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The History and Promise of Shared Space in a Section 35 World

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Chapter 9

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When non-Indigenous people made their way to North America, both conflicting and complementary social norms existed between explorers and the land's original inhabitants.[1] Capable of agreeing with, often challenging, and regularly borrowing each other's ideas, people of early post-contact times demonstrated how they could have different values and processes but could still cooperate. So while colonialism certainly stifled, if not terminated, some Indigenous processes, local concepts still often prevailed and governed all those who inhabited a space—including the non-Indigenous. Canada's post-contact past is as much about the adherence to Indigenous jurisdiction as it is about an external force's interpretation of sovereignty.

As non-Indigenous adherence to Indigenous ways happened, another nuance maintained itself. As Indigenous peoples had obviously organized relations with each other prior to contact with Europeans, different Indigenous nations continued their inter-nation relations post-contact. Through family, community, clan, and national understandings of laws, economic circumstances, and spiritualism, Indigenous individuals and their nations developed their own sets of processes and those systems continued in tandem with, and independent of, any relations with non-Indigenous parties. Those links happened at a personal level and all the way "up" to social understandings of nationhood. Each culture's ways had their own specific form and sometimes those qualities could be observed within another nation. But whatever the case, as more non-Indigenous arrivals made their way across the continent the inter-Indigenous existences continued in the meantime.

My remarks here are about that "meantime". Today, the existence of rights for Indigenous peoples within the confines of Canada's legal system is possible via section 35 of the *Constitution Act, 1982*. It seems to me there is much to learn about inter-Indigenous times and how those relations have their own interaction with the Canadian legal discourse regularly used by Indigenous parties.

1 See Ann M Carlos & Frank D Lewis, "Marketing in the Land of Hudson Bay: Indian Consumers and the Hudson's Bay Company, 1670–1770" (2002) 3:2 Enterprise & Society 285 at 311–14.

To dig deeper into inter-Indigenous history and modern constitutionality, I propose using one example to learn about various matters such a history invariably includes. Learning more about this scenario, this chapter reflects on how its form compares to overarching trends,[2] and then contemplates how a consideration of shared space(s) can show us more about "forging and maintaining respectful relationships."[3] The history of inter-Indigenous roles can help shape how overlapping conditions can be better acknowledged (and even encouraged). Going beyond conventional phrases such as "shared sovereignty"[4] or "we are all here to stay",[5] the inter-Indigenous sharing of space reveals respect, problem-solving, and rule-making from the most personal relations to the most impactful reinforcement of cultural identity. In addition to their value in Indigenous relations, they can be (and are) either acknowledged or implicitly assumed in conversations about constitutionalism. As I show, one consequence of this analysis is that land "title" is no longer automatically about one party alone. By using an Indigenous-centred story about inter-nation interaction, and remembering which constitutional norms can be used to protect ways individual parties consider valuable regarding their own existence, I'm hoping we get a little closer to realizing that social recognition of inter-social existences is not enough—the law should protect it in terms of title. As the land renews itself, so too do laws facilitate renewal of cooperation, peace and socio-economic prosperity.

One Example of Interaction

Located in Canada's North West, the start of the Churchill River has a past that reveals overlapping conditions to its (literal) core. Where the river is at its widest, a peninsula stretches out to let water and soil meet. From the fauna that have a history of using the same space, such as crows, ravens,

2 See generally Signa A Daum Shanks, "Who's the Best Aboriginal? An 'Overlap' and Canadian Constitutionalism" in Law Commission of Canada, ed, *The "Place" of Justice* (Halifax: Fernwood, 2006) 148.

3 Truth and Reconciliation Commission of Canada, "What is Reconciliation?", online: Vimeo <vimeo.com/25389165>.

4 See generally Jane Robbins, "A Nation Within? Indigenous Peoples, Representation and Sovereignty in Australia" (2010) 10:2 Ethnicities 257; Paul LAH Chartrand, "Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy" (2011) 19:2 Waikato Law Rev 24; Stephen Krasner, "Building Democracy After Conflict: The Case for Shared Sovereignty" (2005) 16:1 J Democracy 69. While Krasner argues that the shared sovereignty could be between "recognized national political authorities" and an "external actor such as another state or a regional or international organization" (*ibid* at 70), my point is that shared sovereignty still requires the state to recognize the organization. Inter-Indigenous law pertains to at least two Indigenous entities recognizing each other's sovereignty with or without such recognition being announced by the state.

5 *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at para 186 [*Delgamuukw*].

buffalo and caribou,[6] to the physical landscape having the same diversity with muskeg and dry field being neighbourly, this maritime-like climate labeled as "interdigitating" makes the place where the Churchill River begins a place of geographical and geological overlap in the smallest and largest scales.[7]

Of course, a region's physical form influences human tendencies. But what makes this particular space especially intriguing is how the people there so proactively emulated the space's physical form. By this I mean not only interacting, but having social relationships that did not exist elsewhere. People in the region demonstrated a co-existence that proved both possible and better than having a more isolated and singular cultural foundation.[8] For centuries, at least two Indigenous nations intentionally met in the space to console tired travellers by its protection from inclement weather,[9] provide items so that survival once there could continue relatively easily,[10] and be the access to other parts of the region and beyond. For as long as each culture can remember, members from both the Dene and Nihiyaw (Cree) nations have used the Churchill River's base for all of these reasons.[11] Those Indigenous nations,[12] along with their Métis relatives, exchanged knowledge and physical items in this space. On this peninsula, the space eventually became known as "Île-à-la-Crosse".[13] Île-à-la-Crosse's location was a boon for anyone, and it did not take long for arriving non-Indigenous peoples to figure that out.[14]

Yet despite how fast Europeans learned of Île-à-la-Crosse, they did not actually reach the space quickly. The Hudson's Bay Company's (HBC) emphasis on coastal posts and paranoia about Indigenous intentions meant it did little to better comprehend the North West's inland.[15] And it took a full century after the HBC's establishment for the non-HBC men, often known as coureurs-du-bois or "Pedlars", to get there. The coureurs made it there first in

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6 See Ed Theriau, as told to Patricia Armstrong, "Lost Land of the Caribou" (circa 1980), *Memories of Deep River: Hunting, Trapping, Fishing and Fur Farming in Northern Saskatchewan, Canada* (blog), online: <jkcc.com/lost.html>.

7 See FM Atton, "The Life: Fish and Water" in Henry T Epp, ed, *Three Hundred Prairie Years* (Regina: Canadian Plains Research Center, 1993) 19.

8 See Robert Jarvenpa & Hetty Jo Brumbach, *Ethnoarchaeologial and Cultural Frontiers: Athabascan, Alonquian, and European Adaptation in the Central Subarctic* (New York: Peter Land, 1989) 208.

9 *Ibid* at 612.

10 See CS Brown, *A Geographic Survey and Analysis of the Buffalo Region of Northern Saskatchewan* (1952) [unpublished report for Saskatchewan's Department of Natural Resources] at 12.

11 See Hetty Jo Brumbach & Robert Jarvenpa, "Ethnoarchaeology of Subsistence Space and Gender: A Subarctic Dene Case" (1997) 62:3 American Antiquity 427.

12 See Joe Bag, *Chipewyan & Metis People of La Loche Oral History Project* (SAB, 070, Tape 3, Side B).

13 See James GE Smith, "The Emergence of the Micro-Urban Village among the Caribou-Eater Chipewyan" (1978) 37:1 Human Organization 38.

14 See EE Rich, *Hudson's Bay Company 1670–1870*, vol 1 (Toronto: McClelland and Stewart, 1960) at 126.

15 See Richard Saunders, "The Emergence of the Coureur de Bois as a Social Type" (1939) 18:1 Report of the Annual Meeting of the Canadian Historical Association 22.

1776, and they would become known as part of what would be established as the North West Company (NWC) a few years later in 1783. Unlike the HBC's "Honourable Servants", the coureurs seemed more reconciled to admit that they themselves were dependent on Indigenous peoples and the reverse was incredibly far from true. As a result, staying on the coast and acting superior to the Indigenous locals did not pay off in the early years. Île-à-la-Crosse became a *de facto* hub of trade with the NWC being the main non-Indigenous presence interacting with the Dene, Cree, and Métis.

Alexander Henry and Joseph Frobisher, the Pedlars' representatives in 1776, made it clear that an interest in trade superseded any principled urge to implement British or French legal norms. Because of this foundational attitude, the non-Indigenous practices did not find typical examples of colonialism. In fact, the Indigenous ways overcame the non-Indigenous ones. While we could think of early contact as a challenge to Indigenous processes, this community showed that those ways arguably were strengthened due to the Indigenous concerns about them and the additional reinforcement that came from non-Indigenous individuals. Since Dene, Nihiyaw, and Métis did not need to trade with Pedlars, those same Pedlars needed to learn local standards in order for exchanges to eventually occur.[16] As other scholars have revealed by studying the appearance of missionaries a few decades later or the reinforcement of Indigenous kinship ties as more time passed, Île-à-la-Crosse functioned like a multi-cultural and Indigenous-centric community.[17]

It is important to flesh out what it means to see non-Indigenous visitors putting their own policies aside. Not only does that mean that Île-à-la-Crosse's regulatory form was well shaped in both principles and consequences, it also is apparent that the visitors regularly believed the systems were more helpful to their employer's goal of maximum profit and their own goal of short- and long-term survival. Whether to strengthen ties we might call "political" today, or appreciating that the rules were put in place to work in tandem with how the region's physical features functioned, the localized standards became adopted by visiting corporate bodies and, as a result, became almost multi-national in scope beyond the Churchill. As more time passed, more parties found themselves making the decision NWC workers made: keep to the community's premises or risk social/financial/spiritual rejection. Missionaries,[18] the eventually appearing

16 See JC Yerbury, "The Post-Contact Chipewyan: Trade Rivalries and Changing Territorial Boundaries" (1976) 23:3 Ethnohistory 244; JF Kenney, ed, *The Founding of Churchill: Being the Journal of Captain James Knight* (Toronto: JM Dent and Sons, 1932) at 55–56.

17 For two studies of the village's various roles, see Brenda Macdougall, *One of the Family: Métis Culture in Nineteenth-Century Northern Saskatchewan* (Vancouver: UBC Press, 2010); Timothy P Foran, *Defining Métis: Catholic Missionaries and the Idea of Civilization in Northwestern Saskatchewan 1845–1898* (Winnipeg: University of Manitoba Press, 2017).

18 See Timothy Paul Foran, "Les Gens de Cette Place: Oblates and the Evolving Concept of Métis at Île-à-la-Crosse, 1845–1898" (PhD Thesis, University of Ottawa Department of History, 2011) [unpublished] at 41–42 [Foran, "Evolving Concept of Metis"].

HBC,[19] and anyone who decided to be linked to the community realized that through marriage, inheritance,[20] "criminal activities",[21] construction standards,[22] or traplines, the existence and continuance of standards reinforced Indigenous laws—including the assumption of interaction.[23]

Many examples exist. First, consider how John Franklin demonstrated his allegiance to Indigenous laws when he learned about one distant First Nation from the culture which he was visiting.[24] As well, David Thompson showed how he could abandon British ways when he recalled the differences between the Sioux and their neighbouring (and sometimes feuding) nations,[25] and Alexander Mackenzie gathered information about various hunting patterns in order for him to predict trading interests.[26] When that non-Indigenous adherence to inter-Indigenous ties happened, the respective Indigenous nations' sovereignty gained more recognition as a result.[27] The government agents sent to make agreements repeatedly found the idea of a treaty or scrip was not enough on its own; pending Indigenous signatories needed to be approached respectfully and presented with benefits to be had. The idea that non-Indigenous laws reigned was not part of the peninsula's human evolution. Trade and co-habitation was possible by negotiating norms. Visitors and official representatives knew such was the case as they hoped to benefit from those norms' reinforcement.[28]

In context with other locations involved in the pelt exchange, more than half of all fur trade products from early Canada came through Île-à-la-Crosse's trading system.[29] So besides the socializing ways that acknowledged and reinforced interaction, the economic processes were perhaps the strongest illustrations of those mechanisms. For some examples, local Crees often helped reinforce property laws about traplines that all cultures reinforced;

19 See Arthur Ray, "Diffusion of Diseases" (1976) 66:2 *Geographical Review* 139 at 145, 155; Arthur Ray, *Indians in the Fur Trade: Their Role as Trappers, Hunters, and Middlemen in Land Southwest of Hudson Bay* (Toronto: University of Toronto Press, 1974) at 30.

20 See Foran, "Evolving Concept of Metis", *supra* note 18 at 18.

21 See Robert Jarvenpa, "Intergroup Behavior and Imagery: The Case of Chipewyan Cree" (1982) 21:4 Ethnology 283 at 285.

22 See Foran, "Evolving Concept of Metis", *supra* note 18 at 67–68.

23 See Oliver MacDonagh, "The Anti-Imperialism of Free Trade" (1962) 14:3 Economic History Review 489.

24 See Adele Perry, *Colonial Relations* (Cambridge, UK: Cambridge University Press, 2015) at 44.

25 See Alexander Henry & David Thompson with Elliot Couse, eds, *New Light on the Early History of the Greater Northwest* (Cambridge, UK: Cambridge University Press, 2015) at 434.

26 See Robert H Ruby & John Arthur Brown, *Indians of the Pacific Northwest: A History* (Norman: University of Oklahoma Press, 1988) at 27.

27 See David Stirrup, *Louise Erdrich* (New York: Oxford University Press, 2012) at 18.

28 See Brian Hosmer & Larry Nesper, *Tribal Worlds: Critical Studies in American Indian Nation Building* (Albany: State University of New York Press, 2013) at 127.

29 See Richard Somerset Mackie, *Trading Beyond the Mountains: The British Fur Trade on the Pacific, 1793–1843* (Vancouver: UBC Press, 1997) at xvi, map 1.

Métis men showed both interpretive and discretion skills when informing company traders about village demands to stop a taxation system; and all Indigenous cultures were steadfast in reminding outsiders that foreign ways had to be allowed rather than automatically implemented.[30] This pattern of interacting was not always completely favoured. Marriage doctrines, for example, often needed to be modified spontaneously due to some type of stressor between families about property roles and land management. Without doubt, tensions arose about whose rules should be followed.[31]

But given the number of interactions and the issues at stake (such as large hauls for trade a long ways elsewhere), it is also important to emphasise that without the social acceptance of inter-cultural norms, those same difficulties would have been much higher.[32] At Île-à-la-Crosse, its quantity of interactions surpassed other locales in the North West and the nature of those events ensured economic stability and peaceful relations.[33] While peace can be observed in strong versions of colonialism, the stability at Île-à-la-Crosse illustrated harmony that contained incentives for reinforcing that cohesion instead of a strong unilateral force stifling communication and inventiveness. And because more outsiders reinforced the local ways as more decades passed, Île-à-la-Crosse's history illustrates an evolution that works in strong opposition to the impact of colonialism during the same years. Indeed, it could be argued that the arrival of colonialism actually strengthened the community's multi-Indigenous construct.

Île-à-la-Crosse was not, however, the standard for its location's greater region. Particularly after Great Britain decided the Canadas could become one country, more colonizing efforts entered the North West. Part of that process included severe race-based arrangements about the land. From the *Indian Act* to the treaties Crown agents "negotiated" with First Nations, the later decades in the nineteenth century are rife with exploitation, intimidation, and misrepresentation shown by Crown representatives as they worked to achieve legal authority to govern the West. But as the Crown made its way across the West to both eliminate an Indigenous presence and acquire arrangements that would legally justify claiming sovereignty, Île-à-la-Crosse was a location getting even more famous for its unusual form. To Canada, it was not a problem. First, the Crown believed the space would not be attractive to immigrants nor would the region contribute to urgent needs (such as agricultural products). Second, the Indigenous peoples there

30 See Ann Harper-Fender, "Discouraging the Use of a Common Resource: The Crees of Saskatchewan" (1981) 40:1 J Econ Hist 166.

31 See Anuschka van't Hooft, *The Ways of the Water: A Reconstruction of Huastecan Nahua Society through Its Oral Tradition* (Amsterdam: Amsterdam University Press, 2006) at 258.

32 See Harper-Fender, *supra* note 30.

33 See Robert D Cairns, "Natural Resources and Canadian Federalism: Decentralization, Recurring Conflict, and Resolution" (1992) 22:1 Publius 58.

appeared less of a challenge to Crown ways.[34] Interested in being part of complex trading relationships, calling for formal agreements with Canada but appearing less hostile to Crown representatives, Île-à-la-Crosse's atmosphere seemed almost antithetical to the pressing concerns the newly created federal government observed.

But that was not completely the case. Given the peaceful nature of Île-à-la-Crosse, Crown agents often picked it as the location for scrip and treaty talks. Locals witnessed these discussions but Canada repeatedly decided not to include the space in the region to which the negotiations applied.[35] So while locals were excluded, it did give them more time to learn from neighbours and relatives what happened as a result of their own respective agreements. Île-à-la-Crosse's families understood Canada was legally desperate to acquire agreements so it would need to include the community's space eventually.[36] By using the delay in talks to their advantage, the locals maintained significant Indigenous autonomy so their own norms could strengthen even more as the village became even more surrounded by colonial institutional forms. [37] By the time Canada invented new provinces soon after the turn of the century, it became clear to its officials that the idea of a space contained within what was called Canada needed to be part of agreements, otherwise the Crown's claim of sovereignty over the North West was illegitimate.[38] The community members' time had come.

Immediately after the province of Saskatchewan came to life on 1 September 1905, Crown agents quickly went to the village looking for locals eager to sign on to a formal agreement. Instead, they found interests that had been percolating for decades and a full awareness that Canada was in a legal corner. On top of that, locals were in no socio-economic need for agreements of any Crown-based kind. Families continued to trade with the (now) single fur trade company (HBC) and various independent enterprises.[39] Métis, Dene, and Nihiyaw reinforced their own ties, and the non-Indigenous neighbours learned in the meantime that their own success improved when they supported those same links. So when locals did meet with Crown agents, they had already planned their position and ensured their authority was in its fullest form. By finding out Canada believed the Métis should be approached

34 Roderick MacFarlane Fonds, "MacFarlane Papers" (30 April 1894), Library and Archives Canada (R7344-0-X-E, MG29, A11, vol 1: 1829–1830).

35 B.89/a/38, Île-à-la-Crosse Post Journals (9 April 1898), Hudson Bay Company Archives/ Manitoba Archives.

36 See JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) 218 [Miller, *Compact, Contract, Covenant*].

37 See Brenda Macdougall, "The Comforts of Married Life" (2008) 61 Labour/Le Travail 37.

38 See Signa AK Daum Shanks, *Searching for Sakitawak: Place and People in Northern Saskatchewan's Île-à-la-Crosse* (PhD thesis, University of Western Ontario Department of History, 2015) at 259–61 [unpublished].

39 See Robert Jarvenpa, "Silot'ine: An Insurance Perspective on Northern Dene Kinship Networks in Recent History" (2004) 6:2 J Anthropological Research 153 at 156.

first as the space appeared Métis dominated, those same Métis informed First Nations leaders about the agents' imminent arrival. Because those leaders wanted treaty, their appearance sped up how quickly the Crown agents had to meet with the Métis. When the Métis stated their demand that their pre-scrip ways continue after Canada handed out scrip certificates,[40] agents had no choice but to agree to this position.

While many families had made such a demand before during Crown–Indigenous talks, no other community was in the fortunate place Île-à-la-Crosse found itself in. In that way, the reinforcement of this promise by the Crown was not merely on the day of obtaining scrip. First Nations leaders also could be more threatening in their discussions than their relatives had been elsewhere since the Crown's bind had not be so openly understood by everyone involved.[41] By the summer of 1906, Métis leaders found themselves obtaining a promise for recognition, and a few weeks later local First Nations families finalized their roles via *Treaty 10*. So on that peninsula, the multi-Indigenous links had helped ensure that all Indigenous nations acquired a formal tie with Canada. By the time scrip and treaty were provided to villagers in 1906, locals learned their space was considered legally part of Canada but only by maintaining the village's own set of legal mechanisms.

Today, known as a strong Métis village with close ties to Nihiyaw and Dene families there and elsewhere, Île-à-la-Crosse continues to be a beacon for Indigenous and non-Indigenous peoples concerned about the balance of trade, land renewal, and inter-cultural pride.[42] With the first Saskatchewan community to have bilingual teachers (in Cree and English), its own airport, radio station, and strong health care emphasis, the qualities that reinforced independence have remained.[43] So as it had for centuries, Île-à-la-Crosse reinforced its reputation for hosting numerous nations and for its processes reflecting that tendency. Moreover, that web of relations showed how prosperity from trade could be one of the founding tenets.[44] Neither the tragic harm of a residential school in the village,[45] nor the race-based treatment imposed via the *Indian Act*,[46] eliminated community resilience.[47]

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40 See Miller, *Compact, Contract, Covenant*, *supra* note 36 at 215.

41 *Treaty No. 10 and Reports of Commissioners* (Ottawa: King's Printer, 1906) 5 [*Treaty 10*].

42 See David M Quiring, *CCF Colonialism in Northern Saskatchewan* (Vancouver: UBC Press, 2007) at 160.

43 See generally David Monod, "Bay Days: The Managerial Revolutions and the Hudson's Bay Company Department Stores 1912–1939" (1986) 21:1 Historical Papers 173.

44 As an example of recent progress, see Sakitawak Development Corporation, "Vision and Mission", online: <sakitawak.com/html/Corporate/Vision-Mission/index.cfm>.

45 See Sidney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: Osgoode Society for Canadian Legal History, 1998) at 4.

46 See JR Miller, *Reflections on Native–Newcomer Relations: Selected Essays* (Toronto: University of Toronto Press, 2015) at 11.

47 See Duncan B Hollis, *The Oxford Guide to Treaties* (New York: Oxford University Press, 2012) at 134.

The above history is of course meant to shine a light on a place that is certainly worthy of its own attention. Île-à-la-Crosse's reinforcement of what could be considered a type of *Indigenous-controlled non-dominance* is part of the space's evolution. But some shifts also occurred within this history that are important on their own. First, the strength of Métis-sourced systems certainly increased. But even during that change, the reinforcement of kinship within and amongst Indigenous cultures remained, and even strengthened, with the interaction of Indigenous and non-Indigenous peoples in the community. Not only did colonialism not take over, colonialism's representatives argued that the inter-Indigenous ties rooted themselves even deeper.

Second, while it is important to see the community linked to the Métis culture across the North West, it is also imperative to highlight how the Métis' position at Île-à-la-Crosse had an especial form there. Most obviously, the population grew over time and by 1906 so many Métis families were around the community the Crown considered the territory worthy of Métis-centred attention.[48] As they appeared to be more pivotal to the Crown than the First Nations, Canada reinforced the theme of neither Dene nor Nihiyaw having an exclusive claim to the peninsula. As part of this increasing prominence in the Crown's eyes, the Métis had obtained a responsibility from First Nations to do many tasks, whether translating, hosting, continuing a land pattern or bluntly challenging an outsider party considered too intrusive by community members.[49]

So as we learn about the Métis culture's increasing strength in macro terms, we can also notice what made the Métis in Île-à-la-Crosse a group that illustrates the strong inter-Indigenous component to the village's area. Recalling this quality means that in comprehending modern treaty roles for the space, we cannot interpret the treaty roles as only interacting with First Nations' circumstances. Without the Métis' ideas for negotiating with the Crown, such as when they intentionally invited First Nations leaders earlier than Canada's negotiators expected, it is unlikely treaty talks would have occurred the way they did with their sense of reinforcing pre-scrip/treaty roles. The story at Île-à-la-Crosse expands how we understand the Métis' links to treaty histories. Of course, some agreements such as Treaty 3 are definitely about Métis.[50] But all numbered treaties' histories are intertwined with what Métis individuals espoused during the years leading to and including the treaty's beginning implementation. The interpretation

48 See Miller, *Compact, Contract, Covenant*, *supra* note 36.

49 *Treaty 10*, *supra* note 41 at 7.

50 See Larry Chartrand, "Metis Treaties in Canada: Past Realities and Present Promise" (2016) at 7 [unpublished], online: Métis Treaties Research Project <www.metistreatiesproject.ca/wp-content/uploads/2016/06/Chartrand-Metis-Treaties-Final-Draft-Metis-in-Canada-book-chapter-2016.pdf>.

of these rights impacts Métis roles and, as a result, it is not inappropriate to consider Métis circumstances when thinking about how historic and modern understanding of treaty relationships are considered.

Third, while a space might be shared it is also important not to forget that the sharing occurred within a context of culture-specific roles. For example, Métis families had a strong leadership place when confronting fur traders about prices, exchanges, and payments. Likely influenced by language abilities and the individuals' own kinship ties that crossed many sectors, these positions in the community gained strength from having others *not* having them.[51] Space, as well, often had a sense of family inheritance that demonstrates how people with a specific culture would be left out of certain activities in a specific location. Family traplines reinforced a type of exclusion that was accepted as fair by others involved in other stages of trapping (such as processing and a final exchange of fur for either credit or another product). As it was done elsewhere, local exclusion through property norms can happen within a larger overarching reinforcement of interaction.[52] By using geographical, economic, and social standards, the idea that a location acknowledges and encourages diversity is already part of how societies and physical spaces are understood.

Finally, the village's story is also one of the best illustrations of trade even without considering it through a cultural perspective. An effect of socializing and discovering mutually beneficial interests found during this interaction, the village's history is a past that exposes the issue of recognizing economic relationships in law. The story is one where trade ensured the community's stability, where trade was strong before non-Indigenous peoples arrived and various non-Indigenous institutions participated in that trade, and where trade remained a social and economic pillar for other relationships that developed.[53] Due to documentation made by multiple parties (including non-Indigenous traders and government representatives), the fundamental importance of trade as a foundation for strong inter-cultural ties is well evident.

Île-à-la-Crosse hosted its share of disagreements amongst its locals. And every year was not automatically economically stable for all those located there. But the village, through its strong sense of interaction and understanding of a region's natural functions, ensured that knowledge about how to regulate inter-family/nation ties continued. Its lifespan provides

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51 See Karen Drake & Adam Gaudry, "'The Lands Belonged to Them, Once by Indian Title, Twice for Having Defended Them…and Thrice for Having Built and Lived on Them': The Law and Politics of Métis Title" (2016) 54:1 Osgoode Hall LJ 27.

52 See James C Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven: Yale University Press, 2009) at 6.

53 See David Murray, "Law and British Culture in the Creation of British North America" in Phillip Buckner & R Douglas Francis, eds, *Canada and the British World: Culture, Migration, and Identity* (Vancouver: UBC Press, 2011) 66.

a glimpse into the themes of sharing space and products, law-making, and inter-cultural equipoise.[54] All of these qualities demonstrate a past that contains qualities often cited as optimal—and weak or missing from today's social frameworks.

Binding a History to a Constitution

Despite the case law in Canada that takes heed of Indigenous communities' fundamental qualities, it is hard to predict how the courts will respond to an argument presented by Indigenous parties. The idea that a section 35 argument is a place of "progress" is often touted.[55] But how such a section will ultimately protect a nation's conditions is often anyone's guess.[56] Some section 35 themes appear regularly in rendered decisions. The importance of Crown consultation with Indigenous parties especially if a right could be infringed,[57] a standard for the proof for what "Aboriginal right" means,[58] a recognition for the importance of oral history in evidentiary matters,[59] and the realization that it is possible for Métis to argue for constitutional rights,[60] have all become integral to a strong legal argument. But when we think of one of Île-à-la-Crosse's most prevalent dynamics, namely inter-Indigenous interaction, it is difficult to find guidance from the courts about how to imagine this interaction's legal (particularly its constitutional) nature within a Canadian legal setting.[61] As a result, the village's legal form, though filled with dynamics Canadian society regularly claims are enviable,[62] is not only arguable but has not been argued or resolved. The place of Île-à-la-Crosse in a section 35 world remains unclear. Even though an argument was commenced, the constitutional landscape for the community is not yet ensured.

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54 See Marius Rossignol, "Property Concepts among the Cree of the Rocks" (1939) 12:3 Primitive Man 61 at 65.

55 See "Aboriginal Law: The Progress of Canada's Indigenous Peoples" (Cassels Brock & Blackwell LLP, 2014), online: <casselsbrock.com/files/ file/docs/CasselsBrock_AboriginalPracticeFlyer_May2014.pdf>.

56 See John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997–98) 22 Am Indian L Rev 37; Lawrence Barsh & Sákéj Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993.

57 See Kent McNeil, "Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*" (2005) 29 SCLR 447.

58 See *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*], and then reshaped most significantly in *R v Powley,* [2003] 2 SCR 207 [*Powley*].

59 See *Delgamuukw*, *supra* note 5.

60 See *Powley*, *supra* note 58.

61 See Liam Haggerty, "Métis Welfare: A History of Economic Exchange in Northwest Saskatchewan, 1770–1870" (2003) 61:1 Saskatchewan History 14.

62 See Bonita Beatty, "Saskatchewan First Nations Politics: Organization, Institutions and Governance" in Howard Leeson, ed, *Saskatchewan Politics: Crowding the Centre* (Regina: Canadian Plains Research Centre, 2008) 202.

This argument has come in the form of a lawsuit. In 1994 various families and two Métis organizations filed a statement of claim for a Métis homeland encompassing approximately 20 per cent of Saskatchewan.[63] Île-à-la-Crosse's region is part of that homeland. In fact, the village is a type of *de facto* headquarters for the claim's most vocal supporters due to the claim's acknowledgement of arguably overall the longest contact with newcomers while maintaining its own legal autonomy.[64] Moreover, not only are the details of this longevity known by locals, they are also documented by external institutions such as the HBC and the Crown. Given that non-treatied, treatied, First Nation and Métis peoples claim an affinity to the space,[65] how the community's modern legal form is understood is anyone's multi-dimensional guess. But surely, if Canada's constitution overtly mentions the existence of rights for Indigenous peoples, and much of Île-à-la-Crosse's existence is dependent upon a multi-nation link to the space, doesn't the interpretation of section 35 necessarily need recognition of exclusive and shared rights in the village's area?

If the claim is ever settled, some thought to Métis title is unavoidable. But what to do about that title if space cannot be handed over to the Métis so easily since that same space is part of treaty territory? Constitutional letdown seems unavoidable unless either First Nations parties are willing to cede land to the Crown so it is awarded to the Métis or the Métis abandon their claim to all of the space. These two options seem unimaginable. So what can come of a claim by a culture that is regularly less remembered in Indigenous rights discourse yet played just as strong a role in Île-à-la-Crosse? Here is where the issue of trade can help.

Just as the 1994 claim states, Indigenous "title" is perhaps the most obvious way to frame an argument for the court.[66] But given the overlapping nature of Indigenous nations around Île-à-la-Crosse, is there another way to overcome the highly problematic effect of pitting cultures against each other—which an argument of title will ultimately do?

This idea of a "competing claim" has appeared already. But the version of such a competition is significant in Île-à-la-Crosse's place within a Métis claim in treatied Saskatchewan; not only could siblings be on opposing sides should First Nations challenge the Métis claim but the argument for title is an uncomfortable fit with Île-à-la-Crosse's multi-nation history. Certainly there are both parts of the homeland claim that are more Métis than others, so it is important to acknowledge Île-à-la-Crosse's potentially unique role. Still every part of the homeland is understood to be a place of treaty rights, and

63 *Morin et al v Saskatchewan* (AG), [1994] SKQB No 619 (Statement of Claim).

64 See Sid Fiddler, "Regaining the Harmony" in Henry T Epp, ed, *Three Hundred Prairie Years* (Regina: Canadian Plains Research Center, 1993) 190; Yerbury, *supra* note 16 at 14.

65 See Robert Jarvenpa, "Symbolism and Inter-Ethnic Relations among Hunter-Gatherers: Chipewyan Conflict Lore" (1982) 24:1 Anthropologica (New Series) 43.

66 See Drake & Gaudry, *supra* note 51 at 27.

those treaty rights are understood in Canadian courts. If the courts recognize the Métis claim, First Nations will lose. If treaties are acknowledged by the courts as illustrative of exclusive title, the Métis lose. What with the locals whose parentage is both First Nations and Métis, and for those who have struggled with not having "status" but then finally achieving the right to be a treatied First Nation person via Bill C-31,[67] the stressors in this claim are not only inter-cultural, they are potentially *intra-personal*.[68] Until some type of strategy is imagined to take care of the competition exclusive title automatically triggers, these types of conflicts within Indigenous circles that were previously incredibly cooperative cannot help but reappear.[69]

While the difficulties that a competing claim represents cannot be overemphasised, reminding ourselves of Île-à-la-Crosse's past might in fact hold a key to overcoming those subjects that seem almost impossible to exist together. Indigenous title may have a form that is not necessarily what non-Indigenous title can be, and it is through the evidence of one place that we could encourage the courts to conclude that earlier information did not let them integrate such a theme into judicial discourse. How can that be done?

When compared to the standards the Supreme Court of Canada has constructed, the long history of Métis identity (early eighteenth century), the late date of treaties, and the amount of documentation made by non-Indigenous parties (at least three fur trade companies, the Catholic Church, and federal employees between 1867 and 1906), a case for hunting means the recognition of trapping and cultural activities has significant appeal. So first, Île-à-la-Crosse's past gives arguably the strongest argument for site-specific rights in Canada. Due to the treaty dates for the *Powley* decision (1850/51),

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67 See Shelley AM Gavigan, *Hunger, Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870–1905* (Vancouver: UBC Press, 2012) at 123; Bill C-31, *An Act To Amend the Indian Act*, 1 Sess, 33rd Parl, 1985 (assented to 28 June 1985), SC 1985, vol 1, c 33. In 1992, (then) Île-à-la-Crosse Mayor Buckley Belanger presented views about self-government and the effect of Bill C-31 upon his village to the Royal Commission on Aboriginal Peoples. The commission decided to hold a public hearing in Île-à-la-Crosse as it determined the community acted as a convenient location for most people about the point of immediate families experiencing the implications of the Bill: see Royal Commission on Aboriginal Peoples, *Public Hearings and Round Table Discussions, 1992–1993* (Ottawa: Minister of Public Works, 2008) at 33–59.

68 See Bonita Lawrence, *'Real' Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004) at ch 10-11; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) CJWL 174 at 178.

69 For another example of tension developing see Mary Agnes Welch, "After Supreme Court Ruling, A Clash of Claims between Métis, First Nations", *Winnipeg Free Press* (14 February 2015), online: <winnipegfreepress.com/local/clash-of-claims-on-metis-first-nations-291943961.html>. A reminder of the historic success of overlapping cultures is provided by Robert Jarvenpa & Hetty Jo Brumbach, "The Chipewyan-Cree-Métis Interaction Sphere and the Fur Trade Political Economy: Archaeological, Ethnohistorical and Ethnographic Approaches" in Charlotte Damm & Janne Saarikivi, eds, *Networks, Interaction and Emerging Identities in Fennoscandia and Beyond, Papers from the Conference Held in Tromso, Norway, 13-16 October 2009* (Finland: Société Finno-Ougrienne, 2012) 71.

and the early dating for Métis (at least as early as the 1770s), Île-à-la-Crosse's span of Métis existence is the most robust scenario the courts will have ever encountered. In that way, it is easy to imagine the facts from the claim impacting arguments about subsistence with or without any win regarding traditional title. Moreover, recognition of Métis activities would arguably not significantly impact any activities of First Nations in the same space.

But perhaps the most notable aspect of Île-à-la-Crosse's story, the long history of trade founded on inter-Indigenous ties, can be recalled. If we acknowledge that the space was not part of a First Nation's exclusive space, and the Crown knew that, and the Crown reassured Indigenous peoples in the strongest terms they had ever used that pre-agreement lives would continue after agreements were made, there is some argumentative space for a legally shared existence that complements non-Indigenous understandings of exclusivity while maintaining consistency with what happened in that space—and with discourse pertaining to the role of history in interpreting section 35. I am not arguing for the complete abandonment of exclusivity in a section 35 claim. But case law so far has only emphasised it in terms of exclusive use rather than evaluated the role of shared space. In other words, it might not have been possible in previous litigation but the Métis claim inspires us to make it relevant now.[70] We have yet to witness a facts-specific scenario about joint use determined by acknowledging more than one party (as compared to joint applicants becoming akin to one party). This can be the scenario that uncrates the norms that regulate the set of parties.

Given how case law has evolved since the Métis claim was filed, it appears possible to contextualize more accurately that an overarching control with pockets of shared use or autonomy can still exist. By using the history of trade as the topic that illustrates the variety of relationships, we can suggest that having a map of a homeland can contain various shades of control within it. Should a nation wish to argue about trade being part and parcel of its existence, that control becomes less about one singularly dominant Indigenous force. If the Métis want to project a theme of trade, the areas where this trade occurred likely had more inter-Indigenous sharing of land use. Finding these spaces of trade can be imagined as areas within a larger claim of exclusivity should such a claim still go forward. While acknowledging Indigenous–Indigenous space might appear as a concession, doing so could also strengthen the site-specific roles for Métis. Moreover, providing such a view would likely be less unpalatable to the courts as supporting the Métis argument about exclusive use ultimately means nullifying the understandings of First Nations treaties in the same area.

70 See Brenda Gunn, "The Presumption of Conformity: International Indigenous Human Rights and the Canadian Constitution" in Joyce Green, ed, *Indivisible: Indigenous Human Rights* (Black Point: Fernwood Publishing, 2014) 194.

It is difficult to imagine that any First Nation adherent to treaty space in northern Saskatchewan would agree to transferring a type of exclusive title recognition to the Métis. What using the subject of trade permits is a conversation among Indigenous communities and evaluation in non-Indigenous courts about cultural sustainability that expands the type of title that should be part of section 35's reach. Using exchange as the starting point to discuss title, instead of using title as an opening to discuss trade, means constructing an analysis that reverses the effect of exclusivity around the trading area. In that way, the inter-Indigenous roles should inspire nervousness about Métis links to spaces elsewhere. Making the storyline Indigenous-centred, as section 35 analysis can already support, means that trade becomes a window to realizing exclusivity happened where trade did not. And if that space where trade did not happen was Métis-dominant, compensation for not recognizing it already is in order. If the Métis want a modern treaty that acknowledges that point, that treaty could potentially be in place at the same time as historic treaties are maintained.[71]

Why would First Nations or the Métis agree to the possibility that trade be the focus of a right, and where trade did not happen the possibility of recognizing Métis exclusivity be considered? What makes such an understanding attractive in the way it can mitigate or even eliminate the invariable tension that a competing claim triggers? In northern Saskatchewan, the version of a competing claim is arguably the worst conflict. It seems reasonable then to suggest that an alternative Indigenous-centred position is both what is needed creative-wise and is more historically accurate evidence-wise. As an extension of this social concern for sustainability, another aspect surfaces in this example that suits current constitutional standards. Community members, whether from the same culture or another nation, had mechanisms for imagining the trade, land use, and interaction. Those ways were formal and individuals experienced consequences implemented by others if they did not follow them. In other words, they made laws. They invented legal regulations about their families, their specific culture's components, and the interaction they permitted with other cultures. They made Indigenous laws, and within this category of norms they implemented *inter-Indigenous laws*.[72] The trade lets that idea of law-making come through in a full form for the first time in Canadian judicial history. The idea of using trade as a topic makes the competing claim less harrowing and the recognized topics in law more Indigenous-based (and invariably precedent setting).

71 See Michael Anthony Hart, "Indigenous Worldviews, Knowledge, and Research: The Development of an Indigenous Research Paradigm" (2010) 1:1 J Indigenous Voices Social Work 3.

72 Earlier references to this idea elsewhere, called "inter-Aboriginal law", appear in Signa A Daum Shanks, *Reflections on Treaty-Making in British Columbia* (LLM Thesis, University of Toronto Faculty of Law, 2003) at 126 [unpublished].

Two topics addressed here, Indigenous laws and inter-Indigenous laws, have faced scrutiny elsewhere.[73] What makes the history from Île-à-la-Crosse helpful is the way it portrays both topics and, although part of a currently unfortunate impasse, how it inspires us to look to that past so that we can create appropriate responses today. The reinforcement of inter-Indigenous ways in trade and co-existence became stronger both because of and despite the appearance of colonial entities. Sometimes these moments of unusual interaction are the very social locations of unusually helpful processes.[74] Outsiders came and stayed in Île-à-la-Crosse and by making that choice, those same non-Indigenous individuals shifted their institution's form in the village. Non-Indigenous visitors witnessed Indigenous family law,[75] the enforcement of trap line space demonstrating exclusivity, cultural affinity to locations nearby, and spiritualism. Via certain activities, such as socializing and trade, the inter-Indigenous norms showed themselves as well. The various views complexified further as the Métis culture founded and solidified its presence there as well.[76] Autonomous processes existed. So did ones that were part and parcel of a larger kinship framework. By its inter-cultural relations, the community reinforced sustainability and those activities gained in strength—rather than weakened—when non-Indigenous peoples arrived.

The sustainability, and the ways that quality was reinforced, were pivotal in how Île-à-la-Crosse's reputation was understood.[77] When recalling the Métis claim for title, its filing arguably helps the conversation shift to considering the role of trade and the history of intermingling at certain places within the claim's interpretation of homeland. So even if the claim's argument for the claimed area fails, the argument also introduces a history of activities for the entire area and perhaps even a strong argument for Métis title in and around Île-à-la-Crosse's greater area.[78] As Yvonne Vizina explains,

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73 See Mary Shepardson, "The Traditional Authority System of the Navajos" in Ronald Cohen & John Middleton, eds, *Comparative Political Systems: Studies in the Politics of Pre-Industrial Societies* (Garden City: Natural History Press, 1967) at 145; Daniel N Paul, *We Were Not Savages: A Micmac Perspective on the Collision of European and Aboriginal Civilizations* (Halifax: Nimbus, 1993) at 5; Mary Druke Becker, "Linking Arms: The Structure of Iroquois Intertribal Diplomacy" in Daniel K Richter & James H Merrell, eds, *Beyond the Covenant Chain: The Iroquois and Their Neighbors in Indian North America, 1600–1800* (Syracuse: Syracuse University Press, 1987) at 32.

74 See Chris Maser, *Earth in Our Care: Ecology, Economy, and Sustainability* (New Brunswick, NJ: Rutgers University Press, 2009) at 160.

75 For a helpful evaluation, see Mary Ann Pylypchuk, "The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources" (1991) 32 Archivaria 51; David Milward, "Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence" (2010) 14:4 Intl J of Evidence and Proof 287.

76 See Saunders, *supra* note 15 at 22.

77 See J Burr Tyrrell & DB Dowling, "Report on the Country Between Athabasca Lake and Churchill River" (1896) 8 Geological Survey of Canada Annual Report 8, 1D–120D.

78 See Robert CH Sweeney, "Understanding Work Historically: A Reflection Prompted by

"traditionally, Aboriginal cultures were grounded in sustainable lifestyles."[79] As that sustainability from Île-à-la-Crosse's past demonstrates, the village's form parallels the standards the Supreme Court requires.

What do we need to have in Canada's juridical space for inter-Indigenous laws and/or the subject of trade among Indigenous peoples to gain constitutional protection? Already, the Supreme Court had found comfort in acknowledging what it has imagined as "laws" originating from Indigenous sources.[80] Particularly when introducing some due (and important) observations about historical/oral evidence in 1997,[81] and then in 2003 when the Court's majority concluded that Crown sovereignty does not automatically exist merely because a government representative declared it so,[82] justices observed how Indigenous laws existed prior to Crown laws and those Indigenous laws impacted the development of different nations' cultural forms.[83] Notably, the labels used to identify these regulatory regimes have evolved. From decisions using the phrase "customary law",[84] to other evaluations including the labels of "traditional law",[85] "ancestral law",[86] "Aboriginal law"[87] and then concluding that the Indigenous concepts are yet another form of "law",[88] the Supreme Court has shifted from describing examples similar to habits or choices to outright considering Indigenous legal regimes as formal and as followed as any example of Crown-implemented regulations.

Much as semantics have shifted in society about how to acknowledge Indigenous circumstances, this change by the Court has a particular parallel with how Brian Slattery argues that Crown sovereignty must be noticeably "asserted" rather than simply "assumed" by the Court.[89] It is that shift of demanding evidence about an assertive presence that has allowed the topic

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Two Recent Studies of the Fur Trade" (1997) 41 Labour/Le Travail 245.

79 Yvonne Vizina, "Métis Traditional Environmental Knowledge and Science Education" (MEd Thesis, University of Saskatchewan Faculty of Education, 2010) at 16 [unpublished].

80 See Arthur J Ray, Jim Miller & Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montréal: McGill–Queen's University Press, 2002) at 212.

81 See *Delgamuukw*, *supra* note 5, especially at para 84.

82 See Miller, *Compact, Contract, Covenant, supra* note 36.

83 See Senwung Luk, "The Law of the Land: New Jurisprudence on Aboriginal Title" (2014) 67 SCLR at 306.

84 *R v Marshall*, [2005] 2 SCR 220 at paras 128, 134; *Mitchell v MNR,* [2001] 1 SCR 911 at para 10 [*Mitchell*].

85 *Delgamuukw*, *supra* note 5 at para 148. See also *Mabo v Queensland (No 2)*, [1992] HCA 23 at 58 (an Australian case that is also regularly mentioned when explaining this term), cited in *Van der Peet, supra* note 58 at para 40.

86 *Van der Peet*, *supra* note 58 at para 263, McLachlin J.

87 *Delgamuukw*, *supra* note 5 at para 157; *Mitchell*, *supra* note 84 at para 62.

88 *Ibid*.

89 Compare Brian Slattery "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) to his earlier "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 where an assumption is explained. In that way, the Crown could have representatives in Indigenous territory but would need to act in ways to challenge Indigenous sovereignty before Crown sovereignty is accepted as fact.

of Indigenous laws to receive attention in Canadian courts. Moreover, not assuming the full authority of the Crown at various stages of Canadian history means that more histories, such as multi-cultural Indigenous existences, gain attention. With readjusting how we don't assume Crown sovereignty was strong enough to be a significant force, other themes come into play. The Supreme Court has also suggested that proving the existence of Indigenous laws is less onerous than earlier litigious times. As recently as in *Xeni Gwet'in First Nation v British Columbia,* the Court has explained legal concepts are as helpful as anthropological or economic descriptors for revealing cultural foundations.[90] So proving the role of Indigenous laws (which is how the sovereignty is ensured) is a stage the courts are not averse to hearing and is part of litigation elsewhere.[91] So as we better appreciate how we need to observe the assertion of the Crown, it then follows we should presume the existence of Indigenous laws.

In addition to this matter of assuming Indigenous laws existed and then potentially noticing when Crown laws were asserted, courts also are within their realm to integrate analysis about inter-Indigenous legal norms. In fact, rather than calling for a new recognition of such a reality, judges actually can already rely upon case law and negotiated agreements that can help justify these norms' existence.[92]

In 1997 (then) Chief Justice Lamer of the Supreme Court reflected that the jointly-presented argument allowed the Court to avoid evaluating how different Indigenous laws about inter-Indigenous activities functioned (or even conflicted).[93] In another circumstance, and with more conflict than cooperation, the Gitxsan (along with the Gitanyow) loudly protested the *Nisga'a Final Agreement* in British Columbia due to how the Nisga'a had supposedly not taken their inter-nation relations with enough legal seriousness.[94] Procedurally, the British Columbia Treaty Commission (BCTC)

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90 *Xeni Gwet'in First Nations v British Columbia*, 2014 SCC 44 at para 41. This recent decision's acknowledgement reinforced recognition from *Delgamuukw*, *supra* note 5 at para 138. See *R v Sioui*, [1990] 1 SCR 1025 for a recognition that Indigenous peoples have "autonomy in their internal affairs" which needed to be acknowledged. Even in the much-criticized *Van der Peet,* the Chief Justice wrote of Indigenous peoples' "relevant laws": see *Van der Peet, supra* note 58 at para 141. The Supreme Court also reinforced the point made by the US Supreme Court in 1832 that Indigenous nations had the ability to govern "themselves by their own laws": see *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) at 542–43, cited in *Van der Peet* at para 37 and in *Calder v British Columbia (AG)*, [1973] SCR 313 at 383.

91 See MacDonagh, *supra* note 23 (explaining the necessity of non-Indigenous "settlement" rather than arrival); Soyoung Jung, "A State's Sovereign Rights and Obligations in the WTO" (2013) 21:2 Michigan State Intl L Rev 465.

92 The example of the 1993 implemented *Sahtu-Dene Comprehensive Land Claim Agreement* can also act as a tool today for predicting difficulties and problem-solving in Canada: see Canada, *Sahtu-Dene Comprehensive Land Claim Agreement*, vol 1 (Ottawa: Public Works and Government Services Canada, 1993), online: <aadnc-aandc.gc.ca/eng/1100100031147/1100100031164>. In that way, recognizing inter-Indigenous law in the courts is simply a step in giving attention to political arrangements already in effect.

93 *Delgamuukw, supra* note 5 at para 185.

94 See Neil Sterritt, "The Nisga'a Treaty: Competing Claims Ignored!" (1998/99) 120 BC

has stated any inter-Indigenous histories about the same land space must be acknowledged before any nation interested in making a modern treaty can proceed in its own treaty talks.[95] This demand by the BCTC simultaneously acknowledges inter-Indigenous law and the counter potential "overlap".[96] The earlier talks are meant as a way to ensure the competing claim will disappear, but the talks also reinforce traditional ways of inter-nation communication. In this way, it is not that it is impossible/ground-breaking for the courts to recognize inter-Indigenous laws; the issue is instead one of giving a more accurate label for what has already received attention.

Recognizing spaces that have inter-Indigenous law as a fundamental quality obviously has ramifications. For one, it is logical then to argue that Canada must allow nations a reasonable amount of time to negotiate among themselves. These talks, however, should not be mandatory since the Crown's authority during historic inter-Indigenous times rarely had final say. Unlike the forced talks the BCTC demands, these voluntary discussions should be understood in terms of section 35's standards: potential inter-Indigenous sharing happened without foreign interference so it would be constitutionally inconsistent to make the inter-Indigenous talks a requirement today. Certainly, the Crown would likely be alert to how these talks would happen. As well, the Crown could explain its views and encourage recognition of them. But if the matter pertained to shared land use and exchanges, it is difficult to imagine how the Indigenous perspectives would actually differ much from the Crown in their principles. If the Crown wants some of its concerns taken into account, it would be important to frame them in terms of conservation/sustainability. The inter-nation interaction at Île-à-la-Crosse, however, arguably represents one of the most documented and deep-rooted examples of sustainability in Canada. Should Saskatchewan, for example, tout that it needs to underscore economic development, that is exactly what locals at Île-à-la-Crosse have done for centuries and are interested in doing as more time passes.[97] The village's historic functions act as a template for good land use and social relations today, and those tenets are worthy of attention and legal protection.

Moving Forward on the Relevance of Inter-Indigenous Times

Using the times of one small community as a way to challenge the national standard of "exclusive use" in arguments about section 35 land title is only one way to address the problems constitutional discourse has created for Indigenous peoples. Rarely are strategies perfect in either their construction or

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Studies 73.

95 See BC Treaty Commission, "Stage One Criteria", at no 8, online: <www.bctreaty.ca/policies/stage-1-criteria>.

96 Murray, *supra* note 53.

97 For more information about the community's current socio-economic initiatives see Sakitawak Development Corporation, online: <sakitawak.com/index.cfm>.

their effects. But by finding one of the most documented examples of shared space that had the components of trade and a long history of post-contact interaction without the implementation of formal Crown agreements such as scrip or treaty, we have a location with an intellectual space illustrating inter-Indigenous norms that reaffirmed economic roles, respectful land use, and non-Indigenous reinforcement of Indigenous ways. Given the standard section 35 rights currently have, those historic qualities surely have a place in constitutional discourse now and in the future. We might not be able to eliminate all of the negative side effects of a competing claim, but we can certainly commit ourselves to more conversations about why the demand of "exclusive use" is not necessarily an Indigenous trait all the time and therefore not in line with the spirit section 35 is supposed to represent. The Métis story of many generations at Île-à-la-Crosse is a way to introduce concepts of non-dominance in land title, trade as a fundamental component of any society, and non-Indigenous reliance upon Indigenous legal norms to ensure their own survival.[98] Métis cannot be blamed for framing their argument for recognition in terms of exclusive use as that is what the courts demand. What their claim inspires is a more robust dialogue about how "exclusive use" is, in real practice, regularly not a goal to which we even wish to aspire. Whether we notice the moments of shared space in family law, commercial relations, or discourse pertaining to Canada's immigration laws, the notion of intermingling is a fundamental thread in this country's human fabric.

People have socialized, exchanged and agreed upon standards for those events since time immemorial. Like other cultures around the world, the Indigenous peoples of North America did the same. Around Île-à-la-Crosse, not only did such a reality happen, (non-Indigenous) visitors ultimately reconciled their own sensibilities with what appeared to work as values and processes in the community. After all, folks there had years to deliberate how to tolerate each other, how to achieve some type of economic stability, and how to realise the space could benefit them in the future if they took care of it. The constitutional nature of some of those roles, both Indigenous and non-Indigenous, have received attention from Canada's courts. One of the themes the courts have regularly espoused is our laws have to evolve when we learn more context about the past.[99] By reinforcing this quality of our legal system labeled by Slattery as its "organic" component, we "open…up the Constitution to a variety of perspectives that have long been excluded or assigned to the periphery of our collective life."[100] The notion that shared

98 See Brenda Macdougall, "*Wahkootowin*: Family and Cultural Identity in Northwestern Saskatchewan Metis Communities" (2006) 87:3 Can Hist Rev 431.

99 For a more recent Canadian interpretation of Lord Sankey's metaphor of the "living tree" perspective upon legal norms, see Beverley McLachlin, "Defining Moments: The Canadian Constitution" (Speech delivered at the Canadian Club of Ottawa, 5 February 2013), online: <scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2013-02-05-eng.aspx>.

100 Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada"

use can be an argument by an Indigenous party, and that such an argument is worthy of section 35 protection, is arguably one of those perspectives. Judicial review can shift in its scope.[101] Given that during the invention of section 35 no public thought arose amongst its inventors about the conflicting claims, it is only fitting that new solutions appear that help re-navigate the section 35 discourse so that those conflicting claims do not overtake the section's important purpose of addressing historic roles that were in place long before any non-Indigenous person said the word "Constitution" in Canada.[102]

As Kent McNeil writes, "solutions to lingering questions of sovereignty, territorial boundaries, jurisdiction, title to land, and so on, all must be sought in the middle ground where law and history overlap."[103] Our newer understandings of competing claims has meant we have erased a part of this country's past whose themes we supposedly aspire to reach—remembering our social ties, respecting the land, achieving value so that we can make it to another day, season, and year.[104] It is possible to shift our understanding of what "title" can mean. That shift reveals a strong balance of economic, legal, and intercultural concerns. Like the earliest newcomers illustrated, settlers have to reconcile the fact that their ways are not automatically preferable. And the components Indigenous (and inter-Indigenous) times contain help reinforce this reality. One story from one Métis, Dene, and Nihiyaw part of the world can remind us so.

(1996) 34:1 Osgoode Hall LJ 112.

101 See Lorne Sossin, "The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart, 2004) 91.

102 See Louis A Knafla, "'This is Our Land': Aboriginal Title at Customary and Common Law Comparative Contexts" in Louis A Knafla & Haijo Westra, eds, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (Vancouver: UBC Press, 2010) 8.

103 Kent McNeil, "Sovereignty and the Aboriginal Nations of Rupert's Land" (1999) 37 Manitoba History 2.

104 See John Leonard Taylor, "An Historical Introduction to Metis Claims in Canada" (1983) 3:1 Can J Native Studies 165; Arthur Ray, "Traditional Knowledge and Social Science on Trial: Battles over Evidence in Indigenous Rights in Canada and Australia" (2015) 6:2 Intl Indigenous Policy J 1.