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Representations of Women in Cree Legal Educational Materials:
An Indigenous Feminist Legal Theoretical Analysis

by

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Abstract

Indigenous laws are complexly gendered yet there is a lack of research on this subject. As the field of indigenous law is growing, and as indigenous laws are being revitalized, it is crucial that gender analyses be included given that law and decolonization politics are not disconnected from broader social dynamics. In this dissertation, I engage in a discussion about the possibilities and challenges relating to research on indigenous laws and gender by examining Cree legal educational materials. This study focuses on: 1) how the educational materials, which are meant to advocate empowerment of Cree people and laws, represent Cree women as legal agents, and 2) whether and how indigenous feminist legal theory and methodology facilitate this research.

Indigenous feminist legal theory provides an analytic tool that is attentive to gendered power dynamics in indigenous laws. This theoretical approach informs indigenous feminist legal methodology, which is used to examine discourse and representations. These theoretical and methodological approaches have not yet been articulated and I demonstrate that they are vital tools for anti-oppressive interpretations of law. My research shows that Cree women are represented in limited ways in the educational materials – first, through the absence of women, and second, through limited representations which include women only in relation to traditional gender roles and 'women's issues.' Indigenous feminist legal analysis necessitates moving beyond these tendencies and aims to work with tensions as they arise in my analysis. The educational materials most often present Cree law in aesthetically pleasing ways, and

indigenous feminist legal analysis demands more difficult aesthetics. While it is important to examine how and why these representations are being positively deployed, it is also crucial to examine what is lost when gendered realities are absent or erased. For Cree women to be represented as complex legal agents, Cree law and revitalization need to be gendered in the educational materials, and beyond. Indigenous feminist legal analysis encourages scholarship on indigenous laws that treats Cree law (and other indigenous legal orders) as a living intellectual and practical resource that can be critically engaged with to discuss and challenge gendered conflict.

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Chapter One:
Introduction

1.1 Introduction

There are multiple legal orders in Canada, including numerous indigenous legal orders.[1] John Borrows describes Canada as multi-juridical, both historically and presently, and illustrates how indigenous laws and Canadian laws influence each other.[2] While legal orders affect one another, the focus in this dissertation is on gendered internal social and legal politics in Cree law. I do not focus on state law in this dissertation, though a crucial part of my examination includes approaching indigenous law and indigenous gendered realities as shaped by both internal and colonial norms. It is evident from the literature that there is a need for research that focuses internally on indigenous laws. Not only is there too little research in this area, but also within this small field there is a further need for practical engagement with indigenous laws. Val Napoleon and Hadley Friedland explain that engaging with revitalization must be practical and they suggest that "[i]f people cannot use Indigenous law, that is, if people cannot think and reason within it and apply it to the messy and mundane, then it will continue to be talked

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[1] See for example, Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Doctor of Philosophy dissertation, University of Victoria, 2009) [unpublished] [Napoleon, *Ayook*]; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Canada's Indigenous Constitution*]; Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 195 [Christie, "Indigenous Legal Theory"]; Gordon Christie, "Culture, Self-Determination and Colonialism: Issues around the Revitalization of Indigenous Legal Traditions" (2007) 6:1 Indigenous Law Journal 13 [Christie, "Culture, Self-Determination"]; Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2:1 Indigenous Law Journal 67 [Christie, "Law, Theory and Aboriginal Peoples"]. The multiplicity of legal orders in one geographic area is of course not unique to Canada. See, International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, (Geneva, International Council on Human Rights Policy, 2009).

[2] Borrows, *Canada's Indigenous Constitution*, *supra* note 1. Canadian laws include both state common law and state civil law.

about in an idealized way or as rhetorical critiques of Canadian law."[3] Thus I aim to work practically, and in a way that recognizes the immense possibilities and resources within indigenous laws while also acknowledging, as Borrows and Napoleon's work demonstrate, the difficulties and limitations inherent in any legal tradition (including Canadian laws).[4]

One area that requires deep, pragmatic engagement concerns how indigenous laws and revitalization efforts are gendered.[5] Indigenous laws are

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[3] Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" [forthcoming] at 9 [Napoleon & Friedland, "An Inside Job"]. See also, Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" [forthcoming] [Friedland & Napoleon, "Gathering the Threads"].

[4] Borrows, *Canada's Indigenous Constitution*, *supra* note 1 at 10; Napoleon, *Ayook, supra* note 1; Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17 CJLS 149 [Napoleon, "Raven's Garden"].

[5] When I use the term 'revitalization,' I am referring to indigenous peoples' practices regarding the validation and use of indigenous laws. I discuss Verna St. Denis' work later in the dissertation, however it is worth noting her caution regarding 'cultural revitalization' that culture can often get taken up in fundamentalist ways that detrimentally treat indigenous cultures as unchanging products of the past that are to be taken up in the present. See Verna St. Denis, "Real Indians: Cultural Revitalization and Fundamentalism in Aboriginal Education" in JoAnn Jaffe, Carol Schick & Ailsa M. Watkinson, eds, *Contesting Fundamentalisms* (Winnipeg: Fernwood Publishing, 2004) 35 [St. Denis, "Real Indians"]. I argue throughout this dissertation that law (and also culture, though the two should not be conflated) cannot be imagined as unchangeable if law is to be practically drawn on in the present. Therefore I recognize that 'revitalization' itself needs to be problematized and that questions need to be asked about what is being revitalized, for whom, by whom, to what benefits, and what costs.

Likewise I use the term 'decolonization' and refer to politics done in the name of the 'Cree nation' at various points in this dissertation. When I use the language of 'Cree nation,' I am referring to the broad collective of Cree people. My usage of decolonization, as with revitalization, is intended to be attentive to power dynamics and politics. When I use the term 'decolonization' in this work, I am often referring to Cree politics and practices that are intended to challenge oppressive colonial structures and ideologies, and to promote instead Cree self-determination and self-governance, and indigenous self-determination more broadly. My description of decolonization here is only a working one that is specific to my research project and it does not capture the complexity of what decolonization means to others, or myself. Decolonization is much broader than the above articulation. Decolonization is discussed, debated, lived, and enacted in various ways by a multitude of indigenous peoples and people, though as Taiaiake Alfred notes, "decolonization starts becoming a reality when people collectively and consciously reject colonial identities and institutions that are the context of violence, dependency and discord in indigenous communities" ("Colonialism and State Dependency" [2009] 5 Journal of Aboriginal Health 42 at 44). Though not the focus of her work (which is on indigenous resistance and resurgence), Leanne Simpson contends that non-indigenous people and institutions must also "engage in a decolonization project and a re-education project that would enable its government and its citizens to engage with Indigenous Peoples in a just and honourable way in the future" (*Dancing on Our*

dynamic resources for managing social relations,[6] yet little attention is paid in the literature to how these social relations, and indigenous laws themselves, are gendered. This problem resides not just within the academic literature, but as my focus on Cree legal educational materials demonstrates, gender is not well dealt with in general audience materials as well. This finding that gender is poorly addressed reflects tendencies found in both non-state legal orders[7] and state legal orders.[8] As revitalization efforts via education are growing, and as people are continuing to draw on and theorize their legal traditions, questions about gender remain crucial given the pervasive ways that gender norms and dynamics shape legal discourse and experiences of citizenship.[9] This dissertation makes a unique

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Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence [Winnipeg: Arbeiter Ring Publishing, 2011] at 23). Further, Andrea Smith, whose work I draw on throughout this dissertation, emphasizes that an examination of settler-colonialism and white supremacy are crucial to decolonization politics ("Indigeneity, Settler Colonialism, White Supremacy" [2010] 12 Global Dialogue at para 1 [Smith, "Indigeneity, Settler Colonialism"]). My personal understanding of what decolonization means to me takes up this work of learning and challenging current power structures, and I understand this dissertation as part of these politics. Yet it is crucial to recognize how power dynamics play out in the usages of decolonization (for example, as I show in this dissertation with regards to gendered oppression being perpetuated in the name of decolonization) and how, as Eve Tuck and K. Wayne Yang argue, settler privilege can actually be perpetuated in some articulations of decolonization ("Decolonization is not a metaphor" [2012] 1 Decolonization: Indigeneity, Education & Society 1 at 2-3). They importantly argue that decolonization is, and should be, "unsettling" (*ibid* at 3).

[6] Borrows, *Canada's Indigenous Constitution*, *supra* note 1; John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) [Borrows, *Drawing Out Law*]; Napoleon, *Ayook*, *supra* note 1; Val Napoleon & Richard Overstall, "Indigenous Laws: Some Issues, Considerations and Experiences" an opinion paper prepared for the Centre for Indigenous Environmental Resources 2007; Christie, "Indigenous Legal Theory," *supra* note 1; Christie, "Culture, Self-Determination," *supra* note 1; Christie, "Law, Theory and Aboriginal Peoples," *supra* note 1.

[7] ICHRP, *supra* note 1.

[8] Margaret Davies & Kathy Mack, "Legal Feminism – Now and Then" (2004) 20 Australian Feminist Law Journal 1.

[9] James Tully defines a 'citizen' as "a person who is subject to a relationship of governance (that is to say, governed) *and*, simultaneously and primarily, is an active agent in the field of a governance relationship." James Tully, *Public Philosophy in a New Key: Volume 1: Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008) at 3. He goes on to explain that a governance relationship should be understood in "the broad sense of any relationship of knowledge, power and subjection that governs the conduct of those subject to it, from the local to the global" (at 3). My use of 'citizen' and 'citizenship' should *not* be conflated with the language of 'member' and 'membership' which are commonly used in discussions about indigenous

and urgent contribution to various fields of study (indigenous legal theory, feminist legal theory, indigenous feminist theory), by critically approaching indigenous laws as a site of gender struggle.[10]

In 2010, I audited a course on indigenous women and the law, taught by Dr. Val Napoleon. At the beginning of the semester, she raised some questions – what might indigenous feminist legal theory mean, and how might it help us in our analyses of law?[11] These questions stuck with me well beyond the course as I tried to navigate what I had previously learned about feminist legal theory and indigenous feminist theory, while learning in the field of indigenous law. Learning across these fields holds tremendous opportunity, alongside numerous tensions and difficulties. It is from working with and between these tensions, and from working with the Cree legal educational materials, that my understanding of indigenous feminist legal theory emerges in this dissertation. Articulation of what indigenous feminist legal theory means has not yet been done and this dissertation demonstrates that the need for this type of feminist analysis is urgent. The educational materials that I examined aim to contribute to revitalization and empowerment for Cree people, yet as I will illustrate, Cree women are not included as complex legal agents in these materials, nor is gender treated as a complicated social construct and reality. I contend that Cree women are actually

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politics. Membership refers to state defined rules about who is and is not indigenous. When I use citizenship, I am referring to indigenous defined conceptualizations of belonging, and note that the ways in which various citizens are included and excluded is complex and contested. Thus I am referring to the practice of citizenship, rather than rules for who belongs (see Tully's 'diverse' versus 'modern' citizenship, *ibid* at 246-249).

[10] As described in Chapter Two, Carol Smart's work in feminist legal studies influences my understanding of law as a site of gender struggle. See Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) [Smart, *Power of Law*].

[11] Val Napoleon, *Course Description: Aboriginal Women and the Law*, Syllabus, (Faculty of Law, University of Alberta, 2010) 1 at 1 [Napoleon, *Course Description*].

marginalized in, and by, the educational resources, whereas Cree men are represented as authoritative legal subjects. The need for indigenous feminist legal theory, as an analytic tool for engaging in critical analyses about gender, power, and indigenous laws is pressing and promotes a practical, anti-oppressive gendered approach to revitalization that is presently not being undertaken in the field of indigenous law. More broadly there is a need for an emergent field of indigenous feminist legal *studies*, and this dissertation begins this conversation by drawing on work from various scholars to explicitly articulate indigenous feminist legal theory, along with one approach to indigenous feminist legal methodology, as a way in to this pivotal work. Together, these tools petition for critically oriented engagement in indigenous legal education that can treat indigenous laws (like all laws) as gendered, living, practical resources for thinking about power and conflict.

In this dissertation I do not focus on articulating *what* Cree law is; rather, I concentrate on *how* Cree law is articulated – how Cree law is talked about, represented, how interpretations and claims are put forth – and how these are gendered. This approach is influenced by Napoleon's emphasis on the importance of legal reasoning and the intellectual aspect of law,[12] and by Carol Smart's call to pay attention to "knowledge and ideas" rather than the actualities of law itself.[13] I am interested in the accessibility and impact of laws, but a reader will not find out

[12] Napoleon, *Ayook*, *supra* note 1.
[13] Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (London: Sage, 1995) at 3 [Smart, *Law, Crime and Sexuality*]. Although not writing about law, this spirit of critique is also similar to Patricia Hill Collins' in her work on black sexual politics. See Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* (London: Routledge, 2004). Collins explains, "*Black Sexual Politics* does not tell readers what to think. Rather, it examines what we might think about" (*ibid* at 9).

from this dissertation 'what' Cree law is in terms of an assertion of rules. Law goes well beyond rules,[14] and no one text or person should ever be able to convey the depth and breadth of a legal order. Learning about any legal order is an ongoing process.

In thinking about the gaps in the field of indigenous law regarding gender, I aim to better understand how to practically, and complexly bring gender into legal interpretations, reasoning, and discussions on Cree law. Doing this work *complexly* means working with numerous difficulties, including, the thorny relationship between various interpretations about tradition and gender roles, and understanding Cree law as both a resource for challenging sexism, as well as a site that perpetuates gender oppression. Gendering Cree law (and indigenous laws more broadly) in this way also requires navigating various dichotomies so as to acknowledge the violence and realities of these dualisms, while also challenging them and resisting drawing easy lines between them. These dichotomies, which come up throughout the dissertation, include: indigenous/western; academic/community (or, academic/indigenous); indigenous/feminism; authentic/colonized; man/woman; public/private; mind/body.

Before getting any further into my analysis, it is essential to provide some contextual information. In this chapter, I discuss how I understand the term 'indigenous laws' (as well as other legal terms). I then provide a brief background on Cree peoples. This section is followed by a discussion on gendered realities, which begins to demonstrate why it is so crucial that critical gendered analysis be

[14] See Napoleon, *Ayook*, *supra* note 1. This argument is discussed further in Chapter Five.

integral in the field of indigenous law. I then present the research questions that guide my thinking, and provide chapter summaries.

1.2 Indigenous Laws

There are a multitude of scholars drawn on throughout this dissertation, however the work of Napoleon and Borrows constitute the foundation for my analysis of Cree law. Although neither scholar focuses specifically on Cree law, their analysis of indigenous legal orders provides important insights for my approach. Napoleon has written extensively on indigenous laws and most recently has been doing work on Gitksan legal theory, as well as methodologies for practically engaging with indigenous laws.[15] Borrows is a constitutional legal scholar who has also written extensively on indigenous laws.[16] I discuss their ideas (along with the influence of Gordon Christie) in detail in the next chapter.

It is important to be clear about how I am using the term 'indigenous law.' While much has been written on customary law, I generally do not draw on this literature in my work. Customary law and indigenous law are often wrongfully conflated. This is problematic for several reasons. First, this conflation has meant that indigenous laws are often not treated as law – the misconception is that

[15] See for example, Napoleon, *Ayook*, *ibid*; Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Global Pluralism* (Dordrecht: Springer, 2012) 229 [Napoleon, "Thinking About"]; Napoleon, "Raven's Garden," *supra* note 4. This latter work on methodology has also been done collaboratively with Hadley Friedland. See Napoleon & Friedland, "An Inside Job," *supra* note 3; Friedland & Napoleon, "Gathering the Threads," *supra* note 3.

[16] See for example Borrows, *Canada's Indigenous Constitution*, *supra* note 1; Borrows, *Drawing Out Law*, *supra* note 6; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [Borrows, *Recovering Canada*]; John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR 351 [Borrows, "(Ab)Originalism"].

indigenous peoples only had/have customs.[17] Borrows shows that indigenous laws have many different sources of law of which customary law is just one.[18] Jeremy Webber argues that all legal traditions include customary law and that customary law involves active reasoning.[19] Nevertheless, Napoleon contends that when people reduce indigenous law to customary law, the intellectual aspects of indigenous laws are often denied and indigenous peoples are treated as just engaging in traditions and practices, rather than legal processes and reasoning.[20] It is thus important to be cautious of this conflation, as the reduction of indigenous laws to rigid, singular conceptualizations of tradition can (amongst many problems) result in limited discussions about gender that get bound in the language of authenticity and culture, at the expense of critique, reasoning, and an attentiveness to systemic social realities.[21]

Assumptions about indigenous laws – that they are simple, primitive, inherently sexist, not adaptable, and just custom – are based on a racist and colonial hierarchical approach to law.[22] This hierarchical ordering of laws claims

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[17] In Webber's work he says that he "does not follow the lead of some scholars by presuming that there is a stark contrast between 'custom' and 'law', with the latter conceived in positivist (or at least entirely state-centered) terms" (Jeremy Webber, "The Grammar of Customary Law" [2009] 54:4 McGill Law Journal 579 at 581 [Webber, "Grammar"]).

[18] Borrows, *Canada's Indigenous Constitution*, *supra* note 1 at ch 2. The sources of law that Borrows outlines are discussed in detail in Chapter Five of my dissertation.

[19] Webber, "Grammar," *supra* note 17 at 581-582.

[20] Val Napoleon, "Creating Space for the Project of Indigenous Law within Political Science" (Paper delivered at the 84th Annual Canadian Political Science Association Conference, Edmonton, University of Alberta, 15 June 2012) [unpublished] [Napoleon, "Creating Space"].

[21] Although not writing about indigenous laws, Verna St. Denis' important insights on fundamentalisms and cultural revitalization are drawn on here (see "Real Indians," *supra* note 5). Her work is also discussed throughout this dissertation.

[22] Napoleon, *Ayook*, *supra* note 1 at 89; Borrows, *Canada's Indigenous Constitution*, *supra* note 1 at 12. Bruce Miller also talks about the assumption that indigenous laws are more so about culture, than 'law' (Bruce Miller, "Justice, Law, and the Lens of Culture" [2003] 18:2 Wicazo Sa Review 135 at 135) [Miller, "Justice, Law"].

that: 1) indigenous laws are so primitive that they are not even law,[23] and 2) that law started with the laws of settlers.[24] These ideas are challenged by indigenous legal theory, which treats indigenous laws as complex, and as containing practical tools for social organization and conflict management. It is important to also make clear that when talking about indigenous laws, I (and many others) am not referring to band governance. Band governance, while connected to indigenous laws in some ways, can be thought of as something that *undermines* indigenous legal orders given that band councils are state governance structures imposed onto decentralized social, political, and legal structures.[25] It is also important not to conflate indigenous laws and restorative justice.[26] As Napoleon et al. contend, while restorative justice programs often assert to take up indigenous principles, this is often done in a way that is general and is "unrelated to the laws and legal orders of the local Indigenous peoples where they are applied."[27] Not only is it inaccurate to conflate indigenous laws and restorative justice, this conflation erases the complexity of indigenous laws and reduces 'aboriginal justice' to

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[23] Borrows, Canada's Indigenous Constitution, *supra* note 1 at 12.
[24] *Ibid* at 13.
[25] Napoleon explains, "[i]n Canada, the *Indian Act*-imposed band council structure conflicts with indigenous governance systems because it is this structure that receives government recognition, legitimacy, and resources. Also, as a colonial tool, the band council system is inherently corruptible and open to abuses of power because it is disconnected from indigenous authority, accountability, and scope" ("Raven's Garden," *supra* note 4 at 158).
[26] For example, Hansen does this in his work on Cree law (John George Hansen, *Cree Restorative Justice: From the Ancient to the Present* (Kanata: JCharlton Publishing, 2009) [Hansen, *Cree Restorative Justice*].
[27] Val Napoleon et al, "Where is the Law in Restorative Justice?" in Yale D. Belanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues,* 3d, (Saskatoon: Purich Publishing, 2008) 348 at 349-350 [Napoleon et al, "Where is the Law"]. See also Jonathan Rudin, "Pushing Back: A Response to the Drive for the Standardization of Restorative Justice Programs in Canada" (Paper delivered at the 6th International Conference on Restorative Justice, Vancouver, BC, 2003), online: <http://www.restorativejustice.org/pressroom/04av/rjstandardisatonrudin>.

general pan-indigenous principles that are contrasted with adversarial state laws.[28] My approach to law is that it is involves conflict and I aim to avoid oversimplified generalizations that degrade the complexity of indigenous laws. These complexities include the depth of legal reasoning and richness of legal principles, alongside the contradictions of law (as a source of empowerment and oppression; between legal ideals and practice) and the struggles of indigenous laws.[29]

When referring to Canadian laws (and the laws of other settler states) in the dissertation, I use the terms 'state law' or 'aboriginal law.'[30] These terms refer to state legal practices and laws *imposed on* indigenous peoples. Even though indigenous people use the state legal system for various reasons, it is still overall an imposed, colonial institution that wrongfully asserts itself as 'the' form of law.[31] When I use the term 'indigenous law,' I am referring to indigenous peoples' own internal legal traditions. While I have been using the broad language of 'indigenous' here, research on indigenous laws should speak specifically about particular legal traditions (e.g. Cree legal traditions). A legal tradition can be described as "'a set of deeply rooted, historically conditioned attitudes about the

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[28] Napoleon et al, "Where is the Law," *ibid* at 350.

[29] This understanding of law as about conflict is informed by Napoleon, *Ayook*, *supra* note 1; Borrows, *Canada's Indigenous Constitution*, *supra* note 1; and Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed, *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart Publishing, 2009) 201 [Webber, "Naturalism"].

[30] At various points in this dissertation, I refer to 'western' approaches or scholarship. When doing so, I mean to contrast said approaches with indigenous approaches, though it should be noted that such a tidy divide does not actually exist. Further, in using the term 'western' I do not necessarily mean a geographically bound set of beliefs, rather I am speaking to particular ideologies.

[31] Borrows explains that indigenous law is recognized by the Canadian state – in R v. Van der Peet and R v. Mitchell, in section 35(1) of the *Constitution Act, 1982*. He notes, "[i]n this respect, they [indigenous legal traditions] are also part of Canadian law" (*Canada's Indigenous Constitution*, *supra* note 1 at 11). Though Borrows also emphasizes that in practice, indigenous laws are not well recognized by the state (*ibid* at 6) and emphasizes that "[c]olonization is not a strong place to rest the foundation of Canada's laws. It creates a fiction that continues to erase Indigenous legal systems as a source of law in Canada" (*ibid* at 14).

nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the ways law is or should be made, applied, studied, perfected, and taught.'"[32] I am particularly interested in how Cree law is conceptualized when it is taught – how it is articulated and represented in public educational resources. Importantly, when using the term 'indigenous legal tradition,' tradition is conceptualized as fluid, contested, and something that changes over time.[33] Thus, broadly speaking, a legal tradition can be understood as normative ideas about law and what constitutes the nature of law, though the ideas about this will be plentiful and varied.[34] As illustrated throughout this dissertation, Cree legal traditions are plural and changing, yet similar to Friedland and Napoleon's conclusions in their work on various indigenous legal traditions, Cree law also maintains consistency and continuity.[35]

Napoleon explains that a legal order can be thought of as "the structure and composite parts of law captured at any point in time."[36] A legal order comprises the actual structure and operation of law, shaped by legal tradition (including ideas about how law should be structured). In her work on Gitksan law, Napoleon emphasizes that Gitksan society is decentralized (as is Cree society), and that "Gitksan legal traditions are based on a non-State, decentralized political

[32] John Merryman quoted in Borrows, *Canada's Indigenous Constitution*, *ibid* at 7. Napoleon also draws on this definition of legal tradition in her work. See Napoleon, *Ayook*, *supra* note 1.
[33] See also Borrows, *Canada's Indigenous Constitution*, *ibid* at 8; Napoleon, *Ayook*, *ibid* at 91-92.
[34] Napoleon, *Ayook*, *ibid* at 2.
[35] They explain, "[t]he consistency and continuity of certain principles in each legal tradition through history, despite different expressions and disparate resources, was noteworthy and significant. Time and time again, we saw that Indigenous legal principles can and do maintain their core integrity while adapting to new and changing contexts. There was often remarkable continuity and consistency in legal principles within Indigenous legal traditions from ancient stories to contemporary times. These deep-rooted principles are illustrated and implemented in new ways over time and in changing circumstances" (Friedland & Napoleon, "Gathering the Threads," *supra* note 3 at 30).
[36] Napoleon, *Ayook*, *supra* note 1 at 2.

structure" and is different from state legal traditions in that there are not "centralized legal and enforcement bureaucracies."[37] This is not to say that Gitksan law, or other indigenous laws are without structure, authorities, legal precedent, and accountability processes.[38] Borrows maintains that "[m]any Indigenous peoples believe their laws provide significant context and detail for judging our relationships with the land, and with one another. Yet Indigenous laws are often ignored, diminished, or denied as being relevant or authoritative in answering these questions."[39] I aim to challenge the oversimplification of indigenous laws, through my focus on Cree laws as gendered.

1.3 Cree Brief

It is challenging to briefly introduce who the Cree are, given their substantial history and complex contemporary contexts. Cree identity, culture, and peoples are heterogeneous,[40] though this is not to suggest that they are not a distinct society. The Cree have their own history, culture, stories, ceremonies, language, and laws. The *nehiyawak* (Cree people) are a First Nations people who reside in what is now commonly called Canada. The traditional territory of the Cree is expansive and they "are a people of the boreal forest and prairie. Their homeland

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[37] *Ibid* at 9-10.
[38] *Ibid* generally. For thinking about this point in relation to indigenous legal orders more generally see for example: Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishnabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] [Friedland, *The Wetiko*]; Hadley Friedland, "The Accessing Justice and Reconciliation Project Cree Legal Traditions Report" (University of Victoria Law, Indigenous Bar Association, The Law Foundation of Ontario, Truth and Reconciliation Commission of Canada, 2013) [draft] [Friedland, "Accessing Justice"]; Borrows, *Drawing Out Law*, *supra* note 6; Borrows, *Canada's Indigenous Constitution*, *supra* note 1.
[39] Borrows, *Canada's Indigenous Constitution*, *ibid* at 6.
[40] Naomi Adelson, '*Being Alive Well': Health and the Politics of Cree Well-Being* (Toronto: University of Toronto Press, 2000) at 13.

stretches from James Bay to the Rocky Mountains; the diverse ecologies of this terrain influence their laws."[41] Cree people now live in various parts of Canada, given that a significant number of First Nations do not live on reserve.[42] Importantly, reserves do not properly reflect the breadth of Cree traditional territory[43] or of the historical subsistence patterns in which Cree people moved throughout their territories to where food could be found.[44]

The Cree language is an Algonquian language[45] and there are several dialects and sub-linguistic groups – Atikamêk Cree (Quebec); Moose Cree (Moose Factory, Hudson Bay); Swampy Cree (northern Ontario, Manitoba, eastern Saskatchewan); Woodlands Cree (parts of Manitoba, northern Saskatchewan); and Plains Cree (southern Saskatchewan and central Alberta).[46] Oral tradition is central in Cree culture and contains information about history, law, politics, economics, spirituality, relationships to the land, and social relations. McLeod describes how "[t]hrough stories and words, we hold the echo

[41] Borrows, *Canada's Indigenous Constitution*, *supra* note 1 at 84. Dickason describes of the boreal forest, "[t]his densely wooded area of coniferous trees includes black spruce, white spruce, white pine, red pine, the eastern cedar, as well as a few broadleaf deciduous species such as white birch. The moose, the beaver, and the black bear are the most important of the region's animals" (Olive Dickason with William Newbigging, *A Concise History of Canada's First Nations*, 2d ed [Oxford: Oxford University Press, 2010] at 13).
[42] A 2006 Census report indicates that 60 per cent of First Nations live off reserve (Archived content, 2006 Census: Aboriginal Peoples in Canada 2006: Inuit, Métis and First Nation, 2006 Census: First Nations People, online: Statistics Canada <http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/p16-eng.cfm>).
[43] The literature and many cases on land claims highlight the discrepancies between reserve land and traditional territories.
[44] Friedland, "Accessing Justice," *supra* note 38 at 1-2.
[45] Nancy LeClaire & George Cardinal; Earle Waugh ed, *Alberta Elders' Cree Dictionary*: *alperta ohci kehtehayak otwestamâkewasinahikan* (Edmonton, University of Alberta Press, 1998) at xiii.
[46] Jean Okimâsis, *Cree: Language of the Plains: nêhiyawêwin paskwâwi-pîkiskwêwin*. (Regina: Canadian Plains Research Center, 2004) at 1.

of generational experience, and the engagement with land and territory."[47] He notes that stories change over time –

> [w]hile we are influenced by the stories of the *kêhtê-ayak* (Old Ones), we also add to the meaning of these stories through our experiences and understanding, and add in small ways to the ancient wisdom.
>
> Narratives are constantly being reinterpreted and recreated in light of shifting experience and context.[48]

Cree peoples' histories and contemporary contexts have been impacted by the fur trade,[49] nation-to-nation disputes with other indigenous peoples and with settlers,[50] land claims,[51] colonial policies such as the *Indian Act* and residential schools,[52] and settler violence, in which indigenous women have been especially targeted.[53]

The focus in this dissertation is broadly Cree, as the materials that I am analyzing range from being pan-Cree to particular foci, such as the Mushkegowuk Cree.[54] While it would be most ideal to have a narrower focus given the specific geographic, linguistic, political, and cultural contexts of different Cree collectivities,[55] I am limited by the small amount of contemporary public print and digital resources available in the area of Cree law. There are few public

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[47] Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich Publishing, 2007) at 6 [McLeod, *Cree Narrative Memory*].
[48] *Ibid* at 11.
[49] John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: The University of Manitoba Press, 1988).
[50] *Ibid*; McLeod, *Cree Narrative Memory*, *supra* note 47 generally.
[51] See for example, Adelson, *supra* note 40 generally.
[52] McLeod, *Cree Narrative Memory*, *supra* note 47 generally.
[53] See 'Gendered Realities' section below.
[54] See for instance Hansen, *Cree Restorative Justice*, *supra* note 26.
[55] For example, Cree people living in the James Bay area have been significantly impacted by the James Bay and Northern Quebec Agreement of 1975. Adelson explains, "the agreement led to political, social, and economic changes in each and every one of the Cree communities. However, this was not a clear win or loss for either the Cree of the governments involved and the effects of the signing, both good and bad, resonate to this day" *('Being Alive Well,' supra* note 40 at 50). This agreement is not something that so directly impacted Cree people in the prairies (though there are other land claims, environmental issues, and provincial politics throughout the prairies).

educational resources on Cree law and geographic limiters would be unproductive. There are many times throughout this dissertation (such as the next section) in which it is necessary to broadly draw on literature.

1.4 Gendered Realities[56]

Indigenous women contend daily with gendered realities. While this does not mean that all indigenous women have the same experiences, it does mean that no one is exempt from the pervasive ways that gender operates in social relations and norms that circulate through law, politics, economics, personal relationships, and so on. These gendered dynamics operate both explicitly and implicitly, and in calling law gendered, I focus on these power dynamics. Carolyn Korsmeyer explains that calling something 'gendered' is to make obvious that "there is a hidden skew in connotation or import, such that the idea in question pertains most centrally to males, or in certain cases to females."[57] She describes, "I consider hidden gender a particularly interesting force over thinking because it can be so insidious. Most of the time it is either nearly invisible or apparently trivial; and yet careful scrutiny reveals systematic meanings that exercise considerable influence on the framing of ideas."[58] As I demonstrate in this dissertation, discourses and ideas are not disconnected from social reality and practices. Thus in talking about gendered realities, I aim to make transparent the circulation and impact of gender norms and power dynamics as they circulate in social contexts in

[56] Some of the text in this section, along with some of the ideas in Chapter Two are used in a report that I wrote. See Emily Snyder, *Gender and Indigenous Law*, University of Victoria Law, Indigenous Bar Association, Truth and Reconciliation Commission of Canada, 13 March 2013. A revised version of Chapter Two of this dissertation has also been submitted for publication in a journal.
[57] Carolyn Korsmeyer, *Gender and Aesthetics: An Introduction* (New York: Routledge, 2004) at 3.
[58] *Ibid* at 3-4.

which heteronormative, patriarchal, and colonial violence are realities. Further, when describing Cree law, and indigenous laws more broadly, as gendered, I am not just referring to gender roles. Gender roles are often framed as *the* way to imagine law as gendered in the Cree legal educational resources. It is not sufficient to show that women and men had or have their roles, and representations of gender in the materials fall short. Gendering law should go much deeper than this and likewise the persistent representation of gender as coherent, fully agreed upon conceptualizations that are culturally dictated and wedded to authenticity and ahistorical notions of tradition, work against the type of critical analyses of gender undertaken in this dissertation.

Sexism, the marginalization of women, and violence against women are major social problems in indigenous communities. These social problems are also pervasive in non-indigenous communities, though as the discussion below highlights, these realities are exacerbated for indigenous women as they contend with sexist, racist, and colonial oppression. Indigenous women face marginalization in many different ways, both within and outside of indigenous communities.[59] Gender shapes experience and while indigenous women and men face similar social and legal issues, indigenous women can experience them differently and face additional challenges, compared to indigenous men. Kim Anderson maintains that these gendered realities are erased when

[59] See for example, Joanne Barker, "Gender, Sovereignty, Rights: Native Women's Activism against Social Inequality and Violence in Canada" (2008) 60:2 American Quarterly 259; Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Richardson, Imai & McNeil, *supra* note 1, 233 [Napoleon, "Aboriginal Discourse"]; Emma LaRocque, "The Colonization of a Native Woman Scholar," in Christine Miller and Patricia Chuchryk, eds, *Women of the First Nations: Power, Wisdom, and Strength* (Winnipeg: University of Manitoba Press, 1996) 11 [LaRocque, "The Colonization of"].

"[d]ecolonization, healing, sovereignty, and nation building are areas of priority."[60] It is commonly articulated in indigenous politics that "[i]f we work in these areas, so the logic goes, then the dire conditions in which many Native women find themselves will improve. Yet, in spite of our efforts to achieve self-determination since the middle of the twentieth century, the lives of Indigenous women continue to be plagued by violence and poverty."[61] Indigenous feminists, as is discussed in Chapter Two, significantly illustrate how decolonization efforts need to be explicitly gendered, given that colonial and patriarchal violence are reliant on one another, and also because complex social issues simply cannot be challenged if not directly addressed.

Indigenous social norms regarding gender have been severely impacted by the colonial imposition of patriarchal, Christian, Victorian notions of gender.[62] Part of the colonial attempts at assimilating indigenous peoples included the efforts to Christianize indigenous women to be like Euro-Canadian women, and to reinforce heterosexual relationships, family structures, and gender roles.[63] Ladner contends that "Indigenous women were considered within Indigenous society as persons," compared to European arrangements in which women were treated as property and as subordinates.[64] Forced attendance at residential schools[65] and

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[60] Kim Anderson, "Affirmations of an Indigenous Feminist" in Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: University of British Columbia Press, 2010) 81 at 85.
[61] *Ibid*.
[62] See for example, Napoleon, "Raven's Garden," *supra* note 4; Kiera Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13 Australian Indigenous Law Review 62.
[63] Barker, *supra* note 59.
[64] Ladner, *supra* note 62 at 70.
[65] Dian Million, "Felt Theory: An Indigenous Feminist Approach to Affect and History" (2009) 24:2 Wicazo Sa Review 53 at 56; Shari M. Huhndorf & Cheryl Suzack, "Indigenous Feminism: Theorizing the Issues" in Suzack et al, *supra* note 60, 1 at 5 [Huhndorf & Suzack, "Indigenous

imposed state policies, such as the *Indian Act*,[66] negatively impacted indigenous gender roles and deeply affected indigenous women. Barker explains, "[t]he provisions [of the *Indian Act*] represented and perpetuated a much longer process of social formation in which Indian men's political, economic, and cultural roles and responsibilities were elevated and empowered while those of Indian women were devalued."[67] Through the *Indian Act*, patrilineal means for establishing 'status' were put forth,[68] which perpetuates discrimination against indigenous women.[69] Barker maintains that, "[a]s with all assimilation policies, it was based on an inherently racist and sexist assumption that Indian governance, epistemologies, beliefs, and gender roles were irrelevant and invalid, even dangerous impediments to progress."[70]

In this dissertation I work with the impacts that colonialism has had on indigenous women's rights to political involvement, positions of leadership within their communities, and their economic well-being,[71] while also not oversimplifying indigenous gender norms and roles prior to contact. Working against this oversimplification includes deconstructing and challenging romanticizations of indigenous traditional gender roles in which pre-contact

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Feminism"]; Rebecca Tsosi, "Native Women and Leadership: An Ethics of Culture and Relationship," in Suzack et al, *supra* note 60, 29 at 36.

[66] Million, *ibid* at 55-58; Huhndorf & Suzack, "Indigenous Feminism," *supra* note 65 at 5; Barker, *supra* note 59 at 259. The *Indian Act* imposes patrilineal kin relations still today (Cheryl Suzack, "Emotion before the Law" in Suzack et al, *supra* note 60, 126 at 130 [Suzack, "Emotion").

[67] Barker, *ibid* at 262.

[68] *Ibid* at 259.

[69] Status will not be focused on in my dissertation, as I am looking internally at Cree laws. For a discussion on the *Indian Act* and gender, see Ladner, *supra* note 62. For discussions on status, see Suzack, "Emotion," *supra* note 66; Barker, *supra* note 59 generally; Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18:2 Hypatia 3.

[70] Barker, *ibid* at 261.

[71] *Ibid* at 262; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 CJWL 174 at 180 [Turpel, "Patriarchy and Paternalism"].

societies are imagined as perfect and then ruined by colonialism. LaRocque hesitates to label male violence and privilege as products of colonialism, and questions the "over-riding assumption that Aboriginal traditions were universally historically non-sexist and therefore, are universally liberating today."[72] Further, Napoleon states that "the overall picture that emerges from these early sources [of pre-contact gender relations] is of extraordinary diversity, flexibility, and tolerance among most Aboriginal nations across North America" however she too maintains that "[t]here was no golden age – hardship, wars, violence, sexism, prejudices, repression, and homophobia existed for many Aboriginal nations as in the rest of the world."[73]

This approach of treating the past as also including oppression is not meant to deny the significant violence that indigenous women face because of colonialism. Colonial violence has been, and still is, reliant on violence against indigenous women.[74] Gendered violence, such as sexual assault, is a common "tool" of colonial oppression and degradation.[75] Rates of sexual assault are 3.5 times higher for indigenous women, compared to non-indigenous women in Canada.[76] There is an epidemic of missing and murdered indigenous women in

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[72] Emma LaRocque, "Métis and Feminist: Ethical Reflections on Feminism, Human Rights, and Decolonization" in Joyce Green, ed, *Making Space for Indigenous Feminism* (Winnipeg: Fernwood Publishing, 2007) 53 at 65 [LaRocque, "Métis and Feminist"].
[73] Napoleon, "Raven's Garden," *supra* note 4 at 153. Verna St. Denis, "Feminism is for Everybody: Aboriginal Women, Feminism and Diversity" in Green, *supra* note 72, 33 at 45 [St. Denis, "Feminism is for Everybody"].
[74] Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005) [Smith, *Conquest*].
[75] *Ibid* at 151.
[76] Amnesty International, "No More Stolen Sisters: The Need For A Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada" (London, 2009) at 1, online: <http://www.amnesty.ca/sites/default/files/amr200122009enstolensistersupdate.pdf>. This statistic is based on a government survey that was conducted in 2004. See also, Shannon Brennan, "Violent victimization of Aboriginal women in the Canadian provinces, 2009" Statistics Canada

Canada that continues to be poorly understood and responded to by settlers (individuals and institutions).[77] Further, research indicates the brutality of the violence done unto indigenous women is often more severe.[78] An Amnesty International report noted a government survey that indicated that "young First Nations women are five times more likely than other women to die as a result of violence."[79] The report clarifies that the statistics on violence against indigenous women "almost certainly underestimate the scale and severity of the violence faced by Indigenous women."[80]

Economically, when looking at the differences between indigenous and non-indigenous women, indigenous women typically have lower incomes, earning only 77 per cent of what non-indigenous women in Canada make.[81] Indigenous women are more likely to be living below the poverty line than other women.[82] Further, indigenous women are overrepresented in manual labour jobs and clerical

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Report (Ottawa: Minister of Industry, 2011), online: <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.pdf>.

[77] A fact sheet produced by the Native Women's Association of Canada indicates 582 cases of missing and murdered indigenous women in Canada (as of 2010) ("Fact Sheet: Violence Against Aboriginal Women," Native Women's Association of Canada, at 3, online: <http://www.nwac.ca/sites/default/files/imce/NWAC_3E_Toolkit_e.pdf>) [NWAC, "Fact Sheet"].

[78] Amnesty International, *supra* note 76 at 1.

[79] *Ibid*.

[80] *Ibid*. While there are many complex reasons why indigenous women may not disclose incidents of violence, it certainly must be considered that much of the data comes from government surveys. Given the violent history and contemporary practices of the state, many indigenous women are unlikely to see government surveys as trustworthy or safe outlets for disclosing violence. In a fact sheet by the Native Women's Association of Canada, it is indicated that "[c]ommunity-based research has found levels of violence against Aboriginal women to be even higher than those reported by government surveys" ("Fact Sheet," *supra* note 77 at 5).

[81] Aboriginal Affairs and Northern Development Canada (AANDC), "Aboriginal Women in the Canadian Economy: The Links Between Education, Employment and Income" (fact sheet, 2012), at 2-3 online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ai_res_aborig_econ_pdf_1331068532699_eng.pdf>.

[82] *Ibid* at 3.

work, and are underrepresented in management jobs, compared to non-indigenous women.[83]

Indigenous women also face marginalization within their communities. For instance, on average, indigenous women make less money than indigenous men.[84] Further, indigenous women are less likely to be elected into leadership positions in communities and face political marginalization.[85] Not only can this mean that the risk exists that indigenous women's concerns will not make it to, or be heard by predominantly male decision-makers, but the problem arises that indigenous men are more likely to be in positions in which they can exercise control over resources within a community.[86]

Violence against women is also a significant problem within indigenous communities. For example, indigenous women face high rates of sexual violence.[87] In addition to being vulnerable to this violence as adults, indigenous women report higher rates of having experienced some form of sexual violence as a child (61 per cent of indigenous women reporting this compared to 35 per cent of indigenous men).[88] Rates for domestic violence are also high.[89] While violence can be understood as occurring between individuals, it is important to also recognize it as connected to larger social problems, and to understand that

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[83] *Ibid* at 2.
[84] *Ibid* at 1.
[85] Barker, *supra* note 59; Anderson, *supra* note 60 at 84-85.
[86] Joyce Green, "Taking Account of Aboriginal Feminism," in Green, *supra* note 72, 20 at 24 [Green, "Taking Account"].
[87] Amnesty International indicates that indigenous women in Canada "reported rates of violence, including domestic violence and sexual assault, 3.5 times higher than non-Indigenous women" (Amnesty International, *supra* note 76 at 1).
[88] Ontario Federation of Indian Friendship Centres (OFIFC), "Aboriginal Sexual Violence Action Plan" (in partnership with the Métis Nation of Ontario and the Ontario Native Women's Association, Toronto, Ontario, 2011) at 1, online: <http://www.ofifc.org/pdf/20120202_ Aboriginal_sexual_violence_action_plan_final_report.pdf>.
[89] See *supra* note 87.

violence against women is perpetuated through social structures and circumstances. For example, it might be difficult for an indigenous woman to leave an abusive relationship because of a lack of resources and/or housing shortages.[90] Further, the pervasiveness of violence against women is perpetuated by social norms in which the degradation of indigenous women is treated as normal and is supported by denigrating stereotypes that devalue indigenous women's worth and right to their own bodily and mental safety.

Indigenous women face many challenges, but as discussed in Chapter Two, they also exercise agency and resistance in various ways. Gendered realities, particularly gendered legal realities within Cree law, are discussed throughout this dissertation, and the brief discussion thus far is meant to provide initial social context.

1.5 Research Questions

Before introducing my research questions, it is necessary to discuss my own social position in relation to this dissertation. Indigenous and feminist scholars have amply shown that researchers are not neutral – our histories, social location, and politics, in varying ways, shape the questions that we ask and how we approach and produce research.[91] More broadly, in her work on decolonizing research methodologies, Linda Tuhiwai Smith vitally demonstrates how "the term

[90] OFIFC, *supra* note 88 at 1.
[91] See for example, Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books Ltd.; Dunedin: University of Otago Press, 1999); Elizabeth Grosz, "Philosophy" in Sneja Gunew, ed, *Feminist Knowledge: Critique and Construct* (New York: Routledge, 1990) 147; Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009).

'research' is inextricably linked to European imperialism and colonialism."[92] She explains, "it is surely difficult to discuss *research methodology* and *indigenous peoples* together, in the same breath, without having an analysis of imperialism, without understanding the complex ways in which the pursuit of knowledge is deeply embedded in the multiple layers of imperial and colonial practices."[93]

Throughout this dissertation I draw on work by indigenous and non-indigenous scholars, and try to understand how my own positionality as a white feminist woman influences how I read these texts, and how I interpret the Cree legal educational resources. My articulation of indigenous feminist legal theory encourages analysts, including myself, to make obvious and unnatural, the oppressive ideals and values in scholarship, requiring an approach that is intersectional, attentive to power, and attentive to context. Indigenous feminist legal theory encourages me to interrogate my own assumptions and beliefs. My experiences are influenced by being a white, heterosexual, middle-class woman working in academia. I work to make visible my own privileges as a settler and aim to undo the limited colonial 'truths' that I was taught (and am still asked to believe today).

When writing on white privilege, Marlee Kline explains that white people "are able to ignore the experience of our race because it does not in any way correlate with an experience of oppression and contradiction. Quite the contrary, it

[92] Tuhiwai Smith, *supra* note 91 at 1.
[93] *Ibid* at 2.

is correlated with a position of power."[94] Given that whiteness is normative or the norm in Canadian society (and elsewhere), it can be perceived as 'natural' and comfortable. Aileen Moreton-Robinson describes how white academics deal poorly with this power and privilege – "[w]riting about and recognising white race privilege often means for white feminists that you know about your privilege, you have dealt with it by writing about it, so you can move on."[95] I hope to make clear that in my own work, I aim to challenge hierarchical racial constructs and the power and privileges that I receive from them. I aim to make white privilege, and the power that it accords, an uncomfortable experience – something unnatural and abnormal. Further, thinking about power goes beyond just deconstructing the construct of race, to interrogating, as Andrea Smith argues, the intimate relationship between settler colonialism and white supremacy,[96] which are connected to and sustained also by gendered violence and heteronormative oppression.[97]

Yet difficult questions still persist regarding my relationship to this dissertation research. How can I, as a white woman, draw on indigenous feminisms, and articulate an approach of indigenous feminist legal theory and methodology? Given my own social location, is it legitimate for me to make assessments about Cree law, Cree women's agency, decolonization, and Cree people's revitalization efforts? There are challenging identity politics and power

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[94] Marlee Kline, "Race, racism, and feminist legal theory," in Joanne Conaghan, ed., *Feminist Legal Studies: Evolution* Critical Concepts in Law Vol I (New York: Routledge, 2009/originally published 1989) 185 at 188.
[95] Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (St. Lucia, Queensland: University of Queensland Press, 2000) at 350.
[96] Smith, "Indigeneity, Settler Colonialism," *supra* note 5 generally.
[97] See Smith, *Conquest, supra* note 74.

dynamics playing out, and there will exist various responses to my questions. Perhaps what is most useful for me to do is to be upfront about my intentions. When I talk about indigenous feminism and indigenous feminist legal theory and methodology, I do not mean to claim that I am an 'indigenous feminist.' Nor do I mean to claim solidarity – solidarity is relational – it is not something that I can just claim that I am doing. I include indigenous feminism explicitly in this dissertation because, as I explain in detail in Chapter Two, it is crucial to include indigenous feminism in a comprehensive, explicit way. As Joyce Green notes in her work, indigenous feminism is a "conceptual tool"[98] and it would be a grave oversight for me to do a gendered analysis of Cree law without engaging with the important insights indigenous feminist theory raises. I also treat indigenous feminist legal theory and methodology as analytic tools – approaches that take seriously Cree law and that engage in gendered analyses of indigenous laws to critically interrogate gendered, colonial, heteronormative oppression. I do not mean to speak for indigenous women nor do I suggest that indigenous women (or indigenous people of any gender) have to take up these tools. People will reject, use, or revise this work as they see fit. Though in saying this, I do not mean to deny the unearned authority given to white voices in academia or the difficult power dynamics at play pertaining to identity politics and voice.

Learning and thinking about indigenous feminisms and indigenous laws is important for everyone, including people who are white. While one interpretation is that 'indigenous research' should come only from within (be done by indigenous people – this is discussed further in Chapter Three), indigenous and

[98] Green, "Taking Account," *supra* note 86 at 26.

non-indigenous people do not live in tidy, divisive isolation from one another and an approach of 'research your own legal orders' seems over-simplified. There is much that can be learned from thinking about a plurality of legal orders.[99] I agree with Christie that indigenous legal theory should be indigenous-centered, and that indigenous laws should be articulated by indigenous peoples in ways that work for them. However, I do not think that this should mean that non-indigenous people should then not engage with, and think about, indigenous laws.[100] In asking questions about Cree law I do not mean to undermine Cree legal traditions; rather I aim to understand the depth of Cree law, and aim to treat Cree peoples and law as complex.

For readers who are wondering why I am interested in Cree law specifically, I spend much of my time living and travelling in what is traditional Cree territory and I aim to better understand the plural legal realities of this territory. Further, my partner is Cree. I do not include this familial information to assert an 'in,' or to claim a link to 'authentic experience or knowledge' (whatever that is), or to show that I am an 'ethical person' (one should be ethical towards others regardless of who they know or are related to and even then intimate relationships ought not to be assumed to be necessarily ethical), or to close down questioning of my work. I include this information simply to be explicit about my interests in Cree law. This dissertation brings forth some of the questions that

[99] Borrows, *Canada's Indigenous Constitution*, *supra* note 1.
[100] Christie also does not preclude non-indigenous scholars from working with indigenous legal theory. He says, "[f]or a number of reasons, however, great care must be exercised in this matter, reasons that all tie down at some point to one central fact – that the experiences, understandings, concepts and theories that go into the process of theorising in this context all relate to the collective wills and visions of Indigenous peoples" (Christie, "Indigenous Legal Theory," *supra* note 1 at 209).

arise for me in this ongoing process of learning about Cree law, though I recognize that this work is fraught with tensions. As I discuss in the final chapter, being attentive to these tensions and to other related conflicts are necessary and instructive, as talking about power, race, gender, sexuality, and colonialism ought to be uncomfortable.

When I first began the work for my dissertation, I intended to do community research (interviews) on Cree law, citizenship, and gender. My proposal to do interviews in one Cree community was rejected by Chief and Council. I was not given a reason for why they were disinterested in the research proposal, though certainly the broader politics that I have begun to speak to above, of a non-indigenous researcher working on Cree law, as well as the politics of talking about resources, conflict, gender, and feminism may have been factors. One of the concerns that I had going into that proposed project was that I (or research participants) would not be able to speak openly about indigenous feminism and gendered conflict. The rejection of the initial dissertation proposal, as well as experiences at conferences and community meetings, caused me to realize that substantial theoretical and methodological work for understanding indigenous laws as gendered was lacking. It is difficult to find a way into critical discussion about gender and indigenous laws because of the power of some discourses and ideologies about tradition, gender roles, and 'authenticity' that can silence intellectual engagement with indigenous laws. Indigenous feminist legal theory and methodology provide analytic tools for one way into these much-needed conversations. I refocused my research to an examination of how Cree law

and gender are represented in educational contexts and this shift demanded an examination of how gendered analysis is crucial to the theoretical, methodological, and pedagogical work ahead for the field of indigenous legal studies. Much foundational work in the field still needs to be done.

This approach complements a growing movement in the field, in which work on theory and methodology are being examined. For example, scholars such as Christie, Napoleon, and Borrows have been producing engaging theoretical work on indigenous laws that provides researchers with useful frameworks from which to extend their own analyses.[101] Further, Friedland illustrates that there are different methodologies in the field,[102] and she and Napoleon have been producing work on legal methodologies for substantively engaging with indigenous laws.[103] Friedland explains, "[e]ven if we agree [within the discipline] that Indigenous legal traditions *should* be given more respect and recognition within Canada, and drawn upon in more explicit and public ways, we are still left with the very real question of *how* to do this."[104] My own thinking about indigenous laws has benefitted significantly from the existing (and emerging) foundational work in the field, and I draw on, revise, and add to this work. My thinking has also benefitted greatly from scholarship in the fields of indigenous feminist studies, and feminist legal studies. What emerges in this dissertation is a framework for examining how indigenous laws or representations of law are

[101] Christie, "Indigenous Legal Theory," *supra* note 1; Napoleon, *Ayook*, *supra* note 1; Borrows, *Canada's Indigenous Constitution*, *supra* note 1.
[102] Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 2 [Friedland, "Reflective Frameworks"].
[103] Friedland & Napoleon, "Gathering the Threads," *supra* note 3; Napoleon & Friedland, "An Inside Job," *supra* note 3 generally.
[104] Friedland, "Reflective Frameworks," *supra* note 102 at 3.

gendered, but also significantly, what is developed here is a framework for understanding indigenous legal theory and methodology as gendered. The study and education of indigenous laws is gendered.

By focusing on educational resources, I concentrate on how educators are conceptualizing and teaching about indigenous laws and gender. As I discuss in Chapter Three, the materials that I analyzed include academic and non-academic resources. This dissertation is unique in that it examines how indigenous laws are represented and analyzes how discourses are operating in (and beyond) educational materials about revitalization. Communication, discourses, and as I show, even the aesthetics of representations, are gendered and require close consideration as scholars in this field continue to develop educational materials on indigenous laws, and work to build a vibrant field.

The focus of my analysis is on Cree legal educational resources that promote decolonization and the revitalization of Cree laws. The main questions guiding my research were: 1) how do the educational materials, which are meant to advocate empowerment of Cree people and laws, represent Cree women as legal agents, and 2) how might indigenous feminist legal theory and methodology facilitate this research? There are several subsequent questions that ask after further details: who is included in present-day articulations and representations of Cree law? How are women included? How are representations of Cree citizenry and Cree law gendered? What does it mean for a Cree woman to have and fulfill

'good relations'/*miyo-wîcêhtowin*[105] – as represented in the educational materials? What are some possible implications of the representations? The analysis that I conducted led to the conclusion that Cree women are not represented as full legal agents and citizens in the educational materials. Consequently, I argue that Cree women are marginalized in and by the legal resources, and that the oversimplification of both gender and Cree law are related and undermine Cree law as a resource that can work for all citizens. The application of indigenous feminist legal theory and methodology facilitates a complex understanding of Cree law as gendered and promotes anti-oppressive legal education.

1.6 Chapter Outlines

In Chapter Two, I present the theoretical approach that guides my analysis – indigenous feminist legal theory. I bring three bodies of literature into conversation with one another: feminist legal theory, indigenous feminist theory, and indigenous legal theory to think about how Cree laws are gendered. Presently, these perspectives are speaking past one another and troublesome gaps exist in each field. Feminist legal theory is problematically focused on state laws and does not account well for indigenous feminisms. Indigenous feminist theory also has a tendency to focus on state laws when law is analyzed. Lastly, indigenous legal theory is extremely attentive to indigenous laws, but gender is primarily absent in the field which risks privileging male experiences and a universal male subject. I bring these theories together to articulate an approach to indigenous laws that is

[105] Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 14 [Cardinal & Hildebrandt, *Treaty Elders*].

deeply gendered, intersectional, anti-essentialist, and attentive to power dynamics. The articulation of indigenous feminist legal theory serves as a valuable framework for understanding indigenous laws as gendered, and thus for developing critical research and education on indigenous laws.

Indigenous feminist legal theory then shapes my approach to methodology, which is discussed in Chapter Three. Because little methodological literature exists on how to go about researching indigenous laws as gendered, I draw on various methodologies. These methodologies include critical discourse analysis, feminist critical discourse analysis, and indigenous research methodologies. It is from a reading of these methodologies together, with indigenous feminist legal theory in mind that the main tenets of indigenous feminist legal methodology emerge. This methodology examines how Cree gendered subjects are produced in and by discourses and law; is attentive to the social contexts within which the representations are embedded; examines how meaning and truths are asserted about gender and Cree law; and makes obvious how power dynamics circulate in discourses. Indigenous feminist legal methodology provides not only a theory for how to research indigenous laws as gendered; it produces a framework for researching indigenous laws, and researching education about indigenous laws, in a way that presently is not being done in the field of indigenous legal studies. This methodology both draws out gender dynamics when they remain 'neutral' or 'unseen' in the materials, as well as providing analytic tools for deconstructing oversimplified representations of gender and the discourses that sustain them. I also show how my methodology

informs the specific methods and data collection practices, including how Friedland's legal analytic approach[106] provides a useful framework that I 'gender' and draw on.

In Chapter Four I present the initial findings of my research by concentrating on how gender is represented. The materials are presented as empowering for Cree people, though I argue that Cree women are marginalized in the materials. I show two common ways that Cree women are marginalized: first, Cree women are absent and under-represented in many of the resources; and second, when Cree women do appear it is most often in relation to rigid discussions about gender roles or in relation to 'women's issues.' Concerning the first tendencies, the materials that do this could mistakenly be read as 'gender neutral' but they in fact prioritize men's experiences and knowledge, and represent men as universal authoritative figures who speak for everyone. In these materials in which men are central, men appear just as citizens – not as gendered citizens, thus speaking to the invisibility (or 'neutrality'), and thus normalcy of male privilege operating in the materials. In contrast, women enter into the materials as explicitly gendered subjects. Motherhood, nurturance, and teaching the next generation are lauded as 'traditional' and respected gender roles. While one interpretation might be that the focus on gender roles helps to alleviate the first problem of women's exclusion (via discourses about women as central to the nation and mothers of the nation), I argue that the materials actually perpetuate essentialisms and extremely limited representations of gender. Rather than

[106] Friedland, "Reflect Frameworks," *supra* note 102 at 30; Friedland & Napoleon, "Gathering the Threads," *supra* note 3 at 18.

challenging the male privilege found in the first set of materials, the representations of women's gender roles exacerbates the problem by limiting women to their bodies and to strict ideas about gender. Overall, the representations of gender in the materials – both the exclusions and inclusions of Cree women – are phallocentric in that men's experiences and ideas are universalized as 'Cree' while women appear primarily as specifically limited gendered subjects. The restricted representations of Cree women constrain how they are represented as legal agents in the materials. Conversely, the universally authoritative representations of Cree men enable men as full complex legal subjects.

In Chapter Five I continue analyzing how Cree women are represented by specifically examining how they are depicted as legal subjects. I provide some background context on how Cree law is articulated in the materials. The representations of Cree law are oversimplified in that they are quite general but also because they treat Cree law as relatively one-dimensional and as uncontested. I draw on Borrows' work on deliberative law[107] to speak to concerns that the debate, discussion, and conflicts that shape any legal order, are largely missing in the educational materials. There is a connection between the oversimplified representations of gender and the oversimplified representations of Cree law. When Cree law is oversimplified, complicated gendered realities are disallowed. The possibility that Cree law can perpetuate harm, for example, cannot adequately enter into a conversation if Cree law is represented as perfect. Cree law *cannot* be

[107] See Borrows regarding deliberative law (*Canada's Indigenous Constitution*, *supra* note 1 at 35-46), and also Napoleon, *Ayook*, *supra* note 1.

perfect when gendered conflict is accounted for. Likewise, oversimplified representations of gender disallow complex readings of Cree law. To depict motherhood, for example, as Cree women's primary way in to legal agency undermines the possibilities and practices that exist in Cree law.

I examine the making of both law and gender in this dissertation as both are constructed in interpretations about law.[108] I draw on specific examples in Chapter Five to examine how Cree legal processes, responses, obligations, rights, and principles are gendered. I include examples from the materials that are presented as 'gender neutral' and show how they exclude gendered realities and engage poorly with Cree women as legal subjects. I also focus on the materials that center women and suggest that legal analyses about Cree women need to challenge expressions of legal agency that are exercised via embodiment and the private realm. I argue in this chapter that Cree legal processes and responses can impact women and men in different ways, given their different social locations and the normative expectations about gender. Cree legal obligations can also be experienced differently by women and men, and there are specifically gendered obligations (such as caring for others) that need to be better understood in relation to how systemic sexism operates in law. Cree legal rights are also not straightforwardly applied and I argue that Cree law is not accessible for women in the same ways as it is for men, nor are Cree women being recognized as authoritative legal subjects whose experiences and realities should shape Cree law. Lastly, and perhaps most contentiously, I insist that Cree legal principles (for

[108] Smart, *Power of Law*, *supra* note 10; Janice Richardson & Ralph Sandland, "Feminism, Law and Theory" in Janice Richardson & Ralph Sandland, eds, *Feminist Perspectives on Law and Theory* (London: Cavendish Publishing, 2000) 1 [Richardson & Sandland, "Feminism, Law"].

example 'good relations') are gendered in that they are shaped by gendered power dynamics and thus impact women and men differently. What this means is that legal principles are not neutral guidelines excerpted from the past and used evenly for everyone in the present.[109] I argue that in a society in which sexism exists, it is the experiences and interpretations of those who are in positions of power that lie at the heart of legal principles, in ways that normalize, and work for, their subject position. This pattern is glaringly evident with Canadian law. For example, the legal principle of 'equality' does not actually afford indigenous peoples with fair or equal treatment, along with a number of other groups who do not actually experience, or benefit from, 'equality.'[110] Furthermore there is a normalized subject position (white, male, able-bodied, heterosexual, affluent) that is centered in this legal principle, from which others are then judged.[111] Power operates both in relation to state legal principles and non-state legal principles.[112] Power dynamics shape the articulation and uses of legal principles (and will be resisted and challenged by many), and gendered analyses remain urgent so as to challenge oversimplified discussions about Cree law that erase the insidious ways that power dynamics circulate in and through law.

It is crucial to note that the oversimplified, problematic *representations* of gender and Cree law found in the materials should *not* be misread to mean that Cree law itself is simple or that Cree people construct, act, and engage their

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[109] For a very important discussion about all legal orders as living, changing, historically important but contextually interpreted systems, see Borrows, "(Ab)Originalism," *supra* note 16.
[110] Turpel, "Patriarchy & Paternalism," *supra* note 71 generally.
[111] *Ibid*; Smart, *Power of Law*, *supra* note 10. See also Christie, "Law, Theory, and Aboriginal Peoples," *supra* note 1, regarding the liberal subject in state law.
[112] Webber argues that conflict is a part of any legal order ("Naturalism," *supra* note 29). See also Napoleon, *Ayook*, *supra* note 1; Borrows, *Canada's Indigenous Constitution*, *supra* note 1.

gender in simple ways. Cree law, like all legal orders, has great depth and is both an immense resource as well as something that can perpetuate oppression, as humans interpret and use law. Gendered legal realities are also complicated. What is striking then is how these difficulties and nuanced realities are absent in the representations. Jeremy Webber argues that all law (non-state and state) "is inherently non-consensual, that it is always to some extent peremptory and imposed, establishing a collective position against a backdrop of deep-seated normative disagreement."[113] Law necessarily involves disagreement[114] and it is evident that many of these disagreements are systemic (perpetuated by racism, sexism, etc.). My findings suggest that Cree women are not represented as complex, varied legal subjects, nor is Cree law accurately represented as the living, dynamic resource that it is; rather the education materials depict Cree law and gender roles in aesthetically pleasing ways. When read through the lens of indigenous feminist legal theory and methodology, the representations are actually quite uncomfortable and a critical gendered analysis foregrounds the importance of difficult aesthetics. In Chapter Six, the final chapter of the dissertation, I draw on aesthetic analysis to think further about the disjuncture between on the ground gendered Cree legal realities, and the representations in the educational materials. I consider what these 'nice' discourses are doing and advocate for a more difficult aesthetics when educating about indigenous laws.

[113] Webber, "Naturalism," *ibid* at 202.
[114] *Ibid* generally. See also Napoleon, *Ayook*, *supra* note 1; *Borrows, Canada's Indigenous* Constitution, *supra* note 1.

Chapter Two:
Indigenous Feminist Legal Theory

2.1 Introduction

In this chapter I articulate one perspective of what indigenous feminist legal theory means. This approach brings three theories into conversation: feminist legal theory, indigenous feminist theory, and indigenous legal theory, to think deeply about indigenous laws as gendered. For scholars wanting to engage in critical gender analyses about indigenous laws, there is both a lack of research available about gendered realities in indigenous law, as well as a lack of theoretical work that imagines indigenous law and legal subjects as gendered. If wanting to look critically at the relationship between indigenous law and gender, one must take an approach that involves piecing theories together that speak past each other and that on their own, do not thoroughly address one's focus.

There are significant gaps in the three bodies of work, which can be illustrated:

First, feminist legal theory fails to take into account indigenous laws and routinely overlooks the insights from indigenous feminism. State law remains problematically centered in this field. Second, indigenous feminist approaches bring in indigenous women's experiences, however indigenous feminism sits in a precarious position as the majority of indigenous feminist scholarship on law focuses on state law (or aboriginal law jurisprudence), and substantive discussion

on indigenous laws are scarce. Lastly, while indigenous legal theory is of course attentive to indigenous laws, there is a dearth of gender and feminist analysis. The gender 'neutral' approach in this field privileges male experience and relies on a universal male subject. It is also noteworthy that indigenous legal theory and indigenous feminist theory perpetuate heteronormative approaches. It is necessary to bring these three bodies of work together to show that while they have gaps, they also all have much to offer each other. To date, no one has theorized these fields together in an explicit, detailed way to articulate indigenous feminist legal theory.

Indigenous feminist legal theory is an intersectional, anti-essentialist, multi-juridical tool that is attentive to questions about power, gender, sexuality, colonialism, and law. This approach looks internally and creates space for thinking about the complicated ways that indigenous laws are gendered but also encourages indigenous and non-indigenous scholars in various fields to consider how they approach law more generally. Learning and thinking about indigenous laws and indigenous feminist legal theory is important for everyone, especially for those living in settler-colonial states. I concur with Gordon Christie, a prominent indigenous legal scholar, that indigenous laws should be articulated by indigenous peoples. However, this should not mean that non-indigenous people should then not think about indigenous laws.[1] As a white feminist scholar, thinking about indigenous laws and feminisms is an important part of my own learning and

[1] Christie also does not preclude non-indigenous scholars from working with indigenous legal theory. Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 195 at 209 [Christie, "Indigenous Legal Theory"].

unlearning. The focus of my research is primarily on Canada, however the arguments should be understood as relevant beyond this settler state.[2]

Before bringing these three bodies of scholarship together, each must first be addressed on its own. I begin with feminist legal theory, followed by indigenous feminist theory, and then indigenous legal theory. Attempting to convey the fields is a complicated task as each field is quite diverse and there are not strict demarcations that exist around them. There are some theorists (for example Val Napoleon, Jennifer Denetdale, Irene Watson, Andrea Smith, Sarah Deer) who could be placed in multiple fields and whose work blurs boundaries. Their work can be described as indigenous feminist legal analyses, however as a concept, indigenous feminist legal theory remains to be comprehensively discussed. In the final part of the paper, I articulate the main tenets and importance of indigenous feminist legal theory.

2.2 Three Theories Considered

2.2(a) Feminist Legal Theory

2.2(a)(i) Description of the Field

I begin with feminist legal theory not because I think that it is the most important of the fields but because it is the field to which I was first introduced as a scholar. The ordering of the theories in this section follows my own path of learning, unlearning, and revision. Of the three theoretical fields, feminist legal theory is

[2] My research is includes much literature from Canada, however it should be noted that I do not draw on any francophone feminist literature, as I am not fluent in French.

the most sizable and is the oldest.[3] This of course does not mean that indigenous feminist activism, and advocating for indigenous sovereignty and the revitalization of indigenous laws are new, rather it simply means that the fields of indigenous feminist theory and indigenous legal theory are more recent fields in academia. Kelly Weisberg notes likewise that while the academic field of feminist legal studies is relatively new, (primarily white) feminist activists have been engaging with state law since the first wave of the mainstream feminist movement.[4]

Several shifts have occurred in the field. During the 1970s and 1980s, 'equality' was hotly debated as many activists fought for law reform premised on equality arguments.[5] Joanne Conaghan contends that work in feminist legal studies is now more focused on intersectionality than ever before. She maintains,

> [i]f I were to identify a core feature of feminist scholarship today, it would be the increasing recognition that if we are to understand and oppose gender inequality, we must pay attention to the way in which gendered

[3] This field is about forty years old. Kelly Weisberg, "Introduction" in Kelly Weisberg, ed, *Feminist Legal Theory: Foundations* (Philadelphia: Temple University Press, 1993) xv at xv [Weisberg, "Introduction"]. In relation to the field of 'legal theory' however, feminist legal theory is a *very* recent development. Even in relation to 'feminist theory,' the branch of feminist legal theory is relatively new.

[4] Weisberg, "Introduction," *ibid* generally. See also: Joanne Conaghan, "General Introduction" in Joanne Conaghan, ed, *Feminist Legal Studies: Evolution* Critical Concepts in Law Vol I (New York: Routledge, 2009) 1 at 1 [Conaghan, "General Introduction"]. While I am using the term 'state law' when referring to feminist legal theorists' work, it should be noted that this is not language that is generally taken up. The theorists in this field tend simply to use the term 'law' however I attach the caveat of 'state law' to all of their work to displace their taken for granted assumption that 'law' is only ever that which is espoused by the state. While there are of course feminist legal theorists who work with ideas of legal pluralism (see e.g.: Margaret Davies, "Feminism and Flat Law Theory" [2008] 16:3 Feminist Legal Studies 281 [Davies, "Feminism and Flat Law"]), overwhelmingly theorists in this field center state law either as their target for reform or dismantling.

[5] Martha Albertson Fineman, "Introduction: Feminist and Queer Legal Theory" in Martha Albertson Fineman & Jack Jackson, eds, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Farnham: Ashgate Publishing, 2009) 1 at 2 [Albertson Fineman, "Introduction"]; Janice Richardson & Ralph Sandland, "Feminism, Law and Theory" in Janice Richardson & Ralph Sandland, eds, *Feminist Perspectives on Law and Theory* (London: Cavendish Publishing, 2000) 1 at 1 [Richardson & Sandland, "Feminism, Law"]. Equality debates still persist today.

> social processes interact and interlock with other structured processes predicated on notions of race, class, sexuality and other principles of social ordering.[6]

Nancy E. Dowd and Michelle S. Jacobs describe several threads of theoretical development in feminist theory that made an impact on feminist legal theory. These threads include: 1) consideration of "liberal theory, dominance theory, cultural theory, socialist theory, and postmodern theory";[7] 2) perspectives that combined critical race theory and feminist theory;[8] 3) the inclusion of sexuality and combining queer theory and feminist theory;[9] and 4) perspectives that center analyses on globalization.[10] Margaret Davies and Kathy Mack further describe of the field that,

> [i]n addition to global influences, legal feminism had the advantage of being able to draw upon established feminist work in other disciplines – history and sociology in particular. Legal feminist scholarship was characterised by a good deal of passion and sometimes idealism. It was also coloured by a recognition that the project of feminist legal theory was going to be fairly lengthy and would experience many setbacks and changes in direction.[11]

Although scholars in this field attempt to take up anti-racist and intersectional approaches, this is an area that still requires continued work.

Conaghan argues that trying to represent the field of feminist legal studies presents, "an epistemological dilemma and a practical one, requiring at the very

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[6] Conaghan, "General Introduction," *supra* note 4 at 10.
[7] Nancy E. Dowd & Michelle S. Jacobs, "Theories, Strategies, and Methodologies: Introduction" in Nancy E. Dowd & Michelle S. Jacobs, eds, *Feminist Legal Theory: An Anti-Essentialist Reader* (New York: New York University Press, 2003) 9 at 9 [Dowd & Jacobs, "Theories"].
[8] Dowd & Jacobs, "Theories," *ibid* generally.
[9] *Ibid* at 10.
[10] *Ibid* at 10. While there is work in feminist legal theory that focuses on post-colonialism, Altamirano-Jiménez argues that post-colonial feminism does not simply switch over and apply to indigenous women's lives. She insists that the term post-colonial "continues to neglect Indigenous colonization experiences" (Isabel Altamirano-Jiménez, "Nunavut: Whose Homeland, Whose Voices?" [2008] 26:3,4 Canadian Woman Studies 128 at 130 [Altamirano-Jiménez, "Nunavut"]).
[11] When they speak of 'global influences,' they talk about feminist legal scholarship in Canada, the US, the UK, Australia, and 'Nordic countries.' Margaret Davies & Kathy Mack, "Legal Feminism – Now and Then" (2004) 20 Austl Feminist LJ 1 at 1-2 [Davies & Mack, "Legal Feminism"].

least a cautious, self-consciously sceptical and highly pragmatic approach to the necessary business of representing the field."[12] There is no doubt much diversity in feminist legal studies. This diversity can be considered productive and important.[13] While it is incredibly difficult to represent this plurality, there are still patterns that emerge in terms of the debates, what feminist legal theory offers, and what it lacks. Some of the major points of ongoing debate in the field are over: law reform;[14] equality; the meaning of law; and how the subject should be imagined in feminist legal politics. Margaret Davies and Kathy Mack maintain "[p]erhaps the most significant challenge for legal feminism is to understand the category 'woman' and to engage with concerns about essentialisms and diversity."[15]

Understandings of law and feminism are time, place, and culture specific.[16] However one core belief of feminist legal theory is an understanding of law as gendered. Feminist legal theorists insist that there is no such thing as neutrality in the law and that "standards of what is rational reflect the interests of

[12] Conaghan, "General Introduction," *supra* note 4 at 4.
[13] Clare McGlynn, "Introduction" in Clare McGlynn, ed, *Legal Feminisms: Theory and Practice* (Dartmouth: Ashgate, 1998) ix at xii.
[14] See Martha Albertson Fineman, ed, *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (New York: Routledge, 2011) [Albertson Fineman, *Transcending*]; see generally Davies & Mack, "Legal Feminism," *supra* note 11; Janice Richardson & Ralph Sandland, ed, *Feminist Perspectives on Law and Theory* (London: Cavendish Publishing, 2000) [Richardson & Sandland, *Feminist Perspectives*]. Those who take up liberal feminist orientations are more likely to advocate for law reform and those who aim to work 'outside' of law or who would like to see the entire system undone are more likely to be described as radical feminists. Though, this means of classifying is oversimplified. Conaghan contends that "in many ways, feminist legal studies is about navigating this tension between the positive and negative possibilities of law within the context of a wider exploration of law's role in the construction, maintenance and modification of sexed/gendered social orderings" (Conaghan, "General Introduction," *supra* note 4 at 3).
[15] Davies & Mack, "Legal Feminism," *supra* note 11 at 4.
[16] See Conaghan, "General Introduction," *supra* note 4 generally.

those who currently hold power."[17] Dominant social and cultural norms about gender infuse legal concepts, principles, and practices, and making obvious the power dynamics in a given society explicates who is intended to benefit from 'the law.' Thus in a legal system that exists in a patriarchal society and is premised on a liberal male subject and his experiences, males are the intended beneficiaries of law. However, law should be understood as a site of gender struggle.[18]

Feminist legal theorists take many different approaches to power. Here I draw largely on the work of Carol Smart.[19] Her work is influenced, in part, by Michel Foucault's work on power, and in Chapter Three I speak further about the influence of poststructuralism on my theorizing.[20] Her deconstructionist approach and decentering of state law involves making visible the power dynamics that run through social and legal norms and which constitute the meanings and truths (the discourses) of law and legal principles. Smart approaches law as something that is a part of our everyday lives in terms of how it shapes experiences, knowledges, and perceptions of subjects.[21] Drawing on Foucault, she explains that he "posits

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[17] Katharine Bartlett & Rosanne Kennedy, "Introduction" in Katharine Bartlett and Rosanne Kennedy, eds, *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview Press, 1991) 1 at 3 [Bartlett & Kennedy, "Introduction"].

[18] Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) [*Smart, Power of Law*].

[19] While dated, Smart's work still proves invaluable for feminist legal theorizing and it is still useful to draw on today. See Rosemary Auchmuty & Karin Van Marle, eds, "Special Issue: Carol Smart's *Feminism and the Power of Law*" in (2012) 20:2 Fem Legal Stud.

[20] There are many debates generally in feminist theory about drawing on Foucault. See for example: Margaret A. McLaren, *Feminism, Foucault, and Embodied Subjectivity* (Albany: State University of New York Press, 1997); Susan Bordo, "Feminism, Foucault and the politics of the body" in Caroline Ramazanoglu, ed, *Up Against Foucault: Explorations of Some Tensions between Foucault and Feminism* (London: Routledge, 1993) 179; Deborah Lupton, "Foucault and the Medicalisation Critique" in Alan Peterson & Robin Bunton, eds, *Foucault: Health and Medicine* (London: Routledge, 1997) 94; Jana Sawicki, "Feminism, Foucault and 'Subjects' of Power and Freedom" in Jeremy Moss, ed, *The Later Foucault: Politics and Philosophy* (Thousand Oaks: Sage Publications, 1998) 93.

[21] Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (London: Sage, 1995) at 2-3 [Smart, *Law, Crime and Sexuality*].

two modes of 'contrivances' of power, the 'old' form which is juridical power and the 'new' forms of discipline, surveillance, and regulation."[22] Discipline does come from legal systems in terms of the impositions of rules and punishment, however Smart emphasizes "that law exercises power not simply in its material effects (judgements) but also in its ability to disqualify other knowledges and experiences."[23] Smart advocates that "we should seek to construct feminist discourses on laws."[24] The power of law to disqualify knowledges is important to think about in relation to gender and indigenous law. It is crucial to continue asking after the multitude of ways that indigenous knowledges are disqualified in state law and settler contexts, as well as to interrogate how indigenous women's knowledges and experiences are marginalized in both state law and indigenous laws.

For Smart, the truths upon which state law and legal principles are founded reflect and privilege (white, heterosexual, class affluent) male experience, and she contends that these need to be deconstructed from feminist perspectives – "[l]aw is not a free-floating entity, it is grounded in patriarchy, as well as in class and ethnic divisions."[25] Smart's work challenges the notion that 'law' is a coherent entity. She contends that when law presents itself as a "'singular'" truth, it is attempting "a claim to power in that it embodies a claim to a superior and unified field of knowledge which concedes little to other

[22] Smart, *Power of Law*, *supra* note 18 at 162. Smart notes that many women were already saying the things that Foucault said in his work but it was only once an affluent white male theorist said it, that it became important (*Law, Crime and Sexuality*, *supra* note 21 at 10).
[23] Smart, *Power of Law*, *ibid* at 11.
[24] *Ibid* at 69.
[25] *Ibid* at 88.

competing discourses."[26] Smart's conceptualization of law as a site of struggle containing a multiciplicity of legal truths and ways of enacting law, and her attempt to decenter dominant and oppressive singular notions or Truths about law is consistent with indigenous feminist and indigenous legal theoretical interventions to decenter the state. Furthermore, Smart's work is consistent with indigenous feminist legal theory's effort to include indigenous feminist discourses in discussions on indigenous (and state) laws.

Margaret Davies' work further holds potential for discussing power dynamics and decentering state law via her articulation of the entanglement of 'vertical law' and 'horizontal law.' She posits that while vertical law (power is hierarchical, top-down, a single point of authority)[27] and horizontal law (power is relational, plural, and plays out in discourses and norms)[28] interact with one another, and differentially impact people, the normative place that vertical law holds in dominant society needs to be displaced or decentered.[29] This allows for a recognition of power as existing both in formal structures and institutions, as well as more informally in norms and interactions.

The common adherence to anti-essentialist approaches that reject universalisms in feminist legal theory is also key for the development of indigenous feminist legal theory. [30] It is now widely stated in the field that the

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[26] *Ibid* at 4.
[27] Davies, "Feminism and Flat Law," *supra* note 4 at 282-283.
[28] *Ibid* at 282-288.
[29] *Ibid* generally.
[30] While most people in the field, at least at a superficial level, reject the use of a universal woman in their politics, it is strange that interrogating essentialisms often does not go further than this. What are the implications, for example, of rejecting a universal white woman as the subject of one's politics, but then taking up approaches to 'difference' that neglect to ask after further essentialisms? For example, many indigenous women (like other women) do use essentialisms (for

subject of mainstream feminism has been wrongfully premised on a white, middle-class, heterosexual subject that was universally presented. Despite aiming to take up an anti-oppressive approach to law, "mainstream feminisms reproduced the very kind of solipsism they critiqued in masculinist philosophy. Just as male philosophers referred to a purportedly universal but actually male-gendered human subject, so mainstream feminists referred to a purportedly universal but actually white/ western/ middle-class/ heterosexual female subject."[31] This critique in the field, led by Angela Harris, Kimberlé Crenshaw, Mari Matsuda,[32] and Sherene Razack,[33] not to mention contributions by feminist legal theorists and queer legal theorists who aim to undo dominant western understandings of sex, gender, and sexuality,[34] showed that the 'universal woman' is in fact privileged yet treated as the norm.[35] While this approach of rejecting the universal subject of feminism certainly touches on poststructural and postmodern debates about the subject, I instead discuss intersectionality, as it is more accurate to describe intersectional approaches to destabilizing the universal subject as something that is common in feminist legal theory.[36] An intersectional approach in feminist legal

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example race essentialisms, sex essentialisms) in their politics. It is not enough to only reject the use of a universal woman – anti-essentialist politics must go deeper than this.

[31] Rosemary Hunter, "Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice," in Joanne Conaghan, ed, *Feminist Legal Studies: Evolution* Critical Concepts in Law Vol I (New York: Routledge, 2009/originally published 1996) 217 at 219.

[32] Dowd & Jacobs, "Theories," *supra* note 7 at 11.

[33] See for example, Sherene H. Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15 CJLS 91. Feminist legal theorizing now includes more work that centers analyses on globalization (Dowd & Jacobs, "Theories," *supra* note at 10).

[34] Albertson Fineman, "Introduction," *supra* note 5 at 1.

[35] Hunter, *supra* note 31 at 217-218.

[36] I do not mean to suggest that intersectionality is incompatible with, or not utilized by poststructural and postmodern feminists. The significant impact of poststructural and postmodern critiques (rejection of grand theories, rejection of universalisms, questioning the subject, etc.) on feminist theorizing, and their relationship to intersectional approaches should not be overlooked.

theory aims to move beyond just gender to understand how multiple forms of oppression and privileging are interconnected and impact people's understandings of, and experiences with, law.[37] Janice Richardson and Ralph Sandland note that an intersectional feminist approach to state law also includes "the recognition that this 'maleness' of law has in fact excluded many men, for example, by reason of race or sexuality … Things were not as simple as earlier versions of feminism had supposed."[38] Further important critiques related to intersectionality include contributions by feminist legal theorists and queer legal theorists who aim to undo dominant western understandings of sex, gender, and sexuality.[39] Intersectionality must go beyond just trying to recognize multiple experiences of difference, to interrogating the constructs and categories through which we are all labeled and ordered (albeit in different ways), and how these constructs are reliant on one another.

2.2(a)(ii) Gaps

Despite all of the intersectionality talk in feminist legal theory, the problem remains that in actuality, the field still relies on a 'universal' white, middle-class,

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Rather, I am trying to signal that there is much debate over the subject in feminist legal studies and I while I am influenced by poststructural approaches to the subject, I do not want to represent the field as also doing this.

[37] Kimberlé Crenshaw, "Demarginalizing the intersection of race and sex: a Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics" in Joanne Conaghan, ed, *Feminist Legal Studies: Legal Method, Legal Reason, and Legal Change* Critical Concepts in Law Vol III (New York: Routledge, 2009/originally published 1989) 105; Mari J. Matsuda, "When the first quail calls: multiple consciousness as jurisprudential method" in Conaghan, *ibid* [Vol III] 160; Davies, "Feminism and Flat Law," *supra* note 4; Razack, *supra* note 33; Hunter, *supra* note 31 generally; Richardson & Sandland, "Feminism, Law," *supra* note 5 generally; Marlee Kline, "Race, racism, and feminist legal theory" in Joanne Conaghan, ed, *Feminist Legal Studies: Evolution* Critical Concepts in Law Vol. I (New York: Routledge, 2009/originally published 1989) 185; Irene Watson, "Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?" (2007) 26 Australian Feminist Law Journal 95 [Watson, "Aboriginal Women's Laws"].

[38] Richardson & Sandland, "Feminism, Law," *supra* note 5 at 2.

[39] Albertson Fineman, "Introduction," *supra* note 5 at 1.

heterosexual, able-bodied subject in its politics.[40] This conclusion is not meant to deny the significant contributions that have been made by theorists who challenge this,[41] however, overall, the field still perpetuates privileges imbued to the female version of the liberal subject at the expense of Others. Despite talking about intersectionality since the 1980s,[42] the field remains a site that values certain voices and experiences.

Twila L. Perry, who brings together feminist legal theory and critical race feminism in her work explains that, "[t]he existence of racial hierarchies among women is undertheorized in feminist legal theory and warrants much more attention than it presently receives."[43] Of the major edited collections and introductory texts that exist in this field, these texts tend to ignore indigeneity and treat race as an add-on, rather than something that disrupts and unsettles the field altogether.[44] Theorists often overlook the violent beginnings of 'their' countries

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[40] Twila L. Perry also comes to this conclusion. See Twila L. Perry, "Family Law, Feminist Legal Theory, and The Problem of Racial Hierarchy" in Martha Albertson Fineman, ed, *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (New York: Routledge, 2011) 243; Jacobs in Dowd & Jacobs, "Theories," *supra* note 7 at 1.

[41] For example: Perry, *ibid*; Crenshaw, *supra* note 37; Matsuda, *supra* note 37; Razack, *supra* note 33; Watson, "Aboriginal Women's Laws," *supra* note 37; Irene Watson & Mary Heath, "Growing Up The Space: A Conversation About the Future of Feminism" (2004) 20 Australian Feminist Law Journal 95 [Watson & Heath, "Growing Up The Space"]; Sharon Venne & Irene Watson, "De-Colonisation and Aboriginal Peoples: Past and Future Strategies" (2007) 26 Australian Feminist Law Journal 111 [Venne & Watson, "De-Colonisation"].

[42] E.g. Crenshaw, Matsuda, Kline.

[43] Perry, *supra* note 40 at 243. Perry explains, "Critical race theory was partially an outgrowth of the critical legal studies' critique of neutrality in law. However, many race crits believed that critical legal studies failed to address adequately questions involving race" (at 244). Critical race feminism works to address the gaps in critical race theory regarding the lack of attentiveness to gender. In bringing feminist legal theory and critical race feminism together, Perry's work is similar in spirit to my approach – attempting to bring together the important insights from several bodies of work. While critical race theory and critical race feminism are certainly of importance to my discussion, I chose to focus on indigenous feminism and indigenous legal theory, as they are more contextually appropriate and applicable for my analysis of indigenous law.

[44] See for example: Albertson Fineman, "Introduction," *supra* note 5 generally; Albertson Fineman, *Transcending*, *supra* note 14; Nancy Levit & Robert Vercheck, eds, *Feminist Legal Theory: A Primer* (New York: New York University Press, 2006); Weisberg, "Introduction,"

and legal systems.[45] Ironically, when trying to advocate for anti-essentialist approaches, Nancy E. Dowd remarks, "[t]he anti-essentialist critique has challenged the persistent pattern of racial divide within the feminist movement. The divergent interests of white women and women of color in the United States have been evident *since the nation's birth*, as white women played a pivotal role in the oppression of enslaved African women."[46] Starting history at the time of 'the nation's birth' erases indigenous peoples' presence then and now. While the major journals in this field include a diverse range of approaches and foci, for example, including research on indigenous women and the law,[47] the insights

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supra note 3 generally; Hilaire Barnett, *Introduction to Feminist Jurisprudence* (London: Cavendish Publishing, 1998); Dowd & Jacobs, "Theories," *supra* note 7 generally; Bartlett & Kennedy, "Introduction," *supra* note 17 generally; Martha Chamallas, *Introduction to Feminist Legal Theory* (New York: Aspen Law and Business, 1999); Ann Scales, *Legal Feminism: Activism, Lawyering, and Legal Theory* (New York: New York University Press, 2006). While Conaghan's four edited volumes include more on race (and other 'intersections') than is usual, I still argue that state law and white experiences remain firmly entrenched. See: Joanne Conaghan, ed, *Feminist Legal Studies: Evolution* Critical Concepts in Law Vol I (New York: Routledge, 2009) [Conaghan, Vol I]; Joanne Conaghan, ed, *Feminist Legal Studies: Neo/liberal Encounter* Critical Concepts in Law Vol II (New York: Routledge, 2009) [Conaghan, Vol II]; Joanne Conaghan, ed, *Feminist Legal Studies: Legal Method, Legal Reason, and Legal Change* Critical Concepts in Law Vol. III (New York: Routledge, 2009) [Conaghan, Vol III]; Joanne Conaghan, ed, *Feminist Legal Studies: Challenges and Contestations* Critical Concepts in Law: Vol. IV (New York: Routledge, 2009) [Conaghan, Vol IV].

[45] See for example Dowd in Dowd & Jacobs, "Theories," *supra* note 7 at 5.

[46] *Ibid* [emphasis added].

[47] See for example: Watson, "Aboriginal Women's Laws," *supra* note 37; Watson & Heath, "Growing Up The Space," *supra* note 41; Venne & Watson, "De-Colonisation," *supra* note 41; Razack, *supra* note 33; Heather Douglas, "'She Knew What Was Expected of Her': The White Legal System's Encounter with Traditional Marriage" (2005) 13 Fem Legal Stud 181; Nicole George, "'Just Like Your Mother?' The Politics of Feminism and Maternity in the Pacific Islands" (2010) 32 Australian Feminist Law Journal 77; Elizabeth Adjin-Tettey, "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19 CJWL 179; Mary A. Eberts, Sharon McIvor, & Teressa Nahanee, "Native Women's Association of Canada v. Canada" (2006) 18 CJWL 67; Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2006) 18 CJWL 479; Marilyn Poitras, "Through My Eyes: Lessons on Life in Law School" (2005) 17 CJWL 41; Tracey Lindberg, "Not My Sister: What Feminists Can Learn about Sisterhood from Indigenous Women" (2004) 16 CJWL 342 [Lindberg, "Not My Sister"].

from this work have not yet been able to fully disrupt the foundations upon which the field developed and persists.[48]

Watson maintains that white women are still at the center of legal advocacy and claims for women. She argues that "[t]he 'trickle down effect' never reaches the outer periphery, it was never intended to."[49] Further, there is little philosophical consideration in the field of feminist legal theory concerning the material realities and conceptual meaning of indigenous legal orders, indigenous land claims, self-governance, decolonization, and treaty rights, to name a few. When looking broadly at the field of feminist legal theory, indigenous women are marginalized through research that relies on and takes for granted state law as *the* only legal order that is of concern and value. The majority of the literature in anglophone feminist legal studies comes out of Canada, the U.S., Australia, and the U.K. – all regions with direct histories and present practices of colonization, theft of indigenous land, and dehumanizing systematic policies of violence and racism. The tendency to exclude indigenous laws, particularly in the work that emerges from settler states, perpetuates a denial of indigenous women's (and men's) lives and relies on racial and colonial 'logics' and hierarchies in which indigeneity is always Othered and at the margins.

Not only is state law entrenched in feminist legal theory, there is little engagement with indigenous feminist theory.[50] Feminist legal theorists need to

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[48] Shari M. Huhndorf & Cheryl Suzack, "Indigenous Feminism: Theorizing the Issues" in Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: University of British Columbia Press, 2010) 1 at 1 [Huhndorf & Suzack, "Indigenous Feminism"].
[49] Watson, "Aboriginal Women's Laws," *supra* note 37 at 105.
[50] For exceptions see for example Andrea Smith, "Against the Law: Indigenous Feminism and the Nation-State" (2011) 5:1 Affinities: A Journal of Radical Theory, Culture, and Action 56 [Smith, "Against the Law"]; Emily Luther, "Whose 'Distinctive Culture'? Aboriginal Feminism and R. v.

examine how they are part of, and implicated in, colonization. For some feminist legal theorists who are white, this means not just making visible their whiteness but thoughtfully considering and disassembling the footing upon which they experience and perceive law.[51] Part of this dismantling must begin with an examination of how white privilege, male privilege, and state law sustain each other. Mary Ellen Turpel shows that when feminist legal scholars approach state law as something that can help indigenous women, they often overlook the great violence that the state inflicts upon indigenous peoples, via state law.[52] That is to say, if state law is one of the mechanisms through which colonialism is perpetuated, then feminist legal theorists need to think carefully about approaches that leave state law intact or taken-for-granted, if they aim to take up anti-oppressive work. This is not to say that theorists should not engage with state law, as many indigenous peoples themselves aim for reform in state law. What it does mean though is that people should be problematizing state law. Part of this questioning includes asking about who the legal subject is in law, with race and the context of colonialism in mind, in addition to gender. Patricia Monture describes how while feminists have been successful in setting some new precedents in Canadian courts, these precedents are based on a white woman subject. She explains, "[t]his captures First Nations women, who are just beginning to litigate their gendered realities, to a social construction of women that is already judicially determined, ill fitted, and potentially a new site of

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Van der Peet" (2010) 8:1 Indigenous LJ 27; Sarah Deer, "Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty" (2009) 24:2 Wicazo Sa Review 149.

[51] See Smith, "Against the Law," *ibid*. See also Kline, *supra* note 37 at 202.

[52] Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 CJWL 174 at 183 [Turpel, "Patriarchy and Paternalism"].

colonial imposition."[53] Razack additionally encourages legal scholars in settler states to examine how space, law, and justice are racialized and embedded in colonial contexts.[54] For theorists who do not write about indigenous women or indigenous laws, it is still important to question the taken-for-grantedness of state law. As is discussed below in more detail, John Borrows shows that we live in a multi-juridical society in Canada.[55] There is an obligation for feminist legal theorists, living in or doing work on, settler states such as Canada, the U.S., Australia, and New Zealand, for example, to understand and learn from indigenous feminist legal theory.[56]

Scholars such as Smith, Kiera Ladner, and Emily Luther, offer useful critiques of state law by producing analyses that engage with indigenous feminism and legal theory in a way that centers indigenous critique.[57] There are also many indigenous scholars who engage in important gendered analysis of state law but who reject feminism in their approach.[58] Feminist labels (like all labels) can be precarious and there are many indigenous women who might not want to be a part of the field of feminist legal theory. Bringing feminist legal theory into

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[53] Patricia Monture, "The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women," in Kerry Wilkins, ed, *Advancing Aboriginal Claims* (Saskatoon: Purich, 2004) 39 at 46 [Monture, "Right of Inclusion"]. Monture does not describe her work as feminist.
[54] Razack, *supra* note 33.
[55] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23 [Borrows, *Canada's Indigenous Constitution*].
[56] This is also consistent with Smart's argument about decentering state law (*Power of Law*, *supra* note 18).
[57] Smith, "Against the Law," *supra* note 50; Luther, *supra* note 50; Kiera Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13 Australian Indigenous Law Review 62.
[58] For example: Monture, "Right of Inclusion," *supra* note 53 generally; Patricia Monture-Angus, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender," in Elizabeth Comack, ed, *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Publishing, 1999) 76 [Monture-Angus, "Standing Against"]; Turpel, "Patriarchy and Paternalism," *supra* note 52 generally; Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, University of Ottawa, 2007) [unpublished] [Lindberg, *Critical Indigenous Legal Theory*].

conversation with indigenous feminism and indigenous legal theory requires careful deconstruction and application in terms of ridding much of the work of its racial and colonial ideologies. Throughout this dissertation I draw on revised versions of some feminist legal theorists' work (for example Smart) while also drawing on the work of those who take up intersectional, anti-oppressive approaches. While there are those who argue that feminism is a white colonial construct that is incompatible with indigeneity, indigenous sovereignty,[59] or indigenous laws, indigenous feminists offer another reading of feminism that is important for both indigenous and non-indigenous scholars and citizens to consider.

2.2(b) Indigenous Feminist Theory[60]

2.2(b)(i) Description of the Field

> [I]f we were to situate Native women at the center of feminist theory, how would feminist theory itself change? Such a project moves from a narrowly-defined identity politic that ascribes essential characteristics to indigenous womanhood to a revolutionary politic emerging from the nexus of indigenous praxis and the material conditions of heteropatriarchy, colonialism, and white supremacy.[61]

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[59] See for example: Lindberg, "Not My Sister," *supra* note 47; for discussion of debates on this see Joyce Green, "Taking Account of Aboriginal Feminism" in Joyce Green, ed, *Making Space for Indigenous Feminism* (Winnipeg: Fernwood Publishing, 2007) 20 at 25 [Green, "Taking Account"]; Huhndorf & Suzack, "Indigenous Feminism," *supra* note 48 at 2.

[60] In addition to 'indigenous feminism,' the terms 'native feminism,' 'aboriginal feminism,' and 'tribal feminism' are also sometimes used in the literature. I use 'indigenous feminism' as it is most commonly used in the literature. I take the approach that if one's work contributes to the discussion above, then it will be included. It should not be assumed that everyone that I speak of in this section sees themselves as feminist. Also, while indigenous feminism and indigenous feminist theory are deeply connected, in talking about theory, I am referring to frameworks and ideas that shape, describe, and explain indigenous feminist practices. Regarding the recent emergence of indigenous feminist theory in academia, the relationship between indigenous feminism and third wave feminism should be considered. While indigenous feminism is certainly in line with third-wave approaches that are intersectional and focus on race, it would be remiss to lose the label of indigenous feminism in place of just describing it as third-wave feminism. Indigenous feminism works much more specifically with indigenous women's contexts and concerns and is explicitly committed to decentering the settler state and institutions.

[61] Smith, "Against the Law," *supra* note 50 at 57.

Prominent indigenous feminist scholar and activist Andrea Smith speaks to the need to engage in critical, practice-oriented approaches to feminism that make sense for indigenous women's everyday realities and that move beyond simplistic identity politics. Indigenous feminism, and theory more broadly, should not be thought of as something that only 'academics' do – Luana Ross argues "[w]e must continue to define what Native feminism might mean in our families, communities, and personal lives."[62] Indigenous feminism has to be practical.[63] The scholarship on indigenous feminism is small but growing.[64] I show the significant contributions that indigenous feminist theory makes to indigenous feminist legal theory but also raise concerns about some of the gaps that need to be addressed. My focus is on scholarship coming out of Canada, the U.S., and Australia, however it is important to note that indigenous feminism is theorized

[62] Luana Ross, "From the 'F' Word to Indigenous/Feminisms" (2009) 24 Wicazo Sa Review 39 at 50. I include quotation marks around the word academic to problematize it in relation to the word community. Often in discussions (at least in the Canadian context) 'academics' are spoken of as separate and different from 'community members,' with academic most often being read as white (or colonized) and community being read as indigenous. This problematically perpetuates notions that academics are not also indigenous peoples and connected to indigenous communities, as well as insinuates that those who are not in universities – 'community members' do not engage in challenging and important intellectual work in the everyday.

[63] Smith, "Against the Law," *supra* note 50; Lisa Kahaleole Hall, "Navigating Our Own 'Sea of Islands': Remapping a Theoretical Space for Hawaiian Women and Indigenous Feminism" (2009) 24 Wicazo Sa Review 15 at 33.

[64] To date there are two edited collections in North America, that are explicitly about indigenous feminism. This includes: Joyce Green, ed, *Making Space for Indigenous Feminism* (Winnipeg: Fernwood Publishing, 2007) [Green, *Making Space*]; and Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: UBC Press, 2010) [Suzack et al, *Indigenous Women*]. Green's text is more useful for *theorizing* indigenous feminism whereas Suzack et al's text offers examples of the application of indigenous feminist lenses to various subjects. Jessica Yee's edited collection is often referred to as a text about indigenous feminism (Jessica Yee, ed, *Feminism FOR REAL: Deconstructing the academic industrial complex of feminism* [Ottawa: The Canadian Centre for Policy Alternatives, 2011]), however I do not find the work in that text useful for my own analyses (because the text is quite general and not grounded in detailed discussion about theory) and draw very little on this text. There were also special issues published on indigenous feminism in *Wicazo Sa Review*, 24:2 (2009) and *Hypatia*, 18:2 (2003). In addition to these main compilations, I draw on various other books and articles.

elsewhere.[65] The field is developing and shifting, and will continue to do so, as all social and political theories and practices should. There is no *one* indigenous feminism and it ought to be understood as *feminisms* to represent the plurality of indigenous feminists, their perspectives, and cultural locations.[66]

However there are some commonalities. Central to indigenous feminist theorizing is the idea that race, colonialism, gender, and patriarchy are interconnected.[67] This intersectional approach is conceptualized more complexly than in the scholarship on feminist legal theory, as the inclusion of colonialism and indigenous contexts are central in indigenous feminist theorizing.[68] While indigenous women and men might experience some aspects of colonialism and racism similarly, as demonstrated in Chapter One, many gendered differences

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[65] See for example: R. Aida Hernandez Castillo, "The Emergence of Indigenous Feminisms in Latin America" (2010) 35:3 Signs 539; Soneile Hymn, "Indigenous Feminism in Southern Mexico" (2009) 2:1 The International Journal of Illich Studies 21; ann-elise lewallen, "Beyond Feminism: Indigenous Ainu Women and Narratives of Empowerment in Japan," in Suzack et al, *Indigenous Women*, *supra* note 64, 152.

[66] Joyce Green, "Introduction – Indigenous Feminism: From Symposium to Book" in Green, *Making Space*, *supra* note 64, 14 at 18 [Green, "Introduction"]; Renya K. Ramirez, "Race, Tribal Nation, and Gender: A Native Feminist Approach to Belonging" (2007) 7:2 Meridians: Feminism, Race, Transnationalism 22 at 33 [Ramirez, "Race, Tribal Nation"]; Mishuana R. Goeman & Jennifer Nez Denetdale, "Native Feminisms: Legacies, Interventions, and Indigenous Sovereignties" (2009) 24:2 Wicazo Sa Review 9 at 10 [Goeman & Nez Denetdale, "Native Feminisms"]; Kim Anderson, "Affirmations of an Indigenous Feminist" in Suzack et al, *Indigenous Women*, *supra* note 64, 81 at 81; Renya K. Ramirez, "Learning Across Differences: Native and Ethnic Studies Feminisms" (2008) 60:2 American Quarterly 303 at 304 [Ramirez, "Learning Across"].

[67] Green, "Taking Account," *supra* note 59 generally; Verna St. Denis, "Feminism is for Everybody: Aboriginal Women, Feminism and Diversity" in Green, *Making Space*, *supra* note 64, 33 [St. Denis, "Feminism is for Everybody"]; Andrea Smith, "Native american Feminism: Sovereignty and Social Change" in Green, *Making Space*, *supra* note 64, 93 [Smith, "Native american"]; Emma LaRocque, "Métis and Feminist: Ethical Reflections on Feminism, Human Rights, and Decolonization" in Green, *Making Space*, *supra* note 64, 53 [LaRocque, "Métis and Feminist"]; Makere Stewart-Harawira, "Practising Indigenous Feminism: Resistance to Imperialism" in Green, *Making Space*, *supra* note 64, 124; M. Annette Jaimes-Guerrero, "'Patriarchal Colonialism' and Indigenism: Implications for Native Feminist Spirituality and Native Womanism" (2003) 18:2 Hypatia 58.

[68] There are some exceptions to this, for example the work of Sharene Razack (*supra* note 33). Razack's work would fit into both the feminist legal theory and indigenous feminist theory categorization. In terms of indigenous feminist legal theory, her work makes important contributions, however my focus is on indigenous laws and Razack's focus is on the state.

exist and need to be examined.[69] As Smith and many others explain, colonization relies on gendered violence,[70] and "the analysis of and strategies around addressing gender violence must also address how gender violence is a tool of racism, economic oppression, and colonialism, as well as patriarchy."[71] Countering homophobic and heteronormative oppression is also a vital part of indigenous feminist intersectional approaches.[72]

Renya K. Ramirez describes how "Native feminist consciousness … should be viewed as advancing a critical and essential goal for indigenous scholars and communities to confront sexism."[73] Indigenous feminisms target gendered and racialized oppression in settler society (for example governmental policies, stereotypes), as well as sexism in indigenous communities. Colonial policy and violence via the *Indian Act*,[74] residential schools,[75] and the general imposition of Victorian European gender norms impacted and altered indigenous gender relations in Canada. The universal enforcement of patrilineal modes of

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[69] Green, "Taking Account," *supra* note 59 generally.
[70] Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005) [Smith, *Conquest*]; Kahaleole Hall, *supra* note 63 at 15-16.
[71] Smith, *Conquest*, *ibid* at 151.
[72] Andrea Smith, "Indigenous Feminism Without Apology" (2006) 58 New Socialist 16 [Smith, "Indigenous Feminism"]; Smith, "Native american," *supra* note 67; Smith, "Against the Law," *supra* note 50; Ramirez, "Learning Across," *supra* note 66; Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17 CJLS 149 [Napoleon, "Raven's Garden"].
[73] Ramirez, "Learning Across," *ibid* at 305.
[74] Dian Million, "Felt Theory: An Indigenous Feminist Approach to Affect and History" (2009) 24:2 Wicazo Sa Review 53 at 55-58; Huhndorf & Suzack, "Indigenous Feminism," *supra* note 48 at 5; Joanne Barker, "Gender, Sovereignty, Rights: Native Women's Activism against Social Inequality and Violence in Canada" (2008) 60:2 American Quarterly 259 at 259. The *Indian Act* imposes patrilineal kin relations still today (Cheryl Suzack, "Emotion before the Law" in Suzack et al, *Indigenous Women*, *supra* note 64, 126 at 130 [Suzack, "Emotion"]).
[75] Million, *ibid* at 56; Huhndorf & Suzack, "Indigenous Feminism," *ibid* at 5; Rebecca Tsosi, "Native Women and Leadership: An Ethics of Culture and Relationship" in Suzack et al, *Indigenous Women*, *supra* note 64, 29 at 36.

order,[76] the recognition of only indigenous men as leaders[77] and points of economic and political trade,[78] as well as the imposition of a Christian heteronormative gender binary[79] in which males receive the most favourable attributes[80] were all part of a patriarchal social ordering that continues today. While not all indigenous societies had or have similar gendered norms, and while scholars should be careful to not romanticize gender relations prior to contact as perfect, no doubt various indigenous concepts about gender have been impacted by colonization. Joanne Barker maintains that "[t]he important conceptual challenge in understanding the impact of these ideologies [of patriarchy and heterosexism] on Indian peoples is refusing a social evolutionary framework in which pristine, utopian Indian societies degenerate into tragically contaminated ones."[81]

Sexism is deeply normalized in indigenous communities. Ladner explains, "colonialism is a gendered enterprise defined by racialised sexual violence perpetuated by the church and state as a means of securing control over a nation and its land – and it is increasingly being perpetuated from within as a result of neo-colonialism, institutionalised sexism and the internalisation of sexual

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[76] Million, *ibid*.
[77] Huhndorf & Suzack, "Indigenous Feminism," *supra* note at 1; Tsosi, *supra* note 75 at 34. See Denetdale for a discussion about male leadership in Navajo politics (Jennifer Denetdale, "Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition" [2006] 21:1 Wicazo Sa Review 9 at 13 [Denetdale, "Chairmen, Presidents, and Princesses"]).
[78] Huhndorf & Suzack, "Indigenous Feminism," *ibid* at 5; Barker, *supra* note 74 at 262; Altamirano-Jiménez, "Nunavut," *supra* note 10 generally.
[79] Tsosi, *supra* note 75 at 32; Ladner, *supra* note 57 at 70; Napoleon, "Raven's Garden," *supra* note 72; Barker, *supra* note 74 generally; Smith, "Indigenous Feminism," *supra* note 72 at 17; Lina Sunseri, *Being Again of One Mind: Oneida Women and the Struggle for Decolonization* (Vancouver: University of British Columbia Press, 2011) at 89.
[80] The power and privilege that indigenous men have access to within their communities should not be misconstrued to mean that they necessarily also have significant power outside of their communities. Indigenous men still face many damaging stereotypes and much oppression.
[81] Barker, *supra* note 74 at 262.

violence."[82] Thus indigenous men are afforded some power and can experience privileges from this social structure.[83] As shown in the previous chapter, indigenous men can more easily control and access resources, and be elected into leadership positions in communities and in national Aboriginal organizations.[84] Women can also internalize and take up gender norms in ways that are oppressive.

Decolonization or self-governance politics that are void of gender overlook serious, lived, gendered specificities. Gender 'neutral' in actuality translates into an assumed and invisible norm of maleness (as whiteness also exists as an invisible norm in western societies[85]). Accordingly, concerns exist that indigenous politics work to reinforce male privilege (intentionally or not) and exclude the contexts of indigenous women's lives.[86] For example, land claims often focus on traditionally male activities such as hunting, trapping, and fishing.[87] While these are represented as 'aboriginal practices' they are in fact about men's practices and erase women's traditional practices, such as berry picking.[88] Smith explains that when gender is made 'visible' in decolonization strategies, it is often focused on men and concerns that they have been displaced

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[82] Ladner, *supra* note 57 at 66.
[83] Barker, *supra* note 74 at 259.
[84] *Ibid* at 263; Green, "Taking Account," *supra* note 59 at 23; Million, *supra* note 74 at 57-58; Ramirez, "Learning Across," *supra* note 66 at 303; Ladner, *supra* note 57 at 72; Anderson, *supra* note 66 at 84-85.
[85] Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (St. Lucia, Queensland: University of Queensland Press, 2000).
[86] Green, "Taking Account," *supra* note 59 generally.
[87] Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Richardson, Imai & McNeil, *supra* note 1, 233 at 241 [Napoleon, "Aboriginal Discourse"]; Altamirano-Jiménez, "Nunavut," *supra* note 10 generally.
[88] Brenda Parlee, Fikret Berkes and Teetl'it Gwich'in Renewal Resources Council, "Indigenous Knowledge of Ecological Variability and Commons Management: A Case Study on Berry Harvesting from Northern Canada" (2006) 34 Human Ecology 515.

from their traditional economies. The economic focus on survival is problematic, as is the assumption that what men do is most important and most at risk.[89] Furthermore this focus on men is not perceived as divisive to the nation (land claims are 'for' the nation), whereas when women put forth gendered concerns, they are accused of dividing the collective in favour of individual rights.[90]

Indigenous feminists call into question the common assertion that indigenous societies did not have gender problems prior to contact and that therefore gender does not need to be talked about, as the achievement of self-government would solve the problem.[91] Whether indigenous societies had gender-based oppression prior to contact is a contentious issue.[92] There are many indigenous women, feminist and non-feminist, who maintain that pre-contact societies were respectful and had balanced gender roles,[93] but as Verna St. Denis, Joyce Green, and others insist, the reality is that colonialism (which includes patriarchy) has had an impact and sexism in settler society and in indigenous

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[89] Smith explains, "some scholars argue that men were disproportionately affected by colonization because the economic roles in the communities. By narrowing analysis solely to the economic realm, they fail to account for the multiple ways women have disproportionately suffered under colonization – from sexual violence to forced sterilization" (*Conquest*, *supra* note 70 at 138).
[90] St. Denis, "Feminism is for Everybody," *supra* note 67 at 40-41; Green, "Taking Account," *supra* note 59 at 25; Ross, *supra* note 62 at 45; Kahaleole Hall, *supra* note 63 at 26; Huhndorf & Suzack, "Indigenous Feminism," *supra* note 48 at 2; Barker, *supra* note 74 at 259; Jo-Anne Fiske, "The Womb Is to the Nation as the Heart Is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement" (1996) 51 Studies in Political Economy 65 at 69-70; Shari M. Huhndorf, "Indigenous Feminism, Performance, and the Politics of Memory in the Plays of Monique Mojica" in Suzack et al, *Indigenous Women*, *supra* note 64, 181 at 186-187 [Huhndorf, "Indigenous Feminism, Performance"].
[91] Napoleon, "Aboriginal Discourse," *supra* note 87 at 234; Green, "Taking Account," *supra* note 59 at 23. See also Smith, "Native american," *supra* note 67.
[92] Smith, "Native american," *ibid*; see also LaRocque, "Métis and Feminist," *supra* note 67; St. Denis, "Feminism is for Everybody," *supra* note 67; Kahaleole Hall, *supra* note 63 at 15-16; Green, "Introduction," *supra* note 66 generally; Joyce Green, "Balancing Strategies: Aboriginal Women and Constitutional Rights in Canada" in Green, *Making Space*, *supra* note 64,140 [Green, "Balancing Strategies"].
[93] See for example Stewart-Harawira, *supra* note 67; Jaimes-Guerrero, *supra* note 67; Grace Ouellette, *The Fourth World: An Indigenous Perspective on Feminism and Aboriginal Women's Activism* (Halifax: Fernwood Publishing, 2002).

communities is rampant today.[94] Ladner maintains that "[i]t is necessary to both decolonise gender and gender decolonisation."[95] Indigenous feminisms can be advantageous for all genders, as the focus is on empowering communities to be more respectful, and fighting for broader recognition that all members receive the dignity that they deserve.[96] For indigenous feminists, decolonization must be explicitly gendered in order to target the sexism that presently exists internally (and externally), as well as the patriarchal, heteronormative violence that helps to sustain and propel colonialism.[97] So too must notions of self-governance,[98] self-determination,[99] nationhood,[100] and as I argue here, indigenous law be thought of as gendered in order to take up anti-oppressive politics.

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[94] St. Denis, "Feminism is for Everybody," *supra* note 67; Green, "Introduction," *supra* note 66 generally.
[95] Ladner, *supra* note 57 at 72.
[96] Ramirez, "Race, Tribal Nation," *supra* note 66 generally; St. Denis, "Feminism is for Everybody," *supra* note 67.
[97] Ross, *supra* note 62 at 50; Anderson, *supra* note 66 at 85; Smith, *Conquest*, *supra* note 70 at 137-139; Smith, "Against the Law," *supra* note 50 at 65; Altamirano-Jiménez, "Nunavut," *supra* note 10 at 133; Kahaleole Hall, *supra* note 63 at 28-31; Goeman & Nez Denetdale, "Native Feminisms," *supra* note 66 at 10. The idea of dealing with colonialism first and gender later, or the idea that decolonizing will 'resolve' problems with sexism parallel other discussions about intersectionality outside of indigenous contexts. For example, Patricia Hill Collins explains in her work on black sexuality that "[i]n the post-civil rights era, gender has emerged as a prominent feature of what some call a 'new' racism. Ironically, many African Americans deny the existence of sexism, or see it as a secondary concern that is best addressed when the more pressing problem of racism has been solved. But if racism and sexism are deeply intertwined, racism can *never* be solved without seeing and challenging sexism" (Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* [London: Routledge, 2004] at 5).
[98] Napoleon, "Aboriginal Discourse," *supra* note 87 at 234.
[99] Napoleon describes that the term 'self-determination' "is concerned with peoples" and therefore one difficult aspect in using the term is who a 'peoples' is. How 'peoples' is most often defined excludes many indigenous groups – "[a]ll of these conceptions are premised on a division of the globe into mutually exclusive sovereign territories that denies recognition of self-determination to substate groups that are not state centred" (Val Napoleon, "Aboriginal Self-Determination: Individual Self and Collective Selves" [2005] 29:2 Atlantis 31 at 32 [Napoleon, "Aboriginal Self-Determination"]). Napoleon notes that the Royal Commission on Aboriginal Peoples cautioned that self-determination should not be done at the band level per se (because bands are quite small) – rather it should be done at the nation level ("Aboriginal Self-Determination," *ibid* at 33). She describes that with smaller groups like the Saulteau First Nation, connections with other First Nations could be quite useful to develop for self-determination (*ibid* at 40). Gordon Christie prefers the term 'self-determination' over 'self-government,' which he describes as more superficial (Gordon Christie, "Culture, Self-Determination and Colonialism: Issues around the

Many indigenous feminists also reject essentialized notions of subjectivity – the idea that indigenous women (and men) are naturally a certain way because of their gender, sexuality, and race. Rather than seeing the body as an *a priori*, I draw on the work of indigenous feminists (for example, Green, Smith, Emma LaRocque, Napoleon) who argue that the meaning given to bodies is socially and historically constructed, contingent, and a product of human interpretation embedded in webs of power dynamics.[101] Work by indigenous women (some of whom take up the label feminist and some who do not) that uncritically takes up notions of motherhood, peacefulness, and nurturing as 'natural' or as unquestioningly tied up with sacredness bestowed upon women by the Creator are called into question in my conceptualization of indigenous feminist legal theory. Tradition can also often be deployed in ways (packed up in discourses of sacredness, authenticity, 'good relations') that aim to silence critical thought and I draw on the work of indigenous feminists who understand tradition as fluid and who recognize that there are multiple interpretations of tradition and that these interpretations are rooted to power dynamics.[102] St. Denis articulates that when detractors of indigenous feminisms claim that indigenous women should seek

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Revitalization of Indigenous Legal Traditions" [2007] 6:1 Indigenous LJ 13 at 20 [Christie, "Culture, Self-Determination"]).

[100] See Smith, "Against the Law," *supra* note 50 at 60-62; Denetdale, "Chairmen, Presidents, and Princesses," *supra* note 77 generally; Sunseri, *supra* note 79 generally; Altamirano-Jiménez, "Nunavut," *supra* note 10 at 128. Altamirano-Jiménez notes that "[a]n analysis from a nationalist perspective is useful to examine how tradition and gender are crucial boundary makers in the construction of Indigenous national identities and to consider what roles women play in the rhetoric of nationalism" (*ibid* at 128).

[101] Smith, "Against the Law," *ibid* generally; Green, "Taking Account," *supra* note 59 generally; LaRocque, "Métis and Feminist," *supra* note 67; Napoleon, "Raven's Garden," *supra* note 72.

[102] See for example Green, "Taking Account," *ibid*; Smith, "Against the Law," *ibid*; LaRocque, "Métis and Feminist," *ibid*; Smith, "Indigenous Feminism," *supra* note 72; Altamirano-Jiménez, "Nunavut," *supra* note 10 generally; Anderson, *supra* note 66 generally; Napoleon, "Aboriginal Discourse," *supra* note 87 generally; Denetdale, "Chairmen, Presidents, and Princesses," *supra* note 77 generally.

empowerment via traditional gender roles, that "[p]art of what this call to tradition accomplishes is the erasure of the larger socio-political context in which Aboriginal women live."[103] The indigenous feminisms that I draw on in my theorizing interrogate external power dynamics and also take up the crucial task of asking uncomfortable questions about power dynamics within. This goes beyond pointing out internal sexism, to examining how destructive and paralyzing discourses and rhetoric are deployed and sustained in attempts to both disempower and empower indigenous women.[104]

As Smith explains, discussions on indigenous feminism should not be understood as some sort of multicultural add-on to already existing feminisms; rather indigenous feminists aim to provide intellectual and practical tools for indigenous peoples and also work to decenter white heterosexual middle-class settler-colonial privilege.[105] Everyone can benefit from indigenous feminisms. Smith contends that "the theorizing produced by Native women scholars and activists make critical and transformative interventions into not only feminist theory, but into a wide variety of theoretical formations."[106] Indigenous feminist activists and women working towards meaningful change still face significant

[103] St. Denis, "Feminism is for Everybody," *supra* note 67 at 40.
[104] Denetdale notes that the rhetoric of 'tradition' is deployed in marginalizing ways by both indigenous men and women ("Chairmen, Presidents, and Princesses," *supra* note 77 at 9-10). Denetdale's work is important in that it asks after questions regarding power and tradition. One concern that I have about her work is that her argument seems to risk suggesting that tradition should only be interrogated if it seems like colonial ideals might be embedded in it. I take the approach here, drawing on her idea that tradition is political, that indigenous traditions (as with traditions in all societies) should also be subject to critical analysis (whether they are colonial manifestations of tradition or indigenous ones).
[105] Smith, *Conquest*, *supra* note 70 at 152-153.
[106] Smith, "Against the Law," *supra* note 50 at 57.

oppression and indigenous feminist theory needs to be resilient enough to understand and respond to these complexities.

Just as communities and individuals are complex and varied, there are multiple approaches to indigenous people's activism and politics. There is much debate over indigenous feminism. Criticisms against indigenous feminism include: feminism is a tool of colonization;[107] feminism is something that white/western women do;[108] feminism is about white women's lives,[109] feminism is incompatible with indigenous sovereignty;[110] the prioritization of gender individualizes and divides communities;[111] feminism wrongfully blames and targets indigenous men;[112] indigenous communities do not have sexism;[113] and indigenous cultures value balanced gender roles and feminism wrongfully prioritizes women.[114] Further many of the criticisms come from an understanding

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[107] Ramirez, "Race, Tribal Nation," *supra* note 66 at 24; Green, "Taking Account," *supra* note 59 at 25; St. Denis, "Feminism is for Everybody," *supra* note 67 at 34; Goeman & Nez Denetdale, "Native Feminisms," *supra* note 66 at 10; Huhndorf & Suzack, "Indigenous Feminism," *supra* note 48 at 2; Lorraine F. Mayer, "A Return to Reciprocity" (2007) 22:3 Hypatia 22 at 23; Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18:2 Hypatia 3 at 5.

[108] Green, "Taking Account," *ibid* at 23; Huhndorf & Suzack, "Indigenous Feminism," *ibid* generally.

[109] Lindberg, "Not My Sister," *supra* note 47.

[110] Ladner, *supra* note 57 at 63. She explains, "[i]t is important to understand this disagreement over the supposed incompatibility between Indigenous nationalism, sovereignty and gender, for it highlights issues of cultural difference and considerations of intersectionality that are critical" (at 63). Related to the notion that feminism is incompatible with sovereignty, is the idea that feminism will take up valuable energy that needs to be targeted elsewhere (Monture, "Right of Inclusion," *supra* note 53 at 47-48). The idea here is that feminism will not allow indigenous women to get at the state.

[111] St. Denis, "Feminism is for Everybody," *supra* note 67 at 40-41; Green, "Taking Account," *supra* note 59 at 25; Fiske, *supra* note 90 at 69-70; Ross, *supra* note 62 at 45; Kahaleole Hall, *supra* note 63 at 26; Huhndorf & Suzack, "Indigenous Feminism," *supra* note 48 at 2; Huhndorf, "Indigenous Feminism, Performance," *supra* note 90 at 186-187; Barker, *supra* note 74 at 259.

[112] LaRocque, "Métis and Feminist," *supra* note 67 at 66.

[113] LaRocque, "Métis and Feminist," *ibid* at 60-61; Mayer, *supra* note 107 at 23; St. Denis, "Feminism is for Everybody," *supra* note 67 at 37; Green, "Taking Account," *supra* note 59 at 21-22.

[114] LaRocque, "Métis and Feminist," *ibid* at 55; Mayer, *ibid* at 23; Jaimes-Guerrero, *supra* note 67 at 64-65; Ouellette, *supra* note 93 at 79; Lindberg, "Not My Sister," *supra* note 47 at 346.

of feminism as something that treats all women as similarly oppressed[115] or something that aims to make indigenous women like white men.[116] These criticisms can lead to the invalidation of indigenous feminists and the rejection of them as "traitors."[117] However while many argue that feminism is not traditional[118] (or say that there are no gendered words in indigenous languages[119]) or that feminism advocates gender roles incompatible with indigenous cultures,[120] there are those who argue that indigenous societies have always taken up notions of feminism – it just was not called this.[121]

My listing of the debates in this field is no doubt terse – this conflict is profound and hurtful for many indigenous women. There are lived consequences in many indigenous communities for speaking out against gendered oppression or for calling oneself a feminist.[122] Others have written about these debates elsewhere so I will not repeat the arguments here. However it is important to

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[115] Ouellette, *ibid* at 11.
[116] St. Denis, "Feminism is for Everybody," *supra* note 67 at 39; Mayer, *supra* note 107 at 23; Kahaleole Hall, *supra* note 63 at 26.
[117] Green, "Taking Account," *supra* note 59 at 25.
[118] *Ibid* at 26-27.
[119] Lindberg, "Not My Sister," *supra* note 47 at 351; Mayer, *supra* note 107 at 31.
[120] Lindberg, "Not My Sister," *ibid* at 345; Huhndorf & Suzack, "Indigenous Feminism," *supra* note 48 at 2; Anderson, *supra* note 66 at 81; Huhndorf, "Indigenous Feminism, Performance," *supra* note 90 at 185-186; Monture, "Right of Inclusion," *supra* note 53 at 48.
[121] This argument is used by both people who reject and accept the term 'feminism.' Lindberg for example argues that indigenous peoples already knew what egalitarianism was and therefore feminism is not needed to tell them about something that they are already aware of ("Not My Sister," *ibid* at 344). Kahaleole Hall also explains that feminism is described as unnecessary – indigenous women used to have powerful roles and if indigenous people can attain decolonization, then these roles will be able to flourish again (*supra* note 63 at 27). Kahaleole Hall ultimately disagrees with the idea that decolonization will eliminate sexism. Williams and Konsmo, argue that feminism is an indigenous term and that to have any moments of realizing feminist consciousness (and affiliating it with the mainstream women's movement) is actually a form of re-colonization (Krysta Williams & Erin Konsmo, "Resistance to Indigenous Feminism," in Yee, *supra* note 64, 21 at 26. Those who accept the term feminism yet describe it (in different ways) as something traditional that indigenous people did before contact include: Anderson, *supra* note 66 at 82, 89; Theresa TJ Lightfoot, "'So What if We Didn't Call it Feminism?!'" in Yee, *supra* note 64, 105 at 109.
[122] See Green, "Taking Account," *supra* note 59 generally.

realize that these debates are a part of discussions on indigenous feminist legal theory. Many of the above debates rely on simplistic divisions and rigid understandings of indigeneity (and non-indigeneity). Indigenous women who reject feminism often reject it based on its simplest (white) form.[123] As already noted, racism is a significant problem in the mainstream women's movement and many feminisms. However 'feminism' is complex and ought not to be rejected based on the most common-place understandings of it, which treats all feminism as liberal feminism topped off with the most egregious misconceptions about radical feminism – separatism, man-hating, and being anti-family. By reading feminism in its simplest, whitest form, Smith notes that critics overlook the complexity of perspectives within feminism and assume all white feminists to be the same.[124] Also bothersome is that when critics treat feminism as only white, they deny and erase the significant feminist scholarship that 'women of colour' (*including indigenous women*) produce.[125] I do not mean to say that everyone has to agree with or take up feminisms, rather my concern is that detractors of indigenous feminism most often under-theorize the complexity of feminisms and marginalize many indigenous women and indigenous feminisms in the process.

2.2(b)(ii) Gaps

Indigenous feminist theory is a foundational part of indigenous feminist legal theory. However there are two significant gaps in the indigenous feminist theory

[123] For example Lindberg, "Not My Sister," *supra* note 47; Moreton-Robinson, *supra* note 85; Sunseri, *supra* note 79 generally; Monture, "Right of Inclusion," *supra* note 53 generally; lewallen, *supra* note 65.
[124] Smith, "Against the Law," *supra* note 50 at 57. See also Ramirez, "Learning Across," *supra* note 66 at 304; St. Denis, "Feminism is for Everybody," *supra* note 67 at 35.
[125] See also Ramirez, "Learning Across," *ibid* at 304; Huhndorf, "Indigenous Feminism, Performance," *supra* note 90 at 187.

scholarship that need to be addressed. The first is that sex, gender, and sexuality, as concepts are under-theorized. With few exceptions,[126] scholars proceed with analyses that leave the sex and gender binary of male/female and man/woman intact.[127] There is little discussion about the possibility of multiple genders, performing one's gender in a way that is disconnected from normative conceptualizations of the sexed body, and furthermore by keeping the sex and gender binary intact, heteronormativity predominates in the scholarship. If indigenous feminist analysis is to be truly intersectional and anti-oppressive then it ought to better account for sexuality, given that heterosexist oppression and violence, in addition to being a problem in settler society, are prevalent in indigenous communities.[128] Further, heterosexist violence is a tool of colonial violence.[129]

The second gap concerns the lack of in-depth discussion about indigenous laws. The problem is twofold: 1) when 'law' is referred to, it is most often done in a way that focuses on state laws and policies (for example, the *Indian Act*), and 2)

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[126] Exceptions include: Napoleon, "Raven's Garden," *supra* note 72; Kahaleole Hall, *supra* note 63 generally; Ladner, *supra* note 57; Huhndorf & Suzack, "Indigenous Feminism," *supra* note 48 generally; Smith, "Against the Law," *supra* note 50; Jennifer Nez Denetdale, "Securing Navajo Boundaries: War, Patriotism, Tradition, and the Diné Marriage Act of 2005" (2009) 24:2 Wicazo Sa Review 131 [Nez Denetdale, "Securing Navajo Boundaries"]; and Yee's edited collection deals with the construct of gender in a *somewhat* more complex way than is typically seen in the literature (Yee, *supra* note 64).

[127] Most commonly 'sex' is understood as one's biological body. 'Gender' is understood as acting out one's sex in culturally and socially 'appropriate' ways. I take the perspective here that both gender and sex are social constructs. Referring to material bodies (sex) as a social construct does not deny the materiality of that body rather it shows that how that materiality is interpreted, labeled, and categorized comes from a place of human interpretation.

[128] Napoleon, "Raven's Garden," *supra* note 72; Smith, "Native american," *supra* note 67; Ladner, *supra* note 57.

[129] Smith, *Conquest*, *supra* note 70; Mark Rifkin, *The Erotics of Sovereignty: Queer Native Writing* in the *Era of Self-Determination* (Minneapolis: University of Minnesota Press, 2012); Scott Lauria Morgensen, *Spaces between Us: Queer Settler Colonialism and Indigenous Decolonization* (Minneapolis: University of Minnesota Press, 2011).

when indigenous laws are referred to, they are often spoken of generally either in reference to principles, legal ideals, or customs.[130] The second is also often done in passing, rather than indigenous laws being the focus of one's work. The result then is that there is no focused, detailed treatment of indigenous laws in the indigenous feminism literature. My concern is not meant to overlook the significance and importance of gendered analyses of state law. Rather, my interest is that detailed treatments of indigenous laws, which make central indigenous feminist analyses, should also be a part of the field. Indigenous legal traditions contain important resources concerning conflict management and given that indigenous laws are a key part of decolonization, they need to be addressed more thoroughly in the indigenous feminism scholarship. Napoleon cautions that proclivity towards examining external politics can paralyze the internal work that needs to be done on intra-politics.[131]

2.2(c) Indigenous Legal Theory

2.2(c)(i) Description of the Field

Of the three fields discussed here indigenous legal theory is the smallest and most recent.[132] While some has been written on indigenous legal traditions, Napoleon indicates that "analysis as to praxis and theory is not explicated" in most of this literature.[133] In this section of the paper, I offer a description of the field and speak

[130] The few exceptions to this are discussed in the indigenous feminist legal theory section.
[131] Val Napoleon, "Creating Space for the Project of Indigenous Law within Political Science" (Paper delivered at the 84th Annual Canadian Political Science Association Conference, Edmonton, University of Alberta, 15 June 2012) [unpublished] [Napoleon, "Creating Space"].
[132] Christie notes in his 2009 work ("Indigenous Legal Theory," *supra* note 1 generally) that there is not yet a solid body of work that has been generated on indigenous legal theory (at 195).
[133] Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Doctor of Philosophy dissertation, University of Victoria, 2009) at 45 [unpublished] [Napoleon, *Ayook*].

to the gaps that exist regarding the scarcity of work on gender and indigenous law, as well as the lack of theorizing of gender and intersectionality in indigenous legal theory.

The field (in Canada) is sustained by a small group of scholars,[134] and there are many junior scholars writing and researching on indigenous laws,[135] which signals that this field is continuing to grow. Internationally, scholars are also doing work on indigenous laws.[136] The focus in this dissertation is on the field in Canada. Some particular concerns that I have with this work on indigenous laws are that internal conflict often gets overlooked, and certain rhetoric, while sometimes strategic, is too heavily relied on and creates limitations.[137] I focus on the work of Christie, Borrows, and Napoleon here, as these scholars are most useful to my analysis. However the gap of explicitly working with gender still remains a problem in this field and I reflect on this after discussing their work.

Christie's work encourages theorizing of indigenous laws. He explains that while many indigenous people often express hesitation to theorize their laws, (because of concerns that theory is tied up with the university which is seen as a colonial tool, or because of concerns about drawing on western theories), these concerns should be treated with care, rather than be seen as obstructions to

[134] This includes: Christie, Borrows, Napoleon, Darlene Johnston, James (Sákéj) Youngblood Henderson, Tracey Lindberg.
[135] Hadley Friedland, Andrée Boiselle, Sarah Morales, Johnny Mack, Dawnis Kennedy, Carwyn Jones, Robert Clifford.
[136] For example, Antonio Peña Jumpa, Jacinta Ruru, and Matthew Fletcher. See also International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, (Geneva, International Council on Human Rights Policy, 2009).
[137] Harmony, balance, healing, for example.

engaging in the important intellectual work of theorizing.[138] Consistent with what has already been discussed, Christie argues that there is no such thing as objectivity or neutrality in law.[139] Interpretations of law are always "time, place, and culture" specific.[140] Further, he argues that "[t]he law itself is a human construct. Choices were, and continue to be, necessary in its construction."[141] An essential component of indigenous legal theory for Christie is that it be based in indigenous cultures and perspectives. This approach promotes:

> (a) arguments resting weight on the distinct cultural and experiential groundings of Indigenous peoples (and on the cultural impact on experience itself), (b) arguments that [speak] to the idea of a collective voice, expressing the will of an Indigenous community, and (c) arguments that [focus] on the possibility that conceptual and normative frameworks, supplied by the distinct cultural world-views of Indigenous communities, could fundamentally structure the very theories themselves that Indigenous scholars might generate.[142]

He explains that indigenous critiques and theories of both indigenous laws and state law, are a part of "the general family of Indigenous legal theories."[143] Thus for Christie, indigenous legal theories look internally but can also work to decenter state law.[144] This decentering of state law includes challenging the notion that state law is the only legal order in Canada, challenging the misconceptions in state law about indigenous peoples, and also decentering state notions (for example of identity) in discussions on indigenous laws.[145] In my description of the

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[138] Christie, "Indigenous Legal Theory," *supra* note 1 at 211-213.
[139] *Ibid* at 208.
[140] *Ibid* at 219.
[141] *Ibid* at 202.
[142] *Ibid* at 218-219. Christie sees that non-indigenous scholars might have perhaps a peripheral place in thinking about indigenous legal theory, he is for the most part, quite cautious about this (this is discussed later in the chapter) (*ibid* at 209).
[143] *Ibid* at 203.
[144] Christie, "Culture, Self-Determination," *supra* note 99 at 17.
[145] *Ibid* generally.

field here, and in my own approach to indigenous legal theory, I focus on work that looks internally at indigenous laws.

For Christie, indigenous legal theory "would present a theory about law issuing from an Indigenous conceptual universe."[146] He goes on to say, "[i]t would seem folly, however, to imagine that there might be a single Indigenous theory about the law, since such a monolithic theory would require a single conceptual 'pan-Indigenous' universe."[147] Thus indigenous legal theory must be understood as plural. He describes how in different legal orders, there will be many varied understandings of indigenous law,[148] and that there will also be many ideas about the meaning of tradition, and even the meaning of the word indigenous.[149]

While Christie does an excellent job of examining power dynamics when talking about indigenous/non-indigenous and indigenous/state relations, I have questions about how well this is taken up regarding internal conflicts over, and within, indigenous laws. I wonder how Christie's approach to indigenous legal theory could be further deepened by, for example, asking questions about internal gendered power dynamics. Napoleon notes a further concern that Christie "neglects to consider ongoing changes (over time) to indigenous legal orders and law."[150] Napoleon's concern while broadly important, is also significant to think about in relation to my question about power and gender.

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[146] Christie, "Indigenous Legal Theory," *supra* note 1 at 202.
[147] *Ibid* at 202-203.
[148] *Ibid* at 203.
[149] Christie, "Culture, Self-Determination," *supra* note 99 at 21.
[150] Napoleon, *Ayook*, *supra* note 133 at 289.

Although Borrows has written extensively on indigenous law,[151] I focus here on his book *Canada's Indigenous Constitution*, as it is a comprehensive treatment of indigenous law. Like Christie, Borrows is interested in showing the complexity and plurality of indigenous laws and indigenous legal theory.[152] Borrows promotes the idea that law in Canada should be understood as multi-juridical – there is state law but there are also many indigenous laws. He shows how indigenous legal traditions shape Canadian law, and vice versa.[153] For Borrows, legal traditions do not operate in tidy isolation from one another:

> [c]are must be taken not to oversimplify Indigenous societies by presenting each group's laws as completely isolated and self-contained. Law, like culture, is not frozen. Legal traditions are permeable and subject to cross-cutting influences. When making laws, Indigenous peoples often draw upon the best legal ideas from their own culture, and then combine them with others. They compare, contrast, accept, and reject legal standards from many sources, including their own.[154]

Not only do indigenous peoples' legal traditions vary but also within those legal traditions many different sources of law can be found. Indigenous laws are not just customary – they also include deliberative law, positivistic law, natural law,

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[151] See for example Borrows, *Canada's Indigenous Constitution*, *supra* note 55 generally; John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) [Borrows, *Drawing Out Law*]; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [Borrows, *Recovering Canada*]; John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR 351 [Borrows, "(Ab)Originalism"].

[152] Borrows, *Canada's Indigenous Constitution*, *ibid* at 24.

[153] *Ibid* generally. Borrows says, for those who write about Canadian law, "[i]t is a mistake to write about Canada's constitutional foundations without taking account of Indigenous law. You cannot create an accurate description of the law's foundation in Canada by only dealing with one side of its colonial legal history. When you build a structure on an unstable base, you risk harming all who depend upon it for security and protection" (*ibid* at 15). He talks about embracing treaties, which could be more inclusive of different types of law, as a possible way forward (*ibid* at 20-21).

[154] *Ibid* at 59.

and sacred law.[155] This is significant to understand, as it shows that there are varied intellectual resources in indigenous laws.[156]

Borrows' argument that indigenous legal traditions can change is crucial. He explains that tradition needs to be understood as "living, contemporary systems" that will require revision.[157] He makes the point that *all* legal traditions (indigenous and non-indigenous) should be revised so as to be applicable to today's contexts.[158] Indigenous laws, like other laws, are not perfect, and will be need to be discussed and changed over time.[159] These internal processes of deliberation will no doubt include conflicting perspectives, however both Borrows and Napoleon maintain that conflict is a part of any society, and can be understood as healthy when managed.[160] An important aspect of Borrows' (and again Napoleon's) work is that he avoids romanticizing indigenous laws. He contends that all societies have conflict and that we should not get pulled into believing that indigenous societies had some sort of pure pre-contact harmony that will be reinstated with the revitalization of indigenous legal traditions.[161]

Napoleon's work, while similar to Borrows in several ways, provides a more detailed approach for thinking about and working with indigenous laws. She describes how there are not "templates for how to research and articulate indigenous legal traditions in a substantive manner – both the praxis and

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[155] *Ibid* at Chapter 2. These sources of law are discussed in detail in Chapter Five of my dissertation.
[156] *Ibid* at 55-56.
[157] *Ibid* at 8. See also Borrows, "(Ab)Originalism," *supra* note 151.
[158] Borrows, *Canada's Indigenous Constitution*," *supra* note 55 at 9.
[159] *Ibid* at 60. See also Napoleon, *Ayook*, *supra* note 133 generally.
[160] Borrows, *Canada's Indigenous Constitution*, *supra* note 55 at 10. Napoleon, *Ayook*, *supra* note 133 at 180. While conflict can be related to, and create oppression, Napoleon notes that "not all conflicts produce harm" (Val Napoleon, personal communication, 3 June 2013).
[161] Borrows, *Canada's Indigenous Constitution*, *ibid* at 10.

theory."[162] While she has written extensively on indigenous law,[163] her work on Gitksan legal traditions and Gitksan legal theory is an especially important resource for thinking about theory and how to engage in grounded, substantive analyses.[164] Rather than speaking generally about indigenous laws and legal principles, a substantive engagement with Gitksan law meant undertaking an "in-depth exploration of how legal decisions are made, how reasoning and deliberation are conducted, how disputes are managed, and how law is recorded, taught, and changed."[165] She moves away from analyses of indigenous laws that focus on law-as-rules, to approaching law as an intellectual process and enterprise.

Substantive work such as Napoleon's is uncommon in the field, and she says that with careful thought and work, the insights from her work on Gitksan legal traditions could be drawn on to think about how to approach other legal traditions of decentralized societies.[166] Her work, like Borrows', pushes up against romanticized notions of indigenous laws and societies. She focuses on messy internal conflicts and power dynamics. Pertinent to my own work, she attempts to see and work with contradictions in legal practices and reasoning.[167] She notes,

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[162] Napoleon, *Ayook*, *supra* note 133 at 44-45.
[163] *Ibid* generally; Napoleon, "Raven's Garden," *supra* note 72; Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Global Pluralism* (Dordrecht: Springer, 2012) 229 [Napoleon, "Thinking About"]; Napoleon, "Aboriginal Self-Determination," *supra* note 99 generally; Val Napoleon & Richard Overstall, "Indigenous Laws: Some Issues, Considerations and Experiences" an opinion paper prepared for the Centre for Indigenous Environmental Resources 2007.
[164] Napoleon, *Ayook*, *supra* note 133 generally.
[165] *Ibid* at 95.
[166] *Ibid* at 294. See also Friedland for work on indigenous legal methodology: Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 2 [Friedland, "Reflective Frameworks"].
[167] Napoleon, *Ayook*, *supra* note 133 at 316.

> [i]f the Gitksan legal order is to retain any legitimacy today, there has to be a way for people to think through the questions, contradictions, and conflicts. After all, my basic position is that law is something that people do – and it has to be practical and useful to life – otherwise, why bother?[168]

While Napoleon does not engage in an explicit analysis of gender in her work on Gitksan law, her work supports the necessarily thorny approach that will need to be taken in analyses of gendered conflicts in indigenous law. Furthermore, her work, along with Hadley Friedland's, provides a detailed description of methodology, which usefully adds to my discussion in Chapter Three, regarding how to 'look for law' in the educational materials that I am examining.[169] Together, Christie, Borrows, and Napoleon's work are theoretically demanding approaches to indigenous law that are productively submerged in the messiness of people trying to figure out how to live with one another.

2.2(c)(ii) Gaps

Napoleon has published pieces that consider indigenous law and gender together.[170] Borrows has also very recently written about gendered conflict (gendered violence, in particular).[171] Their work signals an important shift that will hopefully gain traction, though explicit theorizing of indigenous feminism and feminist perspectives in relation to indigenous legal theory remains to be found in the field. Overall, the messy realities of power dynamics with respect to

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[168] *Ibid* at 311-312.
[169] *Ibid* generally; Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" [forthcoming] [Napoleon & Friedland, "Gathering the Threads"]; Friedland, "Reflective Frameworks," *supra* note 166.
[170] Napoleon, "Raven's Garden," *supra* note 72; Napoleon, "Aboriginal Discourse," *supra* note 87 generally; Napoleon, "Thinking About," *supra* note 163.
[171] Though the focus in this text is on treaty rights. John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (forthcoming) 49:4 Osgoode Hall LJ [Borrows, "Aboriginal and Treaty Rights"].

gender and sexuality are not well dealt with in the scholarship on indigenous legal theory.[172] While there is the occasional mention of gender and (even less often) sexuality,[173] gendered analyses in relation to indigenous laws are rare.[174] Discussions about indigenous feminism in relation to indigenous laws are even more rare.[175] This gender 'neutral' approach risks relying on a universal male subject and thus expressing a male-centered version of indigenous legal theory and laws.[176] Gender 'neutrality' appears in two ways in indigenous legal theorizing: 1) through the absence of any mention of gender; and 2) through discussions about gender balance that argues that indigenous men and women are equal in indigenous societies. While arguments could be made that indigenous gender relations are conceptualized differently by indigenous people and in indigenous laws, the fact remains that gendered power imbalances exist in indigenous communities today and therefore should be addressed more meaningfully. What then, are the implications of engaging in analysis that overlooks gendered conflict, which has significant impacts on people's relationships, experiences of citizenship, and experiences with law? When Christie, for example, meticulously works in his theorizing to reject the western

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[172] In making this statement, I am including everyone in the field, not just the three people that I focus on above.
[173] Christie, "Indigenous Legal Theory," *supra* note 1 generally; Borrows, *Canada's Indigenous Constitution*, *supra* note 55 generally; Napoleon, *Ayook*, *supra* note 133 generally; Napoleon & Overstall, *supra* note 163; James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1:1 Indigenous Law Journal 1.
[174] For exceptions see: Napoleon, "Raven's Garden," *supra* note 72; Napoleon, "Aboriginal Discourse," *supra* note 87 generally; Sunseri, *supra* note 79 generally; John Douglas Crookshanks, "Cleavages in Indigenous Legal Orders: Why and How We Should Learn More" (2012) unpublished paper; Andrew Gilden, "Preserving the Seeds of Gender Fluidity: Tribal Courts and the Berdache Tradition" (2006-2007) 13 Michigan Journal of Gender and Law 237; Deer, *supra* note 50.
[175] See Crookshanks, *ibid*; Napoleon, "Creating Space," *supra* note 131.
[176] See also Crookshanks, *ibid* at 2.

liberal subject but neglects to discuss how that subject is male, what remains hidden in his analysis?[177] What remains hidden in others' gender 'neutral' analyses? What structures of oppression are reproduced rather than challenged?

In a recently published report on legal pluralism and international human rights, it is noted that while indigenous laws (and other non-state legal orders) are increasingly discussed in relation to legal pluralism, gender and culture remain poorly addressed.[178] The report indicates that a "'gender blindspot'" persists, and that problems exist in which cultural claims are favoured over gender claims.[179] Often the language of "'balance'"[180] is put forth in a way so as to undermine women's rights premised on the logic that what is most paramount is that citizens have access to their own legal orders (regardless of the oppression that might be perpetuated by them). These conclusions in the report reflect the findings about the Cree legal educational materials, parallel the concerns from indigenous feminists about 'gender neutral' assertions of sovereignty and decolonization, and reflect the lack of gender discussion in indigenous legal theory. It is worth

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[177] He in fact uses a universal 'she' pronoun in that particular work but this does little to cover up the universal 'he' that actually lurks beneath the surface. Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2:1 Indigenous LJ 67 [Christie, "Law, Theory and Aboriginal Peoples"].

[178] ICHRP, *supra* note 136 at v. While there are parts of this report that are useful, I do not draw on it a great deal in this dissertation. First, the report is heavily focused on an international human rights framework, which while not necessarily at odds with my approach, is still fairly different. Second, the report is quite heavily focused on the state. The report works to challenge the notion that the state is the only legal order, however the state is still problematically dealt with and centered. For example, much attention is given to state recognition of non-state legal orders. It is explained that "[t]he idea of legal pluralism helps clarify that state law is not the only relevant and effective legal order in people's lives. Nevertheless the state remains central to a human rights analysis of plural legal orders because it is the primary duty-bearer in relation to human rights guarantees" (*ibid* at 15). This positioning of the state, and notions of who a legitimate nation is, are extremely problematic

[179] The report does indicates that sometimes non-state legal orders are deemed by state legal orders, to have jurisdiction over some "'minor'" issues such as family law (*ibid* at vi). It is noted that this perception of family law matters as minor dangerously overlooks the various sites within which gendered conflicts and violence manifest (*ibid* at vi).

[180] *Ibid* at vi.

reiterating that while indigenous laws and state laws are different, they both contend with 'gender blindspots' that stem from patriarchal social contexts and which perpetuate male privilege under the language of neutrality (or 'balance'). As explained above, indigenous feminist theorists have shown quite well that the privileging of male experiences remain hidden and comes at the expense of marginalizing many of the indigenous citizens that these scholars are trying empower. To reiterate, the "prioritizing of race and tribal nation over gender is a mistake, since sexism and racism oppress indigenous women at the same time. Sexism, therefore, becomes too frequently ignored in indigenous communities and scholarship."[181]

2.3 Indigenous Feminist Legal Theory

In this section, I lay out the main tenets of indigenous feminist legal theory. The complexity and value of this approach is demonstrated as it is applied throughout this dissertation. Further, this framework will continue to be deepened as it is discussed and engaged with by others. Here I show how this emergent theory draws on that which is most productive from the three fields and I close the gaps noted above. In doing so, it is not my intention to suggest that the fields should cease to exist on their own. Indigenous feminist legal theory is an invaluable tool for engaging in critical analyses of gender and indigenous laws (and can also be applied for thinking about state laws). A summary of the main tenets of indigenous feminist legal theory include: an understanding of indigenous laws and societies as gendered; a commitment to intersectional analysis; an attentiveness to

[181] Ramirez, "Learning Across," *supra* note 66 at 305.

power dynamics that includes examining how gendered power dynamics play out in the meanings, perceptions, and practices of indigenous laws; an approach that is anti-essentialist and understands gender, sex, and sexuality as plural and complex; and finally, a spirit of critique that challenges rigid and romanticized notions about tradition, gender roles, and law. Indigenous feminist legal theory is an anti-oppressive analytic tool. Throughout the discussion below, I draw attention to these core tenets.

While work exists that could fall under the label of indigenous feminist legal theory,[182] there is no work yet that explicitly takes up the term or considers the above three bodies of work in relation to one another. To reiterate, the explicit use of indigenous feminism is important. Scholars such as Lindberg and Sunseri engage in gendered analyses in their research on indigenous legal traditions;[183] however, gendered analysis must not be conflated with indigenous feminist legal research. Regarding identifying one's work as feminist, Sunseri says,

> [the] use of feminist discourse can be only positive, yet one does not have to resort to feminism to engage in such a critique of tradition: in my community, many elderly women who do not identify themselves as feminists have critiqued men – and women – who have tried to use traditions in such oppressive ways.[184]

While I agree that using the language of feminism is not the only way to talk about gender (or to ask questions about tradition), the ways in which gender discussions in indigenous contexts are 'cleansed' of feminism, particularly critical feminisms, is problematic. Even while trying to be accepting of other indigenous

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[182] For example, Napoleon, "Raven's Garden," *supra* note 72; Crookshanks, *supra* note 174; Watson, "Aboriginal Women's Laws," *supra* note 37; Denetdale, "Chairmen, Presidents, and Princesses," *supra* note 77 generally; Deer, *supra* note 50.
[183] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 58; Sunseri, *supra* note 79 generally.
[184] Sunseri, *ibid* at 163.

women who might identify as feminists, Sunseri risks treating feminism as something that is 'resorted' to. However, feminist voices and perspectives ought to be a part of conversations on indigenous laws. Having said this, it is crucial that indigenous feminist legal theory be understood as an intellectual tool and not an assertion about identity politics. What this means is that the framework that I articulate here does exclude some people who take up the label of indigenous feminist, or feminist, if the ideas that they support in their frameworks are oppressive (e.g. essentialisms). My discussion is intended to go deeper than how one labels oneself, to engaging with the ideas that feminist legal theory and indigenous feminist theory offer to theorizing indigenous law. There should be many ideas about indigenous feminist legal theory, however that does not then mean that a given theoretical articulation has to include every single perspective. *It is important to make the language of 'indigenous feminism' explicit in my discussion, and in indigenous feminist legal theory, because I do not want to silence and overlook these analytic tools*.[185]

[185] Although I am retaining the word 'feminism' in my work, this does not necessarily mean that I am keeping much of the other terminology that is often perceived to come along with feminism. Again, I understand feminisms to be complex and caution against assuming that feminism is just one simple ideology. 'Equality' for example is assumed to be a part of feminist politics yet I do not take up 'equality' in my thinking on indigenous feminist legal theory. I do not use the term, as I have concerns about the normative standard (white men's social position) that is too often relied on and desired in equality arguments. This is similar to Turpel's concerns, however Turpel's rejection of the term equality goes much further. She argues that "[e]quality is not an important political or social concept" (in the Cree context) (Turpel, "Patriarchy and Paternalism" at 179) and that it is often understood as something that is individualizing and selfish, rather than something for the collective (Turpel, "Patriarchy and Paternalism," *supra* note 52 at 180). Ladner further describes of Turpel and Monture's work that, "[d]isagreeing with the manner in which the intersection among sovereignty, nationalism and women's rights has been framed, both Turpel-Lafond and Monture argue that what is perceived as inherent incompatibility can be resolved by stepping beyond the equality discourse of mainstream feminist theory and understanding cultural difference. The crux of the argument is that, while gender equality (and the corresponding equality rights discourse) is a colonial or Western-Eurocentric construct typically at odds with discourses of Indigenous nationalism and sovereignty, Indigenous traditions are, by and large, women-centred, as women are the centre of all life. While the contemporary condition is rife with

As noted above, Christie imagines indigenous legal theory as looking internally *and* as something that offers critiques of state law.[186] Indigenous feminist legal theory as I articulate it can do both of these. In this dissertation, however, I focus on developing indigenous feminist legal theory in a way that can look internally and deeply at indigenous laws. Others have engaged in gendered and indigenous feminist analyses of indigenous women and state law elsewhere.[187] Scholars such as Smith uses feminist and indigenous perspectives to decenter state law, yet an explicit focus on indigenous laws is absent.[188] The language of 'indigenous legal theory' is therefore important. *Indigenous feminist legal theory offers a particular orientation for thinking critically about how indigenous laws are gendered and for thinking about internal gendered legal realities.* This internal focus does not mean that indigenous people are thought of as living in tidy isolation from the rest of the world or that the impacts of colonization and analyses of power in relation to this should be overlooked.

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violence, inequality, and mistreatment, this state of internalised colonialism can be overcome by reclaiming tradition" (Ladner. *supra* note 57 at 63). I distance myself from arguments such as these in my rejection of 'equality,' as they are oversimplified and problematically romanticize gender relations prior to contact.

[186] Christie, "Indigenous Legal Theory," *supra* note 1 at 203.

[187] For indigenous feminist analyses of state law see, for example: Green, "Balancing Strategies," *supra* note 92; Luther, *supra* note 50; Sharon McIvor with Rauna Kuokkanen, "Sharon McIvor: Woman of Action," in Green, *Making Space, supra* note 64, 241. For gendered analyses of state law see, for example: Monture, "The Right of Inclusion," *supra* note 53 generally; Monture-Angus, "Standing Against," *supra* note 58; Lindberg, *Critical Indigenous Legal Theory*, *supra* note 58; While Lindberg work is described as about indigenous laws, much of her analysis also looks at state law. This is especially the case in her chapter on indigenous women. Her work is discussed in Chapters Four to Six, however it is relevant to briefly note here that I do not understand her work to be fully and deeply about gender. She talks about indigenous women in one chapter of her work and the insights from that chapter sit detached from the rest of the text. That is to say – she only talks about gender and women in her 'gender' chapter on violence and does not more broadly engage in gendered analysis otherwise.

[188] Smith, "Against the Law," *supra* note 50. In her work on violence against indigenous women, Smith argues that anti-colonial responses need to be complex (looking internally and externally) to account for the complexity of women's lives (*Conquest*, *supra* note 70 at 151). I agree with this, yet because so little work has focused on internal conflict, I only look internally here.

Indigenous feminist legal theory can also prove to be useful for people with various foci and locations within the fields above, and can provide an analytical tool for encouraging intersectional, multi-juridical, anti-colonial feminist legal analysis.

Making gender an explicit part of indigenous legal theory should not be imagined as a matter of adding indigenous women or of considering them as an afterthought; rather intersectional indigenous feminist legal analyses should disrupt existing gender 'neutral' approaches. It is crucial to understand how systemic sexism is part of indigenous legal norms and practices.[189] As Napoleon argues, talking about gender goes beyond just talking about women and 'women's issues.'[190] *Indigenous feminist legal theory pushes for an understanding of indigenous law as gendered and asserts that all legal issues are gendered and of relevance to both women and men, and to analyses of power.* This approach is informed by indigenous feminist assertions that in order for decolonization to be meaningful for all indigenous people, gender must be included as a complex intersectional reality. *The concept of intersectionality is key to indigenous feminist legal theory.*

I argue that indigenous laws, including legal processes and principles are gendered (discussed in detail in Chapter Five). This means that indigenous laws can play out differently for women and men. But importantly, this approach to gender also requires that the meanings of legal principles and the intellectual processes that shape indigenous legal practices and interpretations are gendered.

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[189] Crookshanks similarly argues this in his unpublished paper on how indigenous legal orders could address internal gendered conflicts (*supra* note 174 at 20).
[190] Napoleon, "Aboriginal Discourse," *supra* note 87 at 235.

To talk about indigenous law as gendered does not mean seeking out what the different 'legal rules' are for indigenous women and men (if these exist in a given indigenous legal order). While asking questions about legal rules could be a part of indigenous feminist legal analysis, in line with scholars such as Napoleon and Smart, I contend that we should shift away from law-as-rules, to think about the intellectual processes and various discourses that sustain the meanings of indigenous laws and legal subjects. Gendered power dynamics exist in both state and non-state legal orders and simply using one legal order over another would not resolve questions about gender oppression.[191] As demonstrated through the discussion about feminist legal theory and indigenous feminist theory, state law and decolonization practices need to be understood as gendered.

Indigenous laws, like any other form of law, do not exist in isolation from social norms and practices, and are time, place, and culture specific – "law is a cultural phenomenon."[192] Built into social and cultural norms are gender norms. Thus, if there is systemic sexism in indigenous communities (in which women are devalued, and male experience, knowledge, and power is privileged) then as with state law, this systemic sexism can influence interpretations of indigenous law and legal practices. Mary Ellen Turpel has shown that the *Canadian Charter of Rights and Freedoms*[193] is not neutral – principles such as equality are premised on a universal western male subject and western cultural norms.[194] Christie as well has

[191] ICHRP, *supra* note 136 at vi.
[192] Borrows, *Canada's Indigenous Constitution*, *supra* note 55 at 140.
[193] *Canadian Charter of Rights and Freedoms* Part 1 of the *Constitution Act* 1982 being Schedule B to the *Canada Act 1982* (U.K.) 1982 c. 11.
[194] Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90) 6 *Canadian Human Rights Yearbook* 3 [Turpel, "Aboriginal Peoples"].

shown that state law is premised on a particular liberal subject.[195] Ladner, and many indigenous feminists, have shown that the concepts of decolonization, sovereignty, and nationhood are gendered and privilege male subjects and experience.[196] 'Phallocentrism' is an important concept for this discussion in that it interrogates representations of indigenous peoples that are premised on the experiences and lives of indigenous men. Phallocentrism occurs when "[t]he masculinity of 'human'" (or in this case 'indigenous') "goes unrecognized."[197] Indigenous feminist legal theory works to challenge notions of gender 'neutrality' that place indigenous men as the stand-in for indigenous peoples.

As many scholars above have shown, the discourses that put forth particular 'truths' about law to sustain it as 'law' are enmeshed in the power dynamics in a given society. Indigenous feminist legal theory asks whose experiences, knowledges, and truths indigenous laws are shaped by. Who is benefitting from particular legal practices, processes, and principles? Who is being marginalized by them? What resources are available in indigenous legal traditions to address these oppressions? What would it take to draw on these in practice? What space exists for dissent? While some might argue that indigenous laws come from the Creator and/or from nature, I treat law as a human construct, involving human interpretation and meaning making.[198] This does not mean that the sacred cannot and does not exist. Nor do I mean to suggest that law cannot be

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[195] Christie, "Law, Theory and Aboriginal Peoples," *supra* note 177.
[196] Ladner, *supra* note 57 at 64.
[197] Elizabeth Grosz, "Philosophy" in Sneja Gunew, ed, *Feminist Knowledge: Critique and Construct* (New York: Routledge, 1990) 147 at 150.
[198] Christie notes, "[a]gency in the legal realm, however, is not restricted to the actions of the subject of the law. The law itself is a human construct. Choices were, and continue to be, necessary in its construction. The creators of law act in the world, imposing their will within the fabric of social and political life" (Christie, "Indigenous Legal Theory," *supra* note 1 at 202).

found in nature. Rather, understanding that which is sacred and natural involves human interpretation. I add Smart's thoughts on law to my understanding of indigenous feminist legal theory: "[i]f we accept that law … makes a claim to truth and that this is indivisible from the exercise of power, we can see that law exercises power not simply in its material effects (judgements) but also in its ability to disqualify other knowledges and experiences."[199] While Smart is writing about state law as a gendering strategy and something that omits other types of knowledge (e.g. feminist knowledges) in order to maintain its superiority, questions should also be asked about whose knowledge is valued in constructions of indigenous laws given that indigenous communities also have gendered power dynamics.

Foucault's conceptualization of power as both repressive and productive is important to consider. As Smart contends however, just because women have and exercise power, does not mean that they are able to do this in a way that is the same as men – "what feminists have added to Foucault's work is the recognition of the gendered nature of patterns [of power] that are formed."[200] To talk about power and indigenous laws is not to deny the agency of indigenous women. Watson, for example, writes of 'grandmother's laws' in Australia and talks about how these are meant to validate indigenous women and their knowledges.[201] However, as Watson shows, these approaches to law are not being recognized. The approach to power that I take acknowledges indigenous women's resistance, knowledges, and agency but argues that these circulate within a socio-legal

[199] Smart, *Power of Law*, *supra* note 18 at 11.
[200] Smart, *Law*, *Crime and Sexuality*, *supra* note 21 at 7-8.
[201] Watson, "Aboriginal Women's Laws," *supra* note 37.

context in which dominant norms that privilege men's knowledges attempt to discipline indigenous legal subjects in phallocentric ways. Thus, *indigenous feminist legal theory insists that indigenous women are complex citizens and legal agents whose realities must be examined with power dynamics at the forefront*.

Indigenous feminist legal theory further requires taking up a critical approach to the relationship between gendered practices, gendered ideals, and gender norms. Notions of 'gender balance' and 'gender complementarity' commonly arise in discussions about gender and indigenous socio-legal issues.[202] Gender practices will of course vary from group to group and indigenous women and men will act variously. As indigenous feminists make clear however, systemic sexism exists in indigenous communities. This reality of gendered conflict sits in contradiction to often asserted cultural ideals and rhetoric about balance (discussed further in Chapter Four).[203] I aim to work with the complexity and contradictions of people's beliefs and actions, and this requires recognizing the importance and meaning of ideals, but also not conflating ideals and cultural values necessarily with practice. It is further important to ask questions about how cultural values and traditions are asserted and deployed and how these change over time. The often repeated discourses about gender balance and complementarity in indigenous contexts are purported to be about equality and empowerment for men and women. Upon considering the realities of

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[202] This occurs for example in academic literature, at conferences, in discussions with others, and in the classroom.

[203] Denetdale shows that women are denied participation in politics in the Navajo nation and are instead included primarily through discourses about motherhood, purity, and beauty (Victorian ideals framed as 'tradition') ("Chairmen, Presidents, and Princesses," *supra* note 77 at 9). 'Womanhood' is used to represent the nation on 'positive' terms, while in reality women are oppressed within. See also Nez Denetdale, "Securing Navajo Boundaries," *supra* note 126.

heteronormative patriarchal realities in indigenous communities however, the repetition of these discourses must also be read as disciplinary and phallocentric (this is discussed further in Chapter Four).

It is contentious to assert that indigenous feminist legal theory should encourage analyses that consider how indigenous laws are phallocentric, given the discourse about gender balance. Further, I am arguing that it is critical to ask questions about the present foundations upon which indigenous laws are asserted, at a time in which assimilationist, colonialist efforts are continuing in their attempts to undermine the existence of indigenous legal traditions, and are violently targeting indigenous women. On the surface, it can seem remiss to draw on indigenous feminist legal theory to deconstruct discourses about indigenous laws amidst reclamation and revitalization efforts of indigenous legal traditions. I want to make clear that *my understanding of indigenous feminist legal theory, as informed by Napoleon and Borrows' writing on law,*[204] *includes valuing indigenous laws as crucial, living, viable resources that are necessary and important to indigenous peoples' cultures and decolonization*. My intention is to ask critical questions about knowledge, power, and gender, not to do away with indigenous laws. A deconstructionist approach to law no doubt means something different when thinking about state law versus indigenous laws (which have already been damaged through the violent imposition of colonialism), however keeping these different contexts in mind should never mean that questions cannot be asked about indigenous laws.

[204] Napoleon, *Ayook*, *supra* note 133 generally; Borrows, *Canada's Indigenous Constitution*, *supra* note 55 generally.

Indigenous feminist legal theory needs to be practical and specific if it is to have any traction in and beyond the academy. This means that it needs to be able to account for the messiness of people's everyday lives and must work against defining indigenous women's citizenship based on rhetoric and general discussions about indigenous laws. Indigenous women, like indigenous men, are complex legal agents engaging with complex legal orders and practices. This involves, as Napoleon and Borrows have shown, contestation, power imbalances, complicated lived realities, and difficult intellectual work.[205] Smart attests that as one thinks more about law, it should become more complex, not simpler.[206] Indigenous feminist legal theory should resist and challenge oversimplified representations of indigenous laws that try to say otherwise and should take up a spirit of critique.

For indigenous laws to be useful and healthy, they must be repeatedly discussed, deliberated, and revised as necessary.[207] Christie speaks to the need for careful, deep discussion about indigenous legal traditions.[208] Napoleon and Borrows further this approach by arguing that it is important that indigenous legal traditions are not imagined as unchanging practices that would just be taken from the past and be dropped into the present.[209] Napoleon argues that,

> [s]ince change has occurred and there was no golden age anyway, the next question to consider is how to compensate for the damages caused by recent history. Again, this work is ongoing and there is no arrival. Instead,

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[205] Napoleon, *ibid*; Borrows, *ibid*.
[206] Smart, *Law, Crime and Sexuality*, *supra* note 21 at 2.
[207] Napoleon, *Ayook*, *supra* note 133 generally; Borrows, *Canada's Indigenous Constitution*, *supra* note 55 generally.
[208] Christie, "Culture, Self-Determination," *supra* note 99 at 18.
[209] Napoleon, *Ayook*, *supra* note 133 at 91; Borrows, *Canada's Indigenous Constitution*, *supra* note 55 at 60; Borrows, "(Ab)Originalism," *supra* note 151.

> it enables people, and this must deliberately include women, to engage on a personal and individual level with a larger self-determination project.[210]

As she notes in her work on Gitksan law, just because legal traditions change over time, as is necessary, this does not mean that people and their laws are no longer Gitksan.[211] All legal traditions change to make sense for people in the present. It is unreasonable and unjust to argue that indigenous laws cannot change.[212] *Indigenous feminist legal theory upholds the idea that "the most crucial process that a people must consider in seeking to understand their own legal order and the legal orders of others is how laws change over time."*[213]

Indigenous feminist legal theory, then, encourages asking difficult, sometimes uncomfortable, questions about how indigenous laws reproduce gendered conflicts but also how they could challenge them. It is appropriate to again draw on Napoleon's invaluable contributions to indigenous legal theory, to help articulate indigenous feminist legal theory. She says,

> [i]nternal oppression and power imbalances are another reality that all Indigenous people—like anyone else—have to consciously guard against. Sexism is a reality. Homophobia is a reality. Ageism (despite the rhetoric) is a reality. Many of our communities are not safe places for our children and other vulnerable individuals. Law is one way to deal with questions of oppression and the abuse of power. If we understand law as an intellectual process that all citizens engage in, then we can use that process to enable people to tackle the uncomfortable issues in our communities. In order to remain alive, Indigenous legal orders and law must be able withstand internal challenges and change. It is this ongoing challenge to norms that keeps a culture alive and vital—and ensures continued relevance for younger people. Otherwise, Indigenous law will fail to be useful in today's

[210] Napoleon, "Aboriginal Self-Determination," *supra* note 99 at 41.
[211] Napoleon, *Ayook*, *supra* note 133 at 3.
[212] See also Borrows, "(Ab)Originalism," *supra* note 151.
[213] Napoleon, *Ayook, supra* note 133 at 290. Borrows further contends that, "[r]espect and reverence for traditions can be expanded if people have enough confidence to apply their ancient principles in the here and now" (*Canada's Indigenous Constitution*, *supra* note 55 at 105-106).

> world, and if it is not useful, there is no point in teaching or practicing it. Our young people will continue to turn away in spite of our rhetoric.[214]

Indigenous feminist legal theory must be able to address the real problems that indigenous peoples (like other peoples) face. This means working against romanticization and disallowing fundamentalisms that aim to silence multiple truths, experiences, and knowledges.[215]

The perspective that indigenous feminist legal theory is misguided in its approach to gender because indigenous cultures have gender balance is based on a romanticization of the present, a conflation of ideals with practice, and a romanticization of the past. In her work on sexual violence in indigenous communities, Deer advocates for a "Native woman-centered model of adjudication"[216] that is feminist and works against state laws that are "inadequate to address sexual assault against Native women."[217] Her broad arguments that state law deals poorly with this violence, and that approaches should be indigenous woman-centered and draw on internal resources is important. I do have questions though about how her work relies on an approach that idealizes the past. She states, "[f]irst and foremost, sexual assault crimes are relatively recent phenomena in tribal communities."[218] Quoting an elder, it is argued that

> '[a]ccording to the oral traditions within our tribal communities, it is understood that prior to mass Euro-American invasion and influence, violence was virtually nonexistent in *traditional* Indian families and

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[214] Napoleon, "Thinking About," *supra* note 163 at 243-244.
[215] Again, this assertion is informed by Napoleon, *Ayook*, *supra* note 133 generally; Borrows, *Canada's Indigenous Constitution*, *supra* note 55 generally; Borrows, "(Ab)Originalism," *supra* note 151. See also St. Denis on fundamentalisms: Verna St. Denis, "Real Indians: Cultural Revitalization and Fundamentalism in Aboriginal Education" in JoAnn Jaffe, Carol Schick & Ailsa M. Watkinson, eds, *Contesting Fundamentalisms* (Winnipeg: Fernwood Publishing, 2004) 35 [St. Denis, "Real Indians"].
[216] Deer, *supra* note 50 at 153.
[217] *Ibid* at 152.
[218] *Ibid*.

> communities. The traditional spiritual world views that organized daily tribal life prohibited harm by individuals against other beings.'[219]

This assertion risks perpetuating the idea that violence is not something that 'authentic'/'traditional' indigenous people engage in, and that violence is only a product of colonialism. Indigenous feminist legal theory works against notions that tradition is perfect and that the past was conflict-free. This includes working against the simplistic approach that colonialism ruined the perfectly balanced gender relations that were apparently in place prior to contact. No society is ever conflict-free, and while conflicts and power play out differently at different times and in different places, given that indigenous laws existed/exist and attempted to address gendered violence, I take an approach here that is open to the idea that gendered conflict is not just a colonial problem. *Indigenous feminist legal theory can be a tool through which to engage in critical discussion about tradition as fluid and to denaturalize tradition.*

Avoiding romanticization also means avoiding essentialisms. Smart maintains that

> [poststructuralism] entails a significant shift in perception away from the idea that people exist in an a priori state, waiting for institutions to act upon them, towards thinking about subjects who are being continually constituted and who also constitute themselves through language/discourse. Poststructuralism thereby destabilizes the 'individual', allowing him/her to become more fluid and diverse.[220]

I understand that drawing on poststructuralism and postmodernism in relation to indigeneity is contentious and this is discussed in the next chapter. What is relevant here is that *indigenous feminist legal theory is anti-essentialist and does*

[219] Deer quoting Lisa M. Poupart, *ibid* [emphasis added].
[220] Smart, *Law*, *Crime and Sexuality*, *supra* note 21 at 8.

not assume that all indigenous women are the same, nor does it assume that they act in particular ways because of any pre-determined traits. For example, when thinking about motherhood rhetoric, which is common in discussions about indigenous women (and is discussed throughout this dissertation), I assert that valuing women as nurturers is something that is culturally and socially produced, rather than there being something naturally and inherently nurturing about indigenous women. As this dissertation demonstrates, Cree women are under-represented in many of the educational materials, and when they are included it is often in a way that imagines indigenous women only as subjects in relation to motherhood and violence, rather than imagining the countless ways that they are legal agents in the everyday and how gendered experience goes beyond just 'gender roles' and 'women's issues.'

An integral aspect of indigenous feminist legal theory includes asking questions about sex, gender, and sexuality, and working against heteronormative oppression. As noted above, in the majority of work by indigenous feminists and indigenous legal theorists, the gender binary man/woman is treated as a normal, unquestioned part of people's analyses. This binary, in addition to the assumption that people naturally engage in heterosexual relationships, produces theories that rely on and perpetuate heteronormativity. There are a few scholars – Andrew Gilden, Ladner, Denetdale and Napoleon who explicitly work with (in different ways) gender and sexuality in their discussions on indigenous laws and consider how notions of gender fluidity have been, and can continue to be a part of,

indigenous legal traditions.[221] With the indigenous feminist legal theoretical approach that I articulate, one way of working against romanticization and fundamentalisms is to ask questions not only about sex, gender, and sexuality, but also about gender roles and tradition.

There are no doubt tensions in bringing feminist legal theory, indigenous feminism, and indigenous legal theory together. I consider the uncomfortable aspects of this approach to be openings for thinking about that which is important. I have included scholars in this conversation who might not want their work to be drawn on to discuss indigenous feminist legal theory. Moreover, feminisms (including indigenous feminisms) are contested and these debates will make their way into deliberations over indigenous feminist legal theory. When thinking about how to engage with non-indigenous theories in his work on indigenous laws, Christie explains that the task goes beyond just talking about a given theoretical perspective in an indigenous context, to watching out for that which is hidden in certain perspectives.[222] For example, one might draw on western legal theories to think about indigenous laws, or to critique western approaches, but Christie cautions scholars to watch out for liberal ideals that western law and legal theorizing are premised on when doing this. He argues that "non-Indigenous theories have historically served as central instruments in the ongoing colonial project (right up to the present moment), acting to entrap and dispossess Indigenous peoples."[223] Napoleon acknowledges these cautions from Christie,

[221] Gilden, *supra* note 174; Ladner, *supra* note 57; Nez Denetdale, "Securing Navajo Boundaries," *supra* note 126; Napoleon, "Raven's Garden," *supra* note 72.
[222] Christie, "Indigenous Legal Theory," *supra* note 1 at 214.
[223] *Ibid* at 210.

though she does draw on western legal theory in her work on Gitksan law as she does not want to start from scratch, and does not want to treat societies as separate when they are not.[224] Christie does ultimately work with western theories alongside indigenous theories, however reading his work shows that there are parallels between separatist feminist rejections of malestream theory and separatist indigenous perspectives that reject whitestream theory. I aim to avoid these approaches here.

I draw on work by indigenous and non-indigenous scholars throughout this dissertation. Indigenous feminist legal theory is an analytic tool for thinking about indigenous laws as gendered. This tool enables a critical reading of the three bodies of literature in relation to one another but also offers a unique framework for engaging with indigenous laws. Indigenous feminist legal theory will be taken up, be rejected, or be revised as people deem it necessary. At present, the term is dangerously pan-indigenous, and in moving forward, its application should be much more specific. Is it possible, for example, that there is such a thing as Cree feminism? Or Cree feminist legal theory?

2.4 Conclusion

Gender is poorly dealt with in the field of indigenous law in that indigenous legal principles, practices, and realities are not critically examined as gendered. As discussed above, using indigenous feminist legal theory to think about indigenous laws as gendered does not mean examining rules about gender roles (though this could be a part of the work); rather indigenous law and indigenous legal theory

[224] Napoleon, *Ayook*, *supra* note 133 at 241-242. Christie also concludes that western theories can be drawn on ("Indigneous Legal Theory," *supra* note 1 at 213).

are approached through an intersectional lens that analyzes indigenous law as a site of gender struggle. For those wanting to do critical research on indigenous laws and gender, one presently has to work across various theoretical fields to piece together legal theory that can speak to one's research interests. This is a difficult task, as I have found a heavy focus on state laws in feminist legal theory and indigenous feminist theory, and indigenous legal theory is treated as gender 'neutral.' Further the importance of indigenous feminist work is not recognized in the indigenous legal theory and feminist legal theory scholarship. While I think that it is important to learn from a variety of theoretical perspectives, I have argued here that there needs to be a conversation between these fields, and I have shown how this conversation can work to build a practical and relevant theory for research on gender and indigenous law. Indigenous feminist legal theory is an important analytic tool that is intersectional, attentive to power, anti-colonial, anti-essentialist, multi-juridical, and embraces a spirit of critique that challenges static notions of tradition, identity, gender, sex, and sexuality. Indigenous feminist legal theory should not be read as being useful only to scholars who are doing research on gender; rather, as shown in this chapter, critically engaging with gender should be a part of all research on indigenous laws.

In thinking about what a broader indigenous feminist legal studies might entail, theory, but also methodology, are crucial. In the next chapter, I turn to articulating one approach to indigenous feminist legal methodology that draws on the discussion from this chapter to develop research that promotes indigenous feminist legal analysis attentive to power dynamics and lived gendered legal

realities. Together these theoretical and methodological tools disrupt approaches to indigenous laws that overlook, oversimplify, and thus erase, gendered legal realities.

Chapter Three:
Indigenous Feminist Legal Methodology

3.1 Introduction

Indigenous feminist legal methodology, like indigenous feminist legal theory, is a term that has not been written on or explicated. While there should be multiple indigenous feminist legal methodologies (as with theories), in this chapter, I consider one approach. Theory, methodology, and methods are deeply connected.[1] A researcher's ontology, epistemology, methodology, and axiology inform and build upon one another.[2] In her work on indigenous methodologies, Margaret Kovach notes that "methodology itself necessarily influences [research] outcomes."[3] Rather than feigning objectivity, which is too often found in legal studies (and many other fields), I aim to embrace a methodology and methods that explicitly advocate indigenous feminist legal theory. This approach is consistent with both indigenous and feminist methodologies.[4] As Elizabeth Grosz notes in

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[1] In line with a Sociological approach to theory, methodology, and methods, I understand these to mean the following: 1) theory: the framework(s) that I am drawing on and developing to explain and analyze my findings and ideas overall; 2) methodology: theory specifically about research/theory concerning how one goes about knowing and learning via research; 3) method: the actual means through which one goes about doing their research. Theory, methodology, and method ought to all be connected to one another. J. Gary Knowles and Ardra L. Cole describe methodology to mean, "what it means to know" (J. Gary Knowles & Ardra L. Cole, "Part 1: Knowing" in J. Gary Knowles & Ardra L. Cole, eds, *Handbook of the Arts in Qualitative Research* [London: Sage, 2008] 1 at 1) and there also ought to be consistent connections between one's ontology, epistemology, methodology, and axiology in a given research project. I have tried in this chapter to not be repeat too much of what has already been said about indigenous feminist legal theory in Chapter 2, how indigenous feminist legal theory and indigenous feminist legal methodology are intimately connected, so some repetition has occurred.

[2] Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Halifax: Fernwood Publishing, 2008) at 33-34.

[3] Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009) at 13.

[4] While there are of course variations within indigenous methodologies and feminist methodologies, doing away with the notion of objectivity is a common tenet in both. See for example, Wilson on indigenous methodologies (*supra* note 2 generally), and Elizabeth Grosz on feminist philosophy (Elizabeth Grosz, "Philosophy" in Sneja Gunew, ed, *Feminist Knowledge: Critique and Construct* [New York: Routledge, 1990] 147).

her work on feminist philosophy, we all have political perspectives, and we write, think, and research from a particular context.[5]

In this chapter, I demonstrate how my method for analyzing representations of gender in the Cree legal educational materials is an appropriate fit with my methodology and research questions. As noted in Chapter One, the main questions guiding my research are: 1) how do the educational materials, which are meant to advocate empowerment of Cree people and laws, represent Cree women as legal agents, and 2) how might indigenous feminist legal theory and methodology facilitate this research?

This chapter is divided into two main sections. The first is on methodology, in which I discuss critical discourse analysis, feminist critical discourse analysis, and indigenous methodologies. Because nothing has yet been written on indigenous feminist legal methodology, I begin with already existing articulations of methodology before offering a description of indigenous feminist legal methodology.[6] The second main section is on methods. In this part of the chapter, I explain how my sample was constructed and describe the types of educational materials that I examined. I then provide details on the data analysis guide that I used and include a short discussion on how I identified law in the materials, and how indigenous feminist legal methodology was used to bring gendered analysis into Friedland's legal analytic framework.

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[5] Grosz, *ibid* at 167.

[6] This is similar to what is done in critical discourse analysis, in which the researcher uses what already exists and "transforms and reproduces" the "conditions of possibility" (Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language*, 2d ed [New York: Pearson, 2010] at 10).

3.2 Methodology

3.2(a) Critical Discourse Analysis

Critical discourse analysis (hereinafter CDA) can be thought of as both a methodology and a method.[7] In this section I discuss it as a methodology, and it will become evident in the second half of the chapter how CDA shapes my methods. CDA falls under the broader label of Critical Discourse Studies, which Bernard McKenna describes, "does not attach itself to a particular social theory, but to 'a field of critical research.'"[8] While CDA can be used in many disciplines, and is commonly aligned with Sociology,[9] the literature shows that CDA is best described as interdisciplinary.[10] This is important to note, as the interdisciplinary nature of CDA is congruent with my overall approach to theory, methodology, and methods, which bring together a multitude of perspectives for a complex reading of representations of gender and Cree law. In his review of the field, McKenna notes that race, pedagogy, and gender are "major issues" that are presently focused in Critical Discourse Studies.[11] The literature on CDA is extensive, and what I offer here is only a brief synopsis, which should not be read as exhaustive of this diverse field.

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[7] Fairclough, *ibid* at 5.
[8] McKenna citing Chouliaraki and Fairclough. See: Bernard McKenna, "Critical Discourse Studies: Where to From Here?" (2004) 1:1 Critical Discourse Studies 9 at 10.
[9] McKenna, *ibid* at 15.
[10] *Ibid* at 15; Teun A. van Dijk, "Principles of Critical Discourse Analysis" (1993) 4 *Discourse Society* 249 at 252; Fairclough, *supra* note 6 at 4. Fairclough prefers the term 'transdisciplinary' and describes, "the 'dialogues' between disciplines, theories and frameworks which take place in doing analysis and research are a source of theoretical and methodological developments within the particular disciplines, theories and frameworks in dialogue – including CDA itself" (Fairclough, *ibid* at 4).
[11] McKenna, *supra* note 8 at 18.

Discourse analysis can be taken up in different ways, depending on one's understanding of discourse.[12] For linguistic researchers, the *form* of language is very important and discourse analysis will often focus on "linguistic units, such as phonology, morphology, and syntax."[13] Gillian Rose expresses concern that this approach often treats discourse as isolated from social contexts and actors, and that the meaning of discourses cannot be truly understood if they are disconnected from social practice.[14] Thus a second approach to discourse analysis examines the function of discourse and treats it as connected to other discourses, all of which are embedded in social contexts. In this approach, discourse is treated as time and place specific.[15] While analyses that examine both form and context can be done together,[16] in my research, I focus primarily on the second approach which examines the social function of discourses,[17] and I understand the form of discourses to be necessarily always social.[18] This allows me to examine

[12] There are times throughout this dissertation when I use the language of 'rhetoric' alongside discourse. I use rhetoric to speak to the repetition of particular discourses (for example, 'balance').
[13] Mary Bucholtz, "Theories of Discourse as Theories of Gender: Discourse Analysis in Language and Gender Studies" in Janet Holmes & Miriam Meyerhoff, eds, *The Handbook of Language and Gender* (Oxford: Blackwell Publishing, 2003) 43 at 44.
[14] Gillian Rose, *Visual Methodologies: An Introduction to the Interpretation of Visual Materials* (London: Sage Publications, 2007) at 170. See also Bucholtz, "Theories of Discourse"; Fairclough, *Critical Discourse Analysis*; McKenna, *supra* note 8 generally; van Dijk, *supra* note 10 generally. McKenna describes of van Dijk's (who is a leading CDA scholar) work that "[t]he crucial element of discourse that separates it from a simple speech act, or communicative event, says van Dijk (1997b, p. 2), is that these acts or events happen 'as part of more complex social events'" (McKenna, *supra* note 8 at 11).
[15] McKenna, *ibid* at 12; van Dijk, *supra* note 10 at 265.
[16] See Bucholtz, *supra* note 13 at 44-45.
[17] *Ibid*.
[18] As Elizabeth Grosz notes, a popular assertion in dominant western philosophy is "[t]he belief in a transparent language and discursive forms that are open to the pure transcription of thought, seeing itself as the play of ideas, concepts, beliefs" (Grosz, *supra* note 4 at 166). I understand language as socially constructed and embedded in power relations – similar to: Grosz, *ibid* generally; McKenna, *supra* note 8 generally; Bucholtz, *supra* note 13 generally; Fairclough, *supra* note 6 generally; van Dijk, *supra* note 10 generally; Rose, *supra* note 14 generally.

representations of law and gender in a way that is attentive to context and asks after the broader meaning and possible social impacts of the representations.

Norman Fairclough, a leading CDA scholar, explains that one of the main tenets of CDA is that discourses are relational.[19] He remarks, "[w]hat then is CDA analysis *of*? It is *not* analysis of discourse 'in itself' as one might take it to be, but analysis of dialectical *relations between* discourse and other objects, elements or moments, as well as an analysis of the 'internal relations' of discourse."[20] CDA examines social relations as they play out in, and are perpetuated through, communication.[21] In examining the function of discourses, CDA focuses on the production of truths – how meaning is asserted (in relation to other discourses), and how subjects are produced in, and by, discourse.[22] This dialectical relationship is emphasized by Fairclough as one of the defining characteristics of CDA.[23] Bucholtz describes how there are many ways to do discourse analysis, though "those that emphasize discourse as a social, cultural, or political phenomenon have in common a theory of discourse not merely as the reflection of society, culture, and power but as their constantly replenished source."[24]

Consistent with the heavy emphasis in indigenous feminist legal theory on examining power dynamics and relations, CDA is very attentive to power. What differentiates '*critical* discourse analysis' from 'discourse analysis' is an explicit orientation of the researcher to engage in research that works against social

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[19] Fairclough, *ibid* at 4; McKenna, *ibid* at 14. Rose refers to this relationality as "intertextuality" (Rose, *ibid* at 142).
[20] Fairclough, *ibid* at 4.
[21] *Ibid* at 3.
[22] *Ibid*; Rose, *supra* note 14 at 142.
[23] Fairclough, *supra* note 6 at 4.
[24] Bucholtz, *supra* note 13 at 45.

inequalities and marginalization.[25] Researchers using CDA are interested in examining how discourse reproduces inequalities and privileges via the production of knowledge, truth, and subjectivities.[26] Teun A. van Dijk explains, "critical discourse analysts want to know what structures, strategies or other

[25] Fairclough, *supra* note 6 at 11; van Dijk, *supra* note 10 at 249; McKenna, *supra* note 8 at 9. While distinctions are drawn between CDA and discourse analysis, I suspect that *many* researchers who use discourse analysis (for example, feminist researchers who use discourse analysis) engage in 'critical,' social justice oriented work. I will stick with the term CDA, given the explicit focus on power, however, the line drawn (by CDA researchers) between CDA and discourse analysis seems a bit precarious to me. Further, the idea that CDA is explicitly political and oriented towards action is, perhaps, a bit misleading in the sense that all methodologies are political in some way, and oriented toward some form of action. What distinguishes CDA however, a 'social justice' approach and a focus on power and social inequality. McKenna suggests, however, that CDA's radical approach to challenge dominance and power might now be compromised, given how institutionalized CDA is in the very institutions that it ought to be challenging (*supra* note 8 at 9). No doubt it is problematic to use, for example, incredibly specialized methodological language that is inaccessible to a majority of the population, and to claim that one is engaging in radical, divergent politics. McKenna further considers "whether and how the foundational principles of critical studies – democracy, equality, fairness, and justice – can be re-affirmed in practice" (*ibid* at 9). I personally am not oriented toward promoting the concepts of democracy and equality, as I think that these concepts are a poor fit with my approach to thinking about Cree law. I am instead interested in being explicit about power and aim to do research that asks after the implications of marginalization. I am hesitant about much of the language taken up by CDA researchers (such as McKenna, *ibid* generally; van Dijk, *supra* note 10 generally) regarding their focus on social inequality, research, and social change. Often the tone is quite patronizing and borders on treating marginalized populations as people who need to be saved. For example, McKenna notes "[c]ritical discourse is ultimately concerned with improving the lives of ordinary people by making transparent the relationships of power that oppress and diminish" (*ibid* at 21). In her work on decolonizing research methodologies, Linda Tuhiwai Smith criticizes researchers who take up that sort of approach – "[m]any researchers, academics and project workers may see the benefits of their particular research projects as serving a greater good 'for mankind', or serving a specific emancipatory goal for an oppressed community" (Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, [New York: Zed Books Ltd.; Dunedin: University of Otago Press, 1999] at 2). I am interested in using CDA as described by feminist researchers – as "a form of analytical activism" (Michelle M. Lazar, "Language, communication and the public sphere: A perspective from feminist critical discourse analysis" in Ruth Wodak & Veronika Koller, eds, *Handbook of Communication in the Public Sphere* [Berlin: Walter de Gruyter GmbH & Co., 2008] 89 at 90 [Lazar, "Language, Communication"]). For me, this eliminates the patronizing approach of saving others and instead focuses on critical approaches to thinking about representations and analyses that are anti-oppressive and attentive to power.

[26] See generally: Lazar, "Language, Communication," *ibid;* Rose, *supra* note 14; van Dijk, *supra* note 10; Fairclough, *supra* note 6; McKenna, *supra* note 8; Bucholtz, *supra* note 13. While I agree with much of van Dijk's work on CDA, he has a tendency to focus on "elites" and only those in positions of power in his work (*ibid* at 259). His reasoning for this is that by focusing on those with the most power, researchers will be able to develop a better understanding of how power is controlled in, and through, discourse. I do think that it is important to look at those who are exerting power but it seems equally important to ask after how those who are marginalized utilize and employ discourses.

properties of text, talk, verbal interaction or communicative events play a role in these modes of reproduction."[27] I take up CDA in the vein that Rose describes,

> [d]oing a discourse analysis assumes that you are concerned with the discursive production of some kind of authoritative account – and perhaps too about how that account was or is contested – and with the social practices both in which that production is embedded and which it itself produces.[28]

Consistent with Foucault's approach to power, researchers doing CDA understand discourse as both repressive and productive.[29] Likewise, law needs to be understood as a site of constraint and agency.[30] The repressive and productive aspects of power are especially important in relation to my analysis, as this approach allows me to examine how the representations of gender in the materials on Cree law attempt to construct and discipline gendered subjects in particular ways, but also to look for and discuss alternative discourses and representations.[31] Furthermore, CDA encourages examination of multiple, competing, and conflicting discourses.[32]

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[27] van Dijk, *supra* note 10 at 250.
[28] Rose, *supra* note 14 at 148.
[29] *Ibid* at 143. CDA is influenced by a wide variety of theorists and theoretical traditions, of which Foucault, and poststructuralism for that matter, is only one. McKenna argues that Foucault's work has had an influence but that his work did not focus on social structures and social change in the same way that CDA does (*supra* note 8 at 10). McKenna explains that the contributions that Foucault's work makes to CDA are: 1) an understanding of power as repressive and productive; 2) an understanding of power as connected to/playing out in social networks; and 3) an understanding of how discourses include only some realities and subjects at the expense of silencing others (*ibid* at 14). I find Foucault's work on power to be useful, and as discussed in Chapter Two of my dissertation, while there might be gaps and criticisms of his work, in using it in conjunction with a variety of theoretical approaches, I am able to utilize an approach to power that works for my research.
[30] Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) [Smart, *Power of Law*].
[31] Fairclough uses the term "technologisation of discourse" to talk about how macro institutions and macro discourses are used to change micro discourses (*supra* note 6 at 88). This is important to think about in relation to law as a powerful macro discourse and institution that has significant impact on how people take up dominant notions of law in their everyday lives.
[32] *Ibid* at 7.

While CDA understands discourses as socially constructed, and therefore malleable and able to shift over time, an approach that is conscientious of power means that discourses of resistance need to be understood in relation to dominant discourses and social norms.[33] An important part of CDA is being able to also look at what is not said or what goes unheard.[34] McKenna notes that "[e]ach discursive formation (such as science, law, medicine, engineering) puts limits on the epistemic, subjective, and ethical bases within which a range of possible statements is possible."[35] He goes on to describe the social nature of discourse and power succinctly, "a discourse has a history; is a product of a community; has boundaries that determine what can be said; has characteristic ways of saying things; sometimes gets conventionalized into genres; and often uses specialized lexis and grammar."[36]

Most of the CDA literature focuses on textual analysis, however CDA is much more complex than this. Fairclough argues that CDA promotes "*multimodal* analysis of the different semiotic 'modes,'" which can include texts, images, audio, conversations, and gestures.[37] Engaging in reflexive analysis of how one approaches these various "semiotic 'modes'"[38] is a key part of CDA and

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[33] *Ibid* at 4-5; McKenna, *supra* note 8 at 12.
[34] McKenna, *ibid* at 15; Rose, *supra* note 14 at 165; van Dijk, *supra* note 10 at 257.
[35] McKenna, *ibid* at 14.
[36] *Ibid* at 15. In his foundational work on CDA, van Dijk brings in work on social cognition. For him, what is said, and how it is received, is deeply connected to already existing normative social cognitive structures. He explains, "[w]hereas the management of discourse access represents one of the crucial social dimensions of dominance, that is, who is allowed to say/write/hear/read what to/from whom, where, when and how, we have stressed that 'modern' power has a major cognitive dimension. Except in the various forms of military, police, judicial or male force, the exercise of power usually presupposes mind management, involving the influence of knowledge, beliefs, understanding, plans, attitudes, ideologies, norms and values" (van Dijk, *supra* note 10 at 257).
[37] Fairclough, *supra* note 6 at 7. Rose notes that discourse analysis can include images as well (*supra* note 14 at ch 7 & 8).
[38] Fairclough, *ibid* at 7.

researchers need to reflect on how their own beliefs and social location influence their interpretations and research results.[39] Researchers need to be further aware of how they are creating and perpetuating discourses in their work.[40]

3.2(b) Feminist Critical Discourse Analysis

As noted in Chapter Two, Smart aims to use feminist discourses to deconstruct the power of state law in an attempt to create space for feminist knowledges and truths about law.[41] I too aim to use feminist discourses (more specifically, indigenous feminist legal discourses) to ask after questions about power, gender, and Cree law. It is important to briefly discuss the field of feminist critical discourse analysis (FCDA) and the contributions that it makes to my overall methodological approach. Like CDA, FCDA is social justice oriented, interrogates power relations, is attentive to social context, understands discourse as repressive and productive, and promotes reflexivity.[42] However FCDA explicitly engages in analysis of communication (language and images) and gender.

Michelle M. Lazar explains that FCDA "critiques from a feminist perspective hierarchically ordered gender structures sustained in/through language

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[39] Rose, *supra* note 14 at 12; van Dijk, *supra* note 10 at 249. It is important to note that while I am trying to look at, and perhaps even assert alternative discourses, I am still doing this within the academy which uses incredibly specialized language. My language usage will no doubt be inaccessible to many. However, it is possible to consider that in the context of the university, that by taking up specialized language, I am able to enter into debates, and to assert alternative discourses in ways that *might* be heard. Though it is also possible that the language and terms that I use will not or cannot be heard in many academic contexts.

[40] As Fairclough explains, "the critical analyst, in producing different interpretations and explanations of that area of social life, is also producing discourse" (*supra* note 6 at 8).

[41] Smart, *Power of Law*, *supra* note 30.

[42] Lazar, "Language, Communication," *supra* note 25 at 90-92. See also Bucholtz, *supra* note 13 at 64.

and other forms of communication, as part of a radical emancipatory project."[43] Gender is understood as ideological, and as a "hegemonic," "prevailing social arrangement."[44] As illustrated when discussing CDA above, language is not neutral. While not doing work on FCDA per se, Grosz's work on dominant western philosophy usefully articulates that sexism, patriarchy, and male privilege operate through discourse and representations.[45] She describes phallocentrism as "a specifically discursive series of procedures" in which men and masculinity universally stand-in for human subjectivity.[46] Gendered norms and power circulate through language and constitutes the dominant meanings of often seemingly 'neutral' terms.[47]

While feminist research is certainly congruous with CDA and could be done under the label of just CDA, Lazar contends that it is important to explicitly name 'feminism' in one's approach. She explains that "[i]t is necessary within CDA to establish a distinctly 'feminist politics of articulation' … i.e. to theorize and analyse from a critical feminist perspective the particularly insidious and oppressive nature of gender as an omni-relevant category in most social practices."[48] Lazar believes that the naming of approaches as feminist, when they are feminist, is important for collective organizing.[49]

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[43] Lazar, *ibid* at 90.
[44] *Ibid* at 91.
[45] Sexism, patriarchy, and male privilege operate and circulate in many ways, of which language is just one.
[46] Grosz, *supra* note 4 at 150.
[47] *Ibid*.
[48] Michelle M. Lazar, "Politicizing Gender in Discourse: Feminist Critical Discourse Analysis as Political Perspective and Praxis" in Michelle M. Lazer, ed, *Feminist Critical Discourse Analysis: Gender, Power and Ideology in Discourse* (New York: Palgrave, 2005) 1 at 3 [Lazar, "Politicizing"].
[49] *Ibid* at 3-4.

Lazar importantly notes that FCDA ought to embrace intersectionality, as gender does not operate and circulate in discourse on its own.[50] As shown in Chapter Two, my use of feminism necessarily includes race, and sexuality, and thus in my approach to methodology and methods I understand sexism, patriarchy, heteronormativity, racism, and colonialism, as perpetuated in and by language and images. I also understand discourses as sites of resistance.

3.2(c) Indigenous Research Methodologies

Indigenous research methodologies are not new, however, this is a relatively new field in academia.[51] Research methodologies have, and still continue to, perpetuate a great deal of violence towards indigenous peoples as colonial ideologies are relied on in research processes, which are connected to and sustain dominant western knowledges, institutions, languages, and discourses.[52] In her foundational work, in which she promotes the decolonization of research methodologies, Linda Tuhiwai Smith explains that, "[r]esearch is one of the ways in which the underlying code of imperialism and colonialism is both regulated and realized. It is regulated through the formal rules of individual scholarly disciplines and scientific paradigms, and the institutions that support them (including the

[50] Lazar, "Language, Communication," *supra* note 25 at 91.
[51] Wilson, *supra* note 2 at 43. I have only focused on scholars in this section who write solely about indigenous research methodologies. There are many additional people that take up and develop indigenous methodologies in their work (e.g. John Borrows, *Canada's Indigenous Constitution* [Toronto: University of Toronto Press, 2010] [Borrows, *Canada's Indigenous Constitution*]; John Borrows, *Drawing Out Law: A Spirit's Guide* [Toronto: University of Toronto Press, 2010] [Borrows, *Drawing Out Law*] but do not do it explicitly under the label of 'indigenous research methodologies.'
[52] It is important to consider how CDA and FCDA might contribute to this violence, but also how they can be used and deconstructed in ways so as to take up modes of analysis that decenter dominant colonial norms.

state)."[53] Kovach argues that the importance of Tuhiwai Smith's work is that it encourages reflection and articulates the damaging effects of research on indigenous peoples.[54] This is, of course, still important to think about, however Kovach (and others) aim to expand the discussion on decolonizing research methodologies from one that is focused on interrogating mainstream research, to articulating indigenous methodologies. Kovach contends that, "we are now at a point where it is not only Indigenous knowledges themselves that require attention, but the processes by which Indigenous knowledges are generated" needs to be focused on.[55]

Indigenous methodologies need to be articulated in the plural, and should be understood as developing in ways that are culturally specific.[56] Kovach discusses how Plains Cree knowledge influenced her research.[57] Similarly, Kathleen O'Reilly-Scanlon, Kristine Crowe, and Angelina Weenie's work on Cree methodologies is informed by Cree ontologies and epistemologies, specifically they articulate *wâhkôhtowin* as a research methodology.[58] Indigenous methodologies (similar to CDA and feminist methodologies) challenge notions of objectivity in the research process, examine how power dynamics shape research

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[53] Tuhiwai Smith, *supra* note 25 at 7-8.
[54] Kovach, *supra* note 3 at 13.
[55] *Ibid*.
[56] *Ibid* at 20.
[57] *Ibid* at ch 2.
[58] Kathleen O'Reilly-Scanlon, Kristine Crowe & Angelina Weenie, "Pathways to Understanding: Wâhkôhtowin as a Research Methodology" (2004) 39:1 *McGill Journal of Education* 29. For them, wâhkôhtowin means "kinship or the state of being related" and "is a fundamental concept for understanding Indigenous cultural and traditional beliefs" (at 30). For additional approaches in which Cree ontology and epistemologies inform methodology see for example: Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich Publishing, 2007) [McLeod, *Cree Narrative Memory*]; John George Hansen, *Cree Restorative Justice: From the Ancient to the Present* (Kanata: JCharlton Publishing, 2009) [Hansen, *Cree Restorative Justice*].

approaches and outcomes, and aim to decenter dominant cultural and social norms.[59] However indigenous methodologies are distinct in that they also aim to produce research that is informed by indigenous ontologies, epistemologies, methodologies, and axiologies, often with the intention of creating research that works for indigenous peoples.[60] It is especially crucial to note that a multitude of perspectives exist regarding, for instance, ontology, and there will be disagreement over what works and is beneficial for a given group.

Kovach expresses concern about doing indigenous methodologies in western institutions (as indigenous methodologies might be appropriated, will have to be defended, might be poorly received/misunderstood).[61] These considerations mirror debates about legal methodology and drawing on western legal theory when doing research on indigenous laws. Kovach ultimately concludes that it is necessary that indigenous knowledges be present at universities, as "Indigenous methodologies disrupt methodological homogeneity in research."[62] She explains,

> [c]ontemporary universities are centres where knowledge is created, maintained, and upheld. Research powers this force. By entering these knowledge centres, Indigenous peoples are well positioned to carry out research that upholds cultural knowledges. Indigenous research frameworks are conceptual tools that can assist.[63]

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[59] Wilson, *supra* note 2 at 16-17.
[60] *Ibid* at 20-21. I discuss further in the chapter that the notion of creating research that works for indigenous people as a whole is not straightforward. Even generalizing that research for indigenous peoples would be anti-colonial and would contribute to decolonization is precarious as there are many different perspectives on what constitutes anti-colonial politics, and how decolonization (if that should even be a focus) is to be undertaken.
[61] Kovach, *supra* note 3 at 12.
[62] *Ibid.*
[63] *Ibid*.

Just as research on indigenous laws can work to decenter state law, indigenous methodologies can also work to disrupt normative approaches to research.

Kovach also raises questions about what non-indigenous researchers might do with indigenous methodologies, if taking them up.[64] She offers suggestions for how non-indigenous researchers might support indigenous epistemologies and methodologies, including an examination of one's positionality, attentiveness to historical and social context – particularly in relation to the institution of education, treating indigenous people as complex subjects, learning about indigenous knowledges, and working collaboratively.[65] Wilson defines indigenous research as "research done by or for Indigenous peoples."[66] Further, O'Reilly-Scanlon, Crowe, and Weenie understand *wâhkôhtowin* as a cross-cultural approach and as something that all researchers can take up.[67] My approach (as someone who is not indigenous) to indigenous methodologies is that they provide analytical and practical tools for thinking carefully about power and interrogating research practices that exclude and marginalize indigenous knowledges. In relation to FCDA, for example, indigenous methodologies disrupt approaches to gender that overlook race and colonialism, and encourages attentiveness to indigenous women's perspectives and knowledges. Research is not neutral and my dissertation explicitly, and purposefully draws on work by indigenous scholars who do work on indigenous feminisms and indigenous legal theory (in addition to work by non-indigenous scholars and western approaches) to engage with

[64] *Ibid*.
[65] *Ibid* at 168-173.
[66] Wilson, *supra* note 2 at 16.
[67] O'Reilly-Scanlon, Crowe, & Weenie, *supra* note 58 at 30-31.

indigenous laws. As discussed in Chapter Two, in drawing on indigenous approaches in my work, my intention is not to speak for indigenous women, rather, I understand the literature that I draw on, including indigenous methodologies, as analytic tools that should be used thoughtfully.

3.2(d) Indigenous Feminist Legal Methodology

> We must ask whether philosophy in *itself* (in its own terms and not in the extremes of abuse to which any theory is liable) participates in power relations. Is the way it develops and uses concepts and methods implicated in power relations? Do its claims and assertions function, create, maintain, or reflect power relations? To ask these kinds of questions of knowledges, including philosophical knowledges, is to subject philosophy itself to a political analysis.[68]

Though Grosz is talking about philosophy in the quote above, I hope to have taken up a similar spirit of rigour in discussing 'methodology' thus far. Theories on the complexities of doing research can encourage difficult questions that hold researchers accountable to their own intentions and beliefs. In this section of the chapter, I bring indigenous feminist legal theory together with the above conversation, to begin to articulate indigenous feminist legal methodology. It is my intention in this chapter to be as clear as possible about the relationship between theory and methodology, and how they shape my approach to research methods, and thus below I outline some tenets of indigenous feminist legal methodology.[69] What I present should be understood as just one approach that necessarily should be debated and revised (as all methodologies should). Because I am analyzing materials in my dissertation, I have been focusing heavily on

[68] Grosz, *supra* note 4 at 148.
[69] McKenna and Lazar's work is useful for showing how researchers might organize tenets of their methodological approach. See generally: McKenna, *supra* note 8; Lazar, "Language, Communication," *supra* note 25.

discourse and representations, and this is reflected below. Arguably indigenous feminist legal methodology works with a variety of qualitative methodologies and methods though (e.g. storytelling, narrative analysis, etc.) and how one then articulates their approach will shift around.[70] Though one consistent benefit of indigenous feminist legal methodology, regardless of methods, is that it allows for a different mode of inquiry regarding indigenous laws, than what is presently found in the literature.

Indigenous feminist legal methodology offers a theory about researching gender and indigenous law, and instigates a much-needed set of questions when approaching Cree law as gendered. Indigenous feminist legal methodology begins with the assertions of indigenous feminist legal theory (e.g. that law is gendered, intersectional analysis is crucial) and engages these tenets with ideas on knowledge, knowing, and ontology to think through how best to approach research in my dissertation. While the focus below is on indigenous law, as stated in Chapter Two, indigenous feminist legal theory can also be applied to analyses of state law, and the description of indigenous feminist legal methodology could be revised accordingly.[71] Likewise, the methodology could be revised from more specific perspectives, for example, Cree feminist perspectives. This last point raises a question about why I am using the broad term 'indigenous feminist legal methodology' rather than 'Cree feminist legal methodology' (or 'Cree feminist

[70] While I am open to thinking about the relationship between indigenous feminist legal methodology and quantitative research methods, I do not ultimately think that they could work well together, given that indigenous feminist legal methodology would aim to disrupt most of the foundations upon which quantitative approaches are premised.

[71] Rather than stating indigenous feminist legal methodology in a more general way, so that it could apply to state and indigenous laws, I decided to articulate the principles specifically to research on indigenous laws, with the hopes that it shows more clearly how my theory, methodology, and methods are connected to an analysis of Cree law.

legal theory'). Kovach importantly explains that indigenous methodologies will shape up differently based on the specificities of culture[72] and she notes that she is not trying to promote a pan-indigenous approach with her terminology.[73] I too have questions about the language that I am using, however there is little work available on Cree research methodologies (or Cree feminism), which would make it very difficult to try to describe 'Cree feminist legal methodology.'

So what might indigenous feminist legal research look like? In an effort to not repeat too much of the text above and from Chapter Two, the following descriptions are kept short. While the tenets are divided up below, there are no such real divisions, as they all sustain and build upon one another.

1. Indigenous feminist legal methodology makes indigenous feminist perspectives explicit in the research process. Various indigenous feminist understandings of indigenous law, decolonization, and indigenous sovereignty, as articulated through indigenous feminist legal theory are explicitly taken up in the research process. Similar to CDA, FCDA, and indigenous methodologies, erroneous notions of objectivity are rejected by indigenous feminist legal methodology, and research is understood not just as a means through which to learn but also as having the possibility for anti-oppressive work. While indigenous feminist legal methodology utilizes insights from indigenous and non-indigenous approaches to qualitative research, it takes seriously the contributions from indigenous methodologies to decolonize the research process, and to interrogate the assumptions of all of the methodological resources drawn on above.

[72] Kovach, *supra* note 3 at 14.
[73] *Ibid* at 20.

2. Indigenous feminist legal methodology understands gender, race, sexuality, and colonialism to be ideological structures that are intersectionally reliant and which impact how knowledge is constructed and circulated in law (and beyond). As noted above, language, images, nor research more generally can be considered neutral. Truths and social structures (such as law) are understood as human constructions fully imbued in the norms and power dynamics of a given society.[74]

3. Indigenous feminist legal methodology is committed to explicating power dynamics in regards to the researcher's positionality, the research process, the research findings, and the broader social context within which the research is embedded. As with CDA, FCDA, and indigenous methodologies, reflexivity is a key aspect of indigenous feminist legal methodology. The researcher is believed to be embedded in power relations and cannot ignore their own social location and how this influences their approach and interpretations.

Indigenous feminist legal methodology is not meant to be comfortable – it works with difficult tensions and conflicts. The above noted work on indigenous methodologies thoroughly works with tensions between indigenous and non-indigenous peoples as they play out in the research process. However what is often missing are difficult questions about internal conflicts and power dynamics within indigenous communities. For example, Wilson's position that indigenous

[74] In her article on legal anthropology, for instance, Sally Falk Moore traces the various shifts in how law was conceptualized in the field from 1949 to 1999. Part of the shifts included a turn to legal pluralism and decentering state law as the only legal order. Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999" (2001) 7:1 Journal of the Royal Anthropological Institute 95.

research be "done by or for Indigenous peoples"[75] risks perpetuating a romanticized approach to indigenous research (especially when done by indigenous people) as entirely unproblematic[76] and relies on the idea that all indigenous peoples will have the same idea of what constitutes useful, empowering research. It is quite clear to me that indigenous feminist legal research is contentious and that there are many indigenous people, from all genders, who would assert that my research is damaging to indigenous peoples, cultures, and laws. There are likewise many indigenous people who will find it to be useful. Questions about power, conflict, and intentions are not straightforward and doing research is not a tidy process. Tuhiwai Smith describes how questions are often raised in indigenous research, such as, "[w]hose research is it? Who owns it? Whose interests does it serve? Who will benefit from it?"[77] These are important questions, yet answering them is not straightforward. It is foreseeable, for example, that research that suggests that male privilege and sexism are problems in a given community is not going to be all that well received. While I, like advocates of indigenous feminism, perceive indigenous feminist legal theory and methodology as something that is anti-oppressive and thus beneficial to

[75] Wilson, *supra* note 2 at 16.
[76] Wilson quotes Cora Weber-Pillwax who says, "'Indigenous research cannot undermine the integrity of Indigenous persons or communities because it is grounded in that integrity'" [Wilson, *ibid* at 60]. Yet if we take seriously the insights of indigenous feminists who assert that power dynamics (for example gendered power dynamics) need to be thought about in indigenous communities (as with any other community), and the insights of those who argue that social norms and power dynamics shape the research process, then we can surmise that indigenous research can very easily cause harm to some. Romanticized notions of indigenous research as necessarily having integrity just because it is indigenous needs to be called into question. Feminist methodologies make many claims to integrity, yet it is evident time and again that not all feminist research affords all women with integrity in the research process.
[77] Tuhiwai Smith, *supra* note 25 at 10.

everyone, there are no doubt people who will disagree with this, for many complicated reasons.

4. Indigenous feminist legal methodology treats indigenous people, peoples, identities, cultures, and laws as complex. In line with indigenous feminist legal tenets committed to anti-essentialisms, avoiding romanticization, and critiquing fundamentalisms, indigenous feminist legal methodology understands indigenous subjectivities, identities, communities, and cultures as complex. I have spoken about 'knowledges' and 'truths' as well, and these should be received in the plural, so as to avoid oversimplifications and uses of knowledge that assert only one way of being. As I show in the following chapters, ideas about ceremony, protocol, and sacred law, for example, are often used in ways that represent just one way of being Cree. These particular assertions of truth, when connected to rhetoric about authenticity and culture, erase heterogeneity. Concerns about this tendency also exist with some of the literature on indigenous methodologies drawn on here. O'Reilly-Scanlon, Crowe, and Weenie, as well as Wilson for example, assert that a defining, unique feature of indigenous methodologies is that they are, and have to include, ceremony.[78] Protocol is something that is unquestioningly discussed as something that researchers must follow.[79] Not all indigenous feminist legal research will be community based, but for those researchers who do community work, indigenous feminist legal methodology

[78] O'Reilly-Scanlon, Crowe, & Weenie, *supra* note 58; Wilson, *supra* note 2 generally.
[79] Wilson, *ibid* at 42.

encourages critical questions about ceremony, tradition, and power.[80] Indigenous feminist legal methodology, as I use it, detracts significantly from articulations of indigenous methodologies that homogenize all indigenous peoples as having (or wanting) to engage in ceremony (as a requirement of being 'properly' indigenous), and which disallow questions about power and tradition.[81] While there are certainly normative aspects about all cultures, and protocols are significant, they should not be uniformly applied to everyone and closed to questioning. Furthermore, individual experience with culture and law are not straightforward. Though talking about critical legal pluralism, Roderick Macdonald's discussion about the fluidity of identity is important:

> people define acceptable behaviour in ways that engage their fluid, competing, and multiple notions of self. These selves, in turn, shift and vary through our interactions, our morphing locations along axes of race, class, gender, age, ethnicity, sexuality, culture, and geography, and

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[80] I recognize that there are also protocols for working with materials and objects. It was once raised to me at a conference, that I should consider seeking community approval to analyze the educational materials that I am focusing on in my dissertation. I disagree with this suggestion. The suggestion is premised on the idea that there is an identifiable 'community' that owns the materials that I am looking at. While I know who the authors are, there are often multiple authors and nations involved thus making it extremely challenging to know who I would speak to. More importantly however, is that the materials that I am examining are *intended* to be publicly available. I have questions about approaches to ethics and indigenous research that rely on rigid conceptualizations of community and indigeneity. Not only does this unproductively affect the research process (for example, ethics boards then take up unworkable, rigid ideas), I worry about critical research being silenced. How might it work, for example, in a project about gendered conflict, to have to approach what is typically predominantly male chief and councils for approval? How can ethics be thought of more complexly so as to acknowledge conflict and power within indigenous communities, in addition to between the researcher and communities? Moreover, how does the word 'protocol' get deployed, and how are indigenous citizens differently impacted by conceptualizations of protocol?

[81] Wilson notes that he is not trying to be dogmatic [*supra* note 2 at 70], for example, when taking up the medicine wheel to show his methodology and to claim that indigenous people work in a "cyclical/relational manner" (at 44). Yet he insists that indigenous research be understood as ceremony. He explains that research as ceremony means that, "[i]t is the required process and preparation that happens long before the event … It is the knowing and respectful reinforcement that all things are related and connected. It is the voice from our ancestors that tell us when it is right and when it is not. Indigenous research *is* a life changing ceremony" (at 60-61). While the notion of ceremony here, seems a *bit* more fluid in terms of relationality, rather than dogma, shortly after this description Wilson reflects on a conference that he attended and remarks, "[t]his again is how things should be, starting and finishing with a prayer and sharing of food" (at 83).

> materialize in the nooks and crannies of everyday life. Our normative commitments thus vary depending on our various configurations of self, which is shaped and informed by our personal motivations, bonds to others, institutional affiliations, and identity markers.[82]

5. Indigenous feminist legal methodology approaches knowledges and truths as social constructions. CDA and FCDA can be thought of as associated with and taking up poststructuralism. Bucholtz contends that "for most discourse analysts the social world is produced and reproduced in great part through discourse"[83] and this includes thinking of the subject as also created in and by discourses.[84] While it is important to not conflate poststructuralism and postmodernism, criticisms are often expressed that both of these approaches dangerously undo the subject in politics, such as in feminist politics and indigenous politics. Rosemary Hunter describes though that

> [p]ostmodern feminists have been concerned to deconstruct categories such as 'women', 'gender' and 'the subject', arguing that such categories are unstable discursive products rather than fixed, objective realities. The category 'woman', for example, is a construct whose meaning is continually produced, contested and negotiated through social practices and power relations.[85]

To speak of the subject as socially constructed and sustained by discourse does not mean to deny the materiality of the body or to deny the importance of subjectivity. Rather, in taking these ideas up, I am interested in examining discourses that sustain certain ideas about subjectivity, particularly gendered, sexed, and racialized subjectivities as they circulate in and are disciplined by Cree

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[82] Roderick A. Macdonald, "Custom Made – For a Non-chirographic Critical Legal Pluralism" (2011) 26 CJLS 301 at 324.
[83] Bucholtz, *supra* note 13 at 45.
[84] Fairclough, *supra* note 6 at 3; Rose, *supra* note 14 at 142.
[85] Rosemary Hunter, "Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice," in Joanne Conaghan, ed, *Feminist Legal Studies: Evolution* Critical Concepts in Law Vol I (New York: Routledge, 2009/originally published 1996) 217 at 218.

law. Law governs and disciplines not just subjectivities but also bodies.[86] While I find a focus on discourse to be extremely insightful, particularly given that I am analyzing text and images in my work, I do have hesitations about the idea that discourse is the only, or the primary, way through which to understand social relations. There are a multitude of ways for getting into meaningful conversations about social realities. Discourse analysis is extremely useful and insightful, though I do not mean to suggest that it is the only relevant methodology for studying indigenous laws and gender.

Further, in thinking about truths, I do not mean to say that I am not asserting truths. I am asserting both truths and making normative claims throughout this dissertation. However I am attempting to do so in a way that asks about dominant truths and normativities and I am interested in how meanings and truths are asserted, and what their potential impacts are.[87]

6. Indigenous feminist legal methodology understands communication and representation as necessary to examine, and maintains that multiple, competing, and even contradictory discourses exist in, and shape, indigenous laws.[88] As is noted by CDA and FCDA scholars, what discourses *do* must be interrogated.[89] Rose explains that "[a]n important part of [discourse analysis] is

[86] McKenna, *supra* note 8 at 12-13.
[87] The language of 'truths' has been used several times up to this point. In describing truths as contingent, I do not mean to deny people's experiential claims, rather I aim to consider, as Joan Scott advocates, that "[e]xperience is at once always already an interpretation *and* something that needs to be interpreted" (Joan Scott, "The Evidence of Experience" [1991] 17:4 Critical Inquiry 773 at 797 [emphasis in original]).
[88] This assertion is applied by many to law more generally, and to state law specifically as well (see Smart, *Power of Law*, *supra* note 30). I specify indigenous laws here simply because of the focus of my analysis.
[89] Fairclough, *supra* note 6 at 4.

how a particular discourse works to persuade. How does it produce its *effects of truth*?"[90] Indigenous feminist legal methodology is thus concerned with questions regarding how multiple discourses about gender, race, and sexuality circulate in representations of law. In Chapter Five I discuss deliberative law in detail. Cree law (as with other legal orders) includes persuasion and debate,[91] and discourses are deployed in various ways in legal arguments. I aim to interrogate the social context in which these arguments are made, and aim to think carefully about the potential impacts of the representations. Analyzing discourses necessarily requires asking questions about power and indigenous feminist legal methodology is attentive to both dominant and resistant discourses and the tensions and relationships between these.

7. Indigenous feminist legal methodology draws on a multitude of perspectives about research and is itself fluid and open to revision. Indigenous feminist legal methodology is an interdisciplinary approach. While there are some tensions between the methodologies drawn together here, there are also similarities. CDA, FCDA, indigenous methodologies, and indigenous feminist legal methodologies are all qualitative approaches and thus share some basic characteristics. For example, there is a tendency in the indigenous methodology literature to emphasize developing relationships as something that is unique to indigenous research.[92] However diligent qualitative researchers ought to be doing this regardless of who they are working with or the focus of their research. Kovach

[90] Rose, *supra* note 14 at 161.
[91] On deliberative law, see Borrows, *Canada's Indigenous Constitution*, *supra* note 51 at 35-46.
[92] O'Reilly-Scanlon, Crowe, & Weenie, *supra* note 58; Wilson, *supra* note 2 generally.

notes that qualitative research is a field in which indigenous researchers might find allies.[93] Both Wilson and Tuhiwai Smith note feminist methodologies as sharing similar principles to indigenous methodologies,[94] for example, in their approaches to power, knowledge, and reflexivity. Yet tensions still persist. The work that I cited on indigenous methodologies tends to not actually take up gender in a detailed way;[95] the work that I looked at on FCDA does not include or acknowledge indigenous methodologies or contexts; and the work that I looked at on CDA rarely acknowledges feminism and does not imagine power in relation to colonial violence and the need to decolonize research (though I think that CDA would very amenable to such analyses). Each of these approaches, when brought together, has something to offer but they also have much to learn from one another.

3.3 Methods

3.3(a) Educational Materials

3.3(a)(i) An Introduction to the Materials

The educational materials come in a multitude of formats including books, a dissertation, lectures, a comic book, videos, websites, lesson plans, and a video game. A total of 11 educational resources, published from 2000 to 2012, were analyzed.[96] A summary of the materials can be found in Appendix A and detailed

[93] Kovach, *supra* note 3 at 13.
[94] Wilson, *supra* note 2 at 16; Tuhiwai Smith, *supra* note 25 at 4.
[95] Tuhiwai Smith perhaps takes up gender in the most committed way, however, I find her statement that indigenous researchers do draw on feminist approaches (*ibid* at 4) to be inapplicable to the Canadian context.
[96] *Mikomosis*, which became publically available near the end of my project is not included in this total, though *Mikomosis* is discussed in Chapter Six of my dissertation (Val Napoleon et al,

information can be found in Appendix B, however below I also offer brief introductions to each resource.[97]

1. On the Path of the Elders[98]

This resource (hereinafter *Path of the Elders*) is an educational website about treaty relations (Treaty 9, specifically) and Cree and Anishinaabe self-governance. Although comprised of a general website which presents information about treaty relations through various means (for example an audio collection, video collection, essay, blog, lesson plans), the main feature of the website is a role playing game called *Knowledge Quest*. In this game, which is set in 1905, the player takes up the character of Kaniskic, a young boy who is tasked with re-negotiating Treaty 9. In order to do this successfully, the player must complete games on six paths, five of which prepare Kaniskic through learning and skill development for the negotiating table on the last path. The paths include: security, culture, education, economy, health, and self-governance. In the same respective order, the player undertakes a hunting game, trapping game, canoeing game, an environmental sustainability game, a scavenger hunt for medicinal plants, and then tackles re-negotiating Treaty 9 on the self-governance path. Kaniskic is guided by an elder, Chief Moonias, and also meets several other characters (most of whom, as with Chief Moonias, are men) along the way. As an educational package, *Path of the Elders* targets youth (grades four to 10) and is presented as a

Mikomosis and the Wetiko [Victoria: UVic Indigenous Law Research Clinic, 2013] [Napoleon et al, *Mikomosis*]).

[97] Information regarding the producers and funders of the materials, audience of the materials, and how I am assessing that each resource is about Cree law, can be found in Appendix B.

[98] Online: *On the Path of the Elders* <http://www.pathoftheelders.com> [*Path of the Elders*].

cultural resource that provides information to indigenous youth who might not have access to elders.[99]

2. Wahkohtowin – Cree Natural Law[100]

Wahkohtowin is a short video about Cree law. The historical and contemporary importance of Cree law is discussed, as well as critiques of state law. Four male elders and a female narrator lead the dialogue, which throughout refers back to particular legal principles, for example, *wahkohtowin* and *wetaskiwin*. It is explained in the video that,

> [w]ahkohtowin is a Cree name for the rules that govern the relationship of one thing to another. The guidelines ensure all people respect one another and the other living things on this earth. When people come to live together in peace and harmony, it is called wetaskiwin. Healthy relationships are the result of following the intent of wahkohtowin and wetaskiwin.[101]

3. Four Directions Teachings.com[102]

This resource (hereinafter *Four Directions*) is an interactive, animated educational website developed for youth (and educators of youth). The site is comprised of five different sections: Cree, Blackfoot, Ojibwe, Mohawk, and Mi'kmaq specific lessons. I analyzed only the Cree part of the website, which focuses on elder Mary Lee's tipi teachings. Her discussion is narrated by a woman's voice, and accompanied by audio and animated depictions of nature, women, the tipi, the drum, and the four directions. Lee describes the meaning of the tipi (including the

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[99] "What Does New Media Mean for Oral Traditions?" (21 April 2010 blog entry), online: *Path of the Elders* blog <http://www.pathoftheelders.blogspot.ca/2010/04/what-does-new-media-mean-for-oral.html>.
[100] *Wahkohtowin – Cree Natural Law*, DVD (Edmonton: BearPaw Media Productions, 2009) [*Wahkohtowin*].
[101] *Ibid.*
[102] Online: *Four Directions Teachings.com* (Cree Teaching by Mary Lee) <http://www.fourdirectionsteachings.com/> [*Four Directions*].

structure and poles) along with the meaning of the four directions. It is described on the website that the overall purpose of *Four Directions*

> was to create an engaging site where people could experience Indigenous knowledge and philosophy and where educators could incorporate the site into their curriculum. FourDirectionsTeachings.com honors oral traditions by creating an environment where visitors are encouraged to listen with intent as each elder/ traditional teacher shares a teaching from their perspective on the richness and value of cultural traditions from their nation.[103]

4. Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations[104]

This resource (hereinafter *Treaty Elders*) is a plain language book comprised of text and photos. In it, the authors Harold Cardinal and Walter Hildebrandt presents elders' interpretations of treaties in Saskatchewan. The province of Saskatchewan resides on several treaty territories and many First Nations' traditional territory.[105] The book is thematically organized around Cree principles relating to citizenship, law, and nation to nation relations.[106]

5. Muskwa: Fearless Defender of Natural Law[107]

This comic (hereinafter *Muskwa*) is a short story about three youth who crash their go-cart in the forest and try to find their way to survive. The main character of the story is Sam, who is accompanied by his friends Isaiah and a girl character

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[103] "About Four Directions Teachings," online: *Four Directions Teachings.com* <http://www.four directionsteachings.com/about.html> ["About Four Directions"].
[104] Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) [Cardinal & Hildebrandt, *Treaty Elders*].
[105] Including Treaties 2, 4, 5, 6, 7, 8, and 10 (*ibid* at 2), as well as Cree, Dene, Assiniboine, and Saulteaux First Nations (*ibid* at vi).
[106] *Ibid* generally.
[107] Greg Miller et al, *Muskwa: Fearless Defender of Natural Law* (Edmonton: BearPaw Legal Education & Resource Centre, second printing 2011) [Miller et al, *Muskwa*]. *Muskwa* is also available as a PDF online at: <http://www.bearpaweducation.ca/sites/default/files/Muskwa.pdf>.

who does not have a name. Sam tries to kill a prairie chicken for food but just ends up wounding it. He leaves it injured rather than killing it. This act is talked about as a violation of natural law in the comic and Muskwa the bear and several birds watch over Sam so that he can right what he did. Muskwa, raven, and the prairie chickens protect the youth, who are still learning about Cree law. Shortly after Sam harmed the prairie chicken, Muskwa visits him while he sleeps and gives him tobacco so that Sam can remedy what he has done. Sam offers the tobacco to the Creator and the natural world to set things back into balance (this is the language used in the comic). Throughout the story, there is another animal character – Cougar. Cougar tries to sway the kids to a position that is depicted as creating an imbalance and violating natural law. The kids stand up for natural law, Muskwa comes in to defend them, and then Cougar also learns about natural law.

6. Cultural Teachings: First Nations Protocols and Methodologies[108]

Written by Sylvia McAdam, this short general audience book (hereinafter *Cultural Teachings*) was produced to offer "an overview of First Nations' ceremonial etiquette and protocols."[109] McAdam discusses various 'cultural teachings,' including those related to indigenous laws, ceremonies, the roles of elders, and gender roles.

7. ILP Online Lectures

This resource consists of two university lectures given by Sylvia McAdam through the Intercultural Leadership Program (ILP). There is a (free) video for

[108] Sylvia McAdam, *Cultural Teachings: First Nations Protocols and Methodologies* (Saskatoon: Saskatchewan Indian Cultural Centre, 2009) [McAdam, *Cultural Teachings*].
[109] *Ibid* at ix.

each lecture, the first entitled "Sylvia McAdam teachings pt.1"[110] and the second, "Sylvia McAdam teachings pt. 2."[111] She covers many topics in these lectures, such as Cree sovereignty, pipe laws, kinship, human birth, spirituality, ceremonies, and education. All of these are discussed in relation to Cree law.

8. Online Video Series[112]

McAdam also discusses Cree law in an online video series that consists of 12 short videos. The videos include: 'Introduction,'[113] 'Human Birth,'[114] 'Spiritkeepers,'[115] 'Wesakechak,'[116] 'Breaking the Laws,'[117] 'Protocol and Smudging,'[118] 'Pipe Laws,'[119] 'Suicide,'[120] 'Mossbag and Womens (*sic*) teachings,'[121] 'treaties,'[122] 'Uncle's four laws,'[123] and 'land prophecy.'[124]

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[110] Sylvia McAdam, "Sylvia McAdam teachings pt. 1," online: <http://vimeo.com/31653388> [McAdam, ILP Lecture 1].
[111] Sylvia McAdam, "Sylvia McAdam teachings pt.2," online: <http://vimeo.com/31616141> [McAdam, ILP Lecture 2].
[112] When referring generally to this series, I will use [McAdam, *Video Series*]. Each video has its own URL, though they can all be found (alongside other videos) on vimeo at: <http://vimeo.com/channels/301066/page:1>; <http://vimeo.com/channels/301066/page:2>; <http://vimeo.com/channels/301066/page:3>.
[113] Sylvia McAdam, "Introduction," online: <http://vimeo.com/34670740> [McAdam, *Video Series*, "Introduction"].
[114] Sylvia McAdam, "Human Birth," online: <http://vimeo.com/34671557> [McAdam, *Video Series*, "Human Birth"].
[115] Sylvia McAdam, "Spiritkeepers," online: <http://vimeo.com/34672155> [McAdam, *Video Series*, "Spiritkeepers"].
[116] Sylvia McAdam, "Wesakechak," online: <http://vimeo.com/34672485> [McAdam, *Video Series*, "Wesakechak"].
[117] Sylvia McAdam, "Breaking the Laws," online: <http://vimeo.com/34672951> [McAdam, *Video Series*, "Breaking"].
[118] Sylvia McAdam, "Protocol and Smudging," online: <http://vimeo.com/34673264> [McAdam, *Video Series*, "Protocol"].
[119] Sylvia McAdam, "Pipe Laws," online: <http://vimeo.com/34673551> [McAdam, *Video Series*, "Pipe Laws"].
[120] Sylvia McAdam, "Suicide," online: <http://vimeo.com/34673969> [McAdam, *Video Series*, "Suicide"].
[121] Sylvia McAdam, "Mossbag and Womens teachings," online: <http://vimeo.com/34674317> [McAdam, *Video Series*, "Mossbag"].
[122] Sylvia McAdam, "treaties," online: <http://vimeo.com/34674834> [McAdam, *Video Series*, "treaties"].

9. Critical Indigenous Legal Theory[125]

This educational resource is a Law dissertation, written by Tracey Lindberg. In this text she articulates critical indigenous legal theory through discussions that focus on resistance, self-determination, critiques of state law, gender,[126] and developing ways to engage in discussions about laws across legal traditions. She argues that indigenous laws are crucial resources for indigenous societies and aims to explain and differentiate indigenous laws from state laws.[127] Regarding the 'critical' aspect of 'critical indigenous legal theory' she explains that

> [t]hinking critically, listening to that voice, and beginning to ask questions about relevancy, accuracy, assumptions, presumptions and who benefits from Canadian law is one essential tool in our tool box. Another is knowledge of our language. A third is knowledge of our laws. A fourth is the ability to translate between laws and legal systems effectively. All of these steps, I think, are ways and means by which we can rejuvenate and/or strengthen our citizens, our communities and nations. In order to strengthen (which I think is critical practice), we need to develop our Indigenous questions and rationales (critical thought) and begin to understand how colonizer law impacts us and why it is in/applicable.[128]

10. Cree Restorative Justice: From the Ancient to the Present[129]

Cree Restorative Justice is an academic book written by John George Hansen. He conceptualizes Cree law as restorative justice (I discuss this conflation in subsequent chapters). In particular, he examines Omushkegowuk (Swampy Cree) elders' interpretations of Cree law.

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[123] Sylvia McAdam, "Uncle's four laws," online: <http://vimeo.com/34675421> [McAdam, *Video Series*, "Uncle's four laws"].
[124] Sylvia McAdam, "land prophecy," online: <http://vimeo.com/34675660> [McAdam, *Video Series*, "land prophecy"].
[125] Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, University of Ottawa, 2007) [unpublished] [Lindberg, *Critical Indigenous Legal Theory*].
[126] She focuses on gender in only one chapter (*ibid* ch 4).
[127] Her discussion is quite broad though, and she states that she purposefully does not provide details, as she does not trust what her white readers would do with the information (*ibid* at 2).
[128] *Ibid* at 324.
[129] Hansen, *Cree Restorative Justice*, *supra* note 58.

11. Cree Narrative Memory: From Treaties to Contemporary Times[130]

Lastly, this resource is an academic book written by Neal McLeod. His focus is on Cree interpretations of, and involvement in, treaties. He examines treaties and Cree sovereignty by articulating various concepts, including 'Cree narrative imagination,' which is part of 'Cree narrative memory,' and which are both part of a broader 'Cree critical theory.' He describes Cree narrative memory as "a large, intergenerational, collective memory"[131] and "an ongoing conversation, a constant play between present, past, and future."[132] Regarding Cree narrative imagination, he explains that it

> is another aspect of Cree narrative memory: it is a way of drawing upon the past and the present and projecting these elements into the future. Cree narrative imagination is overtly futuristic in its orientation, which is embodied within our lives and bodies, and can reshape our social space.[133]

3.3(a)(ii) Designing the Sample

As was noted in Chapter One, my research focuses on contemporary educational materials, as I am interested in better understanding how gender and Cree law are represented in present-day articulations of indigenous legal education. All of the above materials fit this criterion and the sample was created in a way that sought after resources that are about Cree law, and that were developed with goals of empowering Cree people and encouraging decolonization at the forefront.[134]

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[130] McLeod, *Cree Narrative Memory*, *supra* note 58.
[131] *Ibid* at 8.
[132] *Ibid* at 95.
[133] *Ibid* at 93-94.
[134] Not all materials that are about Cree law are necessarily also indigenous-centered and meant to be empowering. For example, I had initially included Richard J. Preston's 2002 reprint of his book *Cree Narrative* in my sample, as I wondered how Cree law was represented in this text. This book was removed from the sample though because it is very much a text in which a researcher is going

While, as discussed below, the audiences of the materials vary, a common objective among the resources is to educate readers about Cree society. The materials in the sample include resources that are indirectly and directly about Cree law. For the materials that are indirectly about Cree law, information was most often conveyed through language about culture and promoted education as a means for decolonization and strength. For instance, on the *Path of the Elders* website it is noted that "[o]ur hope is that this site enriches your life and you come to appreciate, more deeply, the history and culture of our people."[135] Likewise, on the *Four Directions* website, it is stated that "[t]he goal for the project was to create an engaging site where people could experience Indigenous knowledge and philosophy and where educators could incorporate the site into their curriculum."[136] More specifically, the Cree section of this website that is included in my sample focuses on education about Cree women. Mary Lee notes that, "I have shared these teachings with you with the hope that they will help keep the women strong and will help our communities to nurture healthy, balanced people."[137]

Regarding the materials that are explicitly about Cree law, education and decolonization are engaged with via revitalization and understanding Cree law as an invaluable resource for promoting sovereignty and social organization.

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into a community and treats people in that community (and their knowledges) as objects to be observed (despite his efforts to establish relationships). The tone of the text, which was revised little since the 1975 publication (at x) is not in line with the materials that are explicit about Cree empowerment and which aim to promote decolonization (Richard Preston, *Cree Narrative*, 2d ed (Montreal: McGill-Queen's University Press, 2002).

[135] "About Us," online: *On the Path of the Elders* <http://www.pathoftheelders.com/aboutus> ["About Us," *Path of the Elders*].

[136] "About Four Directions," *supra* note 103.

[137] "Conclusion – Poles" section, online: *Four Directions, supra* note 102 [*Four Directions*, "Conclusion – Poles"].

Muskwa, for instance, was created to teach children that Cree law can guide them in their everyday lives.[138] This resource depicts the teenagers in the story as lacking knowledge about Cree law, and aims to contribute to revitalization by passing on information about Cree law, as well as teaching about the importance and value of Cree law.[139] Further, in her lectures, video series, and book, Sylvia McAdam explains that her educational materials are intended to teach the next generations, and that she has an obligation to pass on knowledge to students, so that they can learn about, and sustain, Cree law.[140] Both the sources that are directly and indirectly about Cree law contribute to broader politics of revitalization and I engage in a detailed analysis of these materials in the following chapters, which entails discussing the discourses that are included and excluded in the various articulations of empowerment.

Revitalization efforts in educational contexts are a somewhat recent phenomena[141] and Verna St. Denis argues that 'cultural revitalization' is frequently advocated "as a primary solution to the educational inequality and marginalization" that indigenous peoples face.[142] She does not specifically address indigenous legal education (she mentions instead, initiatives such as language revitalization programs), though I would suggest that these legal

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[138] Miller et al, *Muskwa*, *supra* note 107.
[139] *Ibid*.
[140] McAdam, ILP Lecture 1, *supra* note 110; McAdam ILP Lecture 2, *supra* note 111; McAdam, *Video Series*, *supra* note 112; McAdam, *Cultural Teachings*, *supra* note 108.
[141] St. Denis speaks of programs dating back a few decades (Verna St. Denis, "Real Indians: Cultural Revitalization and Fundamentalism in Aboriginal Education" in JoAnn Jaffe, Carol Schick & Ailsa M. Watkinson, eds, *Contesting Fundamentalisms* [Winnipeg: Fernwood Publishing, 2004] 35 at 35-36 [St. Denis, "Real Indians"]). When I am referring to education here, I am primarily referring to institutionalized modes of education (this does not only mean state institutions though certainly includes them). There are countless ways to educate (for example through oral traditions, through activities, through observation, etc.), which of course are not 'new.'
[142] *Ibid* at 41.

educational initiatives (that focus on law internally rather than on state laws) are a recent trend. St. Denis' research about attempts at revitalization via education provides important insights and parallels in relation to my dissertation. She explains that "[c]ultural revitalization for Aboriginal peoples is a double-edged sword" in that it can be empowering as "it challenges the goals of colonization that eradicate the cultural practices and identities of Aboriginal peoples," but also, she argues that many claims for cultural revitalization rely on oversimplified, fundamentalist notions of 'culture' and divert attention away from systemic causes of oppression.[143] It is important to not conflate revitalization of indigenous laws necessarily with 'cultural revitalization,' however as is discussed in the following chapters, discourses about culture feature prominently in Cree legal discourse. The challenge then with the educational materials is to discuss ways for critically engaging with revitalization, decolonization, and education so as to push up against fundamentalist claims about law and culture and to make obvious systemic social problems, power, and politics.

As was emphasized above, I am not just interested in describing discourses – I also wanted to consider what they do, and how they do it.[144] Discourse includes text and talk but also includes images, and I analyzed text, conversation, sound, and images in the resources. Rose describes how a critical reading of images is "one that thinks about the agency of the image, considers the

[143] *Ibid* at 45.
[144] Rose, *supra* note 14 at 11.

social practices and effects of its viewing, and reflects on the specificity of that viewing by various audiences including the academic critic."[145]

In addition to meeting the requirements that the materials be contemporary, and falling within the parameters of materials that are indigenous-centered and explicitly engaged in politics of decolonization, the materials were also selected based on their public availability. Some of the materials are more public than others. For example, the websites and videos are easily found online, whereas some of the books had to be purchased and others signed out from a university library. The materials were found through library searches, internet searches, and at book fairs at conferences. There are many ways to learn about Cree law (oral history, talking to community members, archives, texts), yet published educational materials that provide an internal viewpoint of law are limited.[146] An internal viewpoint means working with indigenous laws from within to look at intellectual reasoning and legal processes.[147] Hadley Friedland

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[145] *Ibid* at 26.

[146] There are also many different ways for engaging with revitalization. For example, storytelling, songs, art, ceremonies, developing curriculum materials, activism, legal (indigenous and state) change. I have excluded anthropology texts from my sample that take more of an external observer of culture approach. While some of these texts might provide useful information about Cree social norms (see for example, Naomi Adelson, '*Being Alive Well': Health and the Politics of Cree Well-Being* [Toronto: University of Toronto Press, 2000]), explicit politics regarding revitalization of Cree law are much more difficult to find. It is important to note that I have left Cree stories out of my sample. Many ancient stories exist that contain within them important resources for thinking about and using Cree law. While there are some Cree stories in the materials in my sample (for example, about Wesakechak, see: McAdam, *Video Series*, "Wesakechak," *supra* note 116), I decided to leave stories out of my analysis, because as Friedland and Napoleon's work shows, engaging with stories is a distinct area of study that requires additional frameworks that are beyond the scope of my research (Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" [forthcoming] [Friedland & Napoleon, "Gathering the Threads"]; Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" [forthcoming] [Napoleon & Friedland, "An Inside Job"]. This work on stories and law is important and insightful for future work in the area of indigenous feminist legal studies.

[147] Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 2 at 29-30 [Friedland, "Reflective

describes three different types of resources available for engaging with indigenous laws: "(1) resources that require deep knowledge and full cultural immersion; (2) resources that require some community connection; and (3) resources that are publically available."[148] She notes that public materials

> may raise serious questions of bias and legitimacy. However, they may be the amplest or even the only source of historical legal knowledge available for some Indigenous communities and legal scholars. It thus appears that, generally, the most ideal resources [the ones in the first category] are likely the least available at this time, while the least ideal resources are the most available.[149]

Friedland raises important points about the depth of knowledge that can be garnered from published sources though her focus seems to be on historical documents. The trend of indigenous people producing public educational resources signals an important shift, however questions about what discourses are operating in these materials should still be asked. Further questions should be asked of my own analysis, regarding the relationship between the representations of Cree law and lived on the ground realities (discussed further in subsequent chapters). Engaging with public sources does mean that a specific type of analysis might emerge however I maintain in this dissertation that it is crucial to pay attention to representations of Cree law, and the ways in which discourses are deployed in education. This leads to a different mode of analysis than a substantive one of accessing and applying indigenous laws, however I do not think (nor would Friedland, I suggest) that analyzing public representations is disconnected from, or detracts from substantive work. I have purposefully sought

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Frameworks"]; Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Doctor of Philosophy dissertation, University of Victoria, 2009) at 50 [unpublished] [Napoleon, *Ayook*].
[148] Friedland, "Reflective Frameworks," *ibid* at 11. She notes that these three categories are not necessarily or always distinct from one another (*ibid* at 12).
[149] *Ibid* at 12.

out public materials, because representations, as well as the discourses found in the representations, circulate in interpretations of law.[150] Thus for those interested in representational practices and public education, the third type of materials are the most ideal.

One of the challenges in collecting and working with the materials in my sample is that a few of the sources are about multiple indigenous legal traditions (for example *Path of the Elders*, *Treaty Elders*, *Cultural Teachings*, and Lindberg's dissertation).[151] While legal orders are not completely discrete and do not operate in isolation from other legal traditions,[152] I do want to keep my focus on Cree law. In order to do this, my analysis and discussion of the findings concentrates on the Cree aspects of the materials (for example legal principles that are articulated using Cree words). While I am in no way close to being fluent, I have taken introductory Cree language training. Many Cree people themselves are not fluent in Cree and language skills should not then preclude someone from engaging in discussions about Cree law.

When considering all of the materials together, I am not analyzing them as representative of all of Cree law. The materials most certainly do not depict or speak to Cree law in its full breadth and complexity, historically or presently. They are not the only interpretations of Cree law and are just a slice of what can be said about, and learned about, Cree law. My research sample should be thought

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[150] Friedland's discussion speaks to how readers of the materials in my sample might approach a given text differently, based on their own cultural knowledge.
[151] See Appendix B for further discussion about the various resources.
[152] International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, (Geneva, International Council on Human Rights Policy, 2009); Borrows, *Canada's Indigenous Constitution, supra* note 51.

of as a theoretical sample, which is useful for exploring ideas.[153] Further, although I make general observations about my sample and the findings, this does not mean that all Cree women experience law as it is represented in the materials, nor does it mean that the materials are exact stand-ins for on the ground realities. There will no doubt be Cree women, who, when looking at the educational materials, will conclude that how law is being talked about and how Cree women are depicted does not reflect their own lived experiences. Cree women have many different experiences and many different interpretations of Cree law. Further, many of the materials represent Cree law in very simple, pleasing ways, but on the ground, Cree law (like all law) is troubling as it deals with messy, difficult conflicts. What interests me is examining how Cree law is represented, what narratives are told about it, and what discourses are used to sustain these representations. I am interested in thinking about what the representations might be doing – what they are asking people to believe, why they are presented in the ways that they are, and what the implications of these representations of women and law might be. As such, in the presentation of my findings, I work across the materials, using the data analysis guide discussed below, to draw attention to patterns such as the repeated use of discourses and recurrent omissions.

[153] Barney G. Glaser & Anselm L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago, IL: Aldine Publishing Company, 1967).

3.3(a)(iii) Audience

The majority of the materials in the sample are produced by Cree people, for Cree people.[154] For example, at the start of *Wahkohtowin*, the video is described by the producers as "a cultural education tool for those trying to understand Cree Natural Law from a Cree perspective. Discussions by four Cree Elders give insight into the differences between Canadian Law and Cree Natural Law and show examples of how Natural Law is needed in contemporary society."[155] Yet the question of audience throughout the sample perhaps requires some clarification. While most of the materials can be read as speaking primarily to indigenous, particularly, Cree audiences, they are also of educational value for non-indigenous audiences. In *Cultural Teachings*, for instance, McAdam addresses indigenous people as the intended audience, regarding the revitalization of indigenous laws.[156] Her discussion on protocol could certainly be aimed at indigenous people, but is also read as speaking to non-indigenous readers. Her *Video Series* could also be understood as useful to a range of viewers, though she notes, "the reason for this, um, DVD is to bring as much of the Nehiyaw teachings, as possible, to be shared, and transferred, and transmitted to all of the generations to come. Because as indigenous people, that's our responsibility and our obligation to do this."[157] Likewise, *Path of the Elders* is primarily intended to empower and educate Cree and Anishinaabe youth via a role-playing game in which the player can interact

[154] I did not intentionally seek out materials based on whether the author(s)/producer(s) were Cree or not.
[155] This description is from when the video was available online at <http://www.bearpaweducation.ca/wahkohtowin-cree-natural-law> accessed 28 October 2010.
[156] McAdam, *Cultural Teachings*, *supra* note 108.
[157] McAdam, *Video Series*, "Introduction," *supra* note 113. In her ILP lectures, which are also posted online, her direct audience is indigenous students, though the online viewer could be anyone (McAdam, ILP Lecture 1, *supra* note 110; McAdam, ILP Lecture 2, *supra* note 111).

and learn from elders.[158] However, non-indigenous audiences are also addressed through the lesson plans.[159] Given the public nature of the materials, the authors and producers of the resources acknowledge, in various ways, both indigenous and non-indigenous audiences. In her dissertation, Lindberg often speaks directly to non-indigenous (read white) readers, and notes that only certain information will be talked about in her work because of distrust about what white settlers might do with detailed information on indigenous legal traditions.[160]

The age of the audience varied based on the resource itself, though broader patterns can be described in relation to whether the materials were public or academic. Before undertaking the detailed analyses of the materials, they were divided into two groups: 1) public educational materials[161] and 2) academic educational materials (see Appendix A).[162] The public materials addressed audiences that included children and youth,[163] and those who would fall under the wide range of young adults and up.[164] The academic materials on the other hand have only audiences who are young adults or older as their target.

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[158] *Path of the Elders*, *supra* note 98.
[159] "Teachers," online: *On the Path of the Elders* <http://www.pathoftheelders.com/teachers> ["Teachers," *Path of the Elders*].
[160] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 125 at 4.
[161] Includes six materials.
[162] Includes five materials. I am using the term 'academic' here to refer to academia in university and college settings, as well as to bodies of research and literature. While relevant journal articles about Cree law (of which there are few) will be included in the dissertation, I have not included articles in the sample as they are typically not publically accessible.
[163] These sources include: *Muskwa*, *Path of the Elders*, and *Four Directions*. Although there are additional children's books available on Cree culture, many of them seem to be focused on learning about Cree culture, with no broader political goal stated. While there might be additional children's educational materials that I could include in the sample, I decided to keep the sample small, as I think it would shift the focus of the research too much in the direction of an analysis of children's education to include additional children's resources.
[164] These sources include *Wahkohtowin*, *Treaty Elders*, and *Cultural Teachings*. When I use the term 'young adults,' I am referring to the average age of university or college students. Arguably, *Wahkohtowin* also has youth in the target audience, though I would say that the content would be too advanced for children.

The materials were initially grouped into two categories in an attempt to keep similar genres and target audiences roughly together. The categories of 'public educational materials' and 'academic educational materials' are precarious though, as they assert a division that is misleading. Materials were put in the 'public' group if they have a general audience and took up language in a way that is broadly accessible.[165] Conversely, materials that use academic language and target a university audience were put in the 'academic' group.[166] There is a dangerous division that often occurs in discussions in which 'community members' and 'academics' are treated as extremely different and incompatible.[167] In imagining the groupings of 'public' and 'academic' I want to be clear that I think that indigenous people are and can be both community members and academics. Regardless of intentions, it became apparent upon analyzing the materials that the categories of public and academic had little meaning, except in relation to target audience. The educational resources, as is discussed in the subsequent chapters, revealed similar patterns regarding representations of gender and Cree law, irrespective of the initial categorization. The materials are varied in that they have differing audiences, fall under divergent genres (a dissertation and a video game, for example),[168] focus on Cree law in several ways, and employ

[165] It should be noted however that all of the materials are in English, with the occasional usage of Cree.
[166] There are similarities between McAdam's three sources in the sample, however *Cultural Teachings* (*supra* note 108) was placed in the public resources, while the videos were put in with the academic resources. The reason for this is simply because her online lectures take place in a university setting, and in her video series she is identified as the instructor of the Indigenous Leadership Program.
[167] For example, 'academics' being read as not being 'community members.'
[168] I recognize the precariousness of comparing such disparate genres, however there are so few contemporary Cree legal educational materials that they are all considered here together. I think that it is instructive that the same patterns emerge in the materials regardless of their genre.

different pedagogical techniques. While the sample is disparate in some senses it also reveals coherent and consistent patterns. Specifics about the materials (for instance pertaining to audience) are provided, when necessary, in the discussions in subsequent chapters, though I turn now to the framework that I employed to facilitate common points of analysis across the sample.

3.3(b) Data Analysis Guide

I draw on grounded theory in my research. Barney G. Glaser and Anselm L. Strauss describe grounded theory as "discovering theory as a process"[169] – that is to say, that I did not have a set idea of what I was going to find in the materials and argue about the data prior to the analysis. Further, while I had some ideas about indigenous feminist legal theory, this theoretical approach also developed as I engaged with the data. This does not mean that my approach is fully inductive though, as it is unreasonable to expect that a researcher will have no experience in an area and no ideas of what might be found.[170] For example, based on experiences at conferences, in academia, and lived experience, I expected to encounter a fair amount of positive, aesthetically pleasing (and romanticized) representations in the educational materials. I also expected to find Cree women silenced and marginalized in many of the materials, based on thinking through the indigenous feminism literature and literature on feminist legal studies, which together strongly suggest that gendered oppression is pervasive in indigenous

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Though it would be worthwhile in future research to examine the materials more specifically as cultural objects of specific genres to see how my analysis might shift or not.

[169] Glaser and Strauss, *supra* note 153 at 9.

[170] Bruce L. Berg, *Qualitative Research Methods for the Social Sciences* 4th ed (Boston, MA: Allyn and Bacon, 2001) at 245-246.

societies and gendered norms will be found in, and shape, law. *Representations* of law would be no exception to this. Further, my approach also included some deductive aspects in that I aimed to pay attention to how particular discourses were deployed (for example, about tradition and culture) and I set out a thematic framework in advance for organizing the findings and asking after questions that are important to indigenous feminist legal theory.[171]

The data was gathered using the 'Data Analysis Guide' in Appendix C. This guide has several thematic sections so as to focus my attention on particular subjects in a way that was consistent across the sample.[172] The data analysis guide shaped my initial approach to the materials, but as Rose notes (as well as Napoleon and Overstall), there needs to be flexibility with a researcher's framework as the data might take them in unanticipated directions.[173] Rose clarifies that if the researcher finds that there are new questions to be asked and categories to be added, this does not necessarily mean that the researcher has to start all over again – CDA is not rigid in ways that content analysis is (at least numeric approaches to content analysis).[174] Rose reminds researchers "that the most important words and images may not be those that occur most often."[175]

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[171] *Ibid* at 245-246. This framework was flexible though. For example, I had initially included questions about affect in the framework though found these questions were too vague to answer and would have required a separate detailed analysis if I were to focus on affect.
[172] Though my focus was on analyzing discourse, in order to answer some of the questions in the framework, and in order to provide readers with an introductory portrayal of the materials, I used content analysis at times. I did this in a numeric way with several of the materials (for example *Treaty Elders*, *Muskwa*, *Knowledge Quest*) to establish the patterns for how women and men were visually and textually present in comparison to one another.
[173] Rose, *supra* note 14 at 161.
[174] *Ibid*. Though to clarify – I did not shift my questions around regarding the few times that I did use content analysis as noted in footnote 172.
[175] *Ibid* at 157.

While I agree with Rose, I do think it is important to look at the repetition of discourses and how these work to discipline and persuade.

One of the major sections in the analysis guide includes a legal analytic framework, which is an adapted version of Friedland's methodology from her research on Cree law.[176] Friedland describes this method as legal synthesis and explains that it is a process "whereby disparate elements of cases and statutes are fused to develop coherent and useful general legal standards that explain, justify or are consistent with a group of particular legal decisions."[177] She has used this method in her own research,[178] and she and Napoleon also use it in their work on drawing out law from stories.[179] Friedland explains that this method takes up an internal view of law and as such offers "a promising framework to build on the current work of Indigenous legal scholars."[180] This method can be used by the individual researcher but has also been used in larger group sessions.[181] I focus on the legal synthesis part of the data analysis guide in the next two sections to show how it provides a way in for identifying law in the materials, and how a revised

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[176] See Friedland, "Reflective Frameworks," *supra* note 147 at 30-31, 35-36; Friedland & Napoleon, "Gathering the Threads," *supra* note 146 at 18.
[177] Friedland, "Reflective Frameworks," *ibid* at 30. Case briefing is often done as a first step, before entering information into the legal synthesis framework (*ibid*; Friedland & Napoleon, "Gathering the Threads," *supra* note 146 at 8-15). I have not done case briefing in my research, as I draw on the legal synthesis so as to determine if the materials are about law.
[178] See Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishnabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] [Friedland, *The Wetiko*]; Friedland, "Reflective Frameworks," *supra* note 147 generally.
[179] See Friedland & Napoleon, "Gathering Threads," *supra* note 146.
[180] Friedland, "Reflective Frameworks," *supra* note 147 at 7.
[181] *An Exploratory Workshop: Thinking About and Practicing With Indigenous Legal Traditions* conference, hosted by the Indigenous Peoples and Governance (IPG) Project (SSHRC/MCRI) in collaboration with the Treaty 8 Tribal Association, Fort St. John, BC, 30 September to 2 October 2011.

framework can make questions about gender more explicit and in line with indigenous feminist legal methodology.

3.3(b)(i) Identifying Representations of Law in the Materials

It is not immediately apparent that all of the educational materials in the sample are about law. It is important to be able to explain on what grounds I am asserting that these materials are about Cree law, as opposed to being just about social norms and practices.[182] Indeed all legal norms, practices, principles, processes, etc. necessarily contain within them social norms and values. Yet not all social norms and practices are necessarily legal.[183] When thinking about what counts as a representation of law (and thus about 'what counts as law'), one enters into a vast ongoing debate.[184] What I offer below is what guides me, however I do not think of my approach as a solution to the debate, and I use the definitions below as working guidelines.[185]

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[182] This line of questioning should not be misunderstood as treating indigenous laws as simple, as about custom, or as not law, rather the focus here is on theoretical and practical inquiry regarding the analysis of law in various materials.

[183] We could perhaps talk about all social norms in terms of being forms of discipline but this is not necessarily the same thing as law.

[184] As Brian Z. Tamanaha notes, "[t]his issue [of what 'law' is], it should be noted, has never been resolved in legal philosophy, and there are compelling reasons to think that it is incapable of resolution" (Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" [2008] 30 Sydney L Rev 375 at 392). I want to note that while I draw on Tamanaha's work and ideas on legal pluralism and thinking about social and legal norms, I find his approach to discussing different legal orders to be very problematic. For example, he talks about various levels of state laws (municipal, provincial, etc.) in his article and then remarks, "[i]n addition to these familiar bodies of law, in many societies there are more exotic forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society" (at 375). Describing 'Other' or non-state laws as 'exotic' perpetuates misunderstandings and colonialist attitudes towards law, as discussed already in Chapter One.

[185] Tamanaha decides to find his way through the conundrum of 'what counts as law' (in the context of discussions on legal pluralism) by concluding that "[t]he primary theoretical lesson of this article is that it is unnecessary to resolve these debates to come to grips with legal pluralism. For those interested in studying law and society, what matters most is framing situations in ways that facilitate the observation and analysis of what appears to be interesting and important" [*ibid* at

Law operates explicitly and implicitly. In terms of explicit law, Griffith's argues that laws can be found in and understood as "social fields that have the capacity to produce and enforce rules."[186] While this is certainly a part of law, I am interested in thinking about law beyond just rules. As Napoleon explains implicit law can be understood

> as 'the vast body of law lying beneath the surface' of explicit law. Furthermore, the 'existence and content of explicit law' depends on implicit law's 'network of tacit understandings and unwritten conventions, rooted in the soil of social interaction'. Implicit rules arise from the sustained interaction and conduct of people over time and, generally, they enable groups of people to mutually predict the behaviour of others. The practical force of implicit law 'depends neither on authority nor on enactment, but on the fact that they find "direct expression in the conduct of people toward one another."'[187]

It is more difficult, when examining law to differentiate implicit law from social norms and orders, when compared to differentiating explicit law from social norms.[188] In line with Napoleon, who draws on Jutta Brunnée and Stephen J. Toope's work, it seems an unproductive and misguided task to try to draw a solid line between social norms and much of implicit law.[189] That which shapes law as a form of social ordering and organization also influences other forms of social regulation.[190] Napoleon and Overstall also explain that indigenous laws are decentralized and law is therefore "more difficult to see because it is not dealt

411]. I think that it is great to not get stuck in debates, however when trying to figure out what is 'interesting and important' parameters might have to be set for what to analyze and why.
[186] Talked about in Tamanaha, *ibid* at 392-393.
[187] Napoleon, *Ayook*, *supra* note 147 at 244-245. Napoleon is drawing here on the work of Gerald Postema.
[188] *Ibid* at 279; Jutta Brunnée & Stephen J. Toope, "International Law and Constructivism: Elements of An Interactional Theory of International Law" (2000/2001) 39 Columb. J. Transnat'l L. 19 at 68.
[189] Napoleon, *ibid* at 279; Brunnée & Toope, *ibid* at 68.
[190] Brunnée and Toope, *ibid*; Tamanaha, *supra* note 184 at 394.

with in a separate dedicated institution by specialized individuals and the rules that maintain its framework are implicit rather than explicit."[191]

While I am interested in explicit expressions of law in the materials, because I am also interested in implicit expressions, I take heed from Brunnée and Toope who contend that, "[w]e should stop looking for the structural distinctions that identify law, and examine instead the processes that constitute a normative continuum bridging from predictable patterns of practice to legally required behavior."[192] Napoleon explains that her own approach to identifying laws and legal rules is that a legal rule "includes a legal obligation, is enforceable in the legal order, and is reasoned with and deliberated on in the Gitksan legal processes."[193] She goes on to clarify that a social norm (or what she refers to as a "social-legal rule") "is not legally enforceable nor does it engage the legal reasoning and deliberating processes in the legal order."[194] Brunnée and Toope posit that "[l]egal norms are needed when actors seek to impose responsibilities, not simply predictability, on each other."[195]

I understand both social norms and legal norms to be about predictability, expectations, responsibilities, and obligations. I further understand that there are repercussions for violating both social and legal norms. The differentiation, for me, comes with what Napoleon has emphasized regarding legal norms as having processes in place for reasoning through and responding to disruptions to social

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[191] Val Napoleon & Richard Overstall, "Indigenous Laws: Some Issues, Considerations and Experiences" an opinion paper prepared for the Centre for Indigenous Environmental Resources 2007 [Napoleon & Overstall, "Indigenous Laws"] at 4.
[192] Brunnée and Toope, *supra* note 188 at 68.
[193] Napoleon, *Ayook*, *supra* note 147 at 64 footnote 42.
[194] *Ibid*.
[195] Brunnée and Toope, *supra* note 188 at 69.

organization and expectations. Brian Z. Tamanaha describes, "law is what people within social groups have come to see and label as 'law'" – that is to say that there is a general acceptance about what constitutes valid legal processes and norms and that these are context specific and will shift over time.[196] The question of what constitutes a valid legal process and if particular legal norms should be considered acceptable or not is particularly important to me, given my questions about gendered conflicts and thinking about Cree legal principles as shaped by present power dynamics which privilege Cree men. A focus on legal norms as being established through process and reasoning provides space for alternative ideas to potentially emerge, and for revisions in legal processes to take place. Although it is important to remember, as van Dijk notes, that some discourses (and legal norms) are so powerful, that alternative discourses or knowledges cannot actually even be heard sometimes.[197] It is thus very important to ask questions about power when trying to identify law in the educational materials. He describes how "some 'voices' are thereby censored [by dominant discourse], some opinions are not heard, some perspectives ignored" and that those who assert non-dominant perspectives "may also be banished as hearers and contestants of power."[198] Likewise, McKenna notes this problem that "speaking subjects cannot enter the order of discourse if they do not meet certain requirements."[199]

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[196] Tamanaha, *supra* note 184 at 396. Part of his explanation includes describing law as "a 'folk concept'" (at 396), presumably because it is social and a product of peoples. The language of 'folk' seems to really undermine the complexity of law and is not language that I would personally take up.
[197] Van Dijk, *supra* note 10 at 260.
[198] *Ibid*.
[199] McKenna, *supra* note 8 at 14.

The legal analytic framework that is a part of my data analysis guide includes asking questions about responsibility, expectations, obligations, authority, and importantly also legal processes that are in place. While I was not able to answer all of the questions in the framework in full detail with each material, the framework was productive for being able to determine whether the materials were about law, and if law is treated as gendered in the representations. In addition to looking for implicit law, more explicit ways in to identifying law is through discussion about for example, kinship systems, ceremonies, and explanations of processes, reasoning, and response to particular situations in oral histories.[200] I now turn to a short discussion on how I incorporated indigenous feminist legal methodology into the legal analytic framework to ensure that a gendered analysis of power was undertaken.

3.3(b)(ii) Gendering the Legal Analytic Framework

My own experience with the legal analytic framework is that if an explicitly gendered analysis is to be done, then questions about gender need to be directly asked.[201] For example, rather than asking just "who are the authoritative decision-makers?" I want to know if the decision-makers are women and/or men.[202] I want to know who is seen as an authority on which subjects and in what contexts. Napoleon and Overstall note that it is important that any legal framework that is applied to indigenous laws be flexible. They also mention the importance of

[200] Napoleon & Overstall, *supra* note 191 at 3.
[201] *An Exploratory Workshop*, *supra* note 181.
[202] See Appendix C.

paying attention to "internal relations of equality and gender (e.g. how are power imbalances and oppression dealt with?)" in one's analyses.[203]

When engaging with the various materials, I am interested in analyzing if Cree women are present, how they are present in comparison to men, what they are doing, what they are talking about, by what means they are included or excluded. In addition to looking at how women are present in the materials, I am interested in looking for "what is not seen or said."[204] In his work on CDA, van Dijk talks about "context control" – meaning that those in positions of power can control situations and settings so as to exclude women (or particular discourses and knowledges).[205] I will also consider the social context(s) in which the materials have developed and reside, as well as the social context of the perceived audience of the materials.[206] Reading the framework through the lens of indigenous feminist legal methodology creates a mode of inquiry in which Cree law is gendered.

3.4 Conclusion

In my dissertation, I aim to show the value of indigenous feminist legal studies (which includes both theory and methodology). I have focused on indigenous feminist legal methodology in this chapter, and have noted various perspectives that influence my understanding of this term and approach. I now turn to my findings to demonstrate the value of indigenous feminist legal methodology and theory for interpreting representations of gender and Cree law. The analysis of

[203] Napoleon & Overstall, *supra* note 191 at 3.
[204] Rose, *supra* note 14 at 165.
[205] van Dijk, *supra* note 10 at 260.
[206] Rose, *supra* note 14 at 166.

these specific representations provides a way in to a broader discussion about the importance of critically reading Cree law as gendered. The original plan when beginning this research was to organize the following chapters in a way that first examined the public educational materials, and then the academic educational materials. However as noted above, the differences between these two categorizations is not significant enough to proceed in this way. Instead, the findings from both categorizations of materials are combined in the following chapters. Chapter Four introduces, and begins to analyze, representations of gender across the materials. In Chapter Five, these findings about gender are more explicitly connected to a discussion about how Cree law is gendered. Lastly, Chapter Six furthers the analysis by considering the uses, implications, possibilities, and constraints of how gender and Cree law are deployed in these materials which were developed to promote empowerment and revitalization.

Chapter Four:
Gender Roles and Representations of Cree Women

4.1 Introduction

Grosz reflects that, "[p]hilosophy's *patriarchal* investments become clear in focusing, not on what philosophers say about women and femininity, but on what they *do not* say, what is unarticulated or left out of philosophical reflection."[1] Although she is writing about western philosophy, her ideas are important and useful to think about in relation to representations of Cree law, and how these play out in patriarchal contexts in Cree society. As has been discussed in Chapter One, while Cree cultural norms exist that value gender balance and respect for women, lived realities of systemic sexism and patriarchal oppression also exist. I begin to address the tensions and contradictions between these normative ideals and lived realities in this chapter. I concur with Grosz that it is incredibly insightful to examine what is not said and how women are absent. In line with critical discourse analysis and indigenous feminist legal methodology, I illustrate how "patriarchal investments" are also made obvious in what is said and shown.[2]

The focus in this chapter is on answering two questions that help to address my research inquiry regarding how Cree women are represented as legal agents in the educational materials. These questions are: Who is included in present-day articulations and representations of Cree law? And, how are women included? There are several additional questions in the data analysis guide that help to answer these broad questions (see Appendix C). In this chapter, I

[1] Elizabeth Grosz, "Philosophy" in Sneja Gunew, ed, *Feminist Knowledge: Critique and Construct* (New York: Routledge, 1990) 147 at 152 [emphasis in original].
[2] *Ibid* [emphasis removed].

concentrate on the data that was accrued in answering the following: Is gender addressed either explicitly or implicitly in the material? Are both women and men present in the material? What are they doing or saying? In what contexts do women and men appear? How is 'gender' imagined? Is there any mention of sexuality? If yes, how? If not, is there still an implied expectation of sexuality throughout? Is there any mention of gender roles or expectations?

Overall, women and girls are represented in limited ways. Women are rendered absent in many of the resources as men and their experiences are made central and universal. When women do appear, it is most often in relation to gender roles and 'women's issues.' While gender roles are represented as a form of empowerment, drawing on indigenous feminist legal theory I argue that gender roles marginalize when they are depicted in ways that exclude critical reflections of power dynamics and when they represent Cree women primarily in relation to particular roles (for example, as mothers and nurturers). Women and girls' exclusion from 'general' discussions about Cree law and inclusion only as specifically gendered subjects show that the representations in the educational materials are phallocentric. As introduced in Chapter Two, the term phallocentrism describes how men are broadly treated as citizens and legal agents who are 'out there' in the world, and they are stand-ins for 'human' or 'Cree people' as universalisms and male privilege are normalized under the guise of gender 'neutrality.' Women, by contrast, are talked about primarily in relation to

gender specificities (female roles and topics) – the ways in which they are different from men are noted.[3]

In this chapter I first examine how women are absent in the materials. I then analyze how women are present. Of the 11 educational resources examined, I focus on six of them in the section charting women's absence: *Path of the Elders* (which includes *Knowledge Quest*)*, Treaty Elders, Muskwa, Wahkohtowin, Cree Restorative Justice, and Cree Narrative Memory*. I focus on these particular sources as they render women absent and negate the subject of gender in different ways. More specifically, this marginalization occurs through 1) the centrality of men and boys and 2) the erasure of women.

While women, or pronouns referring to women, appear at times in these particular materials, this occurs less often than references to men, and the appearance of a few women should not be equated with an approach that is gender-inclusive. As indigenous feminists insist, women must be explicitly and meaningfully included in legal, social, political, and economic practices for sovereignty and decolonization to be useful and viable.[4] I show here that these six materials treat gender as an unimportant subject and perpetuate gender oppression under the auspice of cultural and legal empowerment and revitalization for all.

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[3] See Grosz on phallocentrism, *ibid* at 150-151.

[4] See for example: Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 233 [Napoleon, "Aboriginal Discourse"]; Joyce Green, ed, *Making Space for Indigenous Feminism* (Winnipeg: Fernwood Publishing, 2007) [Green, *Making Space*]; Joyce Green, "Taking Account of Aboriginal Feminism" in Green, *Making Space, ibid,* 20 [Green, "Taking Account"]; Emma LaRocque, "Métis and Feminist: Ethical Reflections on Feminism, Human Rights, and Decolonization" in Green, *Making Space*, *ibid*, 53 [LaRocque, "Métis and Feminist"]; Andrea Smith, "Native american Feminism: Sovereignty and Social Change" in Green, *Making Space*, *ibid*, 93 [Smith, "Native american"]. See discussion in Chapter Two.

The question that must be asked of these materials is actually: revitalization for whom?[5] The privileging of men's experiences as universally representative is unjust and requires critical engagement.

Following this section on absence, I turn my attention to the ways that women are present in the materials. I examine the five remaining resources, which explicitly include women in varying ways. These resources include: *Four Directions*, Lindberg's dissertation, McAdam's *Cultural Teachings*, *ILP Lectures*, and *Video Series*. While I have split the sample up into two parts, as women are purposefully and more notably present in the five materials just mentioned, the problems of women's absence and presence do not always play out so tidily in the materials. These problems persist (in different ways) throughout the sample. With the game *Knowledge Quest* for example, which is discussed in the section on absence, there are egregious problems with making men central and universal, and with erasing women's existence – yet there are some women that appear in the game, though they appear largely in relation to the private realm and 'women's roles.' Likewise, in McAdam's *Video Series*, which is discussed in the women's presence section, she does explicitly talk about women and Cree law; however, there are also problems with the *Video Series* in that many of her general discussions about Cree law are treated as 'gender neutral.'

Phallocentrism thus persists throughout the sample and following the discussion on absence and presence, I consider the complicated analytic relationship between phallocentrism, heteronormativity, notions of gender

[5] This is akin to what Smith says when she emphasizes that "[b]efore Native peoples fight for the future of their nations, they must ask themselves, who is included in the nation?" ("Native american," *ibid* at 97).

complementarity, and tradition. There are tensions between these terms; however these tensions reveal the complex context in which the educational materials exist – a context in which patriarchy, colonialism, matriarchal ideals, notions of gender balance, and various internal and external power dynamics create tensions in the practices and interpretations of Cree law. The discussion in this chapter is an introduction to the patterns found in the materials, with an emphasis on how women are represented. The relationship between representations of gender and law is discussed in further detail in subsequent chapters.

4.2 Women's Absence

4.2(a) The Centrality of Men and Boys

One of the more obvious ways that men and boys, and their experiences, are privileged is through the use of male protagonists. This occurs most clearly in two of the educational materials: the video game *Knowledge Quest*[6] and the comic *Muskwa*. As introduced in Chapter Three, *Knowledge Quest* features a young boy named Kaniskic, and a male elder, Chief Moonias,[7] who guides Kaniskic on his quest.[8] Kaniskic is tasked with learning Omushkegowuk (Cree) and Anishinaabe principles and practices so that he will have the tools that he needs to re-negotiate Treaty 9 in collaboration with the communities involved.[9] The "young provider"[10]

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[6] On the *Path of the Elders*' homepage, Kaniskic and Chief Moonias are prominent (Online: *On the Path of the Elders* <http://www.pathoftheelders.com> [*Path of the Elders*]).
[7] Chief Moonias was a signatory to Treaty 9 in 1905, and was the Chief of the Fort Hope Band (Anishinaabe) ("Chief Moonias," online: *On the Path of the Elders* <http://www.pathofthe elders.com/moonias> ["Chief Moonias," *Path of the Elders*]). As a note, the spelling of Chief Moonias' name is inconsistent throughout the *Path of the Elders* educational resources.
[8] *Ibid*.
[9] *Knowledge Quest*, online: <http://www.pathoftheelders.com/newgame#start> [*Knowledge Quest*].
[10] Culture Path, *Knowledge Quest*, *ibid* [Culture Path].

learns these skills and acquires this knowledge by first successfully playing five paths (culture, education, security, economy, health), before embarking upon the final one (self-governance).[11] The game is thus played through the lens and experiences of a young boy.[12] The pedagogical framing, at times, attempts to treat the game as gender inclusive. For example, gendered pronouns are taken up when describing the security path – "[i]n the Hunting game, the player is the Hunting Boss. He or she must control the use of his or her hunting territory, follow and enforce the hunting system's protocols, and oversee the sharing of the harvest."[13] This description imagines that girls might also play the game, and seems to extend hunting practices and authority to them. Yet what actually happens in the game is that women are given only limited roles and girl players are never addressed. *Knowledge Quest* requires that all players move through the game as a male – a subject position that is authoritative, treated as normal (and normative) and universal, and treated as gender neutral.

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[11] "Learn the Paths," online: *On the Path of the Elders* <http://www.pathoftheelders.com/learnthe paths> ["Learn," *Path of the Elders*].

[12] The player has no choice but to be Kaniskic. The game is frequently referred to as a role-playing game on the *Path of the Elders* blog (online: *Path of the Elders* blog <http://www.pathofthe elders.blogspot.ca/>), however one cannot chose to be a girl, or a non-normatively gendered character. Blackcherry Digital Media, the company that produced the game (in partnership with others, see Appendix B) recently made a new game (with some similar partners – the Centre for Indigenous Research, Culture, Language and Education [CIRCLE] at Carleton University, Pinegrove Productions, and Wendy Campbell) called *First Encounters*. The game is described as follows: "First Encounters is a groundbreaking achievement that sheds light on two critical moments in world history: the first encounters between Canada's First Peoples and Europeans in the 11th and 16th centuries. The game and website are the culmination of over a year's worth of research and development providing an in-depth look at life in North America when Europeans began arriving from across the Atlantic" (http://www.firstencounters.ca/en/about). With this game, the player has more choice over which character they would like to be. The player can pick from a Norse man or woman, an Inuit man or woman, a Mi'kmaq man or woman, or a French man (*First Encounters*, online: <http://www.firstencounters.ca/en/game>).

[13] "Learn," *Path of the Elders*, *supra* note 11.

Not only are the protagonists of this game a boy and a man, the majority of other characters that are engaged with are also men. For example on the culture path, Kaniskic interacts with six male characters and one female character (who is defined in relation to her husband).[14] Further, on the self-governance path, 21 characters are engaged with, only one of whom is a woman.[15] Overall, of the 59 characters that Kaniskic interacts with in the game, only nine are females.[16] This is not surprising, as the *Path of the Elders* general website privileges men's experiences and knowledge,[17] and the accompanying lesson plans that are part of the entire pedagogical package do little to explicitly encourage critical discussion about gender.[18]

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[14] In an encounter with Queque-ish, an elderly man, it is asked of Kaniskic, "[w]ill you also bring some sphagnum moss from the muskeg swamp to Saachiniipiinuko, the fisherman's wife, who is camped to the southeast across the river? She needs the moss for her children's diapers" (Culture Path, *supra* note 10).

[15] Eight of these male characters are indigenous, and 12 are white. The woman is a band representative while the remaining indigenous characters are chiefs, a river guide, and an elder (Self-Governance Path, *Knowledge Quest*, *supra* note 9 [Self-Governance Path]).

[16] This includes some 'doubles' of characters – for example, Chief Mark is found on the education path, as well as on the self-governance path. Also as a note, there are men Kaniskic does not talk to (for example railway workers, builders, etc.) that are not accounted for here. Also, I have not included the people who are in the village on the main page and on by the negotiation tent on the self-governance path, as I do not talk to/have interaction with them (*Knowledge Quest*, *supra* note 9).

[17] For example, when using the search page on the website, pre-identified keywords can be selected. 'Woman' generates 46 results of related links and topics within the website ("Woman," online: *Path of the Elders* <http://www.pathoftheelders.com/component/search/?searchword=Woman>. Comparatively, 'Man' generates 192 results ("Man," online: *Path of the Elders* <http://www.pathoftheelders.com/component/search/?searchword=Man>). Further, of the 59 audio clips from the Doug Ellis Collection (which "document[s] western James Bay Cree legends, personal stories, memories and conversations"), 47 of the clips are of men speaking, and only 12 are of women ("The Doug Ellis Collection," online: *Path of the Elders* <http://www.pathoftheelders.com/audio> ["Doug Ellis," *Path of the Elders*]). The Elders' Stories video collection (all of the elders are Cree) is exceptional in that there are 89 video clips of women and 88 of men ("The Elders' Stories," online: *Path of the Elders* <http://www.pathoftheelders.com/videos> ["Elders' Stories," *Path of the Elders*]). This equitable inclusion of women and men with regards to the videos should not be understood as representative of the overall pedagogical package offered on *Path of The Elders* (*supra* note 6). Overwhelmingly, women and girls are marginalized throughout this resource.

[18] There is generally a lack of activities and lessons that would encourage discussion about gender. Gender appears only in the lesson plans in terms of gendered pronouns, not as a subject to talk

Similarly, *Muskwa* features a male protagonist who is guided by a male role model. This comic book follows three teenagers as several animals help them to learn about Cree natural law.[19] Males are textually and visually present more often than females. *Muskwa*, like *Knowledge Quest*, is a story in which the audience is invited to come along a path of learning as a young boy works to change his behaviour.[20] Of the humans in the story, Sam is the most active and is the central character.[21] His friends include Isaiah and a teenage girl who does not have a name. Of the seven animals, six are gendered male.[22] Though some of the animals are not textually gendered in the comic, I argue that they are likely to be read as male.[23] The surveillance and military operations that run throughout this text (which the animals use to watch the teenagers, to keep them safe from Cougar) are typical male signifiers. Further, Muskwa lives in a den that is akin to a 'bachelor's pad,'[24] takes up space in ways mostly performed by male bodies (sits on the couch with his legs spread open),[25] and is visually connected to technology and machinery.[26] Also, the description on the producer's website

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about ("Teachers," online: *On the Path of the Elders* <http://www.pathoftheelders.com/teachers> ["Teachers," *Path of the Elders*]).

[19] While the comic more broadly uses the term 'natural law,' I argue that this is a source about Cree law, given that Cree words are used in the comic, including in the title (*muskwa* is Cree for bear). It is also important to note the conflation of natural law with Cree law/indigenous laws here. This is discussed further in Chapter Five.

[20] Sam is depicted as more reckless than Kaniskic, though Kaniskic is still treated as lacking in terms of cultural knowledge about how to act 'appropriately Cree,' particularly when he/the player does not play *Knowledge Quest* 'right' (Kaniskic is scolded by Chief Moonias for his behaviour – this is discussed further in Chapter Five).

[21] The cover of the comic boldly declares "Sam's Spear of Fate" (Greg Miller et al, *Muskwa: Fearless Defender of Natural Law* [Edmonton: BearPaw Legal Education & Resource Centre, second printing 2011] [Miller et al, *Muskwa*]. *Muskwa* is also available as a PDF online at: <http://www.bearpaweducation.ca/sites/default/files/Muskwa.pdf>).

[22] The one female animal character is Cougar's mother (*ibid* generally).

[23] This includes one of the three prairie chickens, Raven, and Muskwa (*ibid* generally).

[24] *Ibid* at 3.

[25] *Ibid* at 19.

[26] *Ibid* at 3, 4, 15.

explains the story as involving "Muskwa the Bear and his forest friends" and he is referred to as a "Woodland superhero."[27]

Muskwa, Sam, and Sam's friend Isaiah are at the heart of the story. Although the boys and the girl team up at the end, to fight against Cougar, the girl character is otherwise peripherally depicted as a mother-type figure who both nurtures the boys by making tea,[28] but who also scolds them and ruins their fun. For example, after Sam wounds a prairie chicken and leaves it to die, she says (with her arms crossed) "[y]ou just speared the prairie chicken and let him rot??!!!" to which Sam responds "I think so …."[29] In addition to the centrality of male figures, the focus on hunting as an activity that males do, works to exclude female readers from 'men's activities' and also takes up a common tendency of representing male activities and experiences as 'indigenous practices' more universally. Napoleon observes that "[t]he literature and images of aboriginal peoples focus almost entirely on males and their activities – hunting, fishing, and trapping."[30] Similarly, in her work on gender, nationalism, and Nunavut, Altamirano-Jiménez illustrates that the making of Nunavut was founded on men's concerns (e.g. hunting) "while women's dynamic social, cultural, and economic roles are left out."[31] This pattern of focusing on men's lives as universal is a common problem in many of the educational materials in my research.[32]

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[27] Information page, "Muskwa: Sam's Spear of Fate," online: BearPaw Legal Education & Resource Centre < http://www.bearpaweducation.ca/publications/muskwa-sams-spear-fate>.
[28] Miller et al, *Muskwa*, *supra* note 21 at 15.
[29] *Ibid* at 12.
[30] Napoleon, "Aboriginal Discourse," *supra* note 4 at 241.
[31] Isabel Altamirano-Jiménez, "Nunavut: Whose Homeland, Whose Voices?" (2008) 26:3,4 Canadian Woman Studies 128 at 130 [Altamirano-Jiménez, "Nunavut"]). Likewise, Sunseri asserts that "[n]ationalist politics are closely tied to gender politics" (Lina Sunseri, *Being Again of*

Not only are men and their activities central in these materials, they are most frequently depicted as knowledge holders, thus perpetuating the equation of masculinity with legal authority. This is evident in both *Knowledge Quest* and *Muskwa* through the characters of Chief Moonias and Muskwa. Male elders are also centrally featured in the video *Wahkohtowin*. While women and men, girls and boys, are visually present throughout this educational video, the authoritative voices are those of men. The audience only hears four elders, all of whom are men, with the exception of the female narrator. This exception is important, as the narrator is authoritative and omnipresent in many ways. However elders are widely recognized as especially authoritative subjects in Cree society, and it is problematic that there is not a single elder who is a woman. Further, when the elders speak, they frequently speak of men and 'guys.'[33] In Chapter Five I analyze a particular moment in the video, in which one of the male elders negatively depicts his female boss so as to maintain his own legal authority.

Wahkohtowin offers a broad introduction to Cree law. It is noteworthy that general discussions about law found in resources such as this video, in *Muskwa*, *Path of the Elders* and *Knowledge Quest* overwhelmingly use men and boys, and their knowledge and experiences, to educate about Cree law, Cree culture, treaty relations, and citizenship. Men are thus heavily associated with 'general

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One Mind: Oneida Women and the Struggle for Decolonization [Vancouver: University of British Columbia Press, 2011] at 102).

[32] For example on the 'history' page of the *Path of the Elders* website, an essay is included that describes who the Mushkegowuk and Anishinaabe people are by emphasizing that "[b]oth our peoples were and still are hunters, trappers and fishermen who learned special hunting knowledge that has been passed down over many centuries" ("History," online: *Path of the Elders* <http:// www.pathoftheelders.com/history> at ch 1).

[33] *Wahkohtowin – Cree Natural Law*, DVD (Edmonton: BearPaw Media Productions, 2009) [*Wahkohtowin*].

knowledge' and stand-in for Cree people and politics. These materials mirror social practices commonly found in indigenous organizations (such as the Assembly of First Nations) and band councils, in which indigenous politics are male-dominated and men are in authoritative positions to speak for the whole.[34] McIvor explains that a misconception exists that when women speak out against gendered oppression and privilege, they are accused of being individualist (i.e. against the nation), whereas when men speak it is claimed as gender neutral and for the nation.[35] Though McIvor does not use the language of phallocentrism, what she describes illustrates the universality and 'neutrality' of men, and the specificity and gendering of women. This arrangement of men speaking for the nation is sometimes asserted as traditional. It is crucial to pay heed to the insights from indigenous feminists who caution first, that questions should always be asked about tradition and power if these discourses are being deployed so as to silence some and privilege others,[36] and second, that patriarchal realities pervade indigenous people's lives and politics and therefore impact how women are heard

[34] See Joyce Green, "Constitutionalising The Patriarchy: Aboriginal Women and Aboriginal Government" (1992) 4 Constitutional Forum 110 [Green, "Constitutionalising"]; Jo-Anne Fiske, "The Womb Is to the Nation as the Heart Is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement" (1996) 51 Studies in Political Economy 65; Sharon McIvor with Rauna Kuokkanen, "Sharon McIvor: Woman of Action," in Green, *Making Space*, *supra* note 4, 241.

[35] Sharon McIvor, "Self-Government and Aboriginal Women" in Enakshi Dua & Angela Robertson, eds, *Scratching the Surface: Canadian, Anti-Racist, Feminist Thought* (Toronto: Women's Press, 1999) 167 at 173-175 [McIvor, "Self-Government"].

[36] See for example, Green, "Taking Account," *supra* note 4; Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17 CJLS 149 [Napoleon, "Raven's Garden"]; Jennifer Denetdale, "Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition" (2006) 21:1 Wicazo Sa Review 9 [Denetdale, "Chairmen, Presidents, and Princesses"]; LaRocque, "Métis and Feminist," *supra* note 4.

and how their authority is perceived.[37] I extend this discussion on indigenous feminist legal theory, knowledge, and authority in Chapter Five to consider how truths (or interpretations) about Cree law are shaped and validated by discourses pertaining to gender, tradition, and authenticity.

Given that maleness is privileged and treated as the norm in patriarchal contexts (as whiteness is normative in colonial contexts), the men and boys can be read first as Cree people/as not gendered. Femininity is visible as it is that which is not masculine/that which is not the norm.[38] The propensity to not read men as gendered can mistakenly lead to conclusions that the materials discussed in this section are 'gender neutral' and universal. Further, the presence of some women and girls might cause one to conclude that materials are inclusive or 'gender neutral.' This (misguided) interpretation of inclusivity is possible, for example, with *Treaty Elders of Saskatchewan* as both men and women are visually and textually present.[39] Upon initially reading this book, many readers might have the sense that women are quoted and referenced throughout. However a close reading shows that men are cited 97 times and women are cited only 24 times.[40] This pattern of women speaking only about a quarter of the time reflects the number of

[37] See for example, LaRocque, *ibid*; Green, "Taking Account," *ibid*; Verna St. Denis, "Feminism is for Everybody: Aboriginal Women, Feminism and Diversity" in Green, *Making Space*, *supra* note 4, 33 [St. Denis, "Feminism is for Everybody"]; Kim Anderson, "Affirmations of an Indigenous Feminist" in Suzack et al., eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: University of British Columbia Press, 2010) 81.
[38] Grosz, *supra* note 1 at 150.
[39] Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) [Cardinal & Hildebrandt, *Treaty Elders*].
[40] This count is based on any time that an elder or indigenous leader is named in the text as having something to say/contribute. If they are quoted/referred to twice on one page, then they are counted twice, so long as they are saying something 'new' about a given subject.

women involved in the research (approximately one quarter of the participants).[41] Although those involved are thus given the same amount of space to speak, the underrepresentation of women elders in the research requires critical interrogation. Reflecting a tendency to treat men's voices as representative, there are many instances in this text in which male pronouns are used to speak about everyone.[42] Elder Jimmy Myo is quoted as saying, "'[w]hen the Creator first put Indians on this land, He gave him everything that he needed, land to live on. He gave them trees, animals and from there to make his own clothing and to make their shelters and to eat.'"[43]

Men are also visually over-represented in *Treaty Elders.* They appear in approximately 80 per cent of the images.[44] At the end of the book, the authors say,

> [m]ost of all, we thank each and every one of the Elders who made a presentation and apologize to all those whose words or thoughts we did not specifically cite or include.
>
> We are confident, however, that this book, taken as a whole, reflects the thoughts of the Elders.[45]

Although it might accurately reflect those who were involved, broadly speaking *Treaty Elders* presents men as the primary experts whose interpretations are relied on. Further, while some women are included as sources of knowledge, the reader is not able to develop a sense of where women were during treaty negotiations, as

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[41] In terms of how many men compared to women are photographed in the text (the photos that 'introduce' who the speaker is in the portrait photos), there are 25 men and six women. I am not sure if that is all of the elders and leaders who were involved, as they do not provide a list (Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 39).
[42] And typically male activities are focused on (such as hunting and fishing) (*ibid*).
[43] *Ibid* at 30. The use of a universal 'he' in this quote works to erase women's labour of making clothes and raising the tipi.
[44] Visually (including the cover and in-text photos and drawings), there are approximately 179 indigenous people, of which 36 are identifiable as women or girls. Not only do the men appear more often, they also frequently appear as powerful leaders and authorities (*ibid* generally).
[45] *Ibid* at 71.

the images and text emphasize men's involvement in the treaty process.[46] This problem is discussed in further detail in the next section in which I examine the erasure of women in the educational materials.

4.2(b) The Erasure of Women

Smith cautions that "[b]efore Native peoples fight for the future of their nations, they must ask themselves, who is included in the nation?"[47] Throughout the materials discussed in this section, audiences are frequently left in the dark about where the women are or what they are doing. In *Muskwa* for example, almost an entire day lapses in the story before the girl character reappears, as the text focuses on the boys' hunting trip. Intriguingly, the girl character is featured alongside Sam and Isaiah on the cover of the comic and it appears as though she is hunting with the boys.[48] In the story itself, however, she is not part of the hunting – her presence is erased.[49] When the boys return at nightfall, she is still at the camp, tending to the fire and thus I assume she has been there most of the day.[50] Her 'appropriate role' is thus equated with the domestic realm as she tends to their camp.

Similarly, gamers playing *Knowledge Quest* might find themselves wondering where the women are. On the economy path, Kaniskic is tasked with

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[46] *Ibid* generally.
[47] Smith, "Native american," *supra* note 4 at 97.
[48] It is refreshing to see a visual depiction of a female character that is not presented in a dress or skirt (as women are in *Knowledge Quest* and *Four Directions*). However, unfortunately the girl character is shown on the cover of *Muskwa* as both terrified and sexualized (with her chest sticking out while she runs) (Miller et al, *Muskwa*, *supra* note 21).
[49] Miller et al, *Muskwa*, *ibid* generally.
[50] *Ibid* at 8.

learning about environmentally sustainable resource practices.[51] Significantly, there are no women characters on this path.[52] Miteo[53] notes how electricity will help the children with their learning and provide light for sewing and making clothes.[54] Women would presumably (based on the historical context of the game) do these activities however their existence as the producers of this labour remains invisible. In the representation of Cree life created by the game, economics are solely a masculine domain; resource management, conflict management (conflicts arise with white miners and lumberjacks), and infrastructure, are the responsibility and work of men.[55] These jobs are presented as requiring physical strength and endurance (as with the tasks on the other paths), leadership skills, and logic and problem-solving skills – all normatively masculine traits.

[51] Economy Path, *Knowledge Quest, supra* note 9 [Economy Path]. This path is interesting in that it shows the difficulties faced by indigenous peoples regarding outside resource development. However Kaniskic is encouraged to engage in environmental sustainability in ways that are peculiar (and seem unsustainable). This path took me a significant amount of time to play, and to 'win,' as my approach to sustainability differs from that used in the game. After failing many times, when I finally 'won' on this path, I had developed at least four mining sites (e.g. gold mining, diamond mining), did much selective cutting of trees, built a lumber mill, and much to my disappointment, I won this path about sustainability even though I built a hydro electric dam. A player does not win when the smelter is purchased, or when mines with serious dynamite are used, because of the environmental damage caused by them, however I was still surprised by my activities being labeled sustainable.

[52] Kaniskic has interactions with: Chief Moonias; Miteo (a powerful man/ 'Shaman'); the strangers (or mandaau) are white men; Ajax Boss (a white lumberjack); Acme Boss (a white lumberjack); 'Railroad Representative' (a white man); men from the village are hired to work on the railway; Ace Boss (a white miner); a surveyor (a white man); an engineer (a white man); Ore Core Boss (a white miner); and a geologist (a white man) (Economy Path, *ibid*).

[53] Chief Moonias describes, "[t]he Cree idea of a Shaman is called a Miteo, a conjurer or seer type. He has been associated with great power and knowledge; he is someone to be respected and feared. In the shaking tent ritual, his spiritual power could see into the future. // He could see where the geese or animals would be, and he could predict future events and deaths, as well as good or bad hunting seasons. His vision is keen and you should seek his advice and answer him when he calls" (Economy Path, *ibid*). Miteo here is gendered male.

[54] Economy Path, *ibid*.

[55] *Ibid*.

Likewise, there are also no female characters on the education path.[56] With this path, the player is to complete a canoeing game. Chief Moonias says to Kaniskic,

> I have a very important task for you. I want you to take a canoe and travel to Moose Factory to speak with Chief Mark.
>
> We all want a better life for our people, but we must make sure we are doing the right thing when the men from the government ask us to sign Treaty Number 9. It is said that two voices are louder than one, and together we may have a better understanding of what the government is asking of us.
>
> The same is true in negotiation. We must not let the men from the government divide our people. We must join our Moose Factory brothers and present a united front.
>
> This is the message that I want you to take to Chief Mark: there is strength in numbers. Now go. The future of all our people may depend on your success.[57]

The player learns nothing of where the women are, and is instead presented with the message that education, canoeing, and coming up with a plan for negotiating a treaty is something best performed by men (including a young boy). This presentation of education as 'men's domain' sits in interesting contrast to representations of Cree women as teachers of the nation found in the materials discussed in the next section.

Women's role, responsibilities and expertise are actively obscured in many paths in *Knowledge Quest*. Even when women are included, this inclusion is marginal. Further questions need to be raised about educational resources that present men and boys as complex subjects while women and girls have appeared nameless (*Muskwa*) and on one occasion as identity-less when presented as exact

[56] Education Path, *Knowledge Quest, supra* note 9 [Education Path].
[57] *Ibid*.

visual replicas of each other.[58] There are so few women in these materials and it is striking that they always exists as underdeveloped characters/partially presented.

In *Cree Narrative Memory*, McLeod also replicates the problem of erasing and obscuring women's realities.[59] This is not to argue that women are absent from the book. McLeod does indeed attempt to include women in the book. He says in his acknowledgements page that "[i]t is to our Old Men and Old Women that we owe our greatest thanks."[60] Further, while he emphasizes that the stories that influence him are from his father, grandfather, and great-grandfather,[61] he also credits the influence of his grandmother, who was an activist and educational leader who worked to develop Cree language educational resources.[62] Additionally, he reflects that historical information is missing sometimes and he provides an example that "the name of the wife of *wîhtikôhkân*" (the woman on the cover of his book) is not known.[63] McLeod describes being influenced by her – "she is like the wind: I cannot see her directly in the stories, but I can see her influence in the life and stories of others. Like the wind, we see her indirectly in the movements of other beings."[64] Though perhaps not said in the same way that I read this example, McLeod's discussion of this woman serves as a metaphor for

[58] In *Knowledge Quest*, Saachiniipiinuko, who appears on the Health Path (Health Path, *Knowledge Quest, supra* note 9 [Health Path]), and Poopoon, who appears on the Self-Governance Path (*supra* note 15), look exactly the same.
[59] Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary Times*, (Saskatoon: Purich Publishing, 2007) [McLeod, *Cree Narrative Memory*].
[60] *Ibid* at 5.
[61] *Ibid* at 7.
[62] *Ibid* at 9-10.
[63] *Ibid* at 8.
[64] *Ibid*.

how women are represented in the materials – as present only indirectly through "other [masculine] beings."[65]

Despite these efforts to include women and their experiences, like the materials described above, McLeod perpetuates the problem of only peripherally including a handful of women in an educational resource that focuses on men's experiences, histories, and contributions.[66] His discussion of treaty negotiations for example, focuses on men (as is also the case with *Path of the Elders* and *Treaty Elders*). The reader has no sense of where the women are during the negotiation process, what they were doing in relation to the process, and how they might be specifically impacted. In her *Video Series* (discussed in the next section), Sylvia McAdam importantly talks about where the women were during the making of Treaty 6. She says,

> [t]he women had authority over the land. But when they tried to talk to the treaty commissioner, about the land, the treaty commissioner wouldn't speak to the women, because the Europeans at that time, um, did not speak to the women. So the women stayed in the background. There was a particular group of women called *okicitaw iskwewak*. There is no English word to describe these women. The closest terminology is, um, clan mothers, warrior women. These women were the law keepers of the Cree nation.[67]

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[65] *Ibid*.

[66] Visually, there is a total of 15 pictures (including the cover) in the book. Of the pictures that have humans, there are 12 images with people. Of those 12 images, there are four images that have Cree women in them. The first two are duplicate images (the cover and page 28) of his grandmother and another male relative; the other is of girls and boys at a residential school, and the other is a family picture with males and females. There are no pictures of just women (though there are several pictures of just men). Women appear only in images in relation to family, and in relation to school, whereas the men are represented in images in relation to spirituality, family, treaty negotiations, and politics. Textually, men appear as leaders, chiefs, negotiators, storytellers, traders, they are part of the economy, part of treaty negotiation, part of history, tricksters, and spiritual figures. Women appear on occasion as storytellers, his grandma appears as an advocate and activist (as with his grandfather), there are brief glimpses of women and their resistance to colonization (*ibid* at 80) but we learn nothing of their social circumstances, their knowledge, and we learn of no specifics.

[67] Sylvia McAdam, "treaties," online: <http://vimeo.com/34674834> [McAdam, *Video Series*, "treaties"]. When referring generally to the videos in this series, I will use [McAdam, *Video*

McAdam describes that there was a ceremony in a women's lodge and "it was the women that spoke about the land, and what it is that they wanted to leave for the generations to come."[68] Her acknowledgement of gender emphasizes how colonial authorities mistakenly treated men as having *the* political and legal authority. Indigenous men were seen as more authoritative than indigenous women by settlers and were thus directly included in the negotiations.[69] Educational resources should challenge, rather than reinforce this colonial imposition that unjustifiably erases women's experiences of treaty negotiations. Further, questions can be raised about how the past is being interpreted in both McAdam and McLeod's accounts.

McLeod's primary focus is on colonialism, and he articulates Cree narrative memory as a form of decolonization. Yet as I have emphasized throughout this dissertation, because patriarchal oppression is an interconnected tool of violence alongside colonization, and since gendered dynamics clearly exist in Cree society, decolonization must necessarily be gendered.[70] What does it mean for McLeod to articulate 'Cree narrative imagination,' 'Cree narrative memory,' and Cree critical theory that is based on the experiences of men?[71] To assert Cree

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Series]. Each video has its own URL, though they can all be found (alongside other videos) on vimeo at: <http://vimeo.com/channels/301066/page:1>; <http://vimeo.com/channels/301066/page:2>; <http://vimeo.com/channels/301066/page:3>.

[68] McAdam, *Video Series*, "treaties," *ibid*.

[69] This should not be misconstrued to mean that treaty negotiation processes overall were fair. Power dynamics shaped how treaties were made, and how they are still interpreted today.

[70] See Chapter Two of my dissertation.

[71] Again, McLeod describes, Cree narrative memory as "a large, intergenerational, collective memory" (*Cree Narrative Memory*, *supra* note 59 at 8) and "Cree narrative imagination can be best articulated by the Cree term *mamâhtâwisiwin*, which could perhaps be best translated as 'tapping into the Great Mystery,' or 'tapping into the Life Force.' The term used to describe the elder Brother *wîsahkêcâhk, ê-mamâhtâwisit*, was also used to describe *mistahi-maskwa* [Big

narrative memory in this way erases women's lived realities and circumstances and perpetuates their marginalization. How can readers meaningfully engage in a discussion about Cree law if women are sidelined in, and by, that very discussion? In her work on law and self-governance, Napoleon emphasizes that, "[w]ithout the thoughtful and deliberate inclusion of aboriginal women, the aboriginal discourse will continue to be impoverished, incomplete, and therefore profoundly flawed."[72]

To be clear, I do not mean to suggest that there should never be gender specific educational materials that focus on just men, or just women. What is problematic, however, is just how frequently men are centered, how commonly they are depicted as authoritative, and how often their knowledge and experiences are sought out and represented. That Cree women are so easily disavowed in the materials in this section, with men constituted as universal stand-ins for Cree people and politics, is deplorable. It is a problem that more than half of the educational resources in my sample do not sufficiently acknowledge gender as a reality shaping Cree people's lives and experiences (be it in terms of privilege or oppression). These educational resources thus offer only partial and incomplete representations of Cree law.

Indigenous feminist legal theory calls for an approach to Cree law that is gendered. Addressing the phallocentric and patriarchal tendencies in the materials discussed in this section requires more than just adding women in. Moving beyond an 'add women and stir' approach, indigenous feminist legal theory also

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Bear]. All these beings struggled to move beyond the ordinary, and to rethink the space and world around them" (*ibid* at 100). It is noteworthy that these are all male beings.

[72] Napoleon, "Aboriginal Discourse," *supra* note 4 at 243.

aims to unsettle the very foundations of analyses that proceed on the grounds of 'gender neutrality.' The dangers of an uncritical and partial inclusion of women are demonstrated in Hansen's book *Cree Restorative Justice*, which like McLeod, includes women on occasion.[73] Importantly Hansen does explicitly reflect on the topic of gender, though it is not the focus of his book and in the summary section of his findings, he says little about gender.[74] Gender is a peripheral subject that does not disrupt his conceptualization of Cree restorative justice.[75] I have used indigenous feminist legal theory to engage in discussions about these materials and have demonstrated the need to produce anti-oppressive Cree legal educational materials. In drawing on this framework, I have begun to engage with gendered realities, and this analysis will be deepened in the next section, and in subsequent chapters.

One interpretation of the texts discussed thus far is that it is erroneous to describe them as patriarchal and phallocentric as they are about traditional Cree

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[73] John George Hansen, *Cree Restorative Justice: From the Ancient to the Present* (Kanata: JCharlton Publishing, 2009) [Hansen, *Cree Restorative Justice*].

[74] Of Hansen's five conclusions, he talks about gender in one of them (under the theme of "[c]hanging culture, worldview and relationships" (*ibid* at 176). He notes, "[t]he Elders expressed that Western colonialism altered relationships between women, men, and families in their communities. The Elders expressed that colonial education, including residential and public day schools, were instrumental in shaping negative perceptions of Omushkegowuk identity and culture which led, more or less directly, to a cycle of family and community dysfunction that remains to the present day. It was expressed that the residential schools resulted in the overthrow of social harmony that seriously debased the healthy relationships between men and women. Generally, the participants suggest that the vicious cycle established by the residential and day schools will be broken only when traditional Omushkegowuk cultural values are restored" (*ibid* at 176).

[75] In her dissertation, *Critical Indigenous Legal Theory*, Tracey Lindberg includes a chapter on indigenous women. Placing her text in this chapter is complicated. While she explicitly discusses gender, the insights from that discussion remain disconnected from her dissertation overall (in that she only focuses on gender in the chapter on women) (Tracey Lindberg, *Critical Indigenous Legal Theory* [LLD Dissertation, University of Ottawa, 2007] [unpublished] [Lindberg, *Critical Indigenous Legal Theory*]). Lindberg certainly does not erase women, and pieces that she has published elsewhere are thoroughly attentive to gender (see for example: Tracey Lindberg, "Not My Sister: What Feminists Can Learn about Sisterhood from Indigenous Women" [2004] 16 CJWL 342 [Lindberg, "Not My Sister"]).

teachings. 'Tradition' here would be used to assert complementary and balanced gender roles, and would be taken up as a means of resistance to colonial violence and interpretations. I challenge this interpretation as oversimplified and suggest that discourses about 'complementarity' need to be critically engaged with as they do not exist outside of ongoing power dynamics. It is crucial to keep in mind the context in which these materials are produced and received, and not to romanticize the past or gender relations more broadly.[76] Although Cree principles inform the materials, these principles cannot simply be abstracted from the patriarchal realities in Cree communities. In her work on indigenous feminism, St. Denis emphasizes that "Aboriginal people live for the most part in a western capitalistic and patriarchal context; it is that social, economic and political context that irrevocably shapes our lives, and denying this or minimizing these conditions will not change it."[77] In the following section on women's presence, I discuss the importance of examining the relationship between power and tradition.

4.3 Women's Presence

> Being a Cree man, I primarily interviewed grandfathers, that is, I interviewed four male Elders as sources of information; however, I also interviewed two grandmothers in this research. It is safe to say that in the culture of the Cree it seems natural that a man is inclined to request *Kiskâyetumoowin*, (knowledge) from his grandfathers, and the same is true for Omushkegowuk women who tend to request knowledge from the grandmothers. This view has been expressed by Elders that I have conversed with in and out of this study who consider that different roles between men and women exist in Omushkegowuk culture. For example, Dennis, a participant in this study stated that: '*Our mother was our first*

[76] Green, "Taking Account," *supra* note 4; LaRocque, "Métis and Feminist," *supra* note 4; Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Doctor of Philosophy dissertation, University of Victoria, 2009) [unpublished] [Napoleon, *Ayook*]; Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Canada's Indigenous Constitution*].
[77] St. Denis, "Feminism is for Everybody," *supra* note 37 at 47.

> *teacher, healer, and counsellor. She fed us, doctored us, and made us happy. As we grew older, depending on whether we are male or female, our education was turned over to our uncles or aunts, our sisters or brothers, our older brothers or sisters, our grandparents*.'[78]

Hansen asserts that it is culturally appropriate in a Cree context, for men to learn from men, and women from women.[79] Women can learn a great deal from other women (and men from men); however his approach reinforces rigid norms about gender and dangerously links biology to knowledge, under the language of empowerment and culture. It is crucial to de-naturalize notions of tradition and to ask questions about power.[80] How might Hansen's assertion that Cree people ought to learn from their own gender be interpreted when men are overwhelmingly depicted as broadly holding knowledge, while women appear in connection primarily to specific knowledge related to their bodies and the domestic realm? If men are speaking broadly for, and about, the nation, and if men's experiences and ideas are most commonly valued, then gendered power relations will be perpetuated when young boys are taught that it is natural that they too will get to hold 'men's knowledge' and thus men's privilege. If readers

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[78] Hansen, *Cree Restorative Justice*, *supra* note 73 at 84 [emphasis in original].

[79] McAdam also talks about this idea. She says that men are part of raising children but she only talks about how men help to teach boys certain skills once they are around 12 years old (Sylvia McAdam, *Cultural Teachings: First Nations Protocols and Methodologies* [Saskatoon: Saskatchewan Indian Cultural Centre, 2009] [McAdam, *Cultural Teachings*] at 40). These skills include hunting, learning how to be leaders, and learning how to be fighters. She says that today, "men might focus on teaching boys and young men cultural skills like singing, drumming and Pow wow dancing and teaching their children employment skills that would enhance their communities" (*ibid* at 40-41). Along the lines of learning from one's gender, McLeod extends this to who one can talk to within a family, along gendered lines. While he does not focus on gender in his text, he mentions the following about gender and "Cree socio-linguistic etiquette": "[w]ithin Cree culture, communication between a man and his mother-in-law, and between a woman and her father-in-law, was frowned upon … There are stories that emphasize this taboo against speaking to in-laws. When a wife was in labour, for instance, the husband went to his mother-in-law's house and had to convey the message to a cat in the room; that is, he had to talk to the cat" (*Cree Narrative Memory*, *supra* note 59 at 14). McLeod does not analyze this gendered arrangement or consider how it may or may not be relevant in contemporary contexts.

[80] See for example, LaRocque, "Métis and Feminist," *supra* note 4; Green, "Taking Account," *supra* note 4.

of the materials adhere to this idea that men learn from men, then men would learn that general engagement with law is their domain, that treaty relations are 'men's issues,' and that men should appear more often in the public sphere on behalf of all Cree people.[81] Some might suggest that my critique is simply reflective of a white settler standpoint that fails to acknowledge how the representations I interrogate are the result of colonial influences. In this view, Hansen's argument might be interpreted as insisting on the importance of learning traditional gender roles from 'appropriately' gendered teachers. In response to this, it is necessary to reiterate that the materials present themselves as representing traditional teachings about Cree law and are presented as empowering for Cree people. It is important to critically analyze how knowledge gets linked to particular bodies in discussions about tradition. Indeed Borrows emphasizes how traditions can be a double-edged sword: "[o]n the one hand, traditions can be positive forces in our communities if they exist as living, contemporary systems that are revised as we learn more about how we should live with one another. On the other, traditions can be destructive if they become static and frozen in their orientation, interpretation, and application."[82]

When considering all 11 resources, Cree women appear in ways that are quite different from men, and I argue, are also quite limited. Boys and men are represented as hunters,[83] as assertive,[84] at times as aggressive and violent,[85] as

[81] People will of course engage with materials in different ways and not necessarily follow what is being asked of them as a reader. It is still crucial to examine what is being asked of Cree citizens though, in educational materials on revitalization and decolonization. Though there will be multiple interpretations of the educational materials.
[82] Borrows, *Canada's Indigenous Constitution*, *supra* note 76 at 8.
[83] Miller et al, *Muskwa*, *supra* note 21 generally; *Path of the Elders, supra* note 6; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 39; Hansen, *Cree Restorative Justice*, *supra* note 73.

risk-takers,[86] as skilled with machines and technology,[87] as political representatives of the nation,[88] as traders,[89] as leaders,[90] as chiefs,[91] as spiritual figures and leaders,[92] as providers,[93] as protectors,[94] as travelers,[95] and as employees/workers.[96] Not only are men and boys appearing most often in the materials, they also appear as more complex legal subjects in comparison to women and girls. In *Knowledge Quest* for example, men talk about various topics such as fishing, hunting, trapping, law, politics, government, development, environmental sustainability, education, they run mills, negotiate railway deals, build things, and lead conflict management efforts.[97] They also have families, though are not defined in relation to children (as women are) and have their own

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[84] Miller et al, *Muskwa*, *ibid*; *Path of the Elders*, *ibid.*
[85] While men are not the focus of *Four Directions*, there is a short section on anger in which it seems that men are being referred to and are talked about as using anger to harm others (online: *Four Directions Teachings.com* [Cree Teaching by Mary Lee] <http://www.fourdirections teachings.com/> [*Four Directions*]). Also, although violence is talked about very little in the materials, men are talked about in relation to violence – as those who cause harm to others (Sylvia McAdam, "Sylvia McAdam teachings pt.2," online: <http://vimeo.com/31616141> [McAdam, ILP Lecture 2]).
[86] Miller et al, *Muskwa, supra* note 21 generally. One could also play Kaniskic in a reckless way during *Knowledge Quest*, though it would be deemed as inconsistent with Cree culture, and one would not be able to win the game (*Knowledge Quest*, *supra* note 9).
[87] Miller et al, *Muskwa*, *ibid*; *Path of the Elders*, *supra* note 6; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 39.
[88] Cardinal & Hildebrandt, *Treaty Elders*, *ibid*; *Path of the Elders, ibid*; McLeod, *Cree Narrative Memory*, *supra* note 59.
[89] McLeod, *Cree Narrative Memory*, *ibid*; *Path of the Elders*, *ibid*.
[90] McLeod, *Cree Narrative Memory, ibid*; *Path of the Elders*, *ibid*; Miller et al, *Muskwa*, *supra* note 21; *Wahkohtowin*, *supra* note 33.
[91] McLeod, *Cree Narrative Memory, ibid*; *Path of the Elders*, *ibid*; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 39.
[92] *Ibid*; *Knowledge Quest*, *supra* note 9; Miller et al, *Muskwa*, *supra* note 21; *Wahkohtowin*, *supra* note 33.
[93] McAdam, *Cultural Teachings, supra* note 79 generally; *Knowledge Quest* (Kaniskic referred to as a provider throughout the game), *supra* note 9; Sylvia McAdam, "Sylvia McAdam teachings pt. 1," online: <http://vimeo.com/31653388> [McAdam, ILP Lecture 1].
[94] McAdam, *Cultural Teachings*, *ibid*.
[95] *Knowledge Quest, supra* note 9.
[96] *Ibid*; McAdam, *Cultural Teachings*, *supra* note 79 generally; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 39; McLeod, *Cree Narrative Memory*, *supra* note 59.
[97] *Knowledge Quest, supra* note 9.

identities (for example, they are not referred to as 'the husband of X').[98] While McAdam talks about both men and women as warriors, and as carrying laws,[99] the ways in which women are described as doing these things is often via motherhood. Cree gender roles are described as different from western patriarchal gender roles,[100] however there are interesting patterns in the representations in that they reflect western philosophical dualisms – male/female; active/passive; mind/body.[101]

The mind/body dualism (which cannot be disconnected from related dualisms noted above) is particularly evident in the sample. Women appear most often through discussions about motherhood (and connectedly their bodies) and 'women's issues.' While Cree women's embodiment is framed as empowering, rather than constraining, I argue here that assertions about tradition, women's bodies, and power require critical consideration, in relation to both Cree norms and patriarchal norms as they circulate in representations of Cree law. I turn now to the remaining five educational resources – *Four Directions*, Lindberg's dissertation, McAdam's *Cultural Teachings*, *ILP Lectures*, and *Video Series* – that explicitly include women. It is noteworthy that these five resources are by women. Yet whether looking at the materials that exclude women, or the ones that focus on them, when women do appear, they are commonly represented in relation to specific gender roles. Although the materials that focus on women

[98] *Ibid;* Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 39.
[99] McAdam, *Cultural Teachings*, *supra* note 79 generally; McAdam, *Video Series*, *supra* note 67; McAdam ILP Lectures 1 and 2 (*supra* notes 93 and 85 respectively).
[100] See for example, Hansen, *Cree Restorative Justice*, *supra* note 73; Lindberg, *Critical Indigenous Legal Theory*, *supra* note 75.
[101] See Grosz for a discussion on dualisms in western philosophy (*supra* note 1 generally).

directly call for inclusion and respect for women (unlike the materials discussed in the previous section), they still remain phallocentric. *Four Directions* is the only educational resource *about* women in which they are the central focus,[102] yet women are not constituted as representative of legal and political authority and not asserted as representative of Cree citizens in the ways that men are – the women appear as specifically gendered and different from men.[103]

Women are depicted as sacred, embodied subjects who nurture, are gentle, are teachers of the nation, are caring and peaceful, and they are associated with the private realm. I engage with these representations through the subject of motherhood, as mothering and motherhood are both implicitly and explicitly expressed as Cree women's primary means for enacting their citizenship and exercising legal agency.

Women are made central in *Four Directions* through the narration (with a woman's voice) and animation of the words of elder Mary Lee.[104] Humans do not appear often in the animation; however when they do, they are most often represented as gender-specific women.[105] The focus of this resource is on tipi

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[102] *Four Directions*, is the only resource that focuses completely on women (*supra* note 85). McAdam includes discussions about women and gender in her various resources (McAdam, *Cultural Teachings*, *supra* note 79 generally; McAdam, *Video Series*, *supra* note 67; McAdam ILP Lectures 1 and 2 [*supra* notes 93 and 85 respectively]), and Lindberg has one chapter on gender in her dissertation (*Critical Indigenous Legal Theory*, *supra* note 75). However, there are still problems with women's absence and 'gender neutral' discussions in these last four resources.
[103] *Four Directions, ibid*.
[104] Despite the centrality of women in this resource, in the accompanying lesson plans women have completely disappeared from the description of the four directions and the four aspects of the self. It is only in the intermediate and senior lesson plans that women appear, in relation to discussion of the tipi. This does not accurately reflect what is talked about in the content online, which notes that women are associated with the east ("Teachers Resource Kit," online: *Four Directions Teachings.com* <http://www.fourdirectionsteachings.com/resources.html>).
[105] Most of the images are of nature (*Four Directions*, *supra* note 85).

teachings;[106] and Cree women are talked about as mothers, nurturers, teachers, and in relation to their bodies.[107] As Lee explains of the four directions, the east is where "[t]he woman spirit comes from."[108] When describing the east, she talks about birth and babies and the "woman spirit" is linked explicitly to reproduction.[109] The tipi is further described as "a symbol of the women" and Lee emphasizes the importance of everyone learning from women and mothers, and of the importance of honouring women.[110] Yet it is concerning that the only educational resource that focuses on Cree women imagines them primarily as mothers.

The representations of women reinforce the idea that women's bodies are sites of reproduction. This is evident through Lee's description of the "woman spirit" being associated with birthing children.[111] In her online *Video Series*, McAdam talks about women's knowledge in relation to the mossbag teachings,[112] which suggests pregnancy and caring for children (moss diapers are also noted on

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[106] Lee explains, "[t]he tipi teachings, as I call them today, relate to nurturing the four aspects of the self, the spiritual, physical, emotional and mental, which are rooted in the four directions. The tipi is also a symbol of the women, so in honour of my mother and great grandmother and Cree women everywhere, I will share some of these tipi teachings with you" (*Four Directions*, *ibid*).
[107] *Ibid*.
[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid*. The language of honouring is used on the website. *Four Directions* does not take up the idea that only girls should watch this animated website, so as to learn from women, as Hansen suggests. Despite having a general audience though, this resource, which is aimed at children, is clearly emphasizing to students that girls are expected to act in certain ways.
[111] *Ibid*.
[112] McAdam says, "[t]he tipi was given to the women, and the children are to be raised in that lodge, with these laws. And that's the same with the mossbag. The mossbag was given to the women as well, so that they raised their children with the, with the laws. Now, the mossbag, the string that we use, on the mossbag, is about uh, uh, the umbilical cord – the belly button" (Sylvia McAdam, "Mossbag and Womens teachings," online: <http://vimeo.com/34674317> [McAdam, *Video Series*, "Mossbag"]. She notes that the mossbag is tied up similarly in the front, in a way that resembles the pegs on the front of the tipi (*ibid*).

Knowledge Quest as something that one of the women needs).[113] In her book *Cultural Teachings*, McAdam includes a discussion about menstruation and preparing young women to be mothers.[114] Likewise, her online lectures represent women as mothers and mothers-to-be.[115] Lindberg does not take up the language of motherhood in her dissertation; however discourses about women caring for the nation are present through her discussions about taking up traditional gender roles, thus reinforcing the view of women as 'mothers of the nation.'[116]

In her recent work on motherhood, Kim Anderson reflects that while for some, mothering means literally creating the next generation, others imagine it more fluidly.[117] Sunseri, though writing about Oneida women, echoes this idea,

> [a]lthough one understanding of mothering is related to the literal meaning of biological reproduction, mothering also encompasses other roles, such as caring for all the children of one's own clan, caring for the earth, and sharing responsibilities with others for the wellbeing of the community. Hence, because of the broad and inclusionary meaning of the term 'mothering,' there was a possibility for those women who did not biologically produce children to still be regarded and treated as 'mothers of the nation.'[118]

There is an effort to disconnect mothering from birthing here so as to be inclusive; however discourses such as these still rely on a "heterosexist framework" and can be described as "totalizing and exclusionary" because they still make grand

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[113] Health Path, *supra* note 58.
[114] McAdam makes this point generally about First Nations girls. She says, "[w]hen a First Nations' girl reaches puberty there are teachings and practices in place to guide her to womanhood. Traditionally, at this time a First Nations' girl was taken into seclusion by their grandmother or a knowledgeable older woman, usually a relative. A young girl is spoken to extensively about her role as a future mother, leader and partner. Particular attention is paid to the sacred teaching that 'the woman is the home'. Through this teaching the young girl learns the importance of love, honesty, compassion and honour to keep the integrity and strength of the home" (*Cultural Teachings*, *supra* note 79 at 31).
[115] See in particular McAdam, ILP Lecture 2, *supra* note 85.
[116] Lindberg, *Critical Indigenous Legal Theory, supra* note 75.
[117] Anderson, *supra* note 37 at 87.
[118] Sunseri, *supra* note 31 at 72.

assertions about how women ought to engage in citizenship.[119] The materials that I examined approach women's bodies as sites of reproduction but also take up notions of mothering in relation to discourses about women being teachers and holders of specific laws (this will be discussed further in Chapter Five).[120] Yet these 'varied' readings of motherhood are never disconnected from women's bodies as specifically gendered sites of potential reproduction, and as sites through which heteronormative gendered ideology is exercised. Further, these readings are still largely confined within rigid notions of gender roles that espouse femininity and nurturing as central to Cree women's citizenship.

In her writing on Navajo governance and tradition, Denetdale draws attention to the power dynamics involved in relation to nationalism and women's bodies, showing that, "as producers of the coming generations, their bodies are patrolled; they are the biological reproducers and so are referred to as mothers … invoked as cultural symbols and signifiers of the nation."[121] Cultural differences about motherhood do exist, however the use of women's bodies in the name of the nation is consistently perpetuated across cultures.[122] Floya Anthias and Nira

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[119] LaRocque, "Métis and Feminist," *supra* note 4 at 63. Though LaRocque is talking about Anderson's work in her (Anderson's) book, *A Recognition of Being: Reconstructing Native Womanhood*, LaRocque's insights should be extended more broadly to the discussion here. She notes that "stereotypes about traditional knowledge and how this is expected to function in gender roles, usually with inferences that Native women be all-embracing mothers and healers, poses particular problems to those who disagree or practise roles outside of these expectations. Many popular creeds portray Aboriginal women as centrally maternal, nurturing and feminine. Typically authenticated by biology, culture or tradition, such characterizations are widely articulated by academics, writers and policy-makers as well as many community platforms" (LaRocque, *ibid* at 62-63).

[120] McAdam, *Cultural Teachings, supra* note 79 generally, McAdam ILP Lecture 1, *supra* note 93; McAdam ILP Lecture 2, *supra* note 85; McAdam, *Video Series*, *supra* note 67; *Four Directions*, *supra* note 85; Lindberg, *Critical Indigenous Legal Theory*, *supra* note 75.

[121] Denetdale, "Chairmen, Presidents, and Princesses," *supra* note 36 at 10.

[122] Floya Anthias & Nira Yuval-Davis, "Introduction" in Nira Yuval-Davis & Floya Anthias, eds, *Woman – Nation – State* (New York: St. Martin's Press, 1989) 1.

Yuval-Davis describe several ways that women's bodies are enlisted in nationalist projects, including treating women 1) "as biological reproducers" of the nation,[123] 2) as having to engage in relationships in ways that are consistent with cultural norms,[124] 3) as being responsible for maintaining the ideological boundaries of the nation and being "the transmitters of its culture,"[125] 4) as standing in symbolically for the purity and "'honour'" of a nation,[126] and 5) as activists in national struggles (though they note that women are most often perceived as nurturing male activists).[127] Teaching the next generation and maintaining culture is of course crucial, however Anthias and Yuval-Davis' work (along with others) shows that this is a common and particularly gendered project in which women's citizenship is limited to their bodies, mothering, and nurturing.

An emphasis on motherhood not only reinforces an expectation that women will be or will act like mothers, but that Cree women should also enjoy caring for others, as it is a position of cultural pride. In her dissertation, Lindberg advocates traditional gender roles as a means of empowerment. Quoting Beverly Hungry Wolf, she explains,

> '[t]he people of the past thought it a great honour that the women should bear and rear the children, ensuring that there would be people in the future. Equally honourable was the women's work of creating the lodges that made the homes, taking them up and down when camp moved, heating them and providing the bedding and clothing for the household members. In the social life of my grandmothers, a household was judged not only by the bravery and generosity of the man, but also by the kindness and work habits of the woman.'[128]

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[123] *Ibid* at 8.
[124] *Ibid* at 9.
[125] *Ibid*.
[126] *Ibid* at 10.
[127] *Ibid*.
[128] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 75 at 149.

In this description of gender roles, men are praised for their active bravery and abundance, while women are valued for their politeness, orderliness, and cleanliness. These are extremely conservative, normative gender roles, which mirror the dichotomies that sustain western conceptualizations of gender – men as active public agents, and women as well-contained passive, private subjects. Lindberg suggests that women should accept the gendered work that they do (and that is expected of them), as it is connected to family and culture – "[t]he work that women did/do was inseparable from who they were/are as the work was a contribution to the community as a whole."[129] Women are thus expected to care for others and this caring work becomes prescriptive. If women do not engage in this type of gendered work, or do not take pride in it, then the implication is that they are colonized or are judged to be compromising the integrity of tradition and the nation more broadly. Tradition here is used to discipline women in restricting ways though is presented as empowering when shielded in the language of 'authenticity' and 'culture.' Tradition is imagined as both perfect in the past (regarding gender relations) as well as inflexible in the present.

Similarly, the expectation of enjoying motherhood is put forth in *Four Directions* when Lee explains,

> [i]n our language, for old woman, we say, Notegweu. Years ago we used the term Notaygeu, meaning when an old lady covers herself with a shawl. A tipi cover is like that old woman with a shawl. As it comes around the tipi, it embraces all those teachings, the values of community that the women hold. No matter how many children and great grandchildren come into that circle of hers, she always still has room.[130]

[129] *Ibid* at 150.
[130] *Four Directions, supra* note 85.

Women are talked about here as nurturers who have a responsibility to not only care for everyone – "no matter how many" – but to do so in a way that upholds "the values of community."[131] Anderson notes that motherhood can be imagined as oppressive when women alone are made responsible for the care of children.[132] She also emphasizes that the patriarchal contexts in which women are mothers needs to be acknowledged.[133] Anderson reflects, "[m]y worry is that what we celebrate as our responsibility is really a question of overwork for Native women."[134]

McAdam pushes for various understandings of women's roles in *Cultural Teachings*. She asserts that

> [s]ome First Nations' societies were matrilineal and the family line, names, dances, songs and so forth were passed on through the women. First Nations' women were teachers, the givers of life and contributed to the training and selection of the leaders of their community. Women were much more than nurturers; their roles were endless and varied from community to community.[135]

Despite her attempt to show women's various roles, in the educational materials overall (including in McAdam's materials), there are particular notions of morality that "stick"[136] to women's bodies.[137] Via discourses about nurturing,

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[131] *Ibid.*

[132] Anderson, *supra* note 37 at 87. McAdam talks about how both women and men are responsible for a baby when it is in utero. What she is suggesting here is that men need to treat women well, as to not do so will impact the baby (ILP Lecture 2, *supra* note 85). She primarily talks about children and teaching the next generation as women's responsibility though.

[133] See also, Nicole George, "'Just Like Your Mother?' The Politics of Feminism and Maternity in the Pacific Islands" (2010) 32 Australian Feminist Law Journal 77 at 82.

[134] Anderson, *supra* note 37 at 88. Similarly, George notes of the strategic use of motherhood in Pacific women's politics that "such activity has also been subject to some critique with feminist researchers asking if it too easily glosses over … 'the maternal burden'" (*supra* note 133 at 81), and George notes the importance of looking at motherhood claims in relation to the contexts that they would be taken up (*ibid* at 82).

[135] McAdam, *Cultural Teachings*, *supra* note 79 at 41.

[136] Sara Ahmed, *The Cultural Politics of Emotion* (New York: Routledge, 2004) at 90-92 [Ahmed, *Cultural Politics*]. Though Ahmed is focusing on disgust in her work, her overall point that particular ideas stick to certain bodies (e.g. notions of disgust 'sticking' to particular racialized

Cree women are depicted as pure and peaceful. In *Muskwa* for example, in one of the few scenes in which the girl character is featured, she is making tea for Sam and Isaiah and remarks, "[t]his tea should keep us warm."[138] *Four Directions* is presented in a way that is soft (in terms of colours and movement) and gentle (in terms of music and the narrator's voice).[139] Women might also be visually interpreted as angels in *Four Directions*, when the moving animation shows images of women and tipis morphing into one another. They are wearing long white dresses and their sleeves, which look like wings, eventually turn into the flaps at the front of the tipi. The intention is to show that Cree women's bodies and tipis are symbolic of one another (this is discussed further in Chapter Five). It is described how in addition to representing the tipi, the figures "resemble a bird with its wings up when it comes to land;"[140] however the women also appear angelic in their flowing white dresses and arms stretched out to the sky.[141] The imagery, in which these figures are sitting on top of the earth, also depicts connections between women and the earth.[142]

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bodies) is useful here for thinking about how particular discourses about womanhood, which are laden with a particular morality, stick to indigenous women's bodies.

[137] This occurs in both the educational materials in which gender is present and erased.

[138] Miller et al, *Muskwa*, *supra* note 21 at 15.

[139] There are a few exceptions to this gentleness. For example, when discussing how youth might not listen to elders, this is visually accompanied by an image (and sounds) of a thunder and lightening storm, which is overlaid with the colour red ("South" section, online: *Four Directions, supra* note 85 [*Four Directions*, "South"].

[140] It is further explained of the landing bird, "that's another teaching: the spirit coming to land, holding its wings up" ("Tipi Structure" section, online: *Four Directions*, *supra* note 85 [*Four Directions*, "Tipi Structure"]).

[141] "The Centre" section, online: *Four Directions, supra* note 85 [*Four Directions*, "The Centre"].

[142] References to 'mother earth' are found in many of the educational materials (for example, *Four Directions, supra* note 85; Miller et al, *Muskwa*, *supra* note 21; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 39; McAdam, *Cultural Teachings, supra* note 79), implying connections between nature, women's bodies, and nurturing.

Cree women are frequently described as sacred in the educational materials and this is especially prominent in the resources in which women are present. Lee describes, "[i]n the Cree language, the centre, the fire, is iskwuptew. 'Woman' in our language is iskwew, more than one woman, iskwewuk. We were named after that fire, iskwuptew, and that is very powerful, because it honours the sacredness of that fire."[143] When discussing Cree women's participation in the negotiations of Treaty 6, McAdam explains, "[t]heir [the women's] compassion was so sacred, that they were able to see into the generations to come, that they wanted to leave – the children not born yet – they wanted to leave them something. So they said, we will share the land."[144] McAdam often uses the language of sacredness and 'profoundness' when describing Cree women.[145] In *Cultural Teachings* she discusses women as sacred because they can give life and notes that their love for others is so powerful that "when she withdraws it [love], destruction can occur."[146] Connected to these discourses of sacredness are discourses that treat women/mothers as peace-keepers and healers.[147]

Specifically feminine modes of morality are thus taken up when talking about women in the educational materials. I do not mean to suggest that Cree women are not powerful or that spiritual connections and symbolism are unimportant. It is crucial though to recall the discussion from Chapter Three that

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[143] *Ibid.*
[144] McAdam, *Video Series*, "treaties," *supra* note 67.
[145] McAdam, *Video Series*, *supra* note 67; McAdam, *Cultural Teachings*, *supra* note 79; McAdam, ILP Lecture 2, *supra* note 85. In *Critical Indigenous Legal Theory* (*supra* note 75) Lindberg also takes up the language of sacredness to describe women (see for example at 151).
[146] McAdam, *Cultural Teachings*, *ibid* at 42.
[147] *Ibid*. On the *Path of the Elders* website descriptions of the paths, the health path shows an image of Saachiniipiinuko and Waasiabin (mother and child) (Health Path, *supra* note 58). This is an interesting representation of using the image of a mother in relation to healing, given that so few women actually appear on the health path while playing it.

discourses are relational and to ask after what discourses and truths these representations are perpetuating. In her work on western conceptualizations of motherhood (discussed further below), Adrienne Rich describes,

> [t]he institution of motherhood is not identical with bearing and caring for children, any more than the institution of heterosexuality is identical with intimacy and sexual love. Both create the prescriptions and the conditions in which choices are made or blocked; they are not 'reality' but they have shaped the circumstances of our lives.[148]

As discussed in further detail below, women are talked about in relation to traditional gender roles so as to empower Cree women. Yet Denetdale's insights from her research on Navajo beauty pageants are again insightful, as she articulates that notions of "purity, mothering and nurturing," which are framed as 'traditional' and in the name of nationalism, are used to discipline Navajo women in particular ways. Crucially, she explains that,

> when Miss Navajo Nation does not conform to the dictates of ideal Navajo womanhood, she is subjected to harsh criticism intended to reinforce cultural boundaries. Her body literally becomes a site of surveillance that symbolically conveys notions about racial purity, morality, and chastity.[149]

An emphasis on Cree women as central to the survival of the nation is a prominent theme in several of the materials in my sample.[150] Lindberg describes women as the "backbones"[151] of a nation and notes that "[w]omen share that circle of protection and are the frontline in our preservation and defense."[152] Women are also described as teachers of the nation – those who teach children

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[148] Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (New York: W.W. Norton & Company, 1986/originally published 1976) at 42.
[149] Denetdale, "Chairmen, Presidents, and Princesses," *supra* note 36 at 18.
[150] For example, Lindberg, *Critical Indigenous Legal Theory*, *supra* note 75; Hansen, *Cree Restorative Justice*, *supra* note 73; McAdam, *Video Series*, *supra* note 67; *Four Directions*, *supra* note 85.
[151] Lindberg, *Critical Indigenous Legal Theory, ibid* at 154.
[152] *Ibid* at 230.

and future generations.[153] Cree women are indeed crucial to the survival of Cree society (as are Cree men); however the grounds on which they are included and upheld in the materials limits their knowledge and restricts their enactments of citizenship to the domestic sphere. In contrast, Cree men's knowledge is represented as much more broad – as encompassing authority over economics, governance, and law. Hansen argues that, "[t]he Old Ones say that 'the women are the heart of our nations' because women provide the life force for Aboriginal nations."[154] Men too have reproductive capabilities, yet men are not talked about in this way. What would it mean to value Cree women as citizens with expertise and authority in governance and economics based on their humanity in general, rather than just via their bodies? Although women's gender roles are spoken of as honoured, rather than subservient, traditional notions of gender roles are never inherently and necessarily universally empowering for women – it could not be so simple. Norms about appropriate social behaviour will reflect power dynamics in a society and will exclude particular ways of being.

Further, the discourses about Cree women as honoured and central to the Cree nation sit in stark contrast to what is actually going on in many of the materials in my sample, and in stark contrast to the lived realities that Cree women face regarding oppression.[155] For example, as discussed in Chapter One, and as shown in this chapter, systemic social problems exist in that indigenous

[153] See for example, *Four Directions*, *supra* note 85; McAdam, *Cultural Teachings*, *supra* note 79 generally; McAdam, *Video Series*, *supra* note 67. As discussed in Chapter Five, Cree women are talked about in relation to particular gendered knowledge though.
[154] Hansen, *Cree Restorative Justice*, *supra* note 73 at 21.
[155] Sunseri also notes that "we must always distinguish between an ideal conceptualization of empowered mothering and its actual reality" (*supra* note 31 at 132). Although Sunseri acknowledges this need to be realistic in her work, she does also rely on idealized notions of motherhood at times.

women are being marginalized from political and governance structures. The social realities that Cree women face regarding political marginalization, high rates of violence, less access to resources, and pervasive stereotypes that undermine their humanity *should not* be washed over with the language of honouring. To assert that Cree women are being honoured only perpetuates further violence. While one response could be that the above discourses about women as mothers of the nation are needed to challenge these marginalizations, when discourses about honouring are used devoid of context and without critical attention to power dynamics, this challenge is extremely limited. For McAdam, for instance, to talk about women's love as so powerful that "destruction can occur" if she withholds it[156] overlooks lived realities and power dynamics (women cannot just easily change their circumstances by withholding love). Women exercise agency in a multitude of ways and McAdam's idealization overlooks the complexities of power and does little to help address systemic social problems. LaRocque argues that

> [w]omen cannot saddle ourselves with the staggering responsibility of teaching or nurturing the whole world; nor should we assume sole responsibility for 'healing' or 'nurturing' Aboriginal men. To assume such roles is tantamount to accepting patriarchal definitions about the nature and role of women, and it results in assuming responsibility for our oppression and our inequality.[157]

Motherhood, like law, is complex – it involves human relationships, human interpretations and expectations about behaviour; it is difficult work, and it is embedded in cultural and social structures in which both dominant, but also competing power dynamics exist. The lived realities that Cree women face are

[156] McAdam, *Cultural Teachings*, *supra* note 79 at 42.
[157] LaRocque, "Métis and Feminist," *supra* note 4 at 65.

erased by motherhood ideology when it is espoused in fundamentalist and idealized ways. Although Hansen deals with gender sparsely, and uncritically in most of his text, he does note the disjuncture that exists between notions of respecting women and the actual lived realities that Cree women face concerning high rates of violence.[158] Hansen frames Cree women's experiences of gendered violence as coming only with colonialism. But as I have emphasized, the past was not perfect. Also, accounting for Cree women's lived realities should not focus only on violence – the disconnect between the rhetoric that asserts that Cree women are 'honoured' and the realities that they face play out in a multitude of ways, both macro and micro in scale. It is problematic that the educational materials rely on normative representations of womanhood as women's primary way into societal, legal, and cultural engagement. Importantly, a few of the resources discuss violence against indigenous women as a systemic social problem,[159] and this begins to acknowledge the complexity and realities of gendered power dynamics. It is important to also recognize the many other ways that gendered power dynamics shape people's lives, and to move beyond imagining the manifestation of sexism only in relation to violence.

Part of critically engaging with the simplistic representations that motherhood is women's primary way into law, involves considering motherhood as an institution. Motherhood is a significant part of many women's lives, and the

[158] Hansen, *Cree Restorative Justice*, *supra* note 73 at 21. Though not about Cree law, Sunseri also acknowledges this (*supra* note 31 at 142).
[159] Hansen, *Cree Restorative Justice*, *ibid*; McAdam, ILP Lecture 2, *supra* note 85; Lindberg, *Critical Indigenous Legal Theory, supra* note 75. Lindberg also focuses on status when talking about women (*ibid* at ch 4). There is a common tendency in the broader literature about indigenous women to talk about gender predominantly in relation to violence and status. These are two very significant social problems, however they are not the only social problems that are gendered, nor should they be framed as 'women's issues.'

challenges and strengths of mothering are certainly worth discussing – personally, politically, culturally, economically, socially, and in relation to law. But these complex discussions about motherhood are missing here; instead one encounters continual representations and discourses that I argue romanticize motherhood and homogenize the experiences of Cree women. It is useful to return to Rich's work on the institution of motherhood as an analytic tool for thinking further about the representations in the educational materials. Rich differentiates between the institution of motherhood and mothering.[160] As an institution, motherhood limits women in that there are expectations and norms regarding how women's bodies and morality are read. For example, childless women are read as 'barren' and abnormal; women who are mothers should love every moment of it.[161] It is these social expectations about motherhood that limit how women can experience the actual complexities of mothering.[162] Rich maintains that the institution of motherhood emerges in a patriarchal context in ways that work to maintain men's privilege and power, in that women are defined in relation to their bodies and reproduction, whereas in contrast men forge ahead with their individuality regardless of whether they have children.[163] Rich contends that while motherhood as an institution and mothering are distinct, they are also "superimposed on the other: the *potential relationship* of any woman to her powers of reproduction and to children; and the *institution*, which aims at ensuring that that potential – and all

[160] Rich, *supra* note 148 generally.
[161] She says for example, that "[w]oman's status as childbearer has been made into a major fact in her life. Terms like 'barren' or 'childless' have been used to negate any further identity. The term 'nonfather' does not exist in any realm of social categories" (*ibid* at 11).
[162] *Ibid* at 39.
[163] *Ibid* at 13.

women – shall remain under male control."[164] The institution of motherhood dictates that women are responsibilized to care for children, perpetuates a public/private split, and "has alienated women from our bodies by incarcerating us in them."[165]

Rich notes that understandings of motherhood are time and culture specific, and that she is writing about western patriarchal conceptualizations of motherhood.[166] As Andrea O'Reilly explains, "[t]he term motherhood refers to the patriarchal institution of motherhood that is male-defined and controlled and is deeply oppressive to women, while the word mothering refers to women's experiences of mothering that are female-defined and centered and potentially empowering to women."[167] How am I (and others) to read Rich's ideas in relation to Cree notions of motherhood? While it seems that Cree motherhood should not be described as a patriarchal institution, as Cree motherhood is represented as empowering and respectful of women, as I detailed in this section of the chapter, there are actually similarities between patriarchal motherhood and the representations in the educational materials. This is not to say that Rich's conclusions about motherhood seamlessly translate over to Cree contexts – this is not at all the case. However, the analytic framework of examining ideological assertions of motherhood compared to the actual practices of mothering is useful. The idealization of motherhood and the framing of Cree women as primarily

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[164] *Ibid*.
[165] *Ibid.*
[166] *Ibid*. She says, "[a]t certain points in history, and in certain cultures, the idea of woman-as-mother has worked to endow all women with respect, even with awe, and to give women some say in the life of a people or a clan. But for most of what we know as the 'mainstream' of recorded history, motherhood as institution has ghettoized and degraded female potentialities" (*ibid*).
[167] Andrea O'Reilly, "Introduction" in Andrea O'Reilly, ed, *Feminist Mothering* (Albany: State University of New York Press, 2008) 1 at 3 [O'Reilly, "Introduction"].

mothers (biologically or otherwise) requires ongoing critical dialogue about how Cree women's subjectivity and engagements with citizenship are represented. Cree women are defined in relation to their bodies in ways that Cree men are not, and their engagement with law, education, economics, ceremony, and citizenry more broadly is being defined in relation to their bodies in ways that Cree men are not. Motherhood in the materials *can* be read as an institution in that romanticized notions of motherhood are asserted (and imply what 'bad' mothering would be), and erase the actual realities and complexities of mothering.[168] The possibilities of Cree mothering as a site of empowerment are lost when motherhood is represented in simple terms disconnected from social context, and is put forth as ideology and an institution that disciplines Cree women in particular ways.[169] In her work on motherhood in Pacific contexts, George reflects,

> some have also questioned the transformative aspect of the maternal agenda, hinting that it entails a certain reification of values that perhaps need more critical attention. As Shahra Razavi has noted, this form of 'claims-making', legitimised by the idea that women's rights should be

[168] Some of these realities include that motherhood can be tiring and that there can be associated health risks (George, *supra* note 133 at 81).

[169] This disciplining contributes to the policing of women's reproduction. In *Four Directions* for instance, Lee says the following about conception – "[a]nd because that being is identified as a person at conception, the older women taught us how to balance ourselves during that nine-month journey, how to look after ourselves so that journey would not be disrupted" ("East" section, online: *Four Directions, supra* note 85 [*Four Directions*, "East"]. How might a Cree woman go about accessing abortion services in light of this assertion, and predominant ideologies that motherhood is 'culturally appropriate'? George notes that there are tensions between cultural claims to motherhood and reproductive choices, such as abortion (*supra* note 133 at 95). She concludes that the use of motherhood discourse is both empowering and potentially limiting (*ibid*); however, I suggest that discourses that work against indigenous women's reproductive choices should be approached as problematic overall for indigenous women as a group, regardless of individual experiences. Furthermore, although I am focusing on internal gendered dynamics and norms, it is crucial to also note, and differentiate the extreme violence of the external policing of Indigenous women's reproduction. For a discussion on the regulation of indigenous women's reproduction (via sterilization) in Canada, see Karen Stote, "The Coercive Sterilization of Aboriginal Women in Canada" (2012) 36:3 American Indian Culture and Research Journal 117. Stote illustrates how the attempted control of indigenous women's reproduction is part of the colonial efforts to lessen the number of 'Indians' that the state has obligations to (including land and other legal obligations).

> recognised in 'return for certain pre-given responsibilities tied to traditionally ascribed gender roles', may perhaps unwittingly serve the interests of 'paternalists.'[170]

George concludes that mothering can be engaged with complexly, however the sentiment in the last part of her quote is crucial as representations of Cree motherhood are not disconnected from patriarchal realities in Cree communities.

Feminism, broadly speaking, is often seen as at odds with, and detrimental to, indigenous notions of motherhood.[171] Ouellette argues that indigenous cultures imagine motherhood differently than western cultures and that "as mothers and nurturers of their families, Aboriginal women feel it is their duty and responsibility to keep and reinforce former traditional roles of Aboriginal women."[172] She concludes that "[i]t does not seem possible that there will ever be a relationship between Aboriginal women and the feminist movement, because most feminist theories perceive motherhood and its responsibilities as instrumental in women's oppression."[173] It is crucial to respond to several questionable assumptions in Ouellette's argument.

First, her assertion that feminists see motherhood as only a site of oppression is misinformed and perpetuates misconceptions about feminists as

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[170] George, *supra* note 133 at 81.
[171] Grace Ouellette, *The Fourth World: An Indigenous Perspective on Feminism and Aboriginal Women's Activism* (Halifax: Fernwood Publishing, 2002) at 42; Anderson, *supra* note 37 at 81.
[172] Ouellette, *ibid* at 79.
[173] *Ibid* at 90. Similarly Sunseri describes that because motherhood is understood in a different way from 'western' understandings (as patriarchal and submissive), that it is empowering and a means to challenge colonization (*supra* note 31 at 132-133). She does note that motherhood can also be used against women (at 103, 131) though overall Sunseri's work still requires further critical engagement. For example, she contends that "[t]his empowered mothering [one of authority, not subservience] recognizes that when mothers practise mothering from a position of agency rather than of passivity, of authority rather than of submission, and of autonomy rather than of dependency, all mothers and children become empowered" (*ibid* at 132). The social complexities of how Oneida women (and other women) actually go about doing this, *and* have their intentions read in this way, is more difficult than what Sunseri suggests.

being anti-family and anti-children. As introduced with Rich's framework, it is not mothering that is derided in most feminist work, rather it is *motherhood as an institution* that essentializes and constrains women's experiences, subjectivity, and agency as citizens that is treated as oppressive.[174] Feminists have various perspectives on motherhood and feminist literature exists that understands mothering as a site of empowerment.[175] I am not speaking here of maternal feminism or cultural feminism, which share commonalities with the perspective that Ouellette takes and which is similar to the representations in the educational materials. As George describes of cultural feminism, "[t]he aim here was not to challenge the stereotypical qualities allegedly used by men to assign gender difference, but, rather, to re-describe these qualities in ways that provided a renewed validation of the role played by women in society,"[176] such as celebrating women as mothers and peace-builders. Cultural feminism is dangerously detached from social reality and problematically perpetuates essentialisms. In saying that mothering is complexly understood by feminists, I am referring instead to edited collections such as O'Reilly's, in which questions about what feminist mothering might mean are considered, as well as how woman-centered discussions about mothering can be empowering as they push up against ideological conceptualizations of motherhood.[177] Mothering is a complicated site of both oppression and empowerment and these complexities are absent in the educational materials.

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[174] Rich*, supra* note 148 generally.
[175] See Andrea O'Reilly, ed, *Feminist Mothering* (Albany: State University of New York Press, 2008).
[176] George, *supra* note 133 at 83.
[177] O'Reilly, "Introduction," *supra* note 167 at 1-3.

The second problem that I have with Ouellette's statement is that she contends that feminism and indigenous women will not have a relationship together yet Chapter Two clearly demonstrates that many indigenous women do have a relationship with feminism that is meaningfully expressed in ways that promotes intersectional, anti-colonial analyses. Many indigenous feminists raise vital questions about how motherhood is used to limit how indigenous women's subjectivity is imagined and how rhetoric about tradition is used to *disempower* under the guise of self-determination and decolonization.[178] This last point relates to the third critique of Ouellette's assertions, in that she fails to question the complexities of how women's bodies are used in nationalist politics. I have already discussed this above, drawing on Denetdale, and Anthias and Yuval-Davis' work.

There is a nuanced and difficult discussion that needs to take place between various feminist readings of motherhood (including indigenous feminist readings) and the oversimplified representations in the materials. This is not to say that Cree women's enactment of gender is simple or that all Cree interpretations of gender are oversimplified; rather, mothering and gender are poorly represented in the materials, and that the complex relationship between Cree and patriarchal norms, as well as general analyses of power dynamics require further discussion.

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[178] See for example LaRocque, "Métis and Feminist," *supra* note 4; Sunseri, *supra* note 31 at 5; Anderson, *supra* note 37 (though Anderson's work offers some critical discussion it also requires further critical engagement and discussion about romanticizing motherhood She notes for instance that "Indigenous feminism is linked to a foundational principle in Indigenous societies – that is, the profound reverence for life" (Anderson, *ibid* at 81). She further explains that "Old ladies were deemed to be the most appropriate first teachers of hunting because of their experience and wisdom as life givers" (*ibid* at 82).

4.4 Phallocentrism, Heteronormativity, Gender Complementarity, and Tradition: A Critical Discussion

> [A] discernable pattern is already there: Native women are 'honoured' as 'keepers' of tradition, defined as nurturing/healing, while Native men control political power. What concerns me even more is that in the interest of being markers of difference, many non-western women are apparently willing to accept certain proscriptions, even fundamental inequalities. Why is it women who are always the ones to do this? In Canada, much of the rhetoric of Indigenous nationalism is filtered through the language of 'cultural difference' requiring 'culturally appropriate' responses and models.[179]

LaRocque's quote signals the need to examine power dynamics and to ask difficult questions when talking about culture, tradition, and gender. The concepts of phallocentrism, heteronormativity, gender complementarity, and tradition might seem as though they are at odds with one another – the first two being western concepts that are potentially interpreted as having no place in discussions of Cree law and as working against Cree conceptualizations of gender by denying the value of the last two which are often deployed in the name of sovereignty. To describe something as phallocentric identifies how the masculine is constructed as universal (as unmarked), while the feminine is relegated to the particular (as marked).[180] Further, in taking up the term heteronormativity, I aim to challenge rigid conceptualizations of gender that treat males and females, men and women, as opposite halves and the only two genders that make for a 'complete' picture when brought together. As two vital aspects of indigenous feminist legal theory, my hope is that the concepts of phallocentrism and heteronormativity can offer a

[179] LaRocque, "Métis and Feminist," *supra* note 4 at 66.
[180] Grosz, *supra* note 1 at 150.

more nuanced and practical way to discuss the pattern that LaRocque notes,[181] and which is evident in my own findings.

In *Cree Restorative Justice*, Hansen contends that researchers (particularly Cree researchers) who want to engage in analyses of gender in Cree society must take up culturally specific and "appropriate" conceptualizations.[182] He explains,

> [w]hat I want to say is that an Omushkegowuk researcher will base observations on the concepts of woman and man in the appropriate cultural meaning the researcher has been educated in. This will lead to different assumptions about, for example, gender roles and their value within the society observed.[183]

For Hansen (and others), gender is to be approached as "different, yet complimentary (*sic*) roles in our society."[184] The notion of difference as equality[185] or difference as functional (and therefore good) is expressed both directly and indirectly in the materials in my sample.[186] Lindberg, for example, notes that because of gendered colonial violence,[187] there has been a loss of women's presence in indigenous communities. She argues that because gender

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[181] LaRocque, "Métis and Feminist," *supra* note 4 at 66.
[182] Hansen, *Cree Restorative Justice*, *supra* note 73 at 31.
[183] *Ibid* at 30-31.
[184] *Ibid* at 30.
[185] The language of equality can be contentious when applied to gender roles in indigenous contexts. There are scholars who take up the language of equality, such as Hymn, who argues that "[c]omplimentarity is equality. Respect of difference is equality" (Soneile Hymn, "Indigenous Feminism in Southern Mexico" [2009] 2:1 The International Journal of Illich Studies 21 at 25). Also, St. Denis notes the importance of not conflating equality with sameness ("Feminism is for Everybody," *supra* note 37 at 43).
[186] Lindberg, *Critical Indigenous Legal Theory, supra* note 75; McAdam, ILP lectures generally (*supra* notes 93 and 85); McAdam, *Cultural Teachings, supra* note 79 generally; McAdam, *Video Series, supra* note 67; Hansen, *Cree Restorative Justice, supra* note 73; *Four Directions*, *supra* note 85; McLeod, *Cree Narrative Memory, supra* note 59. Likewise, there are scholars who reject the language of equality. For example, Mary Ellen Turpel contends that "First Nations communities, and in particular the community of my heredity, the Cree community, are ones which do not have a prevailing ethic of equal opportunity for men and women in this sense. It is important in the Cree community to understand the responsibilities of women and of men to the community. Equality is not an important political or social concept" (Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" [1993] 6 CJWL 174 at 179 [Turpel, "Patriarchy and Paternalism"]).
[187] She talks about missing and murdered women, and state imposed Indian status (Lindberg, *Critical Indigenous Legal Theory*, *supra* note 75).

roles are functional, when women are missing, societies do not function well, as women are not able to fulfill their gendered obligations and roles.[188] Because Lindberg frames gender roles as a means to, and expression of, citizenship and culture, she advocates that traditional gender roles be taken up as something that is both empowering for women and contributing to decolonization.[189] This sentiment is found consistently in my sample[190] and widely in the literature.[191] I agree with Lindberg that a society in which women are harmed and are physically and politically absent (and this is a multi-societal issue) requires significant change. However I have questions about taking up traditional gender roles as a solution to the impacts of colonization, as well as about Hansen's framing of what is 'culturally appropriate.' Lindberg describes 'functionality' in the following way:

> [i]t is important to note that all of our work was part of a functional and highly specialized interdependency with our men, our families and our nations. Our nations work when we take responsibility for our obligations and contribute meaningfully to the whole. Our interdependence insures our survival; our survival is threatened when we operate alone or are unable to take responsibility for our obligation (fulfill our duties). This sharing of responsibility and obligation ensured that all people's task were equally valued.[192]

Yet Anderson heeds that "[c]alling on traditional ideologies of motherhood is challenging because the relationship between respect for Indigenous motherhood and women's roles in the present day is not straightforward."[193] Motherhood and

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[188] *Ibid* at 151.
[189] *Ibid* at ch 4.
[190] *Ibid*; see also for example: Hansen, *Cree Restorative Justice*, *supra* note 73; McAdam, *Cultural Teachings, supra* note 79 generally; *Four Directions, supra* note 85; McAdam ILP Lecture 2, *supra* note 85; McAdam *Video Series, supra* note 67.
[191] LaRocque, "Métis and Feminist," *supra* note 4 at 62-63.
[192] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 75 at 150.
[193] Anderson, *supra* note 37 at 86.

the obligation to fulfill gender roles would not have been straightforward in the past as well.

Much is missing when traditional gender roles are so easily assumed as a solution to complex social issues, particularly when the framing of the solution relies on notions of the past as something that was pure and perfect.[194] By focusing on colonial violence as the only source of gendered oppression, internal power dynamics (then and now) are overlooked.[195] Traditional gender roles are articulated as having potential to disrupt the sexism that exists in indigenous societies today, by asserting an arrangement premised on balance and complementarity.[196] Ladner describes of gender roles in indigenous societies more generally that

> women were integral members of society in the pre-colonial period … the persistence of this gendered division of labour cannot be equated with inequality, subordination or oppression. Rather, these roles were respected and are recounted with great reverence in the oral traditions … Women were not confined by an absolute gender division, as many *ninawaki* or *sakwo'mapiakikiwan* (manly hearted women) pursued more masculine roles as warriors, hunters and leaders.[197]

Though there is the occasional mention of women as warriors in the materials that I examined,[198] for the most part gender roles are presented in over-simplified ways. Including a substantive discussion about Cree law could complicate and

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[194] LaRocque, "Métis and Feminist," *supra* note 4 at 55, 65.
[195] *Ibid*.
[196] For example, Lindberg, *Critical Indigenous Legal Theory*, *supra* note 75; Ouellette, *supra* note 171 generally; Minnie Grey, "From the Tundra to the Boardroom and Everywhere in Between" in Suzack et al, *supra* note 37, 21; Annette Jaimes-Guerrero, "'Patriarchal Colonialism' and Indigenism: Implications for Native Feminist Spirituality and Native Womanism" (2003) 18:2 Hypatia 58.
[197] Kiera Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13 Australian Indigenous Law Review 62 at 70.
[198] For example, McAdam, *Video Series*, "treaties," *supra* note 67.

add depth to conversations on gender balance.[199] Looking closely at lived practices could also complicate the all too frequent conflation of ideals about gender with reality.[200]

In Hansen's text, for example, he makes many sweeping claims about gender roles that are rigid and seem quite detached from reality. Yet there are disruptions in his data that are significant. For instance he notes of a passage from one of his research participants,

> that although boys were normally taught by men, the understanding of the process (the moose meat) was, of course, also passed on to girls. This is in accordance with holism. Although in general, women processed the food (e.g. making pemmican) that men harvested, girls also learned about the process of hunting, and you can make an educated suggestion that boys also learned about processing the food. Thus there are gender roles in education, but they might not be as restrictive as it looks.[201]

This disruption does not really alter his overall analysis,[202] but it is noteworthy that norms should not necessarily be conflated with practice. Drawing on the work of Nyamu, Napoleon explains,

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[199] For a discussion on substantive application of indigenous laws see Napoleon, *Ayook*, *supra* note 76. See also, Napoleon, "Raven's Garden," *supra* note 36.

[200] Though Napoleon does not focus on gender in *Ayook*, she does emphasize the importance of not just focusing on what people say law is, but also looking at what people do – how they reason, and how they use law (*ibid* at 311-312). Though this might seem a bit strange to apply to textual analysis, there are moments in the texts (for example, with Hansen's, *supra* note 73) in which how people act in their everyday lives complicates idealized principles that are asserted. Ladner also contends that just because women are *supposed* to be treated this way, does not mean that they are (Ladner, *supra* note 197 at 71).

[201] Hansen, *supra* note 73 at 117. Likewise, there are a few moments in the video archive found on the *Path of the Elders* website in which rigid notions of gender roles are challenged (for example, Daisy Turner notes how her husband also knew how to do preserves, "Elders' Stories," *Path of the Elders*, *supra* note 17). In her work on Oneida gender roles, Sunseri maintains that gender 'balance' can mean, similar to what Hansen says, that "it can be acceptable for men to do what are considered women's tasks and vice versa if the overall outcome is the desired equilibrium and holistic wellbeing" (Sunseri, *supra* note 31 at 70). Though it is emphasized in much of the literature that women's tasks are not denigrated in indigenous societies, I contend that it is still reasonable to ask why particular tasks are depicted as the work of women and why others are commonly depicted as the work of men.

[202] Two pages later he emphasizes gender roles as complementary and thus functional (Hansen, *Cree Restorative Justice, supra* note 73 at 119).

> assertions of culture rarely reflect the entire social reality of the cultural group. That is, '[c]ustoms, laws, rituals, symbols, and rigid procedures serve as a cultural framework that attempts to capture and represent social life. Social life is, however, difficult to define due to continuous cultural and social change.'[203]

Norms are incredibly important to pay attention to, as they shape experiences and how one moves (or not) through a given society. However it should not be assumed that all Cree people agree with or act in accordance with normative Cree conceptualizations of gender (or western conceptualizations of gender), that there is a singular Cree conceptualization of gender that everyone agrees upon, or that all Cree people equate 'complementarity' with empowerment.[204] Cree norms are treated as straightforward, yet norms are interpreted, can empower, can oppress, and are not detached from broader power dynamics.[205]

The language of 'culturally appropriate' engagements with gender, while used to try to ensure that culturally relevant conceptualizations and histories are recognized, are used in my sample in ways to assert a particular interpretation of culture which is devoid of discussion, debate, or multiple interpretations. What power dynamics are involved in defining what is 'culturally appropriate'?[206] I have shown that notions of authenticity shut out particular knowledges and perspectives. Indigenous feminism (and likewise, presumably indigenous feminist legal theory) has been deemed culturally inappropriate by many, yet as discussed in Chapter Two, this theoretical tool is very relevant and is embraced by many

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[203] Napoleon, "Raven's Garden," *supra* note 36 at 168.
[204] As Napoleon maintains – "[t]here is no one Aboriginal nation, no one Aboriginal community, and no one Aboriginal approach to sexual orientation and transgender issues" (*ibid* at 151).
[205] For a discussion on norms and law see Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed, *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart Publishing, 2009) 201 [Webber, "Naturalism"].
[206] LaRocque, "Métis and Feminist," *supra* note 4; Napoleon, "Raven's Garden," *supra* note 36 at 168.

indigenous women who are not any less indigenous because they use it. Who gets to say what counts as appropriately gendered behaviour and approaches?[207]

It is vital to ask questions about tradition – not to undermine indigenous sovereignty – but to participate in it by engaging in the important intellectual deliberation that makes Cree society, and other societies, dynamic.[208] In her work on the Navajo nation, Denetdale remarks, "[w]hile it is necessary for Native scholars to call upon the intellectual community to support and preserve Indigenous sovereignty, it is crucial that we also recognize how history has transformed traditions, and that we be critical about the ways tradition is claimed and for what purposes."[209] She raises questions about how western concepts about gender and governance are asserted via 'tradition' "to legitimate claims about appropriate gender roles" – ones in which Navajo women are held to unreasonably high moral standards and rigid notions of womanhood that are reminiscent of Victorian 'ideals' (e.g. chastity), in the name of the nation.[210] Denetdale's interrogation of western ideology present in assertions of Navajo tradition is important, however this type of analysis also risks running into problems around assertions of authenticity, as though there is a particular point in time that can be captured and frozen to represent a nation. Perhaps more useful would be an approach in which questions about *all* traditions can be raised for

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[207] Green, "Taking Account," *supra* note 4 at 27. Altamirano-Jiménez notes that indigenous men are in a dominant position to define what tradition is (*supra* note 31 at 129). For example, she describes of politics in Nunavut that the discourse of Inuit men as providers was taken up by men so as to fight against equal employment opportunities for women (*ibid at* 132). While many women resist men's definitions of tradition, and assert otherwise (*ibid* at 129) (though are often not listened to), Denetdale also notes that both men and women perpetuate limiting notions of tradition and gender ("Chairmen, Presidents, and Princesses," *supra* note 36 at 10).
[208] Napoleon, *Ayook*, *supra* note 76; Borrows, *Canada's Indigenous Constitution, supra* note 76.
[209] Denetdale, "Chairmen, President's, and Princesses," *supra* note 36 at 20.
[210] *Ibid* at 17.

discussion, so as to be able to account for traditions changing over time, the complexities of multiple cultural traditions existing, power dynamics, and the ways in which people have resisted particular traditions or attempted to challenge tradition.[211] Smith asks, "is our current relationship to 'tradition,' actually traditional? Or is it the product of colonialism in which any change can seem threatening?"[212] My interpretation of what Smith is saying here, is that tradition has become more inflexible in response to colonial violence, yet this rigid approach to tradition is inconsistent with indigenous social practices.

It is striking that the educational materials considered in this dissertation all rely on a limited dualistic conceptualization of gender (man/woman) and depict only heterosexual relationships.[213] Gender and sexuality are thus rigidly defined as only two genders that conform to inflexible notions that enactments of femininity and womanhood, for example, stem only from biologically sexed female bodies, which are consequently only attracted to male bodies that perform masculinity. It is these depictions of gender and sexuality that are asserted as traditional and empowering in the educational resources. Yet these representations of traditional gender roles *negate* the existence of multiple genders, variously sexed bodies, acting in ways that are gender queer, and desiring others regardless of their sex or enactment of gender. As Napoleon vitally argues,

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[211] See Borrows' work on constitutionalism, John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR 351 [Borrows, "(Ab)Originalism"].
[212] Andrea Smith, "Against the Law: Indigenous Feminism and the Nation-State" (2011) 5:1 Affinities: A Journal of Radical Theory, Culture, and Action 56 at 65 [Smith, "Against the Law"].
[213] Heterosexual relationships are presented in various ways, for example by seeing couples together, through most of the discussions on motherhood which rely on notions of heterosexual sex and relationships, and through stated expectations. For instance, one of the activities in the *Four Directions* lesson plans asks of students, "Do you have a teenage brother who has a girlfriend?" (this question is found in the junior, intermediate, and senior Cree lesson plans, "Teachers Resource Kit," *supra* note 104).

> [i]n the Aboriginal political landscape, there is an absence of voices advocating that sexual orientation and transgenderism are significant Aboriginal issues. Instead, they remain subsumed by continuing political and legal battles over Aboriginal rights and title, formal equality rights as set out in the *Canadian Charter of Rights and Freedoms*, and human rights legislation. Furthermore, in many Aboriginal communities, conservative and Christianized revisionist 'culture' mitigate against acceptance of transgenderism and variety in sexual orientation. Consequently, the discourse is limited, and many gay, lesbian, and transgendered Aboriginal persons are adversely affected, living in silence and isolation, or endangered by violence.[214]

Not only do heteronormative representations exclude a significant number of citizens and perpetuate oppressively limited ways of being, they also overlook the intellectual resources (such as stories, songs, deliberation amongst citizens) that are available in Cree society and law for engaging more complexly with gender and sexuality.[215] Education about Cree law that is heteronormative unfairly excludes citizens and undermines the possibilities of Cree law.

How can critiques of heteronormativity be applied to this analysis, given the emphasis in the materials on Cree law that assert that both women's and men's roles are respected and functional of a larger whole?[216] Or perhaps asked differently, what are the implications of framing heteronormativity as restrictive, when the language of complementarity and functionality are taken up as positive and integral to Cree conceptualizations of gender and Cree society in the materials? Further, might some people suggest that heteronormativity as it operates in settler society has men at the center, whereas Cree approaches to

[214] Napoleon, "Raven's Garden," *supra* note 36 at 149-150.
[215] *Ibid* at 150.
[216] To reiterate, heteronormativity includes heterosexism but goes beyond it to think more broadly about how male and female are depicted as complementary opposites that make for a whole when brought together.

gender treat women as central to the nation?[217] Jaimes-Guerrero uses the term "Native Womanism" to describe this type of centrality of women and she

> advocates for more 'historical agency' in reenvisioning a pre-patriarchal, pre-contact, and pre-capitalist U.S. society, as well as for Native women's self-determination in reclaiming their indigenous (that is, matrilineal/matrifocal) roles that empower them with respect and authority in indigenous governance.[218]

She further claims that "*feminized* subordination of nature, Natives, and women is a manifestation of the denigration of the *female principle*."[219] There are many questions that need to be asked about what the 'female principle' entails, then and now. As Green notes of the praising of women as matriarchs, "[s]uch analyses celebrate an historic, cultural and/or romantic mythic gender construct, while implicitly or explicitly dismissing a feminist critique of the construct or of its contemporary application."[220] The concept of heteronormativity, when read through indigenous feminist legal theory, helps to encourage analyses that ask questions about how gender is being imagined and talked about, and the potential implications of these conceptualizations, be they patriarchal or matriarchal. Further, indigenous feminist legal theory works to disrupt binaries and the hierarchies and oversimplifications that stem from them. This approach no doubt sits uncomfortably in relation to interpretations of gender roles as dual and balanced.

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[217] Lindberg for example notes of traditional gender roles that gender can be talked about in relation to circles, in which men make up one half, and women make up the other half (*Critical Indigenous Legal Theory, supra* note 75 at 180) (though she clarifies that women were autonomous and central [*ibid* at 165]).
[218] Jaimes-Guerrero, *supra* note 196 at 67.
[219] *Ibid* at 68. Fiske also talks about the concept of the 'feminine nation' as a means of political engagement, which I discuss further in subsequent chapters (Fiske, *supra* note 34).
[220] Green, "Taking Account," *supra* note 4 at 25.

McAdam's descriptions of gender in Cree society are framed as traditional and empowering yet they rely heavily on the idea that only two genders exist and that their appropriate roles are to procreate with one another. She attempts to highlight the idea of gender balance and complementarity by describing that two genders can be found in the plant world. In the one example, the 'female' plant is described as "plain" and "it just lays on the ground" while the 'male' part of the plant is "just a plain long stem like this [gestures upwards] and a little white flower" grows on it.[221] Though both are described as plain, McAdam's description plays out a patriarchal heterosexual and heteronormative script of the active phallus and the passive female who "just lays" there.[222] Assertions are made with McAdam's example about what is 'natural,' and although more implicit, the common binary depiction of gender alongside the language of 'natural law' in some of materials also risks reinforcing these assertions.

McAdam gives another example about gender in nature by describing sweetgrass. Her explanation is that "the male sweetgrass, the blade is wider – it's wider. And the female sweetgrass, the blade of the sweetgrass is thinner."[223] This example also plays out normative gender scripts of big, strong masculine males, and thin, delicate females. Gendering plants involves human interpretation – all constructions of gender and sexuality involve human interpretation and should be interrogated and discussed – be they western or indigenous. Too often there is

[221] McAdam, ILP Lecture 2, *supra* note 85.
[222] *Ibid*. She talks about this plant (specifically the roots of it) as one that is used for "male ailments." Interestingly though, she also notes how she likes the taste of the tea that is made from the roots. What she does in practice, suggests that it is not just a plant that is for men (as she asserts when describing the plant's use).
[223] *Ibid*.

little consideration of how gender oppression can and has existed in indigenous societies.[224] While I recognize the importance of speaking to past matrilineal practices, so as to engage in discussion about the importance of Cree women's power and citizenship, matriarchal societies should not then be treated as pure social arrangements. Matriarchal societies are asserted as necessarily good and peaceful because they are woman centered. These interpretations rely on particular normative constructions of gender and overlook messy gendered realities including complexities amongst Cree women.

While some interpretations of traditional gender roles privilege women,[225] others take up gender difference and gendered roles as an acceptable social arrangement based on the reasoning of functionality and difference as empowering.[226] The notion here is that although women do different tasks than men, they are still respected and valued for their work – not denigrated how western women are.[227] I talk about the private sphere more in Chapter Five, however it is worth beginning the discussion here, given the representations of gender in the materials that for the most part place Cree women's 'culturally appropriate' gender roles in relation to the home. Women's primary role as mothers, nurturers, and teachers of the next generation are lauded as positions of respect and past and future empowerment. It is necessary to note that although motherhood is the ground through which Cree women are made visible in some of the materials, it is also the ground for their invisibility in other materials. For

[224] LaRocque, "Métis and Feminist," *supra* note 4 at 55, 65.
[225] See for example, Lindberg, *Critical Indigenous Legal Theory*, *supra* note 75 at ch 4.
[226] Lindberg also emphasizes complementarity, in addition to treating women as the center of indigenous nations (*ibid*).
[227] For example, *ibid*, Hansen, *Cree Restorative Justice*, *supra* note 73.

example, when on the health path in *Knowledge Quest*, the player comes across Saachiniipiinuko, a woman whose daughter, Waasiabin, "has wandered off" while playing.[228] Saachiniipiinuko asks Kaniskic to find her daughter, as she cannot leave the tipi because she must take care of the rest of her children. In this path, Saachiniipiinuko remains firmly wedded to the home.[229] Do women appear so rarely in *Knowledge Quest* because they are in the private realm while Kaniskic is out in the world learning about how to negotiate a treaty? While Lee describes how the home can be a way for Cree women to engage in citizenship (via raising the next generation),[230] drawing on the insights of indigenous feminism, it is important to also ask about how the home or the framing of women's roles in relation to domestic labour excludes women from citizenship.[231] LaRocque contends

> [t]here is an over-riding assumption that Aboriginal traditions were universally historically non-sexist and therefore, are universally liberating today. Besides the fact that not all traditions were non-sexist, we must be careful that, in an effort to celebrate ourselves, we not go to the other extreme of biological essentialism of our roles as women by confining them to the domestic and maternal spheres, or romanticizing our traditions by closing our eyes to certain practices and attitudes that privilege men over women.[232]

Does the celebration of women's 'culturally appropriate' role as being so consistently linked to the private realm serve as a justification for their exclusion?

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[228] Health Path, *supra* note 58.
[229] There are also male characters on this path that are 'stuck' at home when they feel they want to be elsewhere, but they are at home because they are ill, not because it is their gendered obligation to do so.
[230] *Four Directions, supra* note 85. Similarly Anderson talks about motherhood as an authoritative position that provides women with a political voice (*supra* note 37 at 83-84). Though Anderson does attempt to work with lived realities regarding motherhood.
[231] Denetdale contends that in Navajo contexts, gender roles are presently used in a way so as to ensure that "men participate fully in the public sphere while women are relegated to specific and limited participation in the same sphere" ("Chairmen, Presidents, and Princesses," *supra* note 36 at 17).
[232] LaRocque, "Métis and Feminist," *supra* note 4 at 65.

In the materials in which women are absent, domestic roles are not respected.[233] In *Muskwa* for example – a resource (like the others) framed as depicting 'traditional' Cree practices – if the girl character's staying back at camp was respected, then we would see her more often and would learn about how her contributions to their well-being are important and valued. Further, what does it mean to respect and celebrate women's place in the domestic realm when Cree societies have systemic patriarchal social problems?[234] How can this gendered labour be read as a form of resistance?

The materials show phallocentric representations of gender – not ones in which the difference of *everyone* is acknowledged and celebrated. It is women who appear primarily as gendered, and there is an emphasis on *their* difference (with the masculine as a universal signifier) and *their* obligation to take up traditional gender roles. While women's difference is sometimes framed as power, in some of the materials, this power is linked to caring for others.[235] Hansen contends that "[t]he vicious cycle established by the residential schools will be broken only when we restore the cultural values and the customary honour that women held in our traditional societies."[236] Though men are talked about as 'protectors' on occasion in the materials,[237] there is no discussion about what this

[233] And as LaRocque emphasizes, discourses about indigenous women need to move well beyond just 'respect.' She asks, "is 'respect' and 'honour' all that we can ask for?" (Emma LaRocque, "The Colonization of a Native Woman Scholar," in Christine Miller and Patricia Chuchryk, eds, *Women of the First Nations: Power, Wisdom, and Strength* [Winnipeg: University of Manitoba Press, 1996] 11 at 14 [LaRocque, "The Colonization of"]).
[234] See Anderson, *supra* note 37.
[235] Lindberg, *Critical Indigenous Legal Theory, supra* note 75; McAdam, ILP Lecture 2, *supra* note 85; McAdam, *Cultural Teachings*, *supra* note 79 generally; McAdam, *Video Series,* "Mossbag," *supra* note 112; *Four Directions, supra* note 85.
[236] Hansen, *Cree Restorative Justice, supra* note 73 at 22.
[237] McAdam, *Cultural Teachings*, *supra* note 79 at 40.

might mean regarding men changing their behaviour and reflecting on how they move in Cree society compared to Cree women. There is no acknowledgement that Cree traditions regarding gender may not have been static or perfect in the past. Further, the focus is on respecting women, not on interrogating male privilege. Rhetoric about respecting women is really 'nice,' and it ought not to be a pleasant conversation – complex discussions about challenging oppression are messy and require facing difficult realities. It is noteworthy, as LaRocque's quote emphasizes at the start of this section, that *women* are made responsible for addressing their own oppression by taking up roles that I (like LaRocque) argue can often be presented in rigid, limiting ways.[238] Lindberg says that both women and men need to take up traditional gender roles.[239] Not only is this an uneven process in terms of the personal and social circumstances that women (compared to men) will face, but to ask women to potentially change their behaviour, in response to oppression that is not of their own making, is unfair. Lindberg includes a quote in her dissertation that makes women responsible for not only their own behaviour, but also for the behaviour of men:

> '[i]n addition to all the responsibilities already talked about, perhaps the most daunting for woman, is her responsibility for the men – how they conduct themselves, how they behave, how they treat her. She has to remind them of their responsibilities and she has to know when and how to correct them when they stray from those.'[240]

While she acknowledges that what is stated in this quote is "weighty," rather than ask questions about how women are made responsible for their own oppression,

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[238] George also notes that motherhood discourse can sometimes be interpreted in ways that makes women responsible for their own oppression, including that women need to take up traditional gender roles as a response to the violence against them (George, *supra* note 133 at 92-93).
[239] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 75 at 150-151.
[240] Citing Osennontion in *ibid* at 152.

she remarks, "[m]any of the obligations and responsibilities that Indigenous women have are ones which have no translation or comparably situated role in western society."[241] She frames being responsible for men's behaviour as part of women's important roles in governance.[242] Although Lindberg may not intend for her discussion on gender roles to be interpreted this way, the above passages risk implying that women are treated poorly, in part, because they are not being 'traditional' enough.[243] When traditional gender roles are presented in the way that they are in the educational materials – in the name of the Cree nation and decolonization – do Cree women really reap the rewards of citizenship?

4.4 Conclusion

Napoleon notes that "authenticity and therefore identity have become central features in the current aboriginal political struggles relating to land, citizenship and membership, and governance."[244] Notions of authenticity are gendered[245] and this is evident in various ways in the Cree legal educational materials. In this chapter I sought to explain who is included in present-day representations of Cree law, and specifically examined in what ways women are included. I have argued that overall, Cree women (and girls) are included in limited ways in that they are either marginalized in the materials by absence or marginalized by being included primarily as mothers and in relation to rigid conceptualizations of tradition and gender. Drawing on indigenous feminist legal theory, I highlighted how the

[241] Lindberg, *ibid* at 152.
[242] *Ibid*.
[243] In her work on Pacific women's use of maternal discourse, George signals the risk that exists in blaming women for the violence against them when traditional gender roles are treated as a solution to gendered conflicts (*supra* note 133 at 92-93).
[244] Napoleon, "Aboriginal Discourse," *supra* note 4 at 253-254.
[245] *Ibid* generally.

representations require ongoing discussion that asks after how essentialisms are relied on, how phallocentric and heteronormative approaches are perpetuated, and how power dynamics and tradition are deeply entangled. I have argued that the representations of Cree women as mothers do little to displace the male privilege that circulates in many of the materials. That male privilege remains unaddressed and normalized when men appear largely as non-gendered subjects (just humans), while Cree women appear as gendered subjects who are required to enact their citizenship in ways that are connected to their bodies.

Ladner emphasizes the importance of decolonizing gender,[246] so as to ensure that indigenous conceptualizations of gender are used in today's politics. She contends that "[t]hese understandings may have to be rediscovered or they may simply need to be dusted off."[247] In thinking about Borrows and Napoleon's work on engaging in critical discussions about various interpretations of legal, social, and cultural norms,[248] questions regarding indigenous concepts about gender and tradition can and should be asked in that process – "'[t]he strength of a tradition does not depend on how closely it adheres to its original form but on how well it develops and remains relevant under changing circumstances.'"[249] While Cree gender roles have a complicated history, and Cree women's lives are

[246] In addition to thinking about decolonization politics as gendered (Ladner, *supra* note 197 generally).
[247] *Ibid* at 72.
[248] Napoleon, *Ayook*, *supra* note 76; Borrows, *Canada's Indigenous Constitution, supra* note 76.
[249] Katherine T. Bartlett quoted in Borrows, *ibid* at 8. While Borrows draws extensively on various sources, including indigenous laws, to make his important arguments about tradition, this particular quote is from a feminist legal scholar. Though Borrows does not engage in a gendered analysis of indigenous legal theory in *Canada's Indigenous Constitution* (though he has recently begun writing about indigenous laws and violence against women, see John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" [forthcoming] 49:4 Osgoode Hall LJ [Borrows, "Aboriginal and Treaty Rights"]).

complex, these lived details are largely lost in the educational materials. There are many ways that Cree women engage in decolonization practices, and the multiplicity of these practices and possibilities are negated when either 'gender neutral' approaches or rigidly gender specific approaches to womanhood and femininity are taken. As I discuss in further detail in Chapters Five and Six, it is striking how conservative (and Christian) the depictions of Cree women's roles are in the materials that I examined. The materials, whether intentional or not, contribute to disciplining women and their bodies in specific ways in the name of authenticity.

The representations of gender in the resources come at the expense of women, not men. Men are privileged in the materials that focus on men – they are complex citizens, whereas women's knowledges and realities are marginal and excluded. In the materials that focus on women, I have argued that it is again women who carry the cost of the representations, as the discourses about traditional gender roles essentialize, discipline, and constrain women in the ways that they are presented. I have suggested in this chapter that how gender is represented and talked about in the educational materials needs to be more nuanced so as to recognize and include a multiplicity of Cree citizens and intellectual practices. When Cree women's citizenship is limited, how they are included and read as legal agents is impacted. I begin to address this problem in the next chapter.

Chapter Five:
Critical Gendering of Cree Law

> Understanding what Indigenous laws were like one hundred years ago is necessary but not sufficient to make these laws applicable today. Changes in traditional means of communication may be needed to increase legal understanding. These changes are acceptable so long as they are consistent with the tradition's broader principles and in line with the community's contemporary aspirations.[1]

5.1 Introduction

In this chapter I examine Cree law as a site of gender struggle.[2] Joanne Barker emphasizes how the marginalization that indigenous women face, including "sexist discrimination and violence against women within Native communities, demonstrates the urgent need for a much more complex understanding of the relationship between gender and sovereignty than currently dominates Native politics."[3] One of the questions posed in this dissertation is: how are representations of citizenry, legal actors, and Cree legal principles gendered? As noted in previous chapters, I aim to push this analysis beyond a discussion about gender roles as women's means for engaging with Cree law, to take up – as Barker advocates – a more complexly intertwined analysis. Indigenous feminist legal theory approaches Cree law as embedded in, and a product of, power dynamics. To examine Cree law as gendered, requires looking not only at women's agency and resistance but also interrogating the ways in which male power and privilege shape how law is interpreted, used, represented, and how

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[1] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, "Canada's Indigenous Constitution"] at 147 [Borrows, *Canada's Indigenous Constitution*].

[2] This analysis is informed by Smart who approaches law as a "site of power struggles" (Carol Smart, *Feminism and the Power of Law* [New York: Routledge, 1989] at 138 [Smart, *Power of Law*]).

[3] Joanne Barker, "Gender, Sovereignty, Rights: Native Women's Activism against Social Inequality and Violence in Canada" (2008) 60:2 American Quarterly 259 at 264.

gendered legal subjects are imagined and impacted. Cree law is not depicted as gendered in complex ways in the educational materials, though gendered dynamics and norms do unfold in, and shape, the materials. Women are absent in many of the resources, and when they do appear, this is most often in relation to limited representations of gender roles. I argue here for an approach to Cree law that is necessarily, always gendered. Even when principles appear to be seemingly neutral, gendered power dynamics are operating. When approaching Cree law as a site of ongoing gender struggle – one in which sexism must be acknowledged, Cree law can be understood as something that can reproduce and sustain gendered oppression, as well as be a resource for challenging it.[4]

I begin this analysis by first discussing how Cree law is depicted in the educational materials. I then move into a detailed discussion about how Cree law is gendered by examining various aspects of Friedland's legal analytic framework,[5] including discussing how Cree legal processes and principles are gendered in the representations. I end the chapter with a discussion on women's laws.

5.2 Representations of Cree Law

Just as there is not one indigenous legal theory,[6] or indigenous feminist legal theory, there are, and should be, many different ways to approach and talk about

[4] Smart frames law as both a resource and as something that can be oppressive (Smart, *Power of Law, supra* note 2 generally).
[5] Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" [forthcoming] at 18 [Friedland & Napoleon, "Gathering the Threads"].
[6] Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 195 at 202-203 [Christie, "Indigenous Legal Theory"].

Cree law. In this section, I show how Cree law is represented in the educational materials. When considered as a group, the materials start to show some variation regarding interpretations of Cree law. However, there are some discernible patterns, which are discussed thematically below. For example, Cree law is commonly articulated in general ways through discussions about principles and is often represented as being primarily about rules. Another tendency in the materials is to present Cree law as sacred law and natural law. Lastly, Cree law is represented as inclusive, which is problematic given the exclusions that are actually taking place in many of the resources.[7] In Chapter Three, I noted that not all of the materials are explicitly about law and it will become evident in this chapter that all of the materials in my sample, regardless of their focus, are about law. What is not particularly prominent in the public representations of Cree law throughout the sample, but which requires close consideration, is the importance of deliberative law. Disagreement, revisions, and multiple interpretations of Cree law are overwhelmingly absent from the educational materials. This finding is unsettling overall, but is especially troublesome in relation to gender, as this absence of deliberation presents a story about Cree law in which asking questions about power, interpretation, and tradition are not part of educational and legal engagement. Questions can of course be asked about the educational materials and they serve as important starting points for discussion. However why not represent Cree law more complexly from the beginning? It is crucial to emphasize

[7] The materials represent this involvement of community and inclusivity as unique to indigenous laws, however in differing ways many legal orders claim to be inclusive. The assertion of community inclusion in Cree law is complex in that this ideal, as with the inclusive ideals of other legal orders, should not necessarily be conflated with practice (as I show in the discussion below).

that the oversimplified representations of Cree law in the educational materials should not then lead to an interpretation that Cree law itself is simple. The discussion below focuses on *representations* of Cree law.

5.2(a) General Depictions of Cree Law

Most of the resources provide general descriptions of Cree law, in which introductory survey approaches are taken, and legal principles are emphasized. Legal principles are an important part of discussing legal processes and interpretations, however law can come across as very general when framed as being about sets of principles. In *Four Directions* for example, the focus on tipi teachings initially seems to provide a specific way into Cree law.[8] Yet Lee states the principles associated with each pole,[9] and does not discuss them beyond being values that Cree people ought to take up and enact in their life.[10] She does note that "each one holds many teachings, and takes a long time and much experience to truly understand" and what she offers is "a beginning."[11] *Four Directions* is not explicitly about law and it is important to consider if this is also why Lee's discussion is so general. It seems unfair to say that Lee is not talking about the details of law, when she might not even be intending to talk about law! However even if stating principles and values under the framework of cultural teachings,

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[8] Online: *Four Directions Teachings.com* [Cree Teaching by Mary Lee] <http://www.fourdirectionsteachings.com/> [*Four Directions*].

[9] "Tipi Poles" section, online: *Four Directions*, *ibid* [*Four Directions,* "Tipi Poles"]. Lee also describes the meaning of the four directions – east, south, west, and north (*Four Directions*, *supra* note 8). This discussion is important to her (and other's) understanding of Cree law, but it is still focused largely at an abstract level.

[10] *Four Directions,* "Tipi Poles," *supra* note 9.

[11] *Ibid*. Earlier on in the animation she notes, "it is hoped that you [the viewer] will continue on your journey to seek the teachings that you require" ("Centre" section, online: *Four Directions*, *supra* note 8 [*Four Directions*, "Centre"].

discussions about how people take up those teachings in their everyday lives is worth asking about. Further, the same general discussions occur in both the materials that are implicitly and explicitly about law.

Similarly, I anticipated that the discussion about treaties and nation-to-nation relations in *Treaty Elders* could provide a way in to specific, deep discussion about Cree law, however the emphasis in the text is on principles.[12] It is noted in this book that the discussion is intentionally general. The authors explain, "[g]iven the [high] professional level at which these Elders function, they have been reluctant to discuss comprehensively many of the elements that require examination."[13] They further explain that "[t]he Elders were careful to point out that the framework they have presented represents, from their perspective, only the beginning. Much more work needs to be done with the Elders to examine in greater depth and detail some of the theories and concepts that they have outlined in a preliminary process."[14] It is noted in other materials that the resources are purposefully general. In her lectures on Cree law, McAdam points out that she does not have enough time in the span of the lectures to get into a deep discussion about law.[15] Producers of the materials also emphasize that they are providing only information that can be shared – stories that are public or talking about

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[12] Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) [Cardinal & Hildebrandt, *Treaty Elders*].
[13] *Ibid* at 28.
[14] *Ibid* at ix.
[15] Sylvia McAdam, "Sylvia McAdam teachings pt. 1," online: <http://vimeo.com/31653388> [McAdam, ILP Lecture 1]. She notes this also in the Wesakechak video in her *Video Series* (Sylvia McAdam, "Wesakechak," online: <http://vimeo.com/34672485> [McAdam, *Video Series*, "Wesakechak"]). When referring generally to the videos in this series, I will use [McAdam, *Video Series*]. Each video has its own URL, though they can all be found (alongside other videos) on vimeo at: <http://vimeo.com/channels/301066/page:1>; <http://vimeo.com/channels/301066/page:2>; <http://vimeo.com/channels/301066/page:3>.

aspects of ceremonies that the public can know about.[16] McAdam indicates that *Cultural Teachings* is meant to be general so as to not "compromise the integrity of First Nations' knowledge and practices."[17] Likewise, Lindberg is purposefully general in her dissertation and comments that "[p]articularizing our philosophies, understandings and laws in light of Canada's legal history would be foolish."[18]

The generalities found in the materials are for a variety of reasons. Even if the materials were extremely detailed, they would still provide only a small slice of Cree law. Lee notes, "you're never done learning."[19] Misconceptions about indigenous laws as simple can lead to expectations that they can be easily, and shortly explained.[20] No one text (or elder) could explain all of Cree law. Law is more complex than that. Yet I wonder about the addition of detailed discussions, and how they might help to move beyond general conversations about Cree law, which can be misread as Cree law being simple or just about cultural practices. Napoleon and Friedland emphasize the importance of detailed work with

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[16] McAdam, ILP Lecture 1, *ibid*; Sylvia McAdam, "Sylvia McAdam teachings pt.2," online: <http://vimeo.com/31616141> [McAdam, ILP Lecture 2]; McAdam, *Video Series*, *ibid*; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12; Sylvia McAdam, *Cultural Teachings: First Nations Protocols and Methodologies* (Saskatoon: Saskatchewan Indian Cultural Centre, 2009) [McAdam, *Cultural Teachings*]; Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, University of Ottawa, 2007) [unpublished] [Lindberg, *Critical Indigenous Legal Theory*].

[17] McAdam, *Cultural Teachings*, *ibid* at ix. She explains, "[i]n the event the reader is seeking further information on any First Nations' ceremonies, appropriate protocols should be followed" (*ibid*).

[18] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 16 at 4.

[19] *Four Directions*, "Centre," *supra* note 11.

[20] Napoleon and Overstall explain that, "scholarship have focused on the 'rules' or the 'practices' in aboriginal peoples' law. Little attention has been paid to the intellectual processes of law that involve legal reasoning and deliberation, and the interpretation and application of law. From this perspective, it appears as aboriginal peoples did not and do not think, but merely followed rules or engaged in practices. Consequently, aboriginal peoples' law has been called 'simple law for simple societies' while western law became the symbol of civilization" (Val Napoleon & Richard Overstall, "Indigenous Laws: Some Issues, Considerations and Experiences" an opinion paper prepared for the Centre for Indigenous Environmental Resources 2007 at 3).

indigenous laws,[21] which helps to promote transparency so that law can be practically and constructively worked with.[22] Both note that there is little substantive educational work done on indigenous laws and they show how to do this with information that can be made publically available.[23] Napoleon emphasizes,

> legal scholarship about indigenous legal traditions must be substantive – grounded in the actuality of law-in-the-world. This treatment requires a practical and in-depth exploration of how legal decisions are made, how reasoning and deliberation are conducted, how disputes are managed, and how law is recorded, taught, and changed.[24]

She notes that with broad depictions of indigenous laws, principles can end up being stated as rules.[25] As I show in this next section, this tendency is found in the educational materials that I examined.

5.2(b) Law as Rules

Napoleon explains that, "[i]nvariably, the emphasis [when looking at law as rules] is on being and doing, rather than on thinking or the intellectual processes of legal reasoning, interpreting, or application."[26] As stressed in Chapter Two, although

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[21] Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Doctor of Philosophy dissertation, University of Victoria, 2009) [unpublished] [Napoleon, *Ayook*]; Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishnabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] [Friedland, *The Wetiko*]; Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" [forthcoming] [Napoleon & Friedland, "An Inside Job"]; Hadley Friedland "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 [Friedland, "Reflective Frameworks"]; Friedland & Napoleon, "Gathering the Threads," *supra* note 5 generally.

[22] Friedland & Napoleon, "Gathering the Threads," *ibid* at 18.

[23] The information that they look at is 1) already publically available, and 2) they have permission to talk about publically (Napoleon, *Ayook, supra* note 21; Friedland, *The Wetiko*, *supra* note 21; Napoleon & Friedland, "An Inside Job," *supra* note 21; Friedland, "Reflective Frameworks," *supra* note 21; Friedland & Napoleon, "Gathering the Threads," *supra* note 5 generally).

[24] Napoleon, *Ayook*, *ibid* at 95.

[25] *Ibid* at 302-303.

[26] *Ibid* at 323 footnote 22.

looking at rules is an important part of indigenous feminist legal analysis, it goes well beyond this to also examine the reasoning and discourses that shape Cree law and representations of legal subjects. Although I do not engage in specific analyses for accessing and applying indigenous laws in the intricate ways that Napoleon and Friedland do, their encouragement of employing internal legal analyses are important. Internal views of law look at reasoning and processes, whereas external approaches provide descriptions of rules.[27]

One of the ways that rules and behaviour are emphasized in the materials is through the language of 'right' and 'wrong.' For instance, in *Four Directions*, when talking about obedience, Lee says, "[w]e learn by their [elders, parents, guardians, teachers, peers] behaviors and reminders, so that we know what is right and what is wrong."[28] This tidy division of behaviour is treated as straightforward and as informed by culture. Yet what constitutes 'right' or 'wrong' behaviour is fuzzy and when devoid of discussions about reasoning, this fuzziness does not get to surface. While Lindberg uses the language of 'law,' she also uses "codes of conduct," which stresses behaviour as central.[29] She describes how "in a Cree context, there are codes of conduct that govern a person's behaviour. These are directly connected to and dependent upon the relationship you have with the person or nation that you are interacting with. The Cree principle / word related to this code of conduct is called *wahkohtowin*."[30]

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[27] *Ibid* at 50; Friedland, "Reflective Frameworks," *supra* note 21 at 7. Friedland explains that an internal view of law means being able to understand and work with law from within, rather than having to do with identity and being indigenous or not (*ibid* at 29-30).
[28] *Four Directions*, "Tipi Poles," *supra* note 9.
[29] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 16 at 23.
[30] *Ibid*.

There is a tendency in the materials to treat principles as setting out rules, and often these rules are framed in the language of protocol and culture. For instance McAdam describes,

> [t]he principles of First Nations' laws affect and are part of all aspects of First Nations' life including ceremonies and activities. The laws were given [by the creator] to the First Nations' people to follow and to abide by. These laws are the protocols and etiquettes in place to guide and direct people to appropriate access to traditional ethical conduct. These protocols are foundational for the First Nations' people to communicate and live.[31]

The heavy emphasis on behaviour can sometimes lead to slippery discussions in which cultural norms (e.g. about jealousy) are talked about as breaking laws.[32] That aside, while culture shapes law, it can be difficult to get into practical discussions about law when the culture as law/law as culture approach is taken, as McAdam does. It can also be really difficult to ask serious questions about law when it is framed in the language of protocol, which implies that if people do not follow it, then they are causing damage to Cree culture. As noted in the previous chapter, many scholars caution that assertions of tradition and culture are embedded in power relations and can sometimes be oppressive for women.[33]

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[31] McAdam, *Cultural Teachings*, *supra* note 16 at 6.
[32] Sylvia McAdam, "Uncle's four laws," online: <http://vimeo.com/34675421> [McAdam, *Video Series*, "Uncle's four laws"]; McAdam ILP Lecture 2, *supra* note 16.
[33] For example, Emma LaRocque, "Métis and Feminist: Ethical Reflections on Feminism, Human Rights, and Decolonization" in Joyce Green, ed, *Making Space for Indigenous Feminism* (Winnipeg: Fernwood Publishing, 2007) 53 [LaRocque, "Métis and Feminist"]; Verna St. Denis, "Feminism is for Everybody: Aboriginal Women, Feminism and Diversity" in Green, *Making Space*, *ibid*, 33 [St. Denis, "Feminism is for Everybody"]; Jennifer Denetdale, "Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition" (2006) 21:1 Wicazo Sa Review 9 [Denetdale, "Chairmen, Presidents, and Princesses"]; Kim Anderson, "Affirmations of an Indigenous Feminist" in Suzack et al., eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: University of British Columbia Press, 2010) 81; Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Richardson, Imai & McNeil, *supra* note 6, 233 [Napoleon, "Aboriginal Discourse"]. See also Celestine I. Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" (2000) 41:2 Harv Int'l LJ 381; International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, (Geneva, International Council on Human Rights Policy, 2009).

Borrows also importantly emphasizes that rules need to be interpreted in relation to context.[34]

In many of the educational resources, Cree law is treated as something that one simply needs to learn (by listening) and then apply in one's life, and elders are the conduits through which these rules are espoused.[35] *Muskwa* is interesting in its representation of law, in that it includes some glimpses of process at times but also negates it in favour of declaration of rules. After Sam injures the prairie chicken, Raven says, "Muskwa, you are not going to b-b-believe what just happened!"[36] Raven declares, "[t]he consequences are g-grave. They should have never let that prairie chicken suffer."[37] Muskwa responds, "[t]hose kids just broke a natural law. When we hunt, we do it with respect, because that animal is a gift, and we need to be grateful that it's giving up its life for us."[38] Then Raven proclaims, "[t]he Creator won't have it a-a-any other way."[39] His face looks angry when declaring this and his wings are out and his beak is open.[40] There is some discussion in *Muskwa* about legal obligations and responses,[41] but there is also the

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[34] John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR 351 at 355-356 [Borrows, "(Ab)Originalism"].
[35] For example, McAdam, *Cultural Teachings*, *supra* note 16; McAdam, *Video Series*, *supra* note 15; McAdam, ILP Lecture 1, *supra* note 15; McAdam, ILP Lecture 2, *supra* note 16; *Four Directions*, *supra* note 8; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12; *Wahkohtowin – Cree Natural Law*, DVD (Edmonton: BearPaw Media Productions, 2009) [*Wahkohtowin*]; Online: *On the Path of the Elders* <http://www.pathoftheelders.com> [*Path of the Elders*] – specifically *Knowledge Quest*, online: <http://www.pathoftheelders.com/newgame#start> [*Knowledge Quest*].
[36] Greg Miller et al, *Muskwa: Fearless Defender of Natural Law* [Edmonton: BearPaw Legal Education & Resource Centre, second printing 2011] at 6 [Miller et al, *Muskwa*]. *Muskwa* is also available as a PDF online at: <http://www.bearpaweducation.ca/sites/default/files/Muskwa.pdf>).
[37] Miller et al, *Muskwa* at 7.
[38] *Ibid*.
[39] *Ibid.*
[40] *Ibid*.
[41] The text does not use this language.

troublesome approach of 'you must follow the rules,' 'because the Creator said so' 'reasoning.'[42]

Rules "are so easy to substitute for either thought or investigation, that they have drawn the attention of jurisprudes too largely to themselves: to the rules – as if rules stood and could stand alone."[43] Lindberg suggests approaching law in a way in which

> we absolutely begin our rejuvenation discussion with a thorough understanding of where our laws come from, how they have been passed on to us, what our obligations are with regard to them and how and when we tell them are ways in which we accord them the respect that they deserve. Telling them in pure and honest form, giving voice to them in principled ways in accordance with protocol is an anti-colonial act. I hope I am not naïve but hopeful when I say, the rest will follow.[44]

Her questions about that which informs and shapes laws are important, though I do have questions about what "pure" Cree law is or means, and how this idea is used to privilege some perspectives while shutting out others.[45] Practicing Cree law today is complicated by the impacts and present constraints of colonization, yet complexities in using and interpreting Cree law would have also existed in the past.[46] The approach that I take up in this research differs from Lindberg's, as Napoleon's invaluable work on decentralized indigenous legal orders suggests that the rest will not necessarily follow, unless people purposefully engage specifically and practically with indigenous laws.[47] There is a passionate emphasis on principles and rules throughout the educational materials in the sample – so

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[42] It is explained of natural law that "every living thing is connected and when people follow natural law, the environment is healthy" (Miller et al, *Muskwa*, *supra* note 36 at 1).
[43] Karl Llewellyn, "My Philosophy of Law" in *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston: Boston Law Book, 1941) 181 at 189.
[44] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 16 at 335.
[45] *Ibid*.
[46] Friedland & Napoleon, "Gathering the Threads," *supra* note 5 at 1-2.
[47] Napoleon's work is on Gitksan law, though she says that "with care" her ideas could be used for thinking about other decentralized legal orders (Napoleon, *Ayook, supra* note 21 at 294).

much so that the glimpses of process and intellectual reasoning that are in the materials are comparatively disregarded.[48] I have been able to draw out some of the details of law (I do this in the next main section below), though my discussion on Cree law is limited here because of the general representations taken and the depiction of law as principles and rules. These limited representations should *not* be misunderstood to generalize or ascertain that Cree law itself is insufficient as a resource.

5.2(c) Law as Sacred

John Borrows shows that there are various approaches to indigenous laws between legal orders, but also within legal orders.[49] He outlines five sources of law, which show the numerous resources available for indigenous legal reasoning.[50] These sources include: sacred law, natural law, customary law, positivistic law, and deliberative law. With sacred law, the laws of the sacred – for instance the Creator or spirits – are emphasized in terms of promises made to them or guidance from them.[51] Natural laws "may be regarded as literally being written on the earth"[52] and Borrows explains that "[t]his approach to legal interpretation attempts to develop rules for regulation and conflict resolution from a study of the world's behaviour. Law in this vein can be seen to flow from the

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[48] An exception to this is Hansen's work. He does focus on legal processes though I argue that there is still an extremely substantial focus in his work on legal principles. Further, Hansen's work often lacks critical engagement with the principles. For example, he quotes an elder that he interviewed who says that people need to do as they are told – "'*listen and obey*'" (John George Hansen, *Cree Restorative Justice: From the Ancient to the Present* [Kanata: JCharlton Publishing, 2009] at 119 [emphasis in original] [Hansen, *Cree Restorative Justice*]). Hansen does not question this, but rather reiterates it in his analysis, ignoring the importance of interpretation.
[49] Borrows, *Canada's Indigenous Constitution, supra* note 1 at 24.
[50] *Ibid* at 55-56.
[51] *Ibid* at 24-28.
[52] *Ibid* at 29.

consequences of creation or the 'natural' world or environment."[53] Customary law is another source of law – one which people often use to generally describe indigenous laws.[54] However customary law – the "practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them,"[55] is just one source of law. Customary law is discussed in the materials, in part, through sacred law and natural law. Borrows recognizes that the five sources are interconnected, and should not be understood as tidy categories.[56] He notes that "oral tradition often blends the sources of law … and keeps Indigenous legal traditions alive and growing."[57] In terms of positivistic law – authoritative enforcement of rules – Borrows notes that while these exist in indigenous legal orders, an attentiveness to power dynamics and social context is vital, so that those in positions of power are held accountable to community standards.[58] He emphasizes the importance of deliberative law, which is "formed through processes of persuasion, deliberation, council, and discussion"[59] and describes this type of law as very common in indigenous legal traditions.[60] While all five sources of law can be found in the educational materials in varying degrees, Cree law is most commonly represented as being comprised of sources

[53] *Ibid* at 28.
[54] *Ibid* at 51.
[55] *Ibid*.
[56] *Ibid* at 55.
[57] *Ibid* at 58.
[58] *Ibid* at 46-48.
[59] *Ibid* at 35. Borrows emphasizes that "Indigenous law must [also] continue to engage in conversations with other legal traditions to stand any chance of continually being embraced by a sufficient number of people within our communities" (*ibid* at 38). The focus of my research is just on internal legal processes, though it is important to note that these are not separate from other legal orders and that discussions across legal orders are important.
[60] *Ibid* at 35.

and rules of sacred law and/or natural law. Deliberative law, while it exists in Cree legal traditions, is under-emphasized in the educational resources.

The language of 'sacred law' itself is not necessarily used in the materials, but the notion is put forth that Cree laws come from the Creator. McAdam says, "[o]ur laws were very profound, and sacred, and came from the Creator" and she speaks of *manitow wîyinkewna* – "the Creator's laws."[61] Lindberg echoes this idea that "[t]hese laws are not man made and are derived from an authentic and Original source."[62] Similarly, in *Treaty Elders*, it is explained that "the laws First Nations follow are given to them by the Creator and [the elders] firmly emphasized their belief that the starting point of discussions on treaties is their relationship to the Creator."[63] Overall, Cree law is repeatedly discussed as coming from the Creator and as being sacred.[64] Laws are thus framed as given to Cree people and as part of overall spiritual practices and obligations. In the lesson plan summary for *Four Directions*, it is stated that "[t]o traditional indigenous peoples, the world is sacred."[65] Being spiritual is emphasized as part of being Cree, and the lesson plans take up the idea that there are four aspects of the self (spiritual, physical, emotional, and mental), and that "[n]eglect of exercising any one

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[61] McAdam, ILP Lecture 1, *supra* note 15. See also McAdam, *Cultural Teachings*, *supra* note 16 at 8.
[62] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 16 at 18.
[63] Cardinal & Hildebrandt, *Treaty Elders, supra* note 12 at 7.
[64] *Ibid* generally; Hansen, *Cree Restorative Justice*, *supra* note 48 generally; McAdam, *Video Series*, *supra* note 15; McAdam, ILP Lectures 1 and 2 (*supra* notes 15 and 16); McAdam, *Cultural Teachings*, *supra* note 16; Lindberg, *Critical Indigenous Legal Theory, supra* note 16; Miller et al, *Muskwa*, *supra* note 36 generally; *Path of the Elders*, *supra* note 35; *Four Directions, supra* note 8; Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary Times*, (Saskatoon: Purich Publishing, 2007) [McLeod, *Cree Narrative Memory*].
[65] "Teachers Resource Kit," online: *Four Directions Teachings.com* <http://www.fourdirections teachings.com/resources.html>, Junior lesson plan at 1, Intermediate lesson plan at 1, Senior lesson plan at 1.

element leads to an imbalance of the whole in the traditional indigenous view."[66] Sacred law is also evident in the resources through discussions about ceremonies.

The strong emphasis on sacred law de-emphasizes other sources of law. Notions of deliberation or discussion about Cree laws are shut out by discourses that treat Cree laws as unchangeable based on the notion that they are sacred. Cree laws tend to be expressed rigidly as rules that are given by the Creator and therefore must be followed in the educational materials.[67] When laws are depicted as coming entirely from the Creator, Cree laws are always framed as 'good,' though as I demonstrate below, it is important to think about laws as changing and to recognize that they can become harmful if they are not revised and discussed. McAdam detaches humans from laws when she frames Cree laws as static *a priori* rules, and humans as fallible when they are not able to meet these standards.[68]

I do not mean to undermine the prominence and importance of spiritual beliefs, as they relate to Cree law and Cree society more generally. Many sacred stories have within them important legal resources that can be drawn out, discussed, and used.[69] Further spiritual beliefs are deeply meaningful to not only individuals but also shape notions of collective political identity. However the approach that I take is that humans interpret the sacred world – and there are

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[66] *Ibid*.
[67] See McAdam, *Cultural Teachings*, *supra* note 16 at 8; Lindberg, *Critical Indigenous Legal Theory*, *supra* note 16 at 20-21; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12 at 8.
[68] McAdam, ILP Lectures 1 and 2 (*supra* notes 15 and 16); McAdam, *Video Series, supra* note 15. She says, when talking about how all humans should be treated the same, "we are all pathetic as human beings, our ch-, we are so easily, um, swayed, we're infallible, we're, we're troubled people" (McAdam, *Video Series*, "Uncle's four laws," *supra* note 32).
[69] See for example, Napoleon & Friedland, "An Inside Job," *supra* note 21; John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) [Borrows, *Drawing Out*].

multiple interpretations about what constitutes spirituality and what role it does or does not have in Cree people's everyday lives. The materials depict the idea that Cree laws come from the creator as straightforward and uncontested. Spiritual beliefs shape legal orders well beyond Cree laws – all law has cosmological norms that are culturally and legally significant. The challenge with cosmological aspects of law, as Roderick Macdonald highlights, is to resist asserting spiritual beliefs in fundamentalist terms that ignore human interpretation, legal reasoning, evidence, debate, the impacts of laws, and social context.[70] In relation to the bible, he explains that "despite the interpretive choice apparently opened by divergent translations [of the text], today's evangelical fundamentalists see no need of scholastic or contextual referents, whether oral or written, to understand biblical wisdom. A text has a meaning ordained by God, and this original divine intention can be apprehended in literalism."[71] Macdonald's ideas apply here to the representations of sacred law noted above.[72]

Further, Macdonald cautions against approaches to sacred law that include humans as subjects but treat these subjects as "*outside*" of law.[73] His reflections on critical legal pluralism emphasize that "[l]egal subjects are not just law-obeying or law-abiding. They are law-creating, generating their own legal subjectivity and establishing legal order as a knowledge process for symbolizing

[70] Roderick A. Macdonald, "Custom Made – For a Non-chirographic Critical Legal Pluralism" (2011) 26:2 CJLS 301 at 305.
[71] *Ibid*.
[72] Friedland and Napoleon describe how Friedland's legal analytic framework (and generally citation of evidence/information) encourages working with indigenous laws in a way that is transparent, rather than relying on "the authority of one elder, a bald assertion, a story, or flawed historical resources for its legitimacy" ("Gathering the Threads," *supra* note 5 at18).
[73] Macdonald, *supra* note 70 at 310 [emphasis added].

inter-subjective conduct as governed by rules."[74] Placing laws as in the hands of the creator overlooks the complexity of human legal agency as "both law-maker *and* law-applier."[75] It is vital to ask after the complexities of sacred law. Crucially, Napoleon encourages critical engagement with sacred law and explains,

> since laws have to be interpreted by human beings, and law is not just rules, the conception of law as being natural or sacred needs further consideration and discussion. What are the consequences of law being sacred or natural? Who gets to say whether the law has been broken? How can people disagree with sacred law or natural law? Can sacred laws change? Can natural laws change?[76]

Additionally, how can Cree legal subjects who do not believe in the Creator be recognized as whole legal subjects who are not treated as though they are inauthentic or colonized because they hold different beliefs? It is especially pertinent to bring in analyses of power to Macdonald's assertions, as not everyone's law-making is heard and received in the same ways. It is evident with the educational materials that I examined that discourses about sacredness get used to put forth particular interpretations about gender roles, tradition, and women's access to and engagement with law.

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[74] *Ibid* at 310.
[75] *Ibid* [emphasis added].
[76] Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Global Pluralism* (Dordrecht: Springer, 2012) 229 at 234 [Napoleon, "Thinking About"]. See also Napoleon, "Aboriginal Discourse," *supra* note 33 at 246.

5.2(d) Natural Law[77]

Natural law also features prominently in the materials and Cree law is conflated with natural law in a couple of the resources. *Muskwa* for instance, is expressly about natural law. The comic begins,

> Aboriginal people have always lived by natural law.
>
> These laws tell people, young and old, how they should respect the land, the animals, the water and each other.
>
> Natural law says that every living thing is connected and when people follow natural law, the environment is healthy …
>
> … people have enough to eat and the land and animals will flourish for future generations.
>
> Natural law always rules …"[78]

Wahkohtowin is also explicitly about natural law, though as with *Muskwa* other types of law are also prominent such as sacred law and customary law.[79] Natural law is discussed throughout the materials, often in relation to hunting and/or treaty relationships. In the essay that is on the *Path of the Elders* website, it is explained that "fundamental principles or laws that we follow came from the land and animals. The animals, fish and birds gave themselves to us but expected us to acknowledge, respect and honor those who had given life so that we may live."[80] Lindberg also emphasizes that "[l]aws are natural and a reflection of the environments and territories that we as Indigenous citizens came from"[81] and Hansen explains how Cree law is informed by nature and the idea that "'what

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[77] I am drawing here on Borrows' conceptualization of natural law, as discussed in the previous section (laws pertaining to nature). This approach is different from most of the scholarship on natural law, though the meaning of natural law is of course varied and debated.
[78] Miller et al, *Muskwa*, *supra* note 36 at 1. The text is broken up here to reflect how the text is divided in speech cells in the comic.
[79] *Wahkohtowin, supra* note 35.
[80] "History," online: *Path of the Elders* <http://www.pathoftheelders.com/history> at ch 2.
[81] Lindberg, *Critical Indigenous Legal Theory, supra* note 16 at 18.

goes around comes around.'"[82] Hansen's assertion is an example of how notions of natural law are not straightforward. The idea that you get back what you put in becomes extremely unsatisfactory (and neo-liberal, and dangerous) when considering systemic social problems such as sexism, heterosexism, and racism, and the reality that some groups of people never get back what they put in. How can natural law be approached more complexly as a resource for discussing difficult social issues and power dynamics?

5.2(e) Cree Law as Collective

Although there is a strong emphasis in the materials on representing Cree law as rules that come from the Creator and nature, Cree law is also talked about as a collective process that involves kinship, elders, and others in the community.[83] In *Knowledge Quest*, for example, Kaniskic is regularly encouraged to talk to others in the community. This does highlight deliberative aspects of law, however as I discuss below, the challenge with this resource is that there is only ever one 'right' answer or way of being Cree in this game. Hansen also talks about Cree law as a community-based process. He contrasts Cree notions of justice with state ideas about justice and says that "the Cree word for describing the activity of restorative justice '*opintowin*', can be interpreted as a process that 'involves the principles of repairing harm, healing, restoring relationships, accountability, community involvement and community ownership.'"[84] Hansen problematically conflates Cree law with restorative justice in his work (and problematically treats

[82] Hansen, *Cree Restorative Justice*, *supra* note 48 at 98.
[83] See Appendix D.
[84] Hansen, *Cree Restorative Justice*, *supra* note 48 at 4.

Cree law and state law is fully disparate),[85] but that aside, his emphasis on community-based processes is consistent with the rest of the sample. This important aspect of Cree law is discussed in more detail below. At this point, what is useful to point out is that this collectivity is intended to be inclusive, and provides a way for laws to be contextually applied. Yet there are difficulties when looking at the representations, as they rely on generalizations, principles, and rules; power dynamics within communities are often poorly addressed; and the representations are limited in terms of how women are depicted as legal subjects. Collectivity is celebrated at the same time that women are being marginalized in and by the resources. The educational materials do not show the breadth of Cree law but they play out the real challenges that exist in all legal orders – questions about inclusion, oppression, and power.

5.2(f) Missing Representations – Cree Law as Deliberative

All of the educational materials are framed as empowering Cree law and people. Deliberative law does not feature prominently in the resources, and I add this discussion here as a way in for thinking more complexly about the materials. While the resources appear to teach overly simplistic lessons about Cree law, and perpetuate prominent discourses in the field, there are also important complexities that exist within the materials, between the materials, and when engaging in discussion about the materials. In discussing deliberative law, I draw attention to

[85] See Jonathan Rudin regarding the importance of not conflating indigenous laws with restorative justice: "Pushing Back: A Response to the Drive for the Standardization of Restorative Justice Programs in Canada" (Paper delivered at the 6th International Conference on Restorative Justice, Vancouver, BC, 2003), online: <http://www.restorativejustice.org/pressroom/04av/rjstandar disatonrudin>. Rudin explains how indigenous laws, or 'aboriginal justice' programs work internally with indigenous-centered approaches, which is distinct from restorative justice programs tied up with state legal systems.

the interpretation of Cree law as fluid, plural, and involving debate.[86] When looking at deliberation, there is an emphasis on legal reasoning, power, and the intellectual work of Cree law, as the reasoning is revealing of how conflict is being approached, how law is imagined, and how social norms and values are asserted.[87] This approach to law is expressed by some scholars in the field of indigenous law, as well as by scholars in the field of feminist legal studies.[88]

It is necessary to first reflect on how conflict appears in the materials – what sorts of conflicts arise, between whom, and how conflict is approached. I have only a short space here to discuss this, though the discussion on conflict is deepened when examining how Cree law is gendered. Various conflicts are discussed in the resources. Macro social conflicts such as treaty relations,[89] state versus indigenous approaches to law,[90] and resource management[91] are often discussed. To a lesser degree education,[92] suicide,[93] violence against women,[94] and community politics[95] are talked about in some of the resources. Interpersonal

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[86] This approach is informed by the work of Napoleon, *Ayook, supra* note 21 and Borrows, *Canada's Indigenous Constitution, supra* note 1 generally.
[87] Napoleon, *Ayook*, *ibid* at 62.
[88] See for example Margaret Davies & Kathy Mack, "Legal Feminism – Now and Then" (2004) 20 Australian Feminist Law Journal 1 [Davies & Mack, "Legal Feminism"].
[89] See for example, McLeod, *Cree Narrative Memory, supra* note 64; *Path of the Elders, supra* note 35; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12; Sylvia McAdam, "treaties," online: <http://vimeo.com/34674834> [McAdam, *Video Series*, "treaties"]; *Wahkohtowin, supra* note 35.
[90] See for example, Cardinal & Hildebrandt, *Treaty Elders*, *ibid*; Hansen, *Cree Restorative Justice, supra* note 48 generally; Lindberg, *Critical Indigenous Legal Theory, supra* note 16.
[91] See for example, Miller et al, *Muskwa*, *supra* note 36 generally; *Path of the Elders*, *supra* note 35.
[92] See for example, *Path of the Elders*, *ibid*; McAdam, ILP Lecture 2, *supra* note 16.
[93] See for example, Sylvia McAdam, "Suicide," online: <http://vimeo.com/34673969> [McAdam, *Video Series*, "Suicide"]; "How Can Online Gaming Foster Positive Self-Identity?" (4 March 2010 blog entry), online: *Path of the Elders* blog <http://www.pathoftheelders.blogspot.ca/2010/03/how-can-online-gaming-foster-positive.html>.
[94] See for example, Lindberg, *Critical Indigenous Legal Theory*, *supra* note 16 (who talks primarily about violence against women in terms of colonial and external violence); McAdam, ILP Lecture 2, *supra* note 16; McAdam, *Cultural Teachings*, *supra* note 16.
[95] For example, McAdam talks about leadership and corruption (ILP Lecture 2, *ibid*).

conflicts are also seen in the resources, for example between Sam and the girl character,[96] between Cougar and the remaining characters in *Muskwa*,[97] and in *Wahkohtowin* between George Brertton and his boss (this example is discussed in the next section).[98] Conflict commonly appears in the materials as external conflict with non-indigenous peoples, however internal conflicts are also evident. Despite the presence of some internal conflicts, Cree law is regularly framed as being about peace and harmony.[99] What is seldom seen in any one resource, are multiple interpretations of Cree law or that some conflicts can be ongoing.

Knowledge Quest is set up to be a role playing game, in which the player has choices for how to respond to various situations. Kaniskic is presented with pre-scripted responses that he can select, at just about every turn. These 'choices' give the sense that one could take up various interpretations about how best to approach legal situations, however ultimately there is only ever one 'correct' response to be picked. For instance, on the education path, Kaniskic has to pick a canoe, out of three possible choices. An elder is nearby to talk to, before making the selection. If the player chooses to respond to the elder in a belligerent tone, then the elder recommends an unsuitable canoe for properly finishing one's journey. Using an unsuitable canoe not only makes traveling difficult but can also lead to drowning.[100] Additional wrong choices in this game can lead to the demise

[96] Miller et al, *Muskwa*, *supra* note 36 generally.
[97] *Ibid.*
[98] *Wahkohtowin, supra* note 35.
[99] See for example, McAdam, *Cultural Teachings*, *supra* note 16; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12; McAdam, *Video Series, supra* note 15; Hansen, *Cree Restorative Justice, supra* note 48 generally.
[100] Education Path, *Knowledge Quest, supra* note 35 [Education Path].

of one's community.[101] While it is most often obvious what the 'right' answer is (though this might not be the case for younger children playing the game) one of the consequences of how this game is set up is that the player can get caught up in picking the right answer for the sake of moving through the game, rather than actually thinking through what is being discussed. The game appears to accommodate multiple interpretations of law, yet there is only one 'right' way to successfully play the game. There were also times when I wanted to speak, but could not. For example, when speaking with the Acme Boss (who is a white logger) who refuses to leave Kaniskic's land, I had no choice but to select "Goodbye" in response to the following angering statement from the Acme Boss: "[w]ell, I don't respect your sovereignty, and I don't believe I need your permission to cut this forest."[102]

When the acceptance and encouragement of multiple interpretations and perspectives are absent in the educational resources, Cree law can come across as a coherent, uncontested entity. As noted above, there is no one Cree law,[103] and rigid explanations about law as, for example, from the Creator (devoid of human interpretation) can lead to singular, unchanging depictions. In their work on legal methodology and theorizing indigenous laws, Friedland and Napoleon illustrate that "[t]here is not 'one size fits all' approach within or among Indigenous legal traditions. There is a wide variety of principled legal responses and resolutions to

[101] For example, on the Economy Path, *Knowledge Quest, supra* note 35 [Economy Path].
[102] *Ibid*. Similarly, there is some debate in *Muskwa* about Cree law, though ultimately the being that approaches law differently (Cougar) is corrected and in the end, everyone agrees (Miller et al, *Muskwa*, *supra* note 36 generally).
[103] Napoleon, *Ayook, supra* note 21 at 15; Borrows, *Canada's Indigenous Constitution, supra* note 1 at 137-138; Friedland & Napoleon, "Gathering the Threads," *supra* note 5 at 26-30.

harm and conflict available within each legal tradition."[104] Similarly, Borrows emphasizes,

> [w]e must come to see that we are free to modify ourselves and how we are constituted. Our society is not insular, one-dimensional, monocultural, or complete. Relationships can be strengthened as we affirm the overlapping, interacting, and negotiated nature of our traditions through time.[105]

McAdam depicts Cree law as a singular entity in her materials.[106] In *Cultural Teachings* she says of protocol and ceremonies that "[t]o do these teachings correctly and precisely is critical."[107] In her lectures, she treats Cree law as something that simply needs to be transmitted to the next generation. She says to her students,

> [n]ow when you're, when you're listening to me talk, um, what, what's happening, you'll start to feel kind of lethargic, and you're starting to, uh, relax, or, or, think. It's because what I'm teaching you, what you're hearing, is nurturing your mind and your soul. It's nurturing you. It's allowing you to, uh, grow and, and start to connect to different things.[108]

This quote is interesting to think about with interpretation in mind, as it assumes that all of the students will agree with what she says, and thus be nurtured by it. What is important about the lecture style of her discussion though is that it does provide space for students to ask questions, and to engage with McAdam.[109] Crucially, the lesson plans that also accompany two of the resources provide space for discussion to emerge.[110] Though I question how much space really

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[104] Friedland & Napoleon, "Gathering the Threads," *ibid* at 26.
[105] Borrows, *Canada's Indigenous Constitution, supra* note 1 at 21; see also Borrows, "(Ab)Originalism," *supra* note 34 generally.
[106] McAdam, *Cultural Teachings*, *supra* note 16; McAdam, *Video Series*, *supra* note 15; McAdam ILP Lecture 1 and 2 (*supra* notes 15 and 16.
[107] McAdam, *Cultural Teachings*, *ibid* at 12.
[108] McAdam ILP Lecture 1, *supra* note 15.
[109] I discuss this further in Chapter Six.
[110] "Teachers Resource Kit," *supra* note 65 generally; "Teachers," online: *On the Path of the Elders* <http://www.pathoftheelders.com/teachers> ["Teachers," *Path of the Elders*].

exists for dissent when assertions about culture, authenticity, and sacredness are used in the materials in ways that shut out plural ways of being.

It is understandable to a degree that the materials present one view of law, given that people are educating from their own perspective.[111] Taken as a whole, the materials start to show some variation (though are not greatly divergent), which shows the importance of looking at a multitude of resources when learning about Cree law. I do wonder though about the importance of individual resources presenting various Cree perspectives. Certainly there must have been deliberation and debate involved in putting the collaborative resources together.[112] Further, I wonder how discourses about sacredness, tradition, balance, authenticity, and respect are used to legitimate particular interpretations over others.

When various interpretations and internal power dynamics are absent, the messy work of law is missing. Again, there are some difficult subjects that are dealt with in the materials – for instance McAdam talks about suicide,[113] McLeod talks about residential schools,[114] Lindberg talks about missing and murdered women,[115] Hansen talks about banishment in response to wrong-doing,[116] and

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[111] Hansen notes that he is presenting just one approach to law (*Cree Restorative Justice*, *supra* note 48 at 178) and that different communities will take up restorative justice differently (at 5).
[112] The collaborative resources include: *Path of the Elders, supra* note 35; Miller et al, *Muskwa*, *supra* note 36 generally; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12; *Wahkohtowin, supra* note 35; *Four Directions* (regarding the animation, and the project overall), *supra* note 8.
[113] McAdam, *Video Series,* "Suicide," *supra* note 93.
[114] McLeod, *Cree Narrative Memory*, *supra* note 64 at 57-60.
[115] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 16, see ch 4.
[116] Hansen frames banishment as being about healing, rather than punishment. He says, "[a]lthough Western scholars usually interpret sanctions such as 'banishment' or 'execution' to be methods of punishment, in reality these sanctions do not serve to punish but rather function to ensure the survival of the Aboriginal community and this is reflected in our tribal narratives" (*Cree Restorative Justice*, *supra* note 48 generally at 67-68). In Hansen's text he contrasts Cree restorative justice with state law, and I question if his framing of banishment as only healing is a way to frame Cree law as distinct. He notes that historically banishment was effective, but would

several of the resources deal with nation-to-nation relations.[117] However in talking about the difficult work of Cree law, I am also including the difficult intellectual work of reasoning, interpreting, and deliberating with others.[118] In *Four Directions*, Lee notes,

> we should take the youth to see different people. My mother used to say, 'If you only go to one elder all your life, you will only know what that one elder knows.' So expand your wings and learn. Go and listen. You might not agree, but hear how that person is teaching. Hear the teachings from other nations, and remember yours. But don't ever contradict or correct them. Only when you're asked do you share.[119]

On the one hand, Lee emphasizes the importance of having space for multiple perspectives and ideas, yet on the other hand she also shuts down critical engagement by teaching children that they cannot challenge elders. Intellectually, and practically, power dynamics circulate in all relationships and there might be situations in which elders need to be challenged.[120] Transparency and being explicit about one's reasoning is an important part of any legal tradition, so as to try to avoid "the assertion of unquestionable, privileged truths that can arise with fundamentalist trends within societies or communities."[121] In approaching Cree law as plural and dynamic, there is certainly more space for various perspectives, however deliberative law does not then mean that power dynamics are 'evened out' in these discussions and that everyone will necessarily be heard and included.

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generally be less effective today, given that the person being excluded could easily go live amongst others, elsewhere (*ibid* at 164-165).

[117] For example, *Wahkohtowin, supra* note 35; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12; *Path of the Elders, supra* note 35.

[118] Napoleon, *Ayook, supra* note 21; Borrows, *Canada's Indigenous Constitution, supra* note 1 generally.

[119] "South" section, online: *Four Directions, supra* note 8 [*Four Directions*, "South"].

[120] I do not mean to suggest that it should be the responsibility of children to call elders out if something inappropriate or oppressive is said – that should be the work of other adults. Rather I caution against treating elders as deities who can say whatever they please without challenge.

[121] Friedland & Napoleon, "Gathering the Threads," *supra* note 5 at 20.

While agency and resistance are key, it is also crucial to recognize the contexts within which discourses circulate. Napoleon explains, "[o]ne of the most important aspects of indigenous legal traditions is that they enable societies to manage themselves and to express normative collective resolutions. However, *such collective agreements are only ever partial*" as law is an ongoing process and conflict an ongoing reality in any society.[122] Legal discussions and decisions, even when discussed collectively, still have the potential to perpetuate existing power dynamics. Feminist legal scholars draw attention to how gendered power dynamics and sexism can be perpetuated by state law, when some voices, experiences, and subjects are seen as more valid than others. Similarly indigenous legal scholars show how this can occur with state law – that the same power dynamics are merely preserved when certain voices are heard over others. In the section below, I draw on indigenous feminist legal theory, and the spirit of deliberative law, to think further about how Cree law can perpetuate existing power dynamics, but also how it can be used as a resource for challenging sexism.

5.3 Gendering Cree Law

In this section, I begin to connect the discussion on gender from Chapter Four, the above section on how Cree law is represented, and the findings from the legal analytic framework to provide a more detailed discussion on the importance of approaching Cree law as gendered. The framework includes looking at legal processes, responses and resolutions, obligations, rights, and principles.[123] I could write an entire chapter on just one of the educational resources, just one section of

[122] Napoleon, *Ayook, supra* note 21 at 91 [emphasis added].
[123] Friedland, "Reflective Frameworks," *supra* note 21 at 30.

the legal analytic framework, or just one legal concept.[124] Even then, my discussion would not reflect the depth of Cree law. The legal synthesis helps to draw out various aspects of law, as they play out in the educational materials (see Appendix D).[125] Here, I speak across the entire legal synthesis, as I want to show the breadth of what it means to frame Cree law as gendered, and to show that indigenous feminist legal analysis has potential for use at all points in legal analysis.[126] As noted in Chapter One, ongoing foundational work needs to be done in the field of indigenous law. However the depth of my analysis with the framework is limited in a few ways. Because of the patterns discussed above regarding general discussions about law and a heavy focus on the assertion of rules and principles, the legal synthesis could not be 'filled in' with a great deal of depth. Though the synthesis 'steps back' and provides a broader picture in some senses, it should also be able to provide detailed information, and I am not able to do this with many parts of the synthesis. Thus what is presented in Appendix D might appear to be complex – and in many ways it is – however there is a great

[124] Friedland provides an extremely useful, specific analysis in which she examines the *wetiko* concept as a legal concept. She describes, "I have concluded that the *wetiko* concept is multi-faceted, and that the simplest explanation for this complexity is to understand the term *wetiko* as a complex intellectual concept within certain Indigenous societies. The subject matter, the collective reasoning processes and the obligations that are triggered by its use all suggest it is best understood as a *legal* concept. Reconceptualized in this way, the *wetiko* accounts can be re-analyzed and applied as part of certain northern Indigenous legal traditions" (Friedland, *The Wetiko*, *supra* note 21 at 14). Future work on Cree law as gendered would thus need to become specific and deeper, as work in this area builds – taking up the type of analysis that Friedland has done.

[125] As discussed in Chapter Three, not all of the materials are explicitly about law, and the synthesis helps to determine if the resources are about law. The synthesis was applied to all of the materials in the sample. Depending on the focus of the materials, how the synthesis was filled in varied. For example, given that several of the sources spoke broadly to rules, details about legal responses were not available.

[126] My focus is on representation, and thus if I (or others) were more closely examining on the ground practices of law, I would have to take up and revise indigenous feminist legal methodology accordingly.

deal of detail that is also missing. In speaking across the five categories in the synthesis, I am wary of providing a discussion that is too broad, so I focus here instead on a few specific examples from the educational resources, rather than offer a general overview of the entire sample.[127]

Given the findings from Chapter Four, it is necessary to consider Cree law as phallocentric and to examine how the representations privilege a male legal subject (including men's experiences and knowledge). The various aspects of the framework such as Cree legal processes and principles tend to be treated as gender neutral in many of the materials. Importantly, there is also some discussion about women's laws and teachings, however these rely heavily on essentialisms, rigid notions about gender and tradition, and women's legal specificity is predominantly attached to their bodies and the private sphere. In this section, I show how Cree law is gendered in the representations by including both what is said and shown, and what is absent. Indigenous feminist legal theory aims to recognize how law is gendered in interpretations, perceptions, and practices. In most of the examples in this section, I focus on 'gender neutral' representations of Cree law, and apply indigenous feminist legal theory to show how gendered power dynamics need to be made obvious. I analyze women's laws at the end of the chapter because I want to first engage in an analysis that emphasizes how gendered power dynamics play out in all aspects of law, and want to show that Cree legal processes, responses, principles, etc. are not neutral pre-determined intellectual and practical entities that necessarily impact Cree women and men

[127] The previous discussion on gender and general representations of Cree law should provide a solid enough foundation for what is generally happening in the sample, that it is no longer necessary to take up such a broad discussion.

similarly, or can be accessed similarly. It is through the circulation of discourses that truths about law are asserted and constitute the making of law.[128] Likewise, part of constructing human interpretations about gender occurs through law – poststructural "theorists tend to focus upon the way law constructs women – rather than simply reflecting a fixed category that exists prior to the operation of law."[129] From this perspective then, it is necessary to examine how Cree law can operate as a normative disciplinary mechanism that is wedded to contemporary power dynamics and social contexts in which patriarchal and heteronormative oppression are a reality. It is likewise necessary to examine Cree law as a resource through which competing and alternative discourses of resistance emerge.

5.3(a) Cree Legal Processes and Gender

When engaging with the educational materials, drawing on the framework, I considered how legitimate decision-making processes are represented. Of particular focus are the questions of who is depicted as authoritative decision-makers, and what steps are shown for addressing conflict.[130] I was interested in further examining the gender of decision-makers in the materials, and how women and men are involved in legal processes. As Appendix D shows, there are various discussions that could be had here, however in the interest of working with few examples, I focus on how the representation of elders as authoritative decision-makers is gendered.

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[128] See Ahmed on Derrida: Sara Ahmed, "An Impossible Global Justice? Deconstruction and Transnational Feminism" in Janice Richardson & Ralph Sandland, eds, *Feminist Perspectives on Law & Theory* (London: Cavendish Publishing, 2000) 53 at 54 [Ahmed, "An Impossible"].
[129] Janice Richardson & Ralph Sandland, "Feminism, Law and Theory" in Richardson & Ralph *supra* note 128*,* 1 at 4 [Richardson & Sandland, "Feminism, Law"]. See also Smart, *Power of Law, supra* note 2 generally.
[130] Friedland, "Reflective Frameworks," *supra* note 21 at 30.

Overwhelmingly, the elders that appear as characters[131] and teachers in the educational materials[132] are men.[133] Men are depicted as general authorities, and on occasion women appear as specific authorities in relation to 'women's topics.'[134] The details of how often men's knowledge is drawn on was demonstrated in Chapter Four. What is necessary to emphasize here are the implications of representing men as primary authorities in Cree law – as the authoritative speakers for what Cree law is in the educational materials, and in their representations as authoritative decision-makers in the materials.[135] As has been discussed, this results in law being talked about in ways that appear to be 'general' and 'universal' but are actually heavily based on men's experiences. The privileging of men to authoritative positions to speak for the nation, but also to have the power to make decisions, is presented as acceptable or normal.[136] Further, if law is approached as being constructed through discourse and interpretation, then in relying on men's knowledge and ideas, a masculinist version (presented as 'neutral') emerges.[137]

In *Wahkohtowin*, four elders, all of whom are men, discuss what Cree law means to them. They are authoritative not only in terms of their knowledge being sought out to explain Cree law in an educational DVD, but a story by one of the

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[131] For example, in *Knowledge Quest, supra* note 35.
[132] For example, in *Wahkohtowin, supra* note 35; Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12.
[133] An exception to this includes Mary Lee in *Four Directions, supra* note 8.
[134] McAdam is interesting in that she is a woman who does speak generally about law in her resources. She also perpetuates the problem though of speaking of women only in relation to women's issues.
[135] For example, Chief Moonias in *Knowledge Quest, supra* note 35.
[136] Lee, McAdam, and Lindberg try to compel listeners and readers to consider women's roles in Cree law.
[137] Smart, *Power of Law, supra* note 2 generally; Elizabeth Grosz, "Philosophy" in Sneja Gunew, ed, *Feminist Knowledge: Critique and Construct* (New York: Routledge, 1990) 147.

elders works to reaffirm his authority in a particular legal process that he talks about. George Brertton discusses the legal responses that were undertaken to respond to a group of youth who had been found to commit wrongdoings. His discussion emphasizes ceremony as part of the process, and notes that respecting the youths' agency and sense of responsibility was at the core of the legal response. He describes how he took the group of young offenders to Poundmakers for a two day fast.[138] When they were done the fast, there was a sweat lodge ceremony and a pipe ceremony, followed by a feast. It is in his re-telling of what happened at the feast that Brertton's example illustrates his authority as gendered, even though this is not explicitly stated. He recalls that at the feast, the youth very eagerly started getting plates of food and he says,

> my boss, she was a woman there, you know and uh, as soon as she saw these kids taking food you know, she said 'you boys!' and uh, as she done that I looked at her and I went like this [gestures that he put his finger up to his lips to get her to stop talking], you know, and she looked at me and they all stopped and they [the woman?] said 'oh never mind.' So these kids, they just kept taking food, you know, after they finished filling that, their plates they brought me one, they brought one [plate], and then they brought over – they served everybody, even though they were hungry, they were the last ones to serve themselves, you know. And no one, *and no one*, told them to do that [pause] you know? And these kids were the ones that were supposed to be the worst behaviour kids in there. And I told my boss there, I said, 'you just about undone *everything* I tried to do,' I said 'just by that one time trying to discipline them' I said 'these kids' I said, 'we have to be able to learn to give them back responsibility' I said, 'for their own actions' I said.[139]

The discussion is framed in a way that depicts the woman in the story as lacking knowledge and as undermining Brertton's. He tells this story in a way that ensures that his own knowledge and authority prevail and are presented as the 'appropriate' Cree way to teach youth. This is not just a story about his boss

[138] Poundmakers is an addictions treatment center that draws on indigenous approaches to health.
[139] *Wahkohtowin, supra* note 35.

undermining what he was doing – it is a story about his *female* boss undermining his teachings, and the story is conveyed with a tone of annoyance so that the audience receives the message that she was 'out of line.' While not all of the male elders in *Wahkohtowin* describe Cree law in this way, questions should still be asked about how gender is operating in relation to their position as authoritative figures. Further, questions should be asked about why the editors of the DVD felt it appropriate to leave in Brertton's discussion, which consequently ends up normalizing his perspective.

Likewise, it is treated as entirely unproblematic in *Treaty Elders* that the majority of the elders explaining law, are men. Borrows, Napoleon and Overstall emphasize that legal processes need to be recognized as legitimate by the larger collective,[140] and I thus have questions about how representing men as authoritative, as is the case in *Treaty Elders* can be read as legitimate. Napoleon and Overstall note that,

> [i]n non-state aboriginal societies, these decentralized institutions and interactive processes result from the continual exercise of individual and collective agency and collaboration, and will be maintained and adapted as long as they are deemed legitimate by the group.[141]

The challenge however is that what is deemed legitimate or acceptable is not necessarily agreed upon, yet certain perspectives will more easily prevail over others.[142] Lindberg, McAdam, and Lee emphasize the importance of recognizing women as leaders, yet how are their ideas are received if men's knowledge and subjectivity is considered more authoritative? In the framework I asked, what is

[140] Borrows, *Canada's Indigenous Constitution, supra* note 1 (see Chapter 6); Napoleon & Overstall, *supra* note 20 at 3. See also Napoleon, *Ayook, supra* note 21.
[141] Napoleon & Overstall, *ibid*.
[142] See Smart, *Power of Law, supra* note 2 at 4.

the relationship between gender, authoritative speakers, and perceived legitimacy of the process? If men are understood to be representatives that speak for others and who ought to be overwhelmingly in positions of authority, then the process would be deemed legitimate. Or in other words, in a patriarchal context, this arrangement is legitimated. Indigenous feminists however have expressed that the overrepresentation of men in leadership positions in indigenous politics and governance is unjust, and thus a different perspective is found here in which what is seen in the representations regarding the disproportionate presence of male elders, can be read as illegitimate. Law is not disconnected from social context, and when sexism, heterosexism, and male privilege are pervasive social problems in Cree communities, then as shown in Chapter Two, these power dynamics shape Cree law at all levels – from process to the interpretation of principles. Importantly, there are multiple perspectives about what constitutes legitimate Cree legal processes, and gender is an important part of this discussion.

There is a tension in the materials in which the inclusion of the community is emphasized as important, yet men are predominantly represented. How are women to engage in legal processes, when brought in under the language of inclusion, and sometimes the language of women's power, but are then simultaneously confronted with gendered power dynamics and lived realities in which their subjectivity is lesser than? In addition to creating notions of womanhood,[143] law works to also perpetuate notions of masculinity and Smart contends of patriarchal contexts that "there is a congruence between law and what might be called a 'masculine culture' and that in taking on law, feminism is taking

[143] Richardson & Sandland, *supra* note 129 at 4.

on a great deal more as well."[144] She describes state law as "an important signifier of masculine power"[145] and emphasizes that how facts are determined, information is gathered, and law is interpreted, is gendered.[146] Although Smart is talking about state law, her analysis is relevant here, as indigenous feminists have articulated the ways in which sexism permeates indigenous people's everyday lives, including perceptions of politics, decolonization, law, and culture.[147] Many indigenous feminists have emphasized how the aspiration of a feminine culture requires critical engagement and is also not reflective of reality.[148] In drawing on indigenous feminist legal analysis, law is treated as thoroughly and necessarily gendered. The materials showed that Cree legal processes include for instance evidence gathering, consultation, and community engagement (see Appendix D). Feminist legal scholars have amply demonstrated that legal processes include not only gendered dynamics amongst people, but also gendered norms, stereotypes, and perceptions about people's roles, knowledge, and authority. How might these realities impact, for instance, evidence gathering? Patriarchal social norms might play out in different ways in Cree law, however they are playing out, given the current state of gender oppression in Cree communities.

Smart explains that women might not always have difficult experiences with law, but the ways in which law is structured and the discourses that sustain it do not bode well for women.[149] While Cree legal processes should be a place in

[144] Smart, *Power of Law, supra* note 2 at 2.
[145] *Ibid*.
[146] *Ibid* at 21.
[147] See Chapter Two of this dissertation.
[148] *Ibid.*
[149] Smart, *Power of Law, supra* note 2 at 138.

which gender oppression could be discussed and challenged, these possibilities are mitigated when women are depicted as less authoritative, or when the social realities that they face are completely erased by gender neutral approaches. Indigenous feminist legal theory aims to show that the representations of Cree law in the educational resources, which present themselves as legitimate and yet marginalize Cree women, require ongoing discussion and challenge. Legal process involves the making of law, but also the making of gender.[150]

5.3(b) Legal Responses, Resolutions, and Gender

I have already begun to talk about legal responses and resolutions through the discussion on process. In Friedland's framework, she asks, "what are the principles underlying these responses and means for resolving conflict?"[151] Importantly, this emphasizes legal reasoning, and the reasons for responses will be specific to the context and conflict being examined. I focus here on Hansen's work on Cree restorative justice, and in particular on the principle of healing that features so prominently in his work. Hansen discusses various responses to wrongdoing and conflict, such as counseling with elders (so as to learn traditional teachings), ceremonies (such as a sweat lodge ceremony), vision quests, reparations, shaming/ostracizing, healing circles, and historically, banishment, and if absolutely necessary, death.[152] He explains that the reason for taking up

[150] *Ibid* generally; Richardson & Sandland, *supra* note 129 at 4.
[151] Appendix D.
[152] Hansen, *Cree Restorative Justice*, *supra* note 48 generally.

these responses, depending on the context, would always be done in the name of healing and restoration, with the intention to "[repair] harms."[153]

I have questions about how all of these responses impact women and men differently – for instance, as discussed below, responding with ceremony is not straightforward and gender neutral – there are different interpretations about ceremony and many indigenous feminists are critical about how women can be excluded or compelled to dress in particular ways in the name of 'tradition.'[154] Furthermore, at a more implicit level gender is always operating and various power dynamics will not just cease to exist once a ceremony begins.

It is vital to also ask questions about how the legal response of shaming is gendered. Feminist legal scholars have clearly demonstrated that stereotypes, perceptions, and expectations about 'appropriate' gendered behaviour impact legal responses and decisions in ways that reinforce dominant power dynamics and norms regarding gender, sexuality, race, and class.[155] I have drawn on Denetdale's work to show how indigenous women can be shamed via national politics and governance if they do not conform to supposedly traditional gender roles.[156] These dynamics need to be considered in relation to shaming responses. What are the complexities, for example, in using shaming to respond to a scenario in which a man has harassed a woman? Given that sexism is pervasive in Cree societies, it must be asked how men could be effectively shamed when male privilege and violence are normalized. I have raised questions about how Cree

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[153] *Ibid* at 173.
[154] LaRocque, "Métis and Feminist," *supra* note 33 at 63.
[155] This is particularly well-illustrated in feminist legal studies literature on state legal responses to sexual assault, however these insights should be applied to all conflicts.
[156] Denetdale, "Chairmen, Presidents, and Princesses," *supra* note 33 at 17.

ideals about gender and respecting women have limited leverage, and have shown how women can end up getting policed and disciplined via law.

Hansen works to show that legal responses are not just picked arbitrarily – they are selected in line with legal principles and so as to respond to a wrong-doing in the most appropriate way possible for a given community.[157] It is necessary to extend his discussion though, to illustrate that gender operates in all legal responses – not just the ones that are 'clearly' about gendered conflict. For example, in a case of child neglect, a gendered approach would demand a consideration of how women are made responsible for children in ways that are different from men. Further, questions should be asked about the complex social contexts in which women mother. Women are individually judged as 'good' or 'bad' mothers in social contexts in which I have argued mothering as an institution is not supported but rather constrains women alongside other complicated socio-economic realities. When Cree law is attentive to, and critical about gendered contexts, these complexities should be deliberately taken up and accounted for in legal responses, so as to not perpetuate oppression.

One of the legal processes that Hansen focuses on for addressing conflict is healing circles. I want to reiterate that this is just one, of various legal processes available in Cree law. Hansen describes healing circles as restorative, "safe," and "respectful" and the reasoning for using them would be to promote healing.[158] Given that gendered power dynamics are always operating, and do not exist outside of law, healing circles need to be discussed also as sites of gender

[157] Hansen, *Cree Restorative Justice*, *supra* note 48 generally.
[158] *Ibid* at 69.

struggle. This particular example of analyzing gender dynamics in restorative justice processes has been done before,[159] and Hansen acknowledges the difficulty of gendered power imbalances when using circles to address gendered violence. He acknowledges that studies raise concerns "in which enduring power imbalances between victims and offenders are a concern with the use of Aboriginal sentencing circles."[160] Yet he also then frames these critiques as "anti-Aboriginal restorative justice arguments"[161] in which "[t]he arguments against Aboriginal restorative justice are premised on how our original justice systems do not work. Indeed, it is true that there are arrays of examples that show how Aboriginal justice fails, but that is beside the point of this work, which is to show how Omushkegowuk justice works."[162] Hansen does go on to acknowledge that there is no such thing as a "perfect justice system,"[163] and while I recognize his concern in talking about how Cree law does not work, part of talking about law, as Borrows and Napoleon have emphasized, necessarily involves asking questions, and revising law if necessary. There are many ways that Cree law does not work for Cree women, and ignoring this in favour of what works ultimately invalidates Cree law, rather than treating it as dynamic and contextually produced. As Borrows notes, "some Indigenous legal systems are and will be badly

[159] Though, as Napoleon points out, the gender of offenders who decide to use restorative justice is often not acknowledged. Those who use restorative justice programs are most often males (Napoleon, personal correspondence, 3 June 2013). There are many questions that need to be asked about this pattern, and although Hansen is framing Cree law as restorative (rather than focusing on restorative justice programs), it is still important to consider how this dynamic plays out in his work.
[160] Hansen, *Cree Restorative Justice*, *supra* note 48 at 73.
[161] *Ibid*.
[162] *Ibid*.
[163] *Ibid* at 74.

administered. This could hurt those who are subject to them or live close to the jurisdiction, just as Indigenous peoples have been harmed by Canadian law."[164]

Deer shows how power dynamics play out in legal processes through her caution that approaches to healing and peacemaking, in the name of 'restoration,' can end up perpetuating male dominance.[165] She explains,

> [m]any scholars of indigenous law, mostly men, have suggested that one of the solutions to violent crime in Indian country is to develop 'peacemaking' sessions to address criminal behavior. Most of these models purport to be more 'indigenous' than the Anglo-American model because they include talking circles, family meetings, and restorative principles. A Native feminist approach necessarily perceives this construct with a skeptical lens, for it is possible that any system of jurisprudence to play unwittingly into the hands of predators, many of whom use any and all means to excuse, mitigate, or minimize their behavior.[166]

Deer highlights that legal processes are not neutral, and that women may have concerns about safety and re-victimization,[167] coercion,[168] men's criminal behaviour being excused or normalized,[169] responsibilizing women to 'heal' crimes that were not of their own making,[170] and that social change cannot be adequately addressed with legal responses that occur in "isolated forums."[171] Crucially, she notes that "[t]here is a tendency to over-romanticize the peacemaking process as one that can 'foster good relations' and heal victims."[172] In the section below on legal principles, I discuss how the idea of good relations is gendered. Not only can this discourse be used in ways that frame justice as

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[164] Borrows, *Canada's Indigenous Constitution, supra* note 1 at 168.
[165] Sarah Deer, "Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty" (2009) 24:2 Wicazo Sa Review 149.
[166] *Ibid* at 155.
[167] *Ibid* at 158-159.
[168] *Ibid* at 159
[169] *Ibid* at 160
[170] *Ibid.*
[171] *Ibid*.
[172] *Ibid* at 157.

working for everyone, when it might not be, but at its very core this principle disciplines women and men in particular ways.

Although Deer is focused on sexual violence, and I have looked here at healing circles, the questions from her analysis can and should be more broadly extended to other legal processes and responses, and can be applied for thinking about law as necessarily gendered – be it in relation to sexual violence, women's participation in governance, economic development, or trap lines. Borrows writes about the importance of indigenous laws being accessible. He explains, "[l]aws are accessible when people know where to find them, how to learn them, and who to speak to if they have questions about them."[173] While in many ways, Borrows is talking here about the learning of indigenous laws, this also speaks to the use of indigenous laws. Indigenous feminist legal theory asks not only how women are constructed in and impacted differently by Cree law, but also how women and men access law differently. What does it mean to think about the accessibility of Cree law in light of sexism, patriarchy, and heteronormative oppression? How do women access, learn about, use, and benefit from Cree law when decision makers are predominantly men, and as Deer's work shows, legal processes are themselves male-dominated? Contextually specific engagements with law, in which deliberative law is embraced are key for challenging gendered power dynamics.[174]

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[173] Borrows, Borrows, *Canada's Indigenous Constitution, supra* note 1 at 142.

[174] Although Borrows does not focus on gender in his work in *Canada's Indigenous Constitution*, his ideas are useful to think about in relation to gendered contexts and the importance of drawing on feminist legal theory. He describes, "Indigenous peoples' law can become more accessible when it is conveyed in modern forms. Indigenous peoples' cultural circumstances are always in flux, and Indigenous law will not be accessible if this fact is not acknowledged. Understanding what Indigenous laws were like one hundred years ago is necessary but not sufficient to make these laws applicable today. Changes in traditional means of communication may be needed to increase legal understanding. These changes are acceptable so long as they are consistent with the

Intellectually, and practically, indigenous feminist legal theory can help with this work.

5.3(c) Legal Obligations and Gender

The multitude of legal obligations included in Appendix D can all be read as gendered. I focus here on the obligation to share and help others in need, as I found the representations of this obligation to be particularly unsettling in *Knowledge Quest*, and requiring further analysis with gender and power in mind. To discuss this, I draw on *Knowledge Quest* and specifically examine the task given to Kaniskic on the health path. Chief Moonias explains, of this path,

> [l]earning about traditional bush medicine is part of your education as a member of the village. Because we live our lives in relative isolation, every member of the community must learn to use the available resources to create medicines to treat the sick and injured.
>
> Every member of the community is a keeper of traditional medicinal knowledge.[175] They will share that knowledge with you if you are respectful and offer to help your Elders before asking for help yourself. This strategy is called principled negotiation and is effective for identifying the needs of the parties involved and removing roadblocks to accomplishing goals.[176]

Kaniskic asks, "[w]hat must I do?" to which Moonias replies, "[g]o and collect ten samples of medicinal plants that grow in the area. You will have to explore the area, solve small puzzles and talk to NPCs who can help you

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tradition's broader principles and in line with the community's contemporary aspirations. Thus, changing cultural circumstances will lead some Indigenous groups to embed common law or civil law principles in their traditions. If this is the self-determining response of the group, it could appropriately recognize the reality of their normative values in modern terms. Indigenous peoples have experienced other people's values for centuries, and they can be adapted to the extent the community desires them. Infusing Indigenous legal traditions with innovations from other systems does not necessarily negate the authenticity or autonomy of Indigenous traditions … In fact, the careful development of Indigenous traditions that are consistent with ancient values, but relevant in today's circumstances, increases their intelligibility and accessibility" (*ibid* at 147-148).

[175] As noted in Chapter Four, although everyone is depicted as holding knowledge, the majority of characters on this path are men (Health Path, *Knowledge Quest, supra* note 35 [Health Path]).

[176] Health Path, *ibid*.

find the plants you need."[177] Kaniskic replies, "Goodbye, Elder. I'll do my best."[178]

Based on the description above, and from playing this path, it becomes evident that Kaniskic is being asked to fulfill a legal obligation to share with, and help, others who are in need. What is missing in this path though, is any acknowledgement of context, for example, what the internal power dynamics in the community are, what the social context is of the legal actor, and how obligation when stated as legal (and moral) rules can become devoid of reasoning. For instance, at one point on the path, amidst trying to find various medicines for people who are sick, Kaniskic encounters a little girl, Waasiabin, whose doll has been taken by the black bear. The 'lesson' stated at the beginning of the path is to always help elders first. How might this statement be made more complex with power dynamics in mind and with an acknowledgement that some elders might in fact exploit others or treat others poorly? The obligation to help others on this path ends up extending beyond elders, as the way that the game is set up pressures the player to feel compelled to get Waasiabin's doll, even though others are also in need of help. It is one thing to find Waasiabin, as requested by her mother, but to then have to get her doll seems extraneous. When the player does help Waasiabin, she then provides information about medicine.[179]

The obligation put forth on this path that one must always help others first is unreasonable when detached from reality. In Friedland's recent research on Cree law, she emphasizes that this principle of helping others is a responsibility

[177] *Ibid* ('NPC' stands for non-player character).
[178] *Ibid*.
[179] *Ibid*.

only when one is *able* to help.[180] This idea is important to think about in all contexts regarding help. It is also important to examine the legal obligation, as stated in *Knowledge Quest*, when challenging the universal position of the boy player. How are players to make sense of the assertion that one is obliged to always help others before themselves when the person helping is a girl or a woman? Recall the discussion from Chapter Four, in which the obligation to care for others is specifically gendered labour that women do in the educational resources. It was demonstrated that what is sometimes a burden or overwork for women gets framed in the language of tradition (and thus acceptability).[181] In my reading of the healing path, when the gender of the person who is helping is switched, dynamics shift, as women's social contexts, including having less access to resources,[182] and being expected to take care of others, reads the obligation to help in a different way.

This is not to say that the obligation to help others in need is negative – in fact it is quite functional (and beneficial for women) when interpreted in relation to context.[183] I simply aim to ask after the complexities of this obligation with gender in mind – to not oversimplify and to take heed of Friedland's point to help

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[180] Hadley Friedland, "The Accessing Justice and Reconciliation Project Cree Legal Traditions Report" (University of Victoria Law, Indigenous Bar Association, The Law Foundation of Ontario, Truth and Reconciliation Commission of Canada, 2013) [draft] at 36 [Friedland, "Accessing Justice"]. And she notes that if one is not able to help others, then they are in a position to ask for help from others.

[181] Nicole George, "'Just Like Your Mother?' The Politics of Feminism and Maternity in the Pacific Islands" (2010) 32 Australian Feminist Law Journal 77 at 81; Anderson, *supra* note 33 at 88.

[182] Aboriginal Affairs and Northern Development Canada (AANDC), "Aboriginal Women in the Canadian Economy: The Links Between Education, Employment and Income" (fact sheet, 2012), at 1 online: <http://www.aadncaandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/textetext/ai_res_aborig_econ_pdf_1331068532699_eng.pdf>.

[183] See Napoleon and Friedland for a discussion on how to engage with stories for thinking about indigenous laws, in which they focus on stories about hospitality and generosity as important legal resources ("An Inside Job," *supra* note 21).

others only when one is able to. What is particularly important is to engage in discussion that acknowledges internal conflicts and power dynamics. For example, one might not be able to help another, if that individual is exploitative, or does not feel like a safe person to be around. In asserting this legal obligation to share and help in the way that it is in *Knowledge Quest*, Cree law is oversimplified and presented as rules that must be followed in order to be 'properly' Cree. Another obligation noted in *Knowledge Quest*, which gets stated as a rule, is the obligation to keep promises. Interestingly, in the lesson plans, teachers are instructed to "[r]emind students that adults should never ask children to promise to do, or not to do, something that makes the child feel personally uncomfortable. Inform students that they must tell a trusted adult if they feel uneasy about a promise they have been asked to make or keep."[184] The health path could have played out much more usefully had this been a part of talking about legal obligations, rather than treating power as an afterthought in the lesson plans.[185]

5.3(d) Legal Rights and Gender

The language of rights is quite loaded. Rights language in relation to gender in indigenous contexts is often critiqued as a western approach, yet Anderson poignantly responds that,

> [i]f Western feminism is unpalatable because it is about rights rather than responsibilities, then we should take responsibility seriously and ask if we are being responsible to *all* members of our societies. If we are to reject

[184] This is taken from the grade four lesson plan (the lesson plans start with grade 4) ("Teachers," *Path of the Elders, supra* note 110 [emphasis removed – all text was bolded]). Unfortunately, by the time one gets to the grade 8 lesson plan, this note has been taken out (*ibid*).
[185] The lesson plans are not likely to be read by people who are playing the game outside of a classroom context.

> equality in favour of difference, then we need to make sure those differences are embedded in systems that empower all members.[186]

In taking up the language of rights here, I aim to talk about what one should be able to expect in legal contexts.

The example that I focus on here is about the rights of the girl character in *Muskwa*. One of the substantive rights that is central in this story is that children should be able to expect protection when they are vulnerable. What is interesting about this though is that this right overshadows some of the internal dynamics in the story, particularly an expectation to not be put in harm's way. Both the girl character and Isaiah were made vulnerable when Sam drove the go-cart into a tree. It is unclear if he was driving recklessly, though at the end of the story the girl character notes that she is going to drive them home, implying that Sam is a bad driver (though ultimately, Sam drives everyone home).[187] That moment in the story aside, the main focus in the comic is on the boys' hunting endeavour, which went wrong and generated a series of repercussions. The girl character expected the boys to act responsibly and was angry when they did not, as this had a direct impact on her, in terms of her own survival and sense of how one ought to engage with the natural world. The focus in the story is on how Sam (with Isaiah as his side-kick) created an imbalance in nature, and how the animals worked to protect and teach him so as to remedy the consequences of his actions, but the ways in which he made others vulnerable is not as explicitly highlighted.

All of this becomes particularly telling in relation to gender, when looking at the procedural rights of the girl character. One of the rights that emerged in the

[186] Anderson, *supra* note 33 at 88.
[187] Miller et al, *Muskwa*, *supra* note 36 at 21-22.

framework, via other educational resources, is the right to be consulted and engaged with. *Muskwa* shows the girl character scolding Sam for his behaviour, and shows that she has some knowledge about Cree law.[188] In the end, through the guidance of Muskwa, Sam learns about natural law, and aims to act in ways that do not put others at risk (non-humans and humans). I wonder how this comic may have played out differently, had the girl been made to be an active character throughout the story, rather than marginally included. I do not mean to suggest that they would have engaged with law perfectly, because of her knowledge about nature. Rather, I am interested in thinking about challenging gender neutral representations of law, which are in fact making peripheral women's legal engagement.

Speaking beyond this example in *Muskwa*, Cree women's rights to bodily safety, to be free from harm, to live well, and to be included as full citizens and legal agents are not being met. The obligations of men to challenge male privilege and gendered oppression are not being met. All of this is evident not only from my cursory look at a small sample of educational materials, but has been statistically and theoretically illustrated again and again through research on political representation and involvement,[189] women's economic circumstances,[190] violence,[191] and the insidious ways that stereotypes and norms about gender

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[188] *Ibid* at 14.
[189] See for example Barker, *supra* note 3 generally; Anderson, *supra* note 33 at 84-85.
[190] AANDC, *supra* note 182.
[191] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 16; Amnesty International, "No More Stolen Sisters: The Need For A Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada" (London, 2009) online: <http://www.amnesty.ca/sites/default/files/amr200122009enstolensistersupdate.pdf>.

pervade social relations at all levels.[192] In both *Cree Restorative Justice* and *Four Directions*, the expectation that one should be able to nurture all four aspects of the self (spiritual, physical, emotional, and mental) is *significantly* more difficult for Cree women when faced with systemic sexism and oppression. Smart describes "[l]aw's claim to truth is not manifested so much in its practice, however, but rather in the ideal of law. In this sense it does not matter that practitioners may fall short of the ideal."[193] It is evident from many of the educational materials, that Cree law is presented as perfect (entrenched by discourses of sacredness) yet intentionally accounting for gender is crucial so as to disrupt this conflation of ideals with practice, and to ask after perhaps less easily digestible, but necessary interpretations of Cree law. When thinking about what one can expect from others, the harsh reality must be considered that in a patriarchal context, a legal order that works for men should be expected. To assert otherwise – to expect and demand otherwise – as a mode of resistance is crucial, but to challenge male dominance with discourses about a perfect legal order is misguided and disconnected from reality. The tendency to speak of Cree law as a set of principles (as discussed above) will promote an unhealthy legal order when those principles are detached from reality.[194]

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[192] Napoleon, "Aboriginal Discourse," *supra* note 33; LaRocque, "The Colonization of a Native Woman Scholar," in Christine Miller & Patricia Chuchryk, eds, *Women of the First Nations: Power, Wisdom, and Strength* (Winnipeg: University of Manitoba Press, 1996) 11 [LaRocque, "The Colonization of"]; Kiera Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13 Australian Indigenous Law Review 62; St. Denis, "Feminism is for Everybody," *supra* note 33; LaRocque, "Métis and Feminist," *supra* note 33.

[193] Smart, *Power of Law, supra* note 2 at 11. See also Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed, *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart Publishing, 2009) 201 [Webber, "Naturalism"].

[194] Napoleon, *Ayook, supra* note 21.

It is striking that the right to protection and connectedly the obligation to protect those who are vulnerable was expressed most often in relation to children and elders.[195] Crucially, Napoleon makes clear that gender and sexuality are key for also thinking about who is vulnerable –

> [u]ltimately, Aboriginal families, kinship groups, communities, and nations must identify who their vulnerable, oppressed members are, and decide whether to continue the oppression. Choosing to end discrimination and protect the rights of women, transgendered persons, gay men, lesbians, and children is the courageous political act of a strong nation.[196]

What one should be able to expect from others in Cree law, should be deliberately gendered.

5.3(e) Legal Principles and Gender

One of the more seemingly abstract aspects of law (and the gendering of law) to grapple with are legal principles. However if approached with practice in mind, legal principles become much less abstract,[197] and it should be evident how they are connected to all of the categories above, and inform legal processes, responses, obligations, and rights. I have devoted more discussion to this section of the framework because of its overriding connections to all aspects of Cree law. Further, because principles were so heavily focused on in the materials, a substantial analytic response is required. Cree legal principles are shaped by gender dynamics and impact women and men differently. Cree legal principles are not pre-existing neutral ideas that then 'go off the rails' when gender is added to the analysis. Rather, the principles themselves make meaning, and rely on

[195] See Appendix D.
[196] Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17 CJLS 149 at 170 [Napoleon, "Raven's Garden"].
[197] Napoleon, *Ayook, supra* note 21.

gendered notions of subjectivity.[198] As I have been illustrating, concepts do not just exist ahistorically, outside of human interpretation. For example, the term 'person' as it has been used in state law has meant many different things, in different contexts, and at different points in time.[199] In speaking about principles, it is not a simple matter of going back and finding *the* definition of a legal principle or concept. As Smart, Richardson and Sandland, Borrows, Napoleon, Macdonald, and others' work have all crucially shown – law is about meaning making.[200] It is crucial to critically engage with gendered legal principles – how they are asserted, interpreted, and deployed; however my focus in this section is on the importance of understanding seemingly 'neutral' principles as gendered. I explain this first by looking at the principle of 'good relations,' and second, by applying these assertions to McAdam's discussion of the seven pipe laws.

Grosz contends that "philosophy, like other forms of knowledge, is not immune to pervasive social beliefs; it both reflects and helps to produce them."[201] She further attests that "[p]hilosophy is not simply neutral towards or ignorant about women; rather, it is actively complicit in providing definitions and interrogative techniques by which western cultures judge and value women."[202]

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[198] As Smart explains of gendering state law, the point is not to add women to already existing structures, rather the purpose is to examine the structures themselves (Smart, *Power of Law, supra* note 2 at 66-67).
[199] See also Borrows, "(Ab)Originalism," *supra* note 34 at 353-354.
[200] Smart, *Power of Law, supra* note 2 generally; Richardson & Sandland, "Feminism, Law," *supra* note 129 generally; Borrows, *Canada's Indigenous Constitution, supra* note 1 generally; Napoleon, *Ayook, supra* note 21; Macdonald, *supra* note 70 generally.
[201] Grosz, *supra* note 137 at 149.
[202] *Ibid* at 153. Though Carolyn Korsmeyer concentrates on feminist analyses of aesthetics in her work, her notion of "'deep gender'" modes of investigation describe what I am doing in this chapter, especially in relation to principles (Carolyn Korsmeyer, *Gender and Aesthetics: An Introduction* [New York: Routledge, 2004] at 3). She notes that deep gender analysis takes on seemingly neutral statements and approaches, but that "gendered thinking [is] operating at its most tenacious and subterranean level" (*ibid*).

Can this be said of indigenous philosophies – here, Cree philosophies – that inform Cree law? Christie maintains that "[t]he world must be categorised and coneptualised before the explicit process of legal analysis begins."[203] While I agree with him that law is informed by social and cultural norms, as has been illustrated, Cree law (as with other kinds of law) also engages in processes of meaning *making* with regards to gender (and other social constructs). Smart describes state law as masculine both in terms of the legal subject that law is premised on, and also the knowledge that is put forth in and through law:

> [m]en as masculine subjects (not as biological entities) have a lot invested in many of the dominant discourses such as law and medicine, not simply because they may operate to serve their interests more than others' interests, but because masculinity is part of that world view. Little wonder then that law is so resistant to more radical forms of feminism but quite comfortable when it is presented in terms of equality, equal opportunity, or difference [because within these principles, maleness is still the normative centre and is thus not threatened].[204]

When talking about state law, Christie is careful to show that racist western ideologies about the subject need to be revealed, so as to show that a liberal white subject lies 'invisibly' at the heart of state law – that is to say that state law is premised on white people's experiences, knowledges, and works well for them.[205] He says of state law that "[t]he domestic legal system as an institution is a social and historical construct, a structure built of words and meanings, designed to promote certain values in an ordering system."[206] Just as Christie emphasizes the need to make visible the white legal subject that lies at the heart of state law, drawing on indigenous feminist legal theory, I aim to make visible the

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[203] Christie, "Indigenous Legal Theory," *supra* note 6 at 200.
[204] Smart, *Power of Law, supra* note 2 at 87.
[205] As noted in Chapter Two, Christie overlooks that this white legal subject is also a male subject.
[206] Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2:1 Indigenous Law Journal 67 at 69 [Christie, "Law, Theory and Aboriginal Peoples"].

male legal subject that lies at the heart of Cree law, and the ways in which Cree law "promotes certain values in an ordering system."[207] Yet how can I make this claim, when Cree cultural norms are described as being woman-centered and respectful of gender? How can I say that Cree law is masculinist when patriarchy is framed as a western colonial problem? In talking about Cree law as masculinist, and premised on a male subject, I do not mean to deny the complex history of gender in Cree culture and law. However, as has been discussed, the past was not perfect, and law changes. Grosz contends that "[t]he 'politics of philosophy' are manifested in and produced by political and social relations, from which it is never free."[208] In thinking about this in relation to Cree law, questions should be asked about how the systemic sexism that exists in Cree societies today shapes how legal principles are conceptualized, interpreted, and applied. In the materials in which male authority, knowledge, and experiences predominate, it would be amiss to then treat principles as though they are neutrally or respectfully articulated.

The principle of 'good relations,' or *miyo-wîcêhtowin*, is a deep-rooted concept in Cree law that has historically and presently been central in Cree legal orders. Cardinal and Hildebrandt describe,

> '*Miyo-wîcêhtowin*' is a Cree word meaning 'having or possessing good relations' … The term outlines the nature of the relationships that Cree peoples are required to establish. It asks, directs, admonishes, or requires Cree peoples as individuals and as a nation to conduct themselves in a manner such that they create positive or good relations in all relationships, be it individually or collectively with other peoples.[209]

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[207] *Ibid* at 69.
[208] Grosz, *supra* note 137 at 147-148.
[209] Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12 at 14.

Lindberg similarly asserts that,

> *[h]armony* and *good relationships* as a way of life, as lawful behaviour if you will, are required. Stemming from that principle/law of creating and maintaining good relations comes the understanding that if there is a flux in your relationship, then conflict must be resolved. In order for that conflict to be resolved in an Indigenized context, you have to examine the Original teachings related to the topic or issue which requires resolution.[210]

The concept of *miyo-wîcêhtowin* is present throughout the educational materials. In *Muskwa*, the girl character says, "we need to start doing things in a good way so we can get home!"[211] McAdam notes that "Elders, knowledge keepers and cultural practitioners need to follow a good way of life" in order to keep indigenous laws strong.[212] Further, Lee talks about how the emotional aspect of the four directions resides "in the West with the adult" because "as adults we're stronger, more capable, if we have grown in a good way. And if we know we need to get healthy, that's usually when we come out and talk about issues that have held us back in our journeys to be good people, to live a good life."[213] Many other principles are connected to *miyo-wîcêhtowin*, including "the principles of good, healthy, happy, respectful relationships (*miyo-wîcêhtowin*)."[214]

What happens to the principle of *miyo-wîcêhtowin* when read in relation to the phallocentric representations found in the educational materials, and in relation to patriarchal social norms that influence Cree law? As noted above, when male privilege is presented as normal, or 'neutral,' or when gendered context is not talked about, then patriarchal relations are represented as acceptable through the language of good relations. Correspondingly, when men reside in a

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[210] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 16 at 22 [emphasis added].
[211] Miller et al, *Muskwa*, *supra* note 36 at 12.
[212] McAdam, *Cultural Teachings*, *supra* note 16 at 1.
[213] "West" section, online: *Four Directions, supra* note 8 [*Four Directions*, "West"].
[214] Cardinal & Hildebrandt, *Treaty Elders*, *supra* note 12 at 33.

universal position for all Cree legal subjects, it is their experiences, interpretations, and wants that shape how 'good' relations are interpreted and constituted. As Denetdale (and others) show, it is essential to examine tradition, gender, and power to consider how women are encouraged to take up good relations, compared to men.

Sara Ahmed's work on happiness provides insight for thinking further about *miyo-wîcêhtowin*. Her work makes clear that how women are expected to act in order to attain normative modes of happiness is different from how men are expected to act.[215] She argues that there is a perception that there is a consensus that everyone thinks of happiness as a universal goal but she asks, "[d]o we consent to happiness? And what are we consenting to, if or when we consent to happiness?"[216] I am particularly interested in this last question in relation to power dynamics and in relation to the disjuncture between legal ideals and lived realities. Ahmed further explains that happiness can be used to advance a particular normative vision and ordering of society but that when accounting for power dynamics, happiness can actually be used to oppress particular groups or 'others' who do not fit in with normative ideas of what constitutes happiness. For example, 'the feminist' is read as unhappy (and thus abnormal) in relation to the 'happy housewife' who fits with dominant norms about femininity (including behaviour and knowledge), womanhood, and sexuality. It is possible, when taking into account the discussion above and in previous chapters to consider how *miyo-wîcêhtowin* is used to put forth a normative gendered vision of Cree society.

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[215] Sara Ahmed, *The Promise of Happiness* (London: Duke University Press, 2010), see Chapter 2: Feminist Killjoys [Ahmed, *Promise of Happiness*].
[216] *Ibid* at 1.

There are normative judgments that are made in applying this principle and it is crucial to pay attention to how these judgments are made when it is predominantly men's knowledge and authority that are prevalent in the representations of Cree law. Even in the educational materials that aim to center and include women, as discussed in Chapter Four, these discourses about women's roles also assert a limiting normative ordering about gender, in which women are expected to act in certain ways in the name of tradition.

Miyo-wîcêhtowin has great potential for thinking about how to challenge systemic sexism and the marginalization of Cree women but it can only be drawn on as a resource to do so when gendered contexts and realities are made explicit and addressed. How can it be said, for example, in *Treaty Elders* that *miyo-wîcêhtowin* is meant to "create positive or good relations in all relationships"[217] yet in that very same resource women are marginalized at the expense of men's knowledge and prominence? Rather than taking principles up in ways in which they simply become rhetoric and means for erasing internal conflicts and promoting male privilege, the challenge is to interpret good relations in a way that necessarily must disrupt systemic on the ground and intellectual sexist oppression.[218] Ahmed interrogates how oppression can be "concealed under the signs of happiness"[219] and it is crucial to also ask how hetero-patriarchal norms and limiting conceptualizations of Cree gender roles can be concealed in

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[217] Cardinal & Hildebrandt, *Treaty Elders, supra* note 12 at 14.
[218] In Adelson's book on health in Cree communities, she talks about the principle of 'being alive well,' yet unfortunately does not interrogate how this principle would be enacted and achieved by Cree women, or along gender lines. Health is not a gender neutral issue (Naomi Adelson, '*Being Alive Well': Health and the Politics of Cree Well-Being* [Toronto: University of Toronto Press, 2000]).
[219] Ahmed, *Promise of Happiness*, *supra* note 215 at 69.

interpretations of 'good relations.' When using *miyo-wîcêhtowin* as a resource informed by indigenous feminist legal theory, the questions more specifically become: what is the relationship between good relations and critically gendering Cree legal processes and responses? What obligations do men have to not perpetuate sexism generally speaking but also in the practices of Cree law? What obligations do men have to challenge male privilege? What would it mean to represent women as full, complex legal subjects who enact their gendered subjectivity in a multitude of dynamics ways?[220]

McAdam's *Video Series* includes a short video about pipe laws. She explains that the laws "were given to the people, every time they lit up the pipe, they're supposed to remember these, these laws."[221] There are seven pipe laws, which include: 1) health; 2) happiness; 3) generation; 4) generosity; 5) compassion; 6) respect; and 7) quietness.[222] I have begun to discuss how none of these principles should be read neutrally and that women face different challenges in trying to attain these ideals, compared to men. I include McAdam's discussion here, as it helps to discuss further the need to examine these principles as socially embedded rather than individually achieved. She says,

> I would suggest to everyone listening to this DVD, to, to recall these laws in your own minds, and to say them out loud … The elders say that, if you can't remember an- either of these laws, after you say them out loud, then those are the laws that are missing in your life. And that those are the laws that you need to work on, and bring them into your life – strengthen them, um, so that they walk with you better in your life.[223]

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[220] I do not mean to suggest that this was a full reality in the past, rather in using the language of the 'present' here, I leave open the need for change.
[221] Sylvia McAdam, "Pipe Laws," online: <http://vimeo.com/34673551> [McAdam, *Video Series*, "Pipe Laws"].
[222] *Ibid*.
[223] *Ibid.*

McAdam attests that these laws exist "to correct you in your life" if you are not following them.[224] Her approach oversimplifies both the complexity of these legal principles and the social contexts within which they exist.[225] To say that Cree women, for example, are personally responsible for not attaining good health purports a neoliberal representation of Cree law in which women's access to health services and social circumstances are grossly overlooked. Further, how are Cree women to go about 'correcting' feelings of unhappiness when living in a society in which gendered violence and oppression, internally and externally, are rampant? The principles in the pipe laws play out differently for women, and as discussed above, if this were acknowledged in the materials, then perhaps additional conversations could develop. McAdam does note that women also had pipe laws, but that "they're just not being utilized right now. That has to come back."[226] The discussion above is thus even more complex in that apparently McAdam is speaking about men's ceremonies as applicable to all.

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[224] *Ibid*.

[225] This is evident not only with this video, but in her discussion of the uncle's four laws (McAdam, *Video Series,* "Uncle's four laws," *supra* note 32). These laws include compassion, jealousy, greediness, and not putting "another human being on a pedestal" (*ibid*). Although McAdam talks about women at times in her resources, these discussions do not penetrate her overall representations of Cree law and she fails to consider how the uncle's four laws play out in particularly gendered ways. For instance, when speaking about jealousy, she says that people should not be jealous of the success or wealth that others have, rather people should "be thankful to witness the Creator's work unfolding before you, because that Creator is blessing that, that person. That Creator is blessing that person, maybe because that person had suffered at some time in their life, and they are being blessed" (*ibid*). Perhaps this is applicable in some cases. However, when thinking about male privilege and the disproportionate access to resources that Cree men have (compared to Cree women), McAdam's explanation erases power dynamics and gender oppression.

[226] McAdam, ILP Lecture 1, *supra* note 15. Unfortunately McAdam does not discuss women's pipe laws any further.

5.3(f) Summary

With the above discussion, I have moved away from some of the tendencies discussed in the first half of the chapter, to take up a more critical, deliberative approach to Cree law. Critically examining gender and power with indigenous feminist legal theory and methodology applied to Friedland's legal analytic framework generated the following main points:

- Men's legal authority is normalized in patriarchal contexts and locates men in a position of power to make decisions and to assert legal interpretations based on their experiences. Both law and gender are constructed through Cree legal practices.
- Gender dynamics shape Cree legal processes and impact women and men differently.
- What is deemed a legitimate process in Cree law should be discussed and contested as necessary.
- Cree legal obligations are experienced differently by women and men. These obligations would include both gendered obligations talked about in Chapter Four (and below), and how seemingly 'neutral' legal obligations are shaped by power dynamics.
- Cree women's rights, both substantively and procedurally, are not being met in the representations of Cree law in the materials, but as discussed they are also not being met more broadly in Cree society (or settler society, for that matter).

- Cree legal principles are shaped by gender dynamics and impact women and men differently. Principles are gendered in terms of meaning, interpretation and application. Questions should be asked about principles that are asserted as neutral and for everyone (and as I show in the following section, should also be asked about how feminine legal principles work to discipline female legal subjects).

5.4 Women's Laws

Cree law is complexly and thoroughly gendered. Yet discussions in the educational materials, about how Cree law is gendered came up only in relation to women's laws and teachings (via discussions about tradition and gender roles). Women's citizenship is limited when they are not included as full legal subjects with their own experiences, knowledges, and realities. As discussed, these limitations can come from representations in which women are excluded, but also in representations in which narrow conceptualizations of gender and tradition are presented. Do the representations of women's laws, found in several of the materials, work to challenge these limitations? The discussions about women's laws are framed as being about resistance and empowerment, yet the representations can also be read as limiting, as women primarily enter into discussions on Cree law in relation to gender roles. More specifically, women's engagements with law are frequently defined in relation to their bodies, whereas Cree men's legal subjectivity is not. Further, Cree women's legal knowledge and responsibilities are often discussed in connection to the private sphere. I have begun to discuss all of this in Chapter Four, and I focus here on how women are

represented as embodied legal subjects who reside in the home mainly through the example of tipi teachings, as they are described by McAdam and Lee.

McAdam describes of women's roles in Cree law that,

> [t]he nêhîyaw women had specific roles that included teaching and maintaining the laws, principles and customs of their people. The women who were chosen for these roles were called *okicitaw iskwewak*. These women were the law keepers. Their approach to law keeping was to restore order and balance as opposed to taking punitive action. The *okicitaw iskwewak* would seek guidance and consensus from other members of the community. No decision was done in malice or in vindictiveness. The *okicitaw iskwewak* were respected teachers and law keepers because of their profound knowledge and sacred teachings.[227]

Here McAdam represents women, their legal knowledge, and authority, as central in Cree legal processes. Women's legal authority is described as being granted (to only some women) on the grounds of their peacefulness. This description of legal authority romanticizes, protects normative femininity through the language of sacredness and power, and interestingly implies that men are not suitable legal authorities for teaching the next generation. In her *Video Series*, McAdam explains of the tipi and women's laws –

> and those tipi poles, were, were, taught uh a certain way to be placed. In those, in those teachings came the laws, the women's laws. And those laws, um, are, are, were given to the women so that where they raise their children, those children will be raised as, uh, law-abiding citizens of their nation. And these children will grow up to be warriors, and healers, and teachers of their nation. And these children would be courageous, and brave, and honourable, and, and would be taught integrity. And these were, um, very profound laws of the Cree people.[228]

My interpretation of McAdam's use of 'women's laws' throughout her resources is that there is a multitude of women's laws, and in talking about the tipi, she is

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[227] McAdam, *Cultural Teachings*, *supra* note 16 at 42.
[228] Sylvia McAdam, "Spiritkeepers," online: <http://vimeo.com/34672155> [McAdam, *Video Series*, "Spiritkeepers"].

discussing just some of women's laws.[229] Though the complexity of women's laws, and the significance of the *okicitaw iskwewak*, get lost in the materials with her focus on mothering, nurturing and teaching, reproduction, and guiding others as women's ways in to law. Similarly, *Four Directions* does not complexly engage with what women's laws have, and could mean.

The explanations about the tipi as containing women's laws (McAdam) and women's teachings (*Four Directions*) often romanticize gender roles and firmly entrench particular notions about womanhood and women's bodies. For example, McAdam describes,

> [t]he tipi is the domain of women and is a gift from the Creator. This gift has numerous teachings associated with child rearing and parenting to benefit First Nations. Specifically, the tipi symbolizes the bond between mother and child. Women bring life into this world and they have an important role and responsibility to nurture that gift of life. The women are the primary caregivers for the children. The governance of the tipi is within the power and authority of women. The men had their own roles and responsibilities which included being the providers of food and the protectors of the community.[230]

These narrow representations of gender, sexuality, and Cree women more generally are protected in discourses about sacredness, which makes it difficult and uncomfortable to engage in critical discussions about law and culture being

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[229] For example, McAdam talks about various women's ceremonies, for example, for welcoming babies into their kinship network (Sylvia McAdam, "Human Birth," online: <http://vimeo.com/34671557> [McAdam, *Video Series*, "Human Birth"].

[230] McAdam, *Cultural Teachings*, *supra* note 16 at 35. In her lecture, McAdam also describes the tipi as a gift that the Creator gave when the women asked the spirits for a more practical lodge (dome shaped lodges were not working, she explains). She explains of the tipi and Cree laws: "[a]nd then when they were given that lodge, they were also given how to understand that lodge, and what laws guided and governed that lodge in order for them to raise their children in it. That's how come you hear of the tipi teachings … there's laws in every one of those poles, that the women knew and understood, and it- the women are the law keepers of our nation – they are similar to the j- judiciary of the European, um, society. We are the law keepers. We had a responsibility to teach our children what I talk about here. And what I talk about here – it's just like, not even the tip of the iceberg [laughs] – it's like a smidge. It's just a smidge of what our nation, uh ideally, should know. We're supposed to know these things" (ILP Lecture 2, *supra* note 16).

used as mechanisms for disciplining women in particular ways. Lee (like McAdam), talks about women's bodies as sacred, and in her discussion in which women's bodies and tipis are symbolic of one another, she expresses that the tipi is "like a woman standing there with her arms out, saying 'Thank you' to everything."[231] In this passage Lee symbolically freezes women into poses of eternal gratitude – suggesting that women should be grateful for taking care of others and for their sacred (natural) place as life givers. So many complexities are lost in Lee's passage – the complexities of motherhood as an institution, the difficulties of mothering generally but also in a patriarchal colonial context, the problematic conflation of women with embodiment and women's bodies as attached to the private realm; and the tensions between the home as a place of authority for women and the high rates of violence that women experience in the home.

The ways that women's laws are talked about by McAdam and Lee are very conservative. The representations are not only reminiscent of Christian Victorian ideals which morally police women, but the discussions about women's laws at times also work to discipline how women use their bodies and take up space. These findings are similar to Denetdale's work on Navajo beauty pageants.[232] The spatial aspect of disciplining women's bodies is evident not only through the relegation of women's bodies to the private realm, but through discussions about 'appropriate' feminine dress and behaviour. For instance, Lee contends that "if you put [the tipi] up right, the poles never show on the bottom,

[231] *Four Directions*, "Centre," *supra* note 11.
[232] Denetdale, "Chairmen, Presidents, and Princesses," *supra* note 33.

and that tipi stands with dignity, just as, years ago, women always covered their legs with the skirt, which also represents the sacred circle of life."[233] With the 'tipi/bird/angel' figure that is found throughout the animation, the viewer never sees the figure's feet, and she is sitting atop the earth. LaRocque reflects that "[e]ven more disconcerting [than motherhood rhetoric] is the notion that a skirt is a way of accessing connectedness to the earth."[234] Skirt politics involve a complicated mess of assertions about tradition and culture, and ideologies about gender that work to discipline how women use and present their bodies, and engage with spirituality (and thus at times citizenry and law).

McAdam also talks about attire at ceremonies (and ceremonies can be ways for engaging with law) and says that "[i]t is suggested that women wear a long dress, covering the upper body and lower body and carry a towel to cover one's self. It's suggested that men wear shorts with a towel wrapped around the waist."[235] She further explains that one of the gendered expectations of women is

> wearing a longer dress or skirt to feasts and other ceremonies, whether as a participant or observer. The length of the dress should reach below the knee or to ankle length. As *always when in public, women should appropriately – sit with your feet together and legs to the side or with your feet underneath, whichever is comfortable*.[236]

This passage is troubling, as it is not just about women's bodies in ceremonies, but is also extended to how women present themselves in public all the time. LaRocque reflects on a similar sentiment about indigenous women and skirts in her work and says, "while we must respect people's faith, what do we do when

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[233] *Four Directions*, "Centre," *supra* note 11.
[234] LaRocque, "Métis and Feminist," *supra* note 33 at 63.
[235] McAdam, *Cultural Teachings*, *supra* note 16 at 27.
[236] *Ibid* at 34 [emphasis added]. She notes the protocols for men, which do not have to do with how men can position their bodies. In terms of dress, she notes in this particular source that men ought not wear hats and that they are "encouraged" to wear ribbon shirts (*ibid*).

faith turns to dogma that requires submission or contradicts other rights?"[237] She describes approaches such as this as "strikingly similar to patriarchal Christian and other fundamentalist constructions of 'woman,' and one wonders to what extent the influence of residential schools and other patriarchal agencies and attitudes, both old and new, is at work here."[238]

Traditional gender roles and women's laws are depicted as unchanging in many ways by McAdam and Lee. Yet there is an interesting exception in *Cultural Teachings* in which McAdam notes that Cree sweatlodge ceremonies used to be gender segregated but are not today.[239] Why this is different is not discussed. She also notes that there were previously fewer tipi poles for practical reasons, yet the meaning of the structure and the poles get discussed as though they are fixed.[240] Further, there is a tension between Lee's depiction of the tipi cover/hide having to go all the way to the ground for dignity's sake, and McAdam's note that if it was really hot outside, then the tipi would be rolled up to allow for better air flow.[241] I do not point out these inconsistencies to discredit that tipi poles have significant cultural and legal meaning, or to say that the processes of ceremonies are insignificant. Rather, what the inconsistencies suggest is that there is room for interpretations that Cree norms and laws change over time, that gender roles are not static, and that Cree laws need to be practical. The inconsistencies show Cree law as dynamic and plural, amidst them being stated as singular and unchanging. Celestine I. Nyamu contends that there needs to be room in legal orders for

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[237] LaRocque, "Métis and Feminist," *supra* note 33 at 63.
[238] *Ibid* at 64.
[239] McAdam, *Cultural Teachings*, *supra* note 16 at 28.
[240] *Ibid* at 36.
[241] *Ibid*.

flexible, non-oppressive interpretations of culture.[242] She maintains that it is not culture that oppresses women or fully empowers them – gendered power dynamics are much more complicated than this and cultural norms are constructed and contested. She employs critical pragmatism which

> involves understanding the flexibility and variation of custom in order to challenge the arguments that deploy culture as a justification for gender inequalities. In contrast, conventional approaches employed by proponents of gender equality implicitly endorse dominant articulations of culture as an accurate description of social custom.
>
> In a plural legal setting, normative orders, including human rights regimes and local customary institutions, present both opportunities and setbacks in the struggle for gender equality.[243]

Culture is too often asserted as wholly oppressive or wholly empowering and Nyamu argues that a more nuanced, productive approach to gender and culture should draw on "evidence of varied and alternative local cultural practices to counteract negative ideological statements on culture" and to promote "flexible" interpretation of legal principles and rules.[244] The representations of gender roles in the educational materials fail to take up this flexibility, and perpetuate particularly negative ideological assertions of culture regarding women's bodies.

Women's laws are explicitly embodied when the tipi is talked about as symbolic of women's bodies.[245] As noted in Chapter Four, in *Four Directions*, the

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[242] Nyamu, *supra* note 33 at 413.
[243] *Ibid* at 382. She explains further, "[t]he term 'critical pragmatism' is borrowed from scholarship exploring the critical potential of pragmatism as a legal framework that can be used to articulate the interests of less powerful social groups. In one situation, an effective strategy may require insistence upon the recognition of customary obligations owed to women. In another context, an insightful critique may question the validity of specific assertions of culture" (at 409-410).
[244] *Ibid* at 413.
[245] McAdam also talks about the sweat lodge as being "the shape of a womb and is symbolic of Mother Earth. When First Nations' people utilize the Sweat Lodge, they are returning as children and are humble as they enter the lodge. As you participate in the Sweat Lodge, you are purified with breathing, meditating, and in the sharing of words, prayers, songs, and storytelling" (McAdam, *Cultural Teachings*, *supra* note 16 at 27).

animation shifts images back and forth between a tipi and a woman's body.[246] Women's bodies are thus entrenched in the private realm through laws and discussions about what is culturally appropriate gendered behaviour. In *Four Directions*, the tipi is talked about as a place of shelter, retreat, and comfort in which everyone is welcome. Lee describes how the tipi "is the spirit and body of woman, because she represents the foundation of family and community. It is through her that we learn the values that bring balance into our lives."[247] When thinking about the tipi as symbolic of women's bodies, how does this then ask listeners to imagine women's bodies? When discussed as structures in which others are cared for, women are again being imagined in terms of expectations that they will reproduce and 'house' the next generation in their bodies – literally and symbolically. Further women's subjectivity is depicted as necessarily embodied (whereas men's subjectivity is depicted as disembodied) and belonging in/being the home. McAdam talks about "the sacred teaching that 'the woman is the home'"[248] and remarks that "[t]oday's family homes retain the same values, meaning and protocols. The home is always the responsibility and authority of the women to maintain, nurture and cherish by following First Nations' laws, values and traditions as much as possible."[249] As discussed in Chapter Four, there are many indigenous feminists who would raise questions about how tradition is being framed here, and who would ask questions about the implications of

[246] Normative ideals about women's bodies are reinforced when she maintains her hourglass figure, even while standing in as a symbol for a wide triangular structure (*Four Directions, supra* note 8).
[247] *Ibid*.
[248] McAdam, *Cultural Teachings*, *supra* note 16 at 31.
[249] *Ibid* at 35.

relegating women to the private realm in this way. What are the discourses of tradition and authenticity doing, when McAdam laments that Cree women no longer know how to cook and take care of their husbands and children?[250] What are the discourses of tradition and authenticity doing when they celebrate modes of subjectivity that are necessarily limited in a society in which sexism exists?[251] I maintain that the discourses are working to constrain women.

The possibilities of women's laws are lost in the educational materials. The discourses about motherhood and nurturing as respected do not translate over to lived realities. Furthermore, Lee and McAdam's descriptions over 'culturally appropriate' gendered behaviour for women are very conservative and restrictive. What of Cree women who deviate from these gender 'ideals' – either because they cannot achieve them (for physical, social, economic, political, or personal reasons) or have no desire to achieve them? How is their access to law restricted when women's laws are talked about in such narrow ways? What of Cree women who do not feel that they are respected for nurturing, or their responsibilities in the private realm? Anderson maintains that "we have to ask what kind of decision-making power our contemporary mothers of the nation truly carry."[252]

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[250] She says, "[t]here's ma- much more of the women's teachings, um, that need to be shared about how we raise our children. The children need to be taught – the young women were supposed to be taught this. The young women were not allowed to take a husband if they were unable to provide for their child, if they are unable to make a *wâspison* – the mossbag, if they are unable to cook, if they're- if they don't know the teachings of the women, then they're not allowed to take a husband, they're not allowed to have a child. In the days when the women, um, had to travel by foot or by horse, they spaced their children apart so that when their second child is born, the child they- that walks, is able to run or walk a great distance, and then they're allowed to have a second child. And there was medicines, that the women had, that, um, allowed for this spacing of children to happen – a form of birth control, is, is what it's called now in the English language" (Sylvia McAdam, "Mossbag and Womens teachings," online: <http://vimeo.com/34674317> [McAdam, *Video Series*, "Mossbag"]).
[251] Anderson, *supra* note 33.
[252] *Ibid* at 86.

She questions if men would take directions from women in the ways that the principles suggest and asks: "[i]n cases where there are no systems for women to exercise their authority, how is the motherhood discourse being used? If women are seen as mothers of the nations but are devoid of political authority, what *are* our roles and responsibilities?"[253] Rich, although not writing about indigenous women, notes how the home has changed significantly. She explains that pre-industrialization, the home was not imagined as 'private' – it was a (most often communal) place of work and "a subsistence unit" for all family members.[254] However definitions of the home shifted along with perceptions about gender and labour during the Industrial Revolution in which "[f]or the first time, the productivity of women (apart from reproductivity) was seen as 'a waste of time…'" with the exception of tending to "[t]he welfare of men and children."[255] Though kinship and the home are conceptualized differently in Cree norms, and women engage in various types of work in reality, it would be remiss to overlook the predominance of the public/private split and the impacts of this ideology via patriarchy, heteronormativity, economics, and colonialism.

LaRocque cautions that the private realm not be romanticized as a space of empowerment for indigenous women given the oppression that can stem from being denied an active public role in society.[256] Further, as signaled earlier, while the home could be imagined as a space of "retreat from the violence of racism" for indigenous people, for women in particular, the home also needs to be

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[253] *Ibid* at 86-87.
[254] Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (New York: W.W. Norton & Company, 1986/originally published 1976) at 47.
[255] *Ibid* at 49.
[256] LaRocque, "Métis and Feminist," *supra* note 33 at 55, 65.

recognized as a "vulnerable place" in which they could be subjected to violence.[257] The power dynamics of the 'private' home need to be recognized today, in addition to the 'public' home of the past, which would not have been without conflict. The patterns found in the educational materials mirror problems that indigenous feminists have already been discussing and challenging, in terms of conservative Christian approaches to gender being asserted in the name of tradition,[258] and essentialisms being perpetuated when women are defined in relation to the materiality of their bodies and the symbolisms of women's bodies in national politics.[259] In relation to law, what happens in the educational materials in my sample, is that the mind/body split, and private/public dichotomies found in western philosophy and laws, is perpetuated – with women limited as embodied subjects who stay in the home, and men empowered as thinkers – those who possess knowledge, and who are 'out there' in the world. These representations are patriarchal, phallocentric and undermine Cree women's complexity as legal subjects and agents. Women's laws need not be represented in only this way though. In her work on grandmother's laws in Australia, Watson examines how aboriginal women's laws are overlooked in state legal processes, which focus on, and favour aboriginal men's laws. She talks about "women's law space" and importantly asks "can that space re-emerge when the imposed

[257] Irene Watson, "Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?" (2007) 26 Australian Feminist Law Journal 95 at 102 [Watson, "Aboriginal Women's Laws"].
[258] See for example Denetdale, "Chairmen, Presidents, and Princesses," *supra* note 33; Isabel Altamirano-Jiménez, "Nunavut: Whose Homeland, Whose Voices?" [2008] 26:3,4 Canadian Woman Studies 128 [Altamirano-Jiménez, "Nunavut"].
[259] See for example Denetdale, "Chairmen, Presidents, and Princesses," *ibid*; Altamirano-Jimenez, *ibid*; LaRocque, "Métis and Feminist," *supra* note 33.

Australian legal system has taken up all the space?"[260] She concludes that "[t]he problem is not so much what we as Aboriginal communities need to do but the work the dominant culture needs to do in shifting the male dominant nature of its own legal system, a system that denies the presence and place of women's law."[261] I agree that the dominant culture needs to change a *great* deal. Her conclusion also makes me wonder about the necessary internal work that needs to be done in relation to Cree law, so as to engage more complexly with women's laws. There are complicated questions that would be part of an ongoing discussion about indigenous feminist legal theory and women's laws: why are women's laws represented as embodied while men's laws (broadly, 'Cree law') are disembodied? What are the dangers of relying on essentialisms? What might be lost if women's laws were disconnected from their bodies? What could be gained? How can women's laws be stated more complexly and be used as a resource so as to acknowledge the lived realities of gender oppression, heteronormative violence, and the multitude of ways that Cree citizens of different genders and sexualities experience Cree law?

5.5 Conclusion

It is deeply troubling to note so many problems regarding how the educational materials represent Cree law and gender. I hope for this discussion to be seen as a gesture of engaging in the serious and necessary critical work that should be done when talking about any legal order, including Canada's. All societies and legal

[260] Watson, "Aboriginal Women's Laws," *supra* note 257 at 99.
[261] *Ibid*.

orders deal with difficult conflicts and forms of oppression.[262] By drawing on indigenous feminist legal theory, I have discussed the intricate ways that Cree law is gendered. The educational materials are especially compelling in that they treat Cree law as either gender neutral or in relation to women's gender roles, yet there are messy dynamics that can be seen playing out in the materials themselves. In other words, Cree law is not complexly gendered by the producers of the materials, but the difficulties of gendered power dynamics unfolded in the resources as I engaged with each one and read them in relation to one another. I discuss these complexities further in the next chapter, in which I consider the implications of the representations.

[262] Napoleon, *Ayook, supra* note 21; Borrows, *Canada's Indigenous Constitution, supra* note 1 generally.

Chapter Six:
Analytic Difficulties

6.1 Introduction

> Damage to Indigenous peoples' conflict management systems and law has resulted in increased conflict that is destructive. The result is that many people no longer know how to constructively deal with conflict.[1]

The analysis in this dissertation demonstrates that gendered power dynamics, conflicts, and oppression are not constructively dealt with in the educational materials. Revitalization efforts are thus partial and exclusionary, and critical gendered analyses such as indigenous feminist legal theory are requisite tools for working productively with indigenous laws. One of the main research questions guiding this analysis was: do the education materials, which are meant to positively promote Cree law and advocate empowerment of Cree people and laws, represent Cree women as full legal agents and citizens? My answer to this question is that the materials do not represent women well, and in this chapter, I conclude the dissertation by considering some reasons for why the representations are presented in the ways that they are and I consider the significance of the findings.

As illustrated throughout, women are represented in limited ways. Cree women are marginalized in and by the materials through two common tendencies – their erasure and absence; and by being included and valued primarily in relation to rigid conceptualizations of gender and gender roles, in which essentialisms predominate and women's legal engagement, knowledge, authority,

[1] Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Global Pluralism* (Dordrecht: Springer, 2012) 229 at 239 [Napoleon, "Thinking About"].

and enactments of citizenship are expected to take place in the private realm and via their embodiment. I illustrated that both of these tendencies end up perpetuating representations of gender that are phallocentric – Cree men are depicted as rational, complex legal agents who are 'out there' in the world and whose knowledge, and experiences stand-in for all Cree people, whereas women are included most often in relation to the specificity of the difference of their gender. While Cree gender norms are espoused as valuing difference, and gender roles are talked about as complementary, what is happening in the materials is that men are the implicit legal subjects and citizens from which women then differ. Further it is evident from the materials that women are consistently represented as lesser-than men as women are denied complex agency and modes of citizenship.

The second main research question guiding my analysis inquired about whether and how indigenous feminist legal theory and methodology can facilitate critical and productive research on Cree law. Indigenous feminist legal analysis insists that Cree law must be understood as gendered in order for revitalization efforts to be meaningful. When gendered contexts and realities are ignored or oversimplified, Cree law cannot be empowering for women as a whole, and the contemporary usefulness and possibilities of Cree law are undermined. Cree women must be recognized as full legal agents and citizens in discussions on Cree law in order to productively challenge systemic oppression. Friedland contends that scholarship on law can help to "increase the possibility of Indigenous laws

being accessed, understood and applied to contemporary issues."[2] I take the position that part of this accessibility and usability includes gendering Cree law.

How is one to make sense of the representations being framed as positive and empowering when my analysis finds that they diminish the usefulness of Cree law and marginalize women? How is one to interpret the representations – as means of revitalization, as educational tools, and in relation to lived realities? Joyce Green explains that

> [r]ejecting the rhetoric and institutions of the colonizer by embracing the symbols of one's culture and traditions is a strategy for reclaiming the primacy of one's own context in the world, against the imposition of colonialism. But, in the absence of an analysis of the power relations embedded in tradition, it is not necessarily a libratory strategy.[3]

She is speaking here specifically about gender oppression and how power dynamics need to be accounted for. Future educational tools require a more difficult aesthetic if they are to more accurately account for social context, conflict and power, and the dynamism of Cree law. Using indigenous feminist legal analysis to complexly account for gender *necessarily disallows* romanticized representations of Cree law that are too commonly found in the materials. That is to say, representations of Cree law as perfect and harmonious *cannot* critically include gender because such a gender analysis disrupts perfection.

I address the above questions by first examining the aesthetics of representing Cree law. This discussion includes explaining why representations matter and how an aesthetic analysis contributes to understanding my findings.

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[2] Hadley Friedland "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 at 28 [Friedland, "Reflective Frameworks"].
[3] Joyce Green, "Taking Account of Aboriginal Feminism" in Joyce Green, ed, *Making Space for Indigenous Feminism* (Winnipeg: Fernwood Publishing, 2007) 20 at 27 [Green, "Taking Account"].

Here I consider how discourses are deployed in various ways by examining how discourses are used in response to colonial oppression, how they are used to reinforce fundamentalisms, and how dominant narratives can be disrupted. In the second half of the chapter, I consider future research directions for indigenous feminist legal studies. This discussion involves examining a graphic novel that exemplifies how indigenous feminist legal analyses, difficult aesthetics, and a deliberative approach to law can productively engage with Cree law as gendered.

6.2 The Aesthetics of Representing Cree Law

6.2(a) Why Representations and Aesthetics Matter

One important question arising from the research in this dissertation pertains to understanding the representations in relation to actual current Cree legal practices. Do my findings accurately mirror what happens within Cree legal orders, on the ground? Can I extrapolate the findings about the representations and generalize them to broader discussions about Cree law? To reiterate, the purpose of this research is not to generalize from the sample; rather my intention is to engage in discussion with the findings that emerged. It would be inaccurate of me to say that what happens in the materials mirrors reality precisely. First, there are a multitude of experiences that Cree people have with Cree law, and as discussed throughout, Cree law can be understood as plural in that there are always various interpretations and uses of it. Representations of Cree law are also plural and are themselves interpretations. Second, as discussed in Chapter Five, the complexities of Cree law (and of gender) are (sometimes purposefully) absent in the educational materials, and it would be entirely inaccurate to say that the general

representations of Cree law means that Cree law itself is vague and general. Third, the focus of this research was on textual and visual analysis, and it would be unreasonable of me to then transfer this analysis seamlessly over to lived practices with Cree law. Having said that though, I have come to several conclusions throughout the dissertation about the connections between social norms in Cree communities and the ways that these play out in the representations of Cree law. Representations are not disconnected from people's everyday lives or from social structures.[4] As stated in my methodology chapter, I am interested in examining how Cree law is talked about and what discourses do to reinforce or challenge these representations. I am interested in thinking about what discourses are doing – how particular interpretations about gender, law, and citizenship are asserted, and my approach is akin to Smart's in which I am not intending to state what Cree law is, rather this dissertation is "about knowledge and ideas" and critical modes of analyses.[5] It is worth re-quoting Fairclough who contends that critical discourse analysis "is *not* analysis of discourse 'in itself' … but analysis of dialectical *relations between* discourse and other objects, elements or moments, as well as an analysis of the 'internal relations' of discourse."[6]

Representations are contextually wedded to social norms and are interpreted by socially embedded agents. It is crucial to look at educational resources, as they authoritatively compel audiences – with my sample, children and adults; Cree and non-Cree people – to consider the interpretations of the

[4] Carolyn Korsmeyer, *Gender and Aesthetics: An Introduction* (New York: Routledge, 2004) at 1.
[5] Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (London: Sage, 1995) at 3 [Smart, *Law, Crime and Sexuality*].
[6] Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language*, 2d ed (New York: Pearson, 2010) at 4.

producers. Poststructural theorists contend that both law and gender are constructed via discourses,[7] and from this perspective, it is then crucial to examine how Cree law is talked about and represented – what truths and interpretations are being asserted about it, which of these interpretations are most dominant, and what possibilities these discourses open and foreclose. This poststructural approach aims to deconstruct the use of binaries found throughout the educational materials to engage with a more realistic, complicated articulation of Cree law. Law involves human interpretation, and indigenous laws are no different.[8] While some people might read my approach as problematic in that I am asking questions about Cree people's representations of Cree law, my intention is to take seriously Cree law by treating it as a strong, capable legal order that can handle and respond to debate and serious engagement.

I have illustrated the interdependence between social norms and representations in this dissertation by drawing out gendered dynamics and struggles as they play out in the materials. While not taking up poststructuralism, Ladner emphasizes that discussions such as the one here about gender, marginalization, and feminism should not be written off as merely academic debates, since "they [also] continue to define and divide the Indigenous women's

[7] Ahmed on Derrida: Sara Ahmed, "An Impossible Global Justice? Deconstruction and Transnational Feminism" in Janice Richardson & Ralph Sandland, eds, *Feminist Perspectives on Law & Theory* (London: Cavendish Publishing, 2000) 53 at 54 [Ahmed, "An Impossible"]; Janice Richardson & Ralph Sandland, "Feminism, Law and Theory" in Richardson & Ralph *ibid,* 1 at 4 [Richardson & Sandland, "Feminism, Law"]; Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) [Smart, *Power of Law*].

[8] Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 195 [Christie, "Indigenous Legal Theory"]; Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Doctor of Philosophy dissertation, University of Victoria, 2009) [unpublished] [Napoleon, *Ayook*]; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Canada's Indigenous Constitution*].

movement and Indigenous politics in Canada."[9] Not surprisingly, the discourses that materialize in the resources also play out in literature, politics, activism, in academia, and in my own engagements with Cree law. The findings in this dissertation signal broader social problems and power dynamics that necessitate sustained attention and critical deliberation. It is necessary to ask why the complexities of Cree law, gender, and Cree people's lives more generally are not well reflected in these educational materials on revitalization and empowerment.

It is significant how 'nice' Cree law and gender roles are presented to be in the materials. To clarify, gender *relations* are not always depicted as 'nice' – for example when Lindberg and McAdam talk about violence against indigenous women.[10] However Cree gender *roles* are depicted as really nice, particularly when couched in the language of tradition. Further, as shown in Chapters Four and Five, male-dominated representations of law are treated as 'neutral' and normal in many of the discussions about the niceties of Cree law. As part of understanding what discourses are doing, I am also interested in accounting for the aesthetic (and affective) work that the discourses attempt.[11] In my use of aesthetics, I am drawing attention to how the materials are put forth in aesthetically pleasing ways, as well as the uncomfortable tensions that arise in the materials, and via my analysis. Aesthetics are thought to most often refer to

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[9] Kiera Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13 Australian Indigenous Law Review 62 at 63.

[10] Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, University of Ottawa, 2007) [unpublished] [Lindberg, *Critical Indigenous Legal Theory*] at ch 4; Sylvia McAdam, "Sylvia McAdam teachings pt.2," online: <http://vimeo.com/31616141> [McAdam, ILP Lecture 2]; Sylvia McAdam, *Cultural Teachings: First Nations Protocols and Methodologies* (Saskatoon: Saskatchewan Indian Cultural Centre, 2009) [McAdam, *Cultural Teachings*].

[11] Korsmeyer notes that art is often judged primarily on aesthetics, without consideration of social norms and values (Korsmeyer, *supra* note 4 at 1). What I am interested in doing in this chapter, is talking about aesthetics, which often is not discussed in relation to indigenous legal discourses.

beauty, or to analyses of art, yet these are limited interpretations of aesthetics.[12] Korsmeyer explains a feminist approach to aesthetics necessitates examining how representations "are indicators of social position and power"[13] and she maintains that "[a]esthetic ideologies that would remove art from its relations with the world disguise its ability to inscribe and to reinforce power relations."[14] Likewise, Manderson describes how "[a]esthetics is the faculty which reacts to the images and sensory input to which we are constantly exposed and which, by their symbolic associations, significantly influence our values and our society."[15] There are various ways that I could 'step back' and reflect on the findings in this dissertation. I am interested in bringing in aesthetics, so as to think further about discomfort and the uncomfortable approach to Cree law that indigenous feminist legal theory necessitates. To include a deep analysis of aesthetics however, requires much more space than I have here, and this discussion should be considered only the start of what should be ongoing conversations.[16]

Of particular importance in explaining the relevance of aesthetic analysis to this dissertation, is work on legal aesthetics. Manderson explains, "'[l]egal aesthetics' suggests that the discourse of law is fundamentally governed by rhetoric, metaphor, form, images, and symbols."[17] He contends that law is not just

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[12] Korsmeyer, *ibid* generally.
[13] *Ibid* at 1.
[14] *Ibid* at 51.
[15] Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (Berkeley: University of California Press, