaties, which have

1 Government of Canada (Indigenous and Northern Affairs Canada, Communications Branch), “Treaty Texts: Treaty No. 8” (3 November 2008), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572>> [perma.cc/4HVD-2YAH]. The McLeod Lake Indian Band is an exception, having adhered to the Treaty in 2000.

2 See e.g. *Canada Impact Assessment Act*, SC 2019, c 28, s 1, s 2(e)(f)(g), 21; Impact Assessment Agency of Canada, “Interim Guidance: Collaboration with Indigenous Peoples in Impact Assessments” (last modified 26 November 2020), online: <<https://www.impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/collaboration-indigenous-peoples-ia.html>> [perma.cc/AZA8-M4DR].

been undermined by the Canadian state for a large part of the 20th century,³ have rarely shaped the processes and outcomes related to permits and project approvals.⁴ I argue that while treaties are meant to create a legal and political framework for co-existence between nations, the Canadian and provincial governments' actions have contradicted the symbolic nature of nation-to-nation agreements by using them to subordinate Indigenous peoples to colonial authority.⁵

As Anishinaabe scholar John Borrows contends, “practices embraced by Aboriginal or treaty rights must include First Nations laws because these laws give content and meaning to First Nations customs and conventions.”⁶ In this article, I focus on principles from Cree (Ne’hiyaw) and Dunne-Za legal traditions to inform processes for the renewal of Treaty 8 obligations and responsibilities and point to how those principles should ground joint frameworks for environmental decision-making. I engage with principles from other legal orders, such as those of the Anishinaabe, the Mohawk, the Tsilhqot’in, and the Métis, to expose the need to embed agreements between Indigenous nations and the Crown in the context of each legal order, especially drawing on the relationship between the human and non-human world.

For this purpose, I analyze one Ne’hiyaw and one Dunne-Za story about the relationship between the Animal and Human Peoples. I have engaged with those legal orders for three years through a research partnership with West

3 See the 1929 *Syliboy* decision, which refused treaty status to the 1752 agreement with the Mi’kmaq; and the 1969 White Paper, which proposed to extinguish treaties with Indigenous peoples. See *Rex v Syliboy*, [1929] 1 DLR 307 at 313; Jean Chrétien, *Statement of the Government of Canada on Indian Policy* (Indian Affairs and Northern Development, 1969).

4 Ministry of Indigenous Relations and Reconciliation, “Treaty 8 First Nations — Province of British Columbia” (last modified 3 January 2024), online: <gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/treaty-8-first-nations>; Giuseppe Amatulli, “New agreements between First Nations and B.C. government a step toward fulfilling Canada’s treaty obligations” (26 April 2023), online: *The Conversation* <<https://www.theconversation.com/new-agreements-between-first-nations-and-b-c-government-a-step-toward-fulfilling-canadas-treaty-obligations-203889>> [perma.cc/PRN2-Y8UR]. British Columbia has been signing agreements with Treaty 8 First Nations with a focus on industrial development benefit sharing. However, for the past few years, there has been a change in the scope of newer agreements, which include provisions regarding shared decision-making and consultation processes, land management, and cumulative impact assessment. Even though this shift demonstrates the province has been increasingly recognizing First Nations’ authority, it does not mean that agreements must observe the Indigenous laws of those Nations.

5 Gina Starblanket, “The Numbered Treaties and the Politics of Incoherency” (2019) 52:3 CJPS/RCSP 443.

6 John Borrows, “With or Without You: First Nations Law (in Canada)” (1995) 41:3 McGill LJ 629 at 642 [Borrows, “With or Without You”].

Moberly First Nations, a Dunne-Za and Nêhiyaw community.⁷ Reflecting on the creation and implementation of treaties, I applied the Narrative Analysis Method to engage with the issue.⁸ Drawing upon the work of Hadley Friedland and Val Napoleon, I use stories to articulate principles for the relationship between Indigenous peoples and the Canadian State.⁹

Following this introduction, the next section focuses on the Site C hydropower project as one example of how uncertainty about the scope of Treaty 8 rights has led to Indigenous laws and understandings about the treaty being ousted of decision-making processes about land and resources. The following section addresses the historical context of the negotiation, the promises included in the Treaty, and how the use of the territory by the Crown has amounted to a breach of treaty promises. Section four outlines legal principles through the analysis of Cree (Nêhiyaw) and Dunne-Za stories about agreements between humans and animals. Section five explores the nature of treaties and their necessary components through the framework of relationality. And finally, section six draws on various Indigenous legal orders to explore how the relationship between humans and non-human beings must guide treaty relationships between Indigenous governments and the Crown.

II. Site C Dam and Treaty Infringement

The story of the approval of the Site C hydropower dam, proposed and built by BC Hydro, offers some insight into how Canadian governments and courts have interpreted numbered treaties, particularly Treaty 8, and what constitutes a breach of treaty promises. Whereas Canada and British Columbia formed a joint review panel to assess the project's impacts, including the effects on

7 The research aims to support West Moberly First Nations in articulating their laws, especially focusing on natural law as one of the sources of their Dunne-za and Cree legal orders, and how they inform the relationship with the non-human world, their obligations, and their rights. The project is part of the work of the West Moberly Historical Society, led by community member Dean Dokkie. For this purpose, the First Nations' leadership and I have developed and signed a research partnership agreement. While this article expresses some of the research findings in an academic format, I have also developed a preliminary report based on the analysis of traditional stories and interviews with community members (Chief, Council, and knowledge keepers), which was discussed in a community workshop in July 2024. Part of the research findings are described in this article to illustrate the reality of one BC Treaty 8 First Nation, their understanding of the Treaty, and the process of revitalizing their Indigenous legal traditions. The other Treaty 8 First Nations in BC may have different understandings of the Treaty and the principles that should govern it.

8 See Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 16 for a description of the methodology created by Drs. Val Napoleon and Hadley Friedland.

9 Hadley Friedland et al, "Porcupine and Other Stories: Legal Relations in Secwépemcúlecw" (2018) 48:1 RGD 153.

Indigenous peoples' traditional practices, the terms of reference for the assessment excluded any consideration for impacts on Aboriginal or Treaty rights. The terms stated that the panel would not:

... make any conclusions or recommendations as to: a) the nature and scope of asserted Aboriginal rights or the strength of those asserted rights; b) the scope of the Crown's duty to consult Aboriginal Groups; c) whether the Crown has met its duty to consult Aboriginal Groups and, where appropriate, accommodate their interests in respect of the potential adverse effects of the Project on asserted or established Aboriginal rights or treaty rights; d) whether the Project is an infringement of Treaty No. 8; and e) any matter of treaty interpretation.¹⁰

Nonetheless, the panel concluded that the project would likely cause significant adverse effects on fishing opportunities and practices, on hunting and non-tenured trapping, and on other traditional uses of the land for First Nations, and that these effects could not be mitigated. In particular, the project would likely cause significant adverse cumulative effects on the current use of lands and resources for traditional purposes.¹¹

The Environmental Impact Statement prepared by BC Hydro before the appointment of the joint review panel had already recorded Indigenous people's concerns with the lack of acknowledgement and reparation of past grievances related to the WAC Bennett hydro dam, located in the same watershed.¹² This major development, built in the 1960s, had caused significant loss of hunting, fishing, and trapping grounds; loss of prehistoric and historic heritage resources; inundation of lands, homes, and burial sites; impacts on fish, wildlife, and vegetation; and impacts on hydrology and sedimentation.¹³ Indigenous communities had also indicated that changes in the Peace River and the decrease in availability and health of fish, wildlife, and plant resources due to a range of industrial activities in the region (e.g. oil and gas extraction) have impacted their ability to use the lands and resources for traditional purposes.¹⁴

10 *Agreement to Conduct a Cooperative Environmental Assessment, Including the Establishment of a Joint Review Panel, of the Site C Clean Energy Project* (2004) Appendix 1, Part II, s 2(5), online: <<https://www.iaac-aec.gc.ca/050/documents/54272/54272E.pdf>> [perma.cc/7KWM-JS7G].

11 *Report of the Joint Review Panel — Site C Clean Energy Project* (Federal Minister of the Environment and the British Columbia Minister of Environment, 2014) at 103, 109, 113, 120.

12 *Site C Clean Energy Project — Complete Environmental Impact Statement Including Amendments* (Impact Assessment Agency of Canada, 2013) at vol 1, s 9, appendix H at 223–224, online: <<https://www.iaac-aec.gc.ca/050/evaluations/document/88727>> [perma.cc/69W7-EN42].

13 *Ibid* at 12.

14 *Ibid* at vol 3, s 19 at 14.

A joint report by the federal and provincial governments on Site C consultation and accommodation procedures indicated that the scope and nature of the rights and obligations under Treaty 8 must be guided by the understandings and intentions of Indigenous parties and rules of treaty interpretation articulated by the Supreme Court of Canada.¹⁵ However, the report also stated that Treaty 8, much like other historic treaties, “had the effect of exchanging all undefined Aboriginal rights in or to the lands described, both surface and subsurface, for the defined rights in the treaty,” more specifically hunting, trapping, and fishing, subject to limitations of land “taken up from time to time for settlement, mining, lumbering, trading or other purposes.”¹⁶

Indigenous peoples challenged the understanding that, based on the Treaty, the Crown may unilaterally, through an administrative decision, take up land for development without justifying an infringement of their rights. Prophet River and West Moberly First Nations applied for judicial review of the Governor-in-Council’s decision to approve Site C dam.¹⁷ Although they argued that administrative decision-makers should have decided whether the Site C project infringed their Treaty rights before issuing the approvals, the provincial and federal courts held that discussions around unjustifiable infringement should be addressed in a separate action — not a judicial review of the decision to approve the project — and that a review panel had no power to address any matter of treaty interpretation.¹⁸ The Federal Court of Appeal held that it is not under the Cabinet’s jurisdiction to determine whether the project’s cumulative impacts amounted to an infringement of Treaty rights and that environmental assessment is an information-gathering process, not intended to determine Aboriginal or Treaty rights.¹⁹

West Moberly First Nations then issued a civil claim arguing Treaty rights infringement and requesting an interlocutory injunction to halt the project construction while the Court was dealing with the infringement claim.²⁰ With regard to the injunction, West Moberly contended that “despite the long history of regulatory review and litigation concerning the Project, no decision-maker yet has agreed even to consider, let alone resolve, whether the Project

15 *Federal/Provincial Consultation and Accommodation Report — Site C Clean Energy Project* (Government of British Columbia & Government of Canada, 2014) at 28.

16 *Ibid.*

17 See *Prophet River First Nation v British Columbia (Minister of the Environment)*, 2017 BCCA 58.

18 See *ibid* at paras 30–33; *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15 at paras 69–74.

19 See *Prophet River First Nation v Canada (Attorney General)*, *supra* note 18 at para 46.

20 *West Moberly First Nations v British Columbia*, 2018 BCSC 1835.

unjustifiably infringes West Moberly's treaty rights."²¹ The Court denied the injunction, however, holding that it "would be likely to cause significant and irreparable harm to BC Hydro."²² In June 2022, West Moberly entered into an agreement with BC to pause the civil claim on the matters related to the Treaty rights infringement and negotiate a "government-to-government solution."²³

These decisions reflect the courts' general understanding that the Crown is not required to demonstrate that a treaty right infringement would be justified under the *Sparrow* test before moving ahead with the proposed action,²⁴ in this case, the Site C dam, as long as the Honour of the Crown is satisfied through the duty to consult.²⁵ The Site C decision-making process exposes a gap between the Crown's and the Indigenous nations' understandings of the scope of Treaty rights and the level of protection that should be conferred by the courts. As indicated by Janna Promislow: "With the coercive force of the state behind it and the role of courts as public authorities, the narrative that emanates from courts has a controlling impact on the public history of treaties."²⁶ Reliance on the courts to uphold treaties as the intersection of legal orders has frustrated many Indigenous communities, such as in the Site C case study. This article's objective is to articulate and expose alternative narratives about Treaty 8 promises.

III. Treaty 8 Promises and Why They Are Important Today

Treaties between the British Crown and Indigenous peoples are a foundational piece of Canadian constitutionalism, providing legitimacy to the Canadian

21 *Ibid* at para 287.

22 *Ibid* at para 258.

23 "West Moberly First Nations, B.C., BC Hydro and Canada reach settlement related to the Site C project" (27 June 2022), online: *Government of BC* <https://www.archive.news.gov.bc.ca/releases/news_releases_2020-2024/2022EMLI0042-001009.htm> [perma.cc/XE3K-DZ7F].

24 Ryan Beaton, "Articles 27 and 46(2): UNDRIP Signposts Pointing Beyond the Justifiable-Infringement Morass of Section 35" (Centre for International Governance Innovation Special Report, 2018) 111 at 113. Beaton describes issues with the relationship between the duty to consult and justification of a rights infringement: "[I]n any given case where section 35 rights holders and the Crown disagree as to whether the Crown has fulfilled its constitutional obligations such that it can justify any infringements/adverse impacts on the rights in question, the Crown is allowed to act in the face of this disagreement. As a consequence, the section 35 rights holders carry the burden of bringing the matter to court if they wish to challenge the legality of the Crown's actions" (at 113). For another decision regarding consultation that portrays the same issue as in *Prophet River*, see *Pimicikamak et al v Manitoba*, 2018 MBCA 49.

25 *R v Sparrow*, [1990] 1 SCR 1075 at 1078; Rachel Gutman, "The Stories We Tell: Site-C, Treaty 8, and the Duty to Consult and Accommodate" (2018) 23 Appeal: Rev Current L & L Reform 3 at 5.

26 Janna Promislow, "Treaties in History and Law Special Issue: Law on the Edge" (2014) 47:3 UBC L Rev 1085 at 1087 [Promislow, "Law on the Edge"].

state and settlers' right to live on these lands.²⁷ As argued by John Borrows, the Royal Proclamation of 1763, in which the Crown affirmed that "unceded" Indigenous lands belong to Indigenous peoples,²⁸ must be interpreted in harmony with the Treaty of Niagara, an agreement that created a nation-to-nation relationship between settlers and First Nations, in which no party gave up their sovereignty.²⁹

The 1996 Royal Commission on Aboriginal Peoples ("RCAP") reported that "[t]he Aboriginal world view of a universal sacred order, made up of compacts and kinship relations among human beings, other living beings and the Creator, was initially reinforced by the Crown's willingness to enter into treaties under Indian protocols."³⁰ In fact, treaty relationships are sacred not only in many Indigenous legal orders but also in Canadian common law.³¹ Through treaties, the Crown and First Nations representatives established an interdependent relationship between settler and Indigenous laws. Surrendering land to the Crown and relinquishing control of traditional territories would not have made sense in a nation-to-nation agreement from the perspective of the Indigenous parties.³²

Situating the numbered treaties, including Treaty 8, in the context of treaty federalism and Canadian constitutionalism helps clarify their purpose and effects beyond the contingencies of the historical period when they were signed. The Supreme Court of Canada's decisions clearly state that the parties' intention when signing a treaty is fundamental to understanding the scope of the treaty rights that flow from it.³³ Additionally, the historical and cultural context of treaty negotiations, beyond the written terms of a treaty, should be considered in determining the promises made by the Crown to Indigenous peoples.³⁴

27 James Youngblood Henderson, "UN Declaration on the Rights of Indigenous Peoples and Treaty Federalism in Canada Special Issue: Treaty Federalism" (2019) 24:1 Rev Const Stud 17 at 19.

28 Government of Canada (Crown-Indigenous Relations and Northern Affairs Canada), "Royal Proclamation of 1763: Relationships, Rights and Treaties — Poster" (last modified 27 November 2013), online: <<https://www.rcaanc.cirnac.gc.ca/eng/1379594359150/1607905375821>> [perma.cc/9KT4-UVJZ].

29 John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 161.

30 *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 164–165 [emphasis added] [RCAP].

31 *R v Badger*, [1996] 1 SCR 771 at para 41.

32 RCAP, *supra* note 30 at 160–162.

33 *R v Sioui*, [1990] 1 SCR 1025 at 1035.

34 *R v Marshall*, [1999] 3 SCR 456 at para 82.

In 1899, the Crown signed Treaty 8 with Indigenous peoples and in following years many others adhered, all under the assurance that the agreement would protect their modes of life.³⁵ Until the 1870s, when rich minerals were discovered in the Athabasca-McKenzie region, the Crown was reluctant to negotiate a treaty with Indigenous peoples in the north.³⁶ But, according to Charles Mair's account, a representative of the Métis in the Treaty 8 negotiations, the discovery of gold in the Klondike region in the Yukon led the Crown to pursue a treaty to ensure the passage of gold seekers to the north.³⁷ He stated:

Recent events had awakened them [natives] to a sense of the value the white man was beginning to place upon their country as a great storehouse of mineral and other wealth ... with a view of developing, the minerals of Great Slave Lake, but, above all, the inroad to gold-seekers by way of Edmonton.³⁸

According to the text of Treaty 8, Indigenous peoples agreed to “cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits.”³⁹ The Crown would be able to “take up” tracts of land “from time to time for settlement, mining, lumbering, trading or other purposes.”⁴⁰

Despite the text of the Treaty emphasizing the transfer of land to the Crown, the literature widely supports the view that Treaty 8 First Nations believed they were signing a peace and friendship treaty and not a “surrender” agreement,⁴¹ as summarized by the RCAP:

Throughout the negotiation of the numbered treaties the commissioners did not clearly convey to First Nations the implications of the surrender and cession language in treaty documents. The discussion about land proceeded on the assumption, on the First Nations side, that they would retain what they considered to be sufficient land within their respective territories, while allowing the incoming population to share their lands. Many nations believed they were making treaties of peace and friendship,

35 Treaty No 8 (Made June 21, 1899 and Adhesions, Reports, etc.), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572>> [perma.cc/MJ6B-MLHP] [Treaty 8].

36 Dennis F K Madill, *Treaty Research Report Treaty Eight (1899)* (Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986) at 4 [Madill].

37 Charles Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899* (Toronto: William Briggs, 1908) at 24.

38 *Ibid.*

39 Treaty 8, *supra* note 35 at 8.

40 *Ibid.*

41 Patricia A McCormack, *Research Report: Treaty No. 8 and the Aboriginal Signatories of Northern Alberta* (Fort McKay First Nation, 2013) [McCormack]; Madill, *supra* note 36.

not treaties of land surrender. It is probable that treaty commissioners, in their haste to conclude the treaties, did not explain the concept of land surrender.⁴²

Sheldon Cardinal explained that the concept of surrendering land, which is a central element of Treaty 8's text, was foreign to Indigenous nations' ontologies: "It was the Treaty First Nations' belief that they had no right to sell the land. The Creator owns the land and we cannot sell what is not ours. As a result, our forefathers would have only agreed to share the land with non-Native settlers."⁴³ Additionally, surrendering land was never part of their diplomatic processes and their long experience negotiating treaties with neighbouring communities.⁴⁴

The report by the Treaty Commissioners to the Crown assured that the "Indians would be as free to hunt and fish after the Treaty as they would be if they never entered into it ... We assured them that the Treaty would not lead to any forced interference with their mode of life."⁴⁵ Historical evidence also shows that the Treaty Commissioners expected settlers to use a small portion of the land and not interfere with Indigenous use of the land.⁴⁶ Historian Patricia McCormack indicates that Indigenous communities agreed to share their traditional lands upon the "understanding that they would not be forced to change their way of life or their uses of their large territories, in order to guarantee that their preferred livelihood on all of their traditional lands would continue in perpetuity."⁴⁷ Treaty Commissioners were sure the Crown would have no issues in securing that promise for the future, and never anticipated that any future use of the territory would harm Indigenous people's ability to obtain their livelihood from the land.⁴⁸

In a discussion of the application of the principles for treaty interpretation articulated by the Supreme Court in the *Marshall#1* decision to Treaty 8 promises regarding the amount of land ensured to Indigenous peoples through treaty, severalty, and scrip, Catherine Bell and Karin Buss indicate that treaties

42 *RCAP*, *supra* note 30 at 172–173.

43 Sheldon Cardinal, *The Spirit and Intent of Treaty Eight: A Sagaw Eeniw Perspective* (University of Saskatchewan, 2001) [unpublished] at 17.

44 *Ibid* at 13–14; *RCAP*, *supra* note 30 at 119–120.

45 *Report of Commissioners for Treaty No. 8*. (Ottawa: Commissioners for Treaty No. 8, 1899), online: *Government of Canada, Indigenous and Northern Affairs Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572#chp4>> [perma.cc/K36A-HSWH]. The text of the Treaty is accompanied by this report by the Treaty Commissioners, who negotiated with Indigenous peoples on behalf of the Crown.

46 McCormack, *supra* note 41 at 5.

47 *Ibid* at 14.

48 *Ibid* at 40.

are “forward-looking with respect to setting aside land” for the purpose understood by the parties.⁴⁹ In their words:

Neither party anticipated time restrictions on the date this objective would be fulfilled ... The honour of the Crown requires that these unanticipated events be resolved in favour of the signatories to Treaty 8, and in a way that fulfills oral terms not included in the written text. This may mean implying a right to a land base sufficient in size to enable the contemporary band to survive as an economically self-sufficient entity.⁵⁰

In a 2024 decision, the Supreme Court unanimously confirmed that courts must apply the *Marshall* decision framework in interpreting treaties, first, by identifying the possible interpretations of the words of the treaty and, second, by considering those interpretations against the treaty’s historical and cultural backdrop.⁵¹

The historical context and the need to ensure that obligations continue over time imply that a treaty is an iterative process rather than one specific historical event, where adjustments must be made as needed.⁵² In this sense, the constitutional rights recognized through treaties are triggers for a “dialogue of democratic accountability,” as argued by Jennifer Nedelsky.⁵³ Therefore, the first moments of negotiation and the signature of a treaty are foundational legal facts, which must allow for unforeseeable changes to be addressed by the parties in the future.

Since the Treaty 8 agreements were finalized, much of the land has changed because of human settlements, infrastructure building, industrial developments, and resource extraction. Scholars have discussed how uncontrolled and unstructured industrial development in northeast BC in particular, without substantial consideration for cumulative impacts, has been harming the exercise of traditional practices and food access for Indigenous communities.⁵⁴ Interviews with Indigenous peoples of the region reveal details about the problems related to the cumulative effects of industrial development and the

49 Catherine Bell & Karin Buss, “The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises Perspectives on Marshall” (2000) 63:2 Sask L Rev 667 at 691.

50 *Ibid.*

51 *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at para 80.

52 Promislow, “Law on the Edge”, *supra* note 26 at 1122.

53 Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2012) at 232.

54 See for e.g. Caleb Behn & Karen Bakker, “Rendering Technical, Rendering Sacred: The Politics of Hydroelectric Development on British Columbia’s Saaghii Naachii/Peace River” (2019) 19:3 Global Env Politics 98.

long-lasting exclusion of First Nations from decisions on whether to approve infrastructure projects on treaty territory.⁵⁵

The RCAP report warned that “denials of the validity and importance of the treaties have denigrated Aboriginal peoples’ stature as nations and their substantial contribution to Canada. Unfortunately, non-Aboriginal people valued treaties as long as they continued to be useful.”⁵⁶ Though numbered treaties were designed by the Crown to ensure its right to land and natural resources, this fact does not invalidate those treaties’ relational and sacred nature. It makes a correction of purpose and focus even more necessary.

Evidently, the physical changes in the land that happened in the past 120 years were not accounted for when Indigenous peoples and the Crown agreed to sign Treaty 8. While the promise that Indigenous peoples would be able to continue their ways of life as if no treaty had been signed stands today, the practice of taking up land has not observed the purpose and the promises of the treaty. Also, the Site C case study and many other recent industrial projects in Treaty 8 demonstrate that the purpose of the Crown in ensuring natural resource extraction has not shifted since treaty negotiations. If treaties are reciprocal and relational agreements, respect for all parties’ values and principles must always be the guiding rule in how the Crown makes decisions about industrial developments in a *shared* territory. With this in mind, the next section will focus on Cree (Nêhiyaw) and Dunne-Za’s stories to articulate principles for a renegotiation and renewal of the reciprocal nature of treaties based on the relationship between Human and Animal Peoples.

IV. Reciprocal Relationship between Hunters and Animals

First, a note on an important lesson about analyzing Indigenous stories. Kirsten Anker warns that stories are not like other legal texts; they are not “autonomous products of the human mind” but “have emerged out of Indigenous peoples’ relations with their environments.”⁵⁷ Therefore, stories are inherently connected to the land, being “told in sensuous relationship *with* the land.”⁵⁸ They go

55 Rebeca Macias Gimenez, *Hydro Dams and Environmental Justice for Indigenous People: A Comparison of Environmental Decision-making in Canada and Brazil* (PhD Thesis, University of Victoria, 2021) at 205–224, online, <<https://www.dspace.library.uvic.ca/items/a85b6253-5f54-46ea-81bc-0ccf700aed4f>> [perma.cc/SF9D-GLC8].

56 RCAP, *supra* note 30 at 164–165.

57 Kirsten Anker, “Indigenous Law: What Non-Indigenous People can Learn from Indigenous Legal Thought” in Mariana Valverde et al, eds, *The Routledge Handbook of Law and Society* (Routledge, 2021) 37 at 41.

58 *Ibid.*

way beyond what our minds can capture about the interdependence between the land and all the beings that it shelters and feeds. For three summers now, I have been fortunate to visit the West Moberly community, build friendships, and learn from conversations and from being on their territory. But as an outsider, my understanding of this relationship (between people and land) is very limited, lacking their full experiential and spiritual aspects.⁵⁹

I should also note that even though I draw from traditional stories told by knowledge holders from other Nêhiyaw and Dunne-Za communities, those stories (sometimes parts of them or slightly different versions) are known by West Moberly members. Even on occasions where I had conversations with knowledge holders who said they had never heard of those stories, it became evident that the stories' principles were strongly present in their traditional practices.

This article engages with one Nêhiyaw and one Dunne-Za story and with conversations with West Moberly knowledge holders. These stories are a starting point for the discussion. The Nêhiyaw story is told as follows:

One night, a family of moose was sitting in a lodge. As they sat around the fire, a strange thing happened. A pipe came floating in through the door. Sweet-smelling smoke came from the long pipe and it circled the lodge, passing close to each of the Moose People. The old bull moose saw the pipe but said nothing, and it passed him. The cow moose said nothing, and the pipe passed her by also. So it passed by each of the Moose People until it reached the youngest of the young bull moose near the door of the lodge.

"You have come to me," he said to the pipe. Then he reached out and took the pipe and started to smoke it. "My son," the old moose said, "you have killed us. This is a pipe from the human beings. They are smoking this pipe now asking for success in their hunt. Now, tomorrow, they will find us. Now, because you smoke their pipe, they will be able to get us."

"I am not afraid," said the young bull moose. "I can run faster than any of those people. They cannot catch me." But the old bull moose said nothing more. When the morning came, the Moose People left their lodge. They went across the land looking for food. But

59 There might be a perception that the stories and teachings addressed in the article are full of metaphors because they are mostly related to Indigenous traditions. I would argue, though, that metaphors are embedded in and are pervasive in all traditions, including in Western legal thinking. Images such as the "living tree" and the "Crown" are a couple of them. Metaphors are not only helpful but necessary tools for communication, and must be interpreted in connection to the social and cultural practices that give them meaning. Additionally, it is important to be cautious not to label as metaphors what are actually legal facts in Indigenous legal traditions. For scholarly discussion about the pervasiveness of metaphors, see George Lakoff & Mark Johnson, *Metaphors We Live By* (London: University of Chicago Press, 2003).

as soon as they reached the edge of the forest, they caught the scent of the hunters. It was the time of the year when there is a thin crust on the snow and the moose found it hard to move quickly.

"These human hunters will catch us," said the old cow moose. "Their feet are feathered like those of the grouse. They can walk on top of the snow." The Moose People began to run as the hunters followed them. The young bull moose who had taken the pipe ran off from the others. He was still sure he could outrun the hunters. But the hunters were in snowshoes, and the young moose's feet sank into the snow. They followed him until he was tired, and then they killed him. After they had killed him, they thanked him for smoking their pipe and giving himself to them so they could survive. They treated his body with care, and they soothed his spirit.

That night, the young bull moose woke up in his lodge among his people. Next to his bed was a present given to him by the human hunters. He showed it to all of the others. "You see," he said. "It was not a bad thing for me to accept the long pipe the Human People sent to us. Those hunters treated me with respect. It is right for us to allow the human beings to catch us." And so it is to this day. Those hunters who show respect to the moose are always the ones who are successful when they hunt.⁶⁰

In applying the Narrative Analysis Method, I summarize some of the principles behind the responses of the agents in the story as follows. Human hunters prepare for the hunt, and part of this preparation is offering a pipe to establish a connection with the Animal People. The human hunters will know when the Animal People consent to give themselves to them when the animal smokes the pipe sent by the hunters. While the pipe established a relationship between the hunter and the young moose who smoked it, it also broadly created a relationship between the Human and Moose People. Smoking the pipe together is a political and diplomatic practice common in many legal traditions for establishing peace between different Peoples.⁶¹

After killing the young moose, the hunters thanked him for smoking their pipe and giving himself to them so they could survive. The body of the young moose provided food to the humans. The young moose came back to life in a different body because the hunters treated his body with care and respect and soothed his spirit. There is a relationship of reciprocity between the Human People and Moose People, which ensures the survival of both species. When

60 Herman J Michell, *Land-based Education: Embracing the Rhythms of the earth from an Indigenous Perspective* (Vernon, BC: J Charlton Publishing, 2018) at 25–26. The author is a member of the Barren Lands Cree Nation.

61 Heidi Kiiwetinepinesiiik Stark, "Changing the Treaty Question: Remediating the Right(s) Relationship" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 248 at 255–256.

the reciprocal relationship exists, the needs of all parts are satisfied. The parties have the autonomy to enter the relationship and to fulfill the terms of the agreement.

The second (Dunne-Za) story was told by Elder Charlie Yahey (Doig First Nation, Treaty 8) to anthropologists Robin and Jillian Ridington:

The word for vision quest in Dane-zaa Zdáǵé? Is Shin Kaa, which means “to seek a song of power from an animal friend.” Traditional hunters such as the Dane-zaa view animals as people with whom they must be friends to survive. Before a hunt, a hunter dreams to make contact with the spirit of the animal person that he wishes to bring home to his people. In his dream, he visualizes a place where his trail and that of the animal will come together ...

The Dane-zaa know animals as independent beings with their own wills and intelligence. Animals know when their bodies will be treated with respect and shared generously. The hunter and the animal accept each other’s gifts when their trails come together in the hunter’s dream. The hunter promises to respect the animal’s body and to share the meat generously. The animal promises to show up at the place where their trails come together, although the hunter must still use his skill and knowledge of the animal’s nature to complete their agreement. If the hunter fulfills its obligation, the animal’s spirit will ascend to heaven and return in another body.⁶²

As with the Young Moose story, there are principles from this story that are relevant to treaty interpretation and implementation. The crossing of paths between the hunter and the animal is a place of transformation. The animal is transformed into food and spirit and a different body. The hunter is transformed into a provider for the community. The hunter and the animal exchange promises. The former promises to respect the animal’s body and to share the meat generously. The latter promises to show up “at the place where their trails come together.” A relationship of trust between the Human People and Animal People creates reciprocity and ensures the survival of both species. The Dunne-Za know that animals are independent beings with agency to enter into agreements with the Human People.

After sitting with those stories for some time, I discussed them with a West Moberly hunter, Ryan Desjarlais. He said he had never heard those stories before, but as a hunter, he recognized that they expressed rules he knew he had to follow. Once someone in the community asks him to hunt an animal for their family, he always agrees. He harvests only what he needs, nothing more. He

62 Robin Ridington & Jillian Ridington, *Where Happiness Dwells: A History of the Dane-zaa First Nations* (Vancouver: UBC Press, 2013) at 45–46.

always shares the meat with other families in the community. He also makes a rule of sharing his knowledge with the younger members of the community. When he follows those principles, he is successful in finding the animal he is supposed to hunt. He knows where to go on the land to find the animal. Further, once he is able to kill the animal, he must follow a special protocol in recognition and gratitude for the animal:

After every harvest, once we get into the inner organs, that way we are taught, we take a tip of the heart, hang it to the north, offer tobacco, and we'll say our prayer, thanking the animal for giving itself to us, letting the animal spirit know that it won't go to waste, that the meat is there to feed families and help us stay alive and be healthy. We offer the tobacco and the tip of the heart and a prayer. The hunter that harvests the animal that's who does it. We don't have a certain person come out and do a ceremony. Whoever the trigger man is, the harvester of the animal is the one that will make the offering and say the prayer. (Interview on August 15, 2022)

Taking the tip of the heart as an offering is quite a meaningful practice. In most traditions, the heart represents our most profound being, sometimes interchangeable with the idea of the soul. "Giving one's heart" often means establishing a close connection of care, love, and interdependence. On the one hand, the hunters have clear responsibilities to their community — providing food and knowledge about the land and their practices. On the other hand, they owe responsibilities to the Animal People — treating them with respect, establishing a deep spiritual connection, and contributing to their bodies' transformation and renewal. Those obligations are at the core of the relationship. Reciprocity encompasses responsibility towards fulfilling one's obligations.

One of the lessons taught by West Moberly Elder Dean Dokkie is that all non-human beings were created before humans; therefore, they should all be considered our ancestors, as humans rely on them for survival.

[O]ur grandfathers are everything that was created before us. We know that we were created last, not first. ... Because we weren't here first, there would be nothing here, we would die ... it was like all the trees, all the animals, all that are all our ancestors, especially the animals ... It doesn't matter if it's us, trees, little plants, bugs, or all the animals, there's a reason why they're here. And they have a purpose. And we take from the animals, they give life, they give up their life to restore our life. Life for life. (Conversation on August 15, 2022)

Humans also fulfill their obligation in our relationship with non-human beings by protecting animal populations so that the Animal nations can continue to exist and thrive. One example is West Moberly's efforts to preserve herds of caribou on the verge of extinction. In 2011, the BC Court of Appeal ruled in

favour of West Moberly, finding that provincial government decisions to approve coal mining did not properly consider their right to hunt caribou as part of their traditional seasonal round and did not make adequate provision for the protection and restoration of those caribou, the Burnt Pine caribou herd.⁶³ The Court recognized that caribou was an important food source for the Dunne-Za, who “utilized all parts of the caribou, including the hide, internal organs, and bones[, using] ... these materials to make clothing, bags, and a variety of tools and utensils.”⁶⁴ But the WAC Bennett Dam and the Williston Reservoir, built in the 1960s, caused the caribou population of this region to decline significantly by cutting off traditional migration routes depriving them of their habitat. The Court not only recognized the importance of caribou as a food source but as part of Dunne-Za’s culture, identity, and way of life:

The Mountain Dunne-Za valued the existence of all species, including caribou, and treated them and their habitat with respect. They knew where the caribou’s calving grounds were, and where the winter and summer feeding grounds were located. The people felt and feel a deep connection to the land and all its resources, a connection they describe as spiritual. They regard the depopulation of the species they hunt as a serious threat to their culture, their identity and their way of life. Since about the 1970s, the West Moberly elders have imposed a ban on their people’s hunting of caribou. Where the caribou once existed in abundance, the Burnt Pine caribou herd, of concern in these proceedings, is said now to consist of 11 animals. The petitioners’ people recognize that unless the herd is protected and restored it is no longer possible to hunt these animals without risk of its extirpation.⁶⁵

Many West Moberly members still observe this ban not to hunt caribou (interview with West Moberly member Tamara Dokkie, August 16, 2022). The Nation has also been working to restore the populations of caribou through the Klinse-Za maternity pen in partnership with Saulteau First Nation. In 2014, the two Treaty 8 Nations took matters into their own hands and created the Klinse-Za maternity pen to protect the herds that were on the verge of extinction.⁶⁶

These stories and practices provide us with principles for treaty interpretation and renewal. Indigenous scholars have taken this path before by ac-

63 *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 2.

64 *Ibid* at para 23.

65 *Ibid* at paras 25–26.

66 West Moberly First Nations, Sulteau First Nations & Wildlife Infometrics, *Maternal Penning to Enhance Survival of Caribou within the Kinse-Za Herd* (West Moberly First Nations, 2022); Sarah Cox, “Up close with B.C.’s endangered baby caribou — and the First Nations trying to save them” (25 July 2020), online: *The Narwhal* <<https://www.thenarwhal.ca/bc-endangered-baby-caribou/>> [perma.cc/HSG3-DPEJ].

knowledging that agreements between Indigenous peoples and animals take precedence and must be respected in later agreements with the colonial states. Writing about Anishinaabe Chief Little Rock's speech in their negotiations with the United States in 1863, Heidi Kiiwetinepinesiik Stark explains that the Anishinaabe:

spoke not only for the land, but also for the newcomers to this land. We vouched for these newcomers. ... The animals created a relationship with Anishinaabe and took responsibility for our actions. We did the same for the newcomers when we negotiated treaties with the United States and the Crown.⁶⁷

John Borrows explores the treaty between the Anishinaabe and the deer through a story about Nanabush's disrespect for the agreement humans had with animals. The deer argued: "You have wasted our flesh; you have despoiled our haunts; you have desecrated our bones; you have dishonoured us and yourselves. Without you we can live — but without us you cannot live. We can live with or without you."⁶⁸ To make amends and restore balance in the relationship, the Anishinaabe should honour and respect the animals "in life and in death. Do not waste our flesh. Preserve fields and forests for our homes. Cease doing what offends our spirits."⁶⁹ While the animals and the land can live without humans, we cannot live without them. This is why this treaty is sacred and takes precedence over any other treaty that humans may enter into amongst themselves.

In the Nêhiyaw and Dunne-Za legal traditions, as shown in the stories and perspectives discussed in this section, the relationship between humans and animals is formed by collective agreements that generate responsibilities for all individuals who are part of this agreement. Similarly, individual actions have important implications for all members of the community. If the young moose had not warned his People of the transformation and the renewal he had experienced due to giving himself to the hunters, the Moose People would not have entered the treaty. If the hunter does not fulfill his obligations and observe the necessary protocol, he cannot provide for his community. If the human nations do not protect and conserve caribou herds, these might go extinct. Following the legal principles and obligations of all legal orders represented in the treaty ensures the survival and prosperity of all the people involved.

67 Stark, *supra* note 61 at 268.

68 Borrows, "With or Without You", *supra* note 6 at 651.

69 *Ibid* at 651–652.

Similarly, treaties between the Crown and Treaty 8 First Nations should be interpreted as the beginning of a relationship of interdependence with roots in natural and sacred laws of the Dunne-Za, Ne'hiyaw, and other legal orders.⁷⁰ Treaty 8 First Nations vouched for Canada before the Animal People, with whom they already had an agreement. They accepted Canada's offer to enter a treaty and assured the Animal People that this new agreement would respect the spiritual and natural laws that were already in place in that land, following relationality principles, as discussed in the next section.

V. Treaties as Relational Institutions

It seems obvious that, in establishing a treaty relationship, a primary task is to decide who has the power to define the terms of the agreement, who is subject to the agreement, and what rights and obligations each party is bound to. Questions about the intersection between the autonomy of the individuals involved and how they bind themselves to a collective promise are challenging and have practical effects on the lives of Indigenous peoples who have entered treaties with the state. Particularly in a historical treaty context, the focus on exchanging land for the rights to hunt, trap, and fish has been detrimental to the relationship. Careful consideration of how much land and what specific tracts of land Indigenous peoples need to “meaningfully exercise” their rights is still the courts' main concern when examining claims regarding the violation of treaty promises.⁷¹

But in this approach, very little or no consideration is given to the interdependence between Indigenous peoples, land, and animals, and even less to settlers' dependence on the lands and animals that First Nations have committed to protect. Little do we acknowledge that our existence as humans heavily relies on fulfilling treaty promises and recognizing that Indigenous treaties with animals and the land have sustained all of us humans. But as the philosopher and theorist James Tully argues, reconciliation is a process that necessitates precisely such acknowledgement, and that necessitates reconciliation between humans and the Earth as much as between humans.⁷²

70 See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 24–35 for sources of Indigenous law, including natural and sacred law.

71 See e.g. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69; *West Moberly First Nations v British Columbia*, 2018 BCSC 1835; *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470.

72 James Tully, “Reconciliation Here on Earth” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 83.

Here, I outline three aspects of the relational character of treaties. First, treaties are always collective, and they rely on how each nation will internally organize itself to represent, in the best way possible, the desires of its members. The second aspect is that this agreement does not end with the biological lives of the individuals who signed the treaties and the ones that were represented in the agreement at that moment in history. Treaties are meant to last, most often for an indefinite period of time. The challenge is how to create procedures to renew and adjust the treaty's terms as each party's desires and needs change. A third aspect refers to ensuring that treaties observe overlapping legal orders and not only define and impose rights and obligations from one party to the other.

Regarding the first aspect, about the collective character of treaties, it is crucial first to acknowledge that all individuals are part of a network of relationships.⁷³ Even though law often protects individual interests through institutions like contracts, property, and rights, it is evident that those interests must coexist with collective interests. This balance is necessary for living together. We need other humans in most aspects of our lives, from feeding ourselves through educating our children to keeping our communities safe. Jennifer Nedelsky argues that “the human subjects of law and government are not best thought of as freestanding individuals who need protection from one another.”⁷⁴ Rather, our individual rights and the boundaries between us and others should be seen as “a particular set of decisions that stands in a special relation to other decisions.”⁷⁵ The collective nature of treaties stems from their relational character and requires the application of relational values.

This relational character is not limited to the interaction between individual humans but extends to our interaction with the non-human world. For example, the Métis scholar Zoe Todd explores the relationship between humans and fish. As she writes, fish have born “witness to the colonial relations that humans experience and resist.”⁷⁶ In this sense, it is not only Indigenous peoples who are directly and deeply affected by the Crown's incursions to “open land for settlement, immigration, trade, travel, mining, lumbering and such other purposes.”⁷⁷ The Animal People and the land are also affected and, therefore, are also part of this legal and constitutional relationship.

73 Nedelsky, *supra* note 53 at 19.

74 *Ibid.*

75 *Ibid* at 108.

76 Zoe Todd, “Refracting the State Through Human-Fish Relations: Fishing, Indigenous Legal Orders and Colonialism in North/Western Canada” (2018) 7:1 Decolonization: Indigeneity, Education & Society 60 at 61 [Todd “Refracting”].

77 *Treaty 8, supra* note 35.

Regarding the second aspect of treaties, their long-lasting character, it is necessary to consider that changes will happen to the circumstances of the nations that entered treaties. The representatives of the nations who signed treaties will not, and should not, be able to foresee all the possible changes that may occur. When nations entered Treaty 8, it was unimaginable that societies would need (or desire) so much energy and so many resources to survive. They did not imagine they would be surrounded by hydropower dams or oil and gas power plants. It is unfair that settler governments ask Indigenous peoples and non-human peoples to bear the burden of that demand by allowing more and more land to be consumed by industry.

In her approach to relationality, Jennifer Nedelsky highlights the significance of establishing mutual commitments, including binding oneself to future joint actions and restrictions. This issue is present in all aspects of drawing constitutional limits on democratic decision-making.⁷⁸ “How is it that one decision can control future decisions? What sets the initial ‘boundary-setting’ decision apart? How do we know which things belong in which decision-making category?”⁷⁹ For Nedelsky, this aspect of drawing group boundaries is an “issue of constitutional politics — the basic problem of self-limiting government.”⁸⁰ Treaties require that nations self-limit their powers for present and future decisions. An important question, thus, is whether settler governments have actually limited their powers for the sake of a healthy relationship with Indigenous and non-human nations. Therefore, mutual commitment and self-limitation by both parties are necessary components of a treaty.

Finally, a third aspect of treaties is the necessary overlapping of legal orders. Moving our attention back to the Nêhiyaw and Dunne-Za stories, we notice a series of rules that must be followed for the relationship to stay balanced and for each nation (the Human and the Animal) to be able to sustain itself and thrive. Of course, each legal order has different rules and different intellectual processes for developing and applying those rules. Processes for making, understanding, and applying law can be complicated, especially if we are not embedded in the same social, cultural, ontological, and epistemological context as the group we are creating an agreement with.

Zoe Todd provides a wonderful metaphor for the relationship between humans and fish, mediated by water refraction, which is helpful for understanding the necessary interactions with the other party’s legal order.

78 Nedelsky, *supra* note 53 at 106.

79 *Ibid.*

80 *Ibid.*

The way fish see us, up here in our “air world,” is refracted by the water. And the way we see fish is also refracted by the water — things are not always what they seem. We have to adapt our actions to the water interface in order to actually catch a fish — to actually physically interact with a fish. So, refraction as a physical imperative creates conditions that are complex and require care and skill to navigate the boundaries between interfaces and I see this as an apt metaphor to also query and understand the complex and dynamic interface between Indigenous legal orders and the State.⁸¹

We have to adapt our actions to the interface of the other, of the one we are entering a treaty with. This can be understood as a call to consider how the lives of others will be affected, but beyond that, it can be a warning that in agreements as deep and long-lasting as treaties, it is necessary to “dive into each other’s interface.” Historical treaties with Indigenous peoples require that Indigenous legal traditions be known and applied in all issues that arise pursuant to the treaty relationship. As argued by Chickasaw and Cheyenne scholar James [sákéj] Henderson: “Without a proficiency in indigenous worldviews, languages, rights and treaties, the Canadian legal system cannot equitably talk about authentic democracy.”⁸²

With that said, the next section will move onto an exploration of what the Animal People can teach us about how settlers and settler governments can engage with Indigenous law to foster a healthy and renewed treaty relationship. I use the work of Darcy Lindberg on Nêhiyaw law, Vanessa Watts on Anishinaabe and Mohawk law, and Alan Hanna on Tsilhqot’in law to inform an overlapping of legal orders may take place in a renewed Treaty 8 framework.

VI. Indigenous Law and Treaties

One question I faced when thinking about Indigenous hunting stories in a treaty context was: “How do we know the animals really agreed to give themselves to sustain humans? This does not seem a choice that benefits animals at all!” I believe this question must be answered by turning to Indigenous legal traditions as the source of the principles that govern the relationship and the context where that relationship is materialized.

Nêhiyaw legal scholar, Darcy Lindberg, writing about Nêhiyaw legal pedagogy, warns that “[t]here is the temptation to limit the use of Indigenous law to the forms that are best cognizable by Canadian jurisprudence, while discarding the parts that are unintelligible or untranslatable to current Canadian-state

81 Todd, “Refracting”, *supra* note 76 at 67.

82 James Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58:2 Sask L Rev 241 at 245.

legal procedure.”⁸³ Especially when thinking of hunting practices and stories, it can be a challenge to grapple with concepts such as death, violence, and animals giving themselves to die. Lindberg offers a Nêhiyaw legal perspective by looking at hunting as a process of establishing reciprocity. The actual killing of an animal is simply the culmination of a process that begins with dreaming about the animal and the place where the animal and hunter will meet.⁸⁴

In the Nêhiyaw legal order, Lindberg argues that living in a “lawful” manner within pimatisiwin is to live one’s life in a manner that braids together the legal teachings one continues to observe and attain in one’s life, both for personal and collective strength.”⁸⁵ Jim Webb, a long-time member of West Moberly by marriage, explained that pimatisiwin is a Nêhiyaw organizing principle as it relates to the consequences, enforcement, and teaching of natural law. It refers to the set of relations between an individual and all their relations, both human and non-human beings (plants, rocks, animals, etc.). It stands for the idea that humans are not the masters of anything and do not own anything. Pimatisiwin animates “reciprocal obligations [between relatives] in that [they] are necessary ... to sustain our way of life and grow our families” (conversation on July 30, 2023, at West Moberly First Nation).

Pimatisiwin is closely intertwined with the concept of wahkohtowin. Lindberg draws upon Friedland’s research to explain that wahkohtowin refers to “each individual existing and inextricably connected within a network of relationships” and is a concept that “informs and permeates Cree legal thought and practice.”⁸⁶ Harold Cardinal taught that “when our Elders lifted the pipe, when our Elders used the sweet grass, when our Elders used the ceremonies to go into a treaty-making session,” they were “giving life and physical expression to the doctrine of Wa-koo-towin, the kind of relationship that they were under an obligation to extend to and enter into with other peoples.”⁸⁷ Therefore, in Nêhiyaw law, one must live in balance and care with their network of relation-

83 Darcy Lindberg, “Nêhiyaw Hunting Pedagogies and Revitalizing Indigenous Laws” in Heidi Kiiwetinewinipinesik Stark, Aimée Craft & Hókūlani K Aikau, eds, *Indigenous Resurgence in an Age of Reconciliation* (Toronto: University of Toronto Press, 2023) 112 at 112 [Lindberg, “Nêhiyaw Hunting Pedagogies”].

84 *Ibid.*

85 Darcy Lindberg, “Miyo Nehiyawiwin (Beautiful Greeness): Ceremonial Aesthetics and Nehiyaw Legal Pedagogy” (2018) 16/17:1 *Indigenous LJ* 51 at 55 [Lindberg, “Miyo Nehiyawiwin (Beautiful Greeness)”].

86 *Ibid.* at 56; Hadley Louise Friedland, “Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada” (2016), online: <<https://www.era.library.ualberta.ca/items/48bb0f25-2b18-4596-a73a-4b5915211ee1>> [perma.cc/DND5-CNQU] at 165.

87 Harold Cardinal, “Nation-building as Process: Reflections of a Nihiyow (Cree)” (2007) 34:1 *Can Rev Comparative Literature* 65 at 74–75.

ships, including animals, plants, and rocks. As Sheldon Cardinal (Harold's son) pointed out, First Nations were not and are not free to extinguish wahkohtowin; they are bound by their obligation to the land and the Creator.⁸⁸

Emmeline English and Alan Hanna, writing on Tsilhqot'in law through the lens of contract, argue that "[i]n many Indigenous societies, ontological understandings place people within a complex matrix of relations both living and non-living, depending on how *the living* are defined."⁸⁹ From this perspective, the relationship between animals and humans is one of interdependence, not hierarchy.⁹⁰ As an illustration of this, English and Hanna analyze a Tsilhqot'in story in which Lendix'tcux (a proxy for the Human People) entered into an agreement with the moose. The moose would give food to Tsilhqot'in peoples in exchange for humans ensuring the life of moose populations in perpetuity.⁹¹ Both Lendix'tcux's descendants and the moose's descendants are bound by the agreement, which results in balance and sustainability, where both nations ensure the existence of many generations to come. The hunter's obligation is to let the moose live, which is a responsibility not restricted to the particular relationship between one moose and one hunter, but encompasses the whole community, "protecting moose habitat and ensuring a healthy moose population through legal practice, such as defining limits according to their law."⁹² In this respect, from the perspective of Indigenous law, the hunter believes that the moose is consenting. It is sufficient for the hunter and their community to see the positive results of enacting Indigenous law — the provision of food and the maintenance of sustainable and healthy populations of moose — and to believe consent has been given.⁹³

With the same relational approach, The Mohawk/Anishinaabe scholar, Vanessa Watts, applies the concept of Place-Thought, explaining that "habitats and ecosystems are better understood as societies from an Indigenous point of view; meaning that they have ethical structures, inter-species treaties and agreements, and further their ability to interpret, understand and implement."⁹⁴

88 Cardinal, *supra* note 43 at 23.

89 Emmaline English & Alan Hanna, "Can a Moose Be a Party to a Contract? Nuanced Spaces for Indigenous Perspectives in Canadian Contract Law" (2023) 109:2 SCLR 129 at 130–131 [emphasis in the original].

90 *Ibid.*

91 *Ibid* at 134.

92 *Ibid* at 135.

93 *Ibid* at 136.

94 Vanessa Watts, "Indigenous Place-Thought and Agency Amongst Humans and Non Humans (First Woman and Sky Woman Go On a European World Tour!)" (2013) 2:1 Decolonization: Indigeneity, Education & Society 23.

Animal peoples are active members of those societies, with agency and capacity to consent, and they affect directly how humans organize themselves. She continues: “as Indigenous peoples, we are extensions of the very land we walk upon, then we have an obligation to maintain communication with it.”⁹⁵ Watts argues that humans are made from the land; we are an extension of the soil, and “[i]f I, as a human, am made of the stuff of soil and spirit, do I not extend to the non-human world beyond causal interactions?”⁹⁶ Therefore, the relationship between Animals and Humans is much more complex than one encounter between a hunter and an animal, encompassing the overall relationship with the land and being transformed and renewed, just like every being, when transubstantiated from flesh to dust.

Here I would like to address an argument by Muscogee Creek-Cherokee scholar Craig Womack with respect to his personal experience with hunting as an Indigenous person. Womack argues that “[i]f somebody shoots me with a high-powered rifle, I’m not going to like it no matter how many prayers and ceremonies the guy does before he pulls the trigger. For me there is no longer any respectful way to kill an animal.”⁹⁷ He continues, “[t]he prayers and ceremonies do something for us, not the deer, at the very least not the same thing for the deer, and there is no way to escape the fundamental inequity of the relationship.”⁹⁸ I believe this point requires a return to Lindberg’s argument that meaningfully engaging with Indigenous legal orders cannot be done by picking and choosing “the best meat.” Stories (including personal reflections such as Womack’s) are located within a much broader “constellation,” where “other legal institutions like ceremonies and language can offer deeper knowledge into the legal principles and can help describe specific obligations attached to the legal principle.”⁹⁹ The discussion of animals having agency to enter into agreements and all human and non-human beings living in reciprocity is better understood when analyzed in the context of the legal order and traditions where that relationship exists.

Womack ultimately suggests that it is time for Indigenous peoples to have a new relationship with tradition by avoiding hunting.¹⁰⁰ Of course, not all Indigenous individuals should adhere to hunting practices or eat meat if they

95 *Ibid.*

96 *Ibid* at 27.

97 Craig Womack, “There is No Respectful Way to Kill an Animal” (2013) 25:4 *Studies in American Indian Literatures* 11 at 12.

98 *Ibid.*

99 Lindberg, “Néhiyaw Hunting Pedagogies”, *supra* note 83 at 117.

100 Womack, *supra* note 97 at 26.

do not wish to do so due to personal convictions. Entire Indigenous communities may want to review their hunting traditions and create new ones if they think it important. But it is important to notice that tradition is a materialization of a deeper, more complex and nuanced system, in which humans and non-human animals are only single parts. While traditions may change, reciprocity arrangements are always necessary, as all individuals rely on the land and non-human beings for survival. In this regard, Watts argues that animals and humans live in a permission-based relationship that determines the rules for how humans and other-than-humans will exist within a particular society.¹⁰¹

A final issue to tackle in this section is the presence of death and violence in the stories and practices mentioned before, where death is a productive force and not the end of existence. This can also serve as a metaphor for the transformations that happen through treaties and during the renewal of treaties. Lindberg acknowledges “the necessity of force that sometimes accompanies needed transformations within *nêhiyaw pimatisiwin* (Cree way of life), and how this transformational force is required in the day-to-day lives of people within all societies. We use transformational force every day for survival.”¹⁰² The fact that we all live on Indigenous lands proves that we rely on reciprocal relationships, and the ideals that contour this relationship are balance, respect, and care. We know from history, though, that the relationship became predatory and abusive towards Indigenous peoples. Here is where the metaphor of death may be of great relevance, where abusive relationships die, and new ones arise, for the balance in treaties between Indigenous nations and the Crown to be restored (or possibly reached for the first time).

The idea of treaties with animals and the land is present in many Indigenous legal orders and may offer us important lessons for how treaties between settler and Indigenous governments should take place. Treaties between Indigenous and Animal nations encompass principles such as interdependence and reciprocity and acknowledge that humans are dependent on the land and their beings and have sacred obligations to protect other species. Echoing Dean Dokkie’s lesson about human reliance on all non-human beings, Watts explains that in many Indigenous traditions, humans were the last species created and included in the land society, arguing that the “inclusion of humans into this society meant that certain agreements, arrangements, etc. had to be made

101 Vanessa Watts, “Growling Ontologies: Indigeneity, Becoming-souls and Settler Colonial Inaccessibility” in Kelly Struthers Montford & Chloë Taylor, eds, *Colonialism and Animality* (New York: Routledge, 2020) 115 at 125.

102 Lindberg, “Nêhiyaw Hunting Pedagogies”, *supra* note 83 at 113.

with the animal world, plant world, sky world, mineral world and other non-human species.”¹⁰³ As settlers entered into treaties with Indigenous peoples in North America, the original obligations to land and their beings were extended to the newcomers.

Those obligations have not been properly respected in relationship with the Indigenous legal orders and institutions where they have existed, leading to unbalanced and unfair relationships. In Lindberg’s words, “[a] normative approach to Nêhiyaw legal ordering requires a relationship with the institutions of Nêhiyaw law, like ceremony, family, language, and land-based teachings, to identify legal practices that are invariably bound with other social norms.”¹⁰⁴ If this relationship is not observed, or in Todd’s metaphor, if we do not “dive into the interface” of the people we enter into treaty with, the “myopic view of reciprocal obligations to the people, beings, and institutions” will continue to inform how settler law operates.¹⁰⁵

Particularly regarding the implementation of treaty promises in decisions about land and resources, Canadian law must recognize governments’ obligations to observe Indigenous laws, not in a piecemeal fashion by picking and choosing certain principles and obligations to absorb but through careful and deep consideration of Indigenous legal orders and institutions. The application of Indigenous laws in these decisions requires more than Indigenous consent to individual projects outside of the context of a treaty relationship. As with the relationship between humans and animals, consent is an ongoing and deep connection that is realized through mutual obligations and equal power to make decisions about the future of the nations who entered the treaty. Treaty 8 First Nations are developing various projects to articulate and revitalize their laws, such as the work of the West Moberly Historical Society, which was the inspiration for this article. Implementing this knowledge in joint environmental decision-making with the direction of Crown and First Nations representatives would be one starting point to uphold reciprocity in the treaty relationship. With this in mind, the next section explores how the *Yahey* BC Supreme Court decision may open space for dialogue about the scope of treaty rights and the future of environmental decision-making in the BC Treaty 8 context.

103 Watts, *supra* note 94 at 25.

104 Lindberg, “Miyo Nehiyawiwin (Beautiful Greeness)”, *supra* note 85 at 55.

105 Todd, “Refracting”, *supra* note 76; Lindberg, “Nêhiyaw Hunting Pedagogies”, *supra* note 83 at 5.

VI. Treaty 8 Rights: Triggers for Democratic Dialogue

On rare occasions, courts have momentarily shown awareness of the relational character of treaties, and have upheld rights that serve as triggers for democratic dialogue, as indicated by Nedelsky.¹⁰⁶ The *Yahey* case, filed by Blueberry River, a Treaty 8 First Nation in BC, was one of those instances.¹⁰⁷ The BC Supreme Court decision recognized that in a long-term relationship, where the land has gone through so much change with industrial developments, concepts such as the treaty rights to hunt, gather, and fish require expansion from their narrowest sense of protecting individual practices to providing conditions for the maintenance of collective practices in a continual and sustainable way. The decision means that, in circumstances where rights recognized through treaties are being historically and continuously infringed by the cumulative impacts of development, the Crown has an obligation to review and adapt its regulatory processes. The existence of a treaty inevitably imposes an obligation on the Crown to revise its environmental regulatory framework, ensuring the protection of Indigenous ways of life, as industrial growth, settlement, and proposed infrastructure represent increasing threats to the exercise of Treaty rights.¹⁰⁸ The *Yahey* decision is in plain contrast with the *Prophet River* decision, which avoided the discussion about treaty rights infringement by focusing on the duty to consult and the Crown's discretion to make unilateral decisions about land.

The *Yahey* decision included relevant declaratory remedies that should contribute to pushing provincial governments to act preventively to avoid cases of Treaty rights infringement. One of those declaratory remedies is: "The Province may not continue to authorize activities that breach the promises included in the Treaty, including the Province's honourable and fiduciary obligations associated with the Treaty, or that unjustifiably infringe Blueberry's exercise of its treaty rights."¹⁰⁹ A second declaratory remedy may lead to the Crown seeking to integrate Indigenous peoples' principles of governance over lands and resources in their regulatory frameworks: "The parties must act with diligence to consult and negotiate for the purpose of establishing timely enforceable mechanisms to assess and manage the cumulative impact of industrial devel-

106 Nedelsky, *supra* note 53 at 232.

107 *Yahey v British Columbia*, 2021 BCSC 1287 [*Yahey*].

108 See Robert Hamilton & Nicholas P Ettinger, "The Future of Treaty Interpretation in *Yahey v British Columbia*: Clarification on Cumulative Effects, Common Intentions, and Treaty Infringement" (2023) 54:1 *Ottawa L Rev* 109 for a detailed explanation of how the decision is situated in the evolution of the treaty rights doctrine, in particular the importance of analyzing Indigenous ways of life in determining whether an infringement has occurred.

109 *Yahey*, *supra* note 107 at para 1888(3).

opment on Blueberry's treaty rights, and to ensure these constitutional rights are respected."¹¹⁰

This case represented a shift from focusing on the single moment an Indigenous individual was prevented from exercising a treaty right or justification of rights infringement to concerns regarding the future of a community and their participation in creating the rules on how/when the parties to the treaty should/could use the land. In contrast to a pure rights approach, the relational component of treaties allows for flexibility on how the rights will evolve over time and encompasses the obligation to live in balanced relationships with the non-human world.

The recognition that Indigenous ways of life were intended to be protected through Treaty 8 is a significant step in Canadian law. Nonetheless, it is important to consider this approach cautiously to avoid freezing "Indigenous ways of life" in time by confining them to the activities practised at the time of the agreement, as the courts and the Crown have when interpreting the text of Treaty 8. First, Indigenous peoples may have been prevented from engaging in certain activities embedded in their ways of life due to unilateral decisions by the Crown about treaty lands. Second, as "Indigenous ways of life" are enmeshed in Indigenous legal traditions, they may only be recognized through engagement with Indigenous institutions, such as stories, ceremonies, language, and land-based teaching. They are not mere evidence or facts to be considered in court but are sources of Indigenous peoples' authority over their territories. Therefore, an obvious forward-looking solution would be applying the principles of reciprocity, autonomy, and interdependency present in the Dunne-Za and Nêhiyaw stories described above to lead the renegotiation and renewal of Treaty 8 to recognize Indigenous jurisdiction over traditional territories and their resources. While the novel *Yahey* decision recognized that Indigenous ways of life are central to defining treaty rights infringements, the hard work of engaging with Indigenous legal orders so that they shape environmental decision-making is still in its early stages.

Outside the court, the decision has guided an agreement between Blueberry River First Nation and the province of BC,¹¹¹ as well as agreements between the province and other First Nations in the region.¹¹² According to

110 *Ibid* at para 1888(4).

111 British Columbia & Blueberry River First Nation, *Blueberry River First Nation Implementation Agreement* (2023).

112 Giuseppe Amatulli, "Implementing UNDRIP in British Columbia in a Post-*Yahey* Context: What to Expect After the *Yahey v BC* Litigation (S151727) and the Agreement on Industrial Development and

the Blueberry River agreement, the province must provide restoration funds for the First Nation and take an ecosystem-based management approach for future land-use planning in sensitive areas for the Blueberry River Nation.¹¹³ The province must also obtain consent from the First Nation to approve industrial activities in certain areas of their territories, and specific areas of importance for the Blueberry River are protected from all kinds of industrial development.¹¹⁴ The letters of agreement that BC signed with the other four Treaty 8 First Nations anticipate that the parties will create shared decision-making, natural resource, and landscape pilots.¹¹⁵ Those agreements have the potential to contribute to a renewal of the treaty relationship, especially in a region where First Nations' decision-making options have been historically limited to impact benefit agreements and financial compensation for impacts on their ways of life.¹¹⁶

Even though spaces for dialogue such as the ones created by those agreements are welcome, they are ineffective if they do not serve as spaces to engage with the Indigenous legal orders represented in the agreements. The Crown could comply with Indigenous law by implementing the principles documented by First Nations through their Indigenous law revitalization initiatives and by creating joint decision-making bodies in which Treaty 8 First Nations representatives have the same power as Crown representatives. Those two actions could be the starting point of a renewal of the treaty relationship.

VII. Conclusion

The principles of reciprocity, interdependency, and autonomy sound attractive and fit well with colonial governments' proposals for "collaboration" and "partnership" with Indigenous nations in environmental and natural resources decision-making. However, they will only serve their full purpose of transforming and renewing the treaty relationship if colonial governments are open to letting themselves be led by Treaty 8 First Nations laws, including their values of belonging to and relying on the land and non-human beings.

Treaties between Indigenous and Animal nations embrace reciprocity, autonomy, and acknowledgement that humans depend on the land and their

Cumulative Effects Management" (2023) 14 Arctic Review 132.

113 Amatulli, *supra* note 4.

114 See e.g. British Columbia & Blueberry River First Nation, *supra* note 111, ss 7(3), 14(4).

115 *Letters of Agreement between British Columbia and Treaty 8 First Nations* (2023).

116 See Dayna Nadine Scott, "Extraction Contracting: The Struggle for Control of Indigenous Lands" (2020) 119:2 South Atlantic Quarterly 269 at 278–279.

beings and have sacred obligations to protect other species, such as the burnt pine caribou protected by West Moberly and Saluteau First Nations. Treaties between settler governments and Indigenous peoples need to be transformed from their colonial design (open land for settlement and “development”) to better reflect the interdependent relationship between humans and animals (and all the non-human world).

However, the main issue embedded in this relationship is how to realize and operationalize overlapping legal orders represented in a treaty through decisions about how to use land and its resources. As argued by Lindberg, this requires a deep engagement with Indigenous legal orders through their own institutions, such as ceremony, family, language, and land-based teachings.¹¹⁷ The overlapping of legal orders will not occur through consultation processes, court decisions about the infringement of Treaty rights, or by the signing of agreements that mirror the colonial legal orders. The agreements triggered by the *Yahay* decision, especially the ones that have anticipated the creation of shared decision-making frameworks, could serve as the means to allow deeper interaction and understanding of Indigenous legal orders. But this will occur only if community-centred initiatives to revitalize those Indigenous legal orders are at the core of this process and if the Crown recognizes First Nations’ authority to make decisions.

117 Lindberg, “Miyo Nehiyawiwin (Beautiful Creeness)”, *supra* note 85 at 55.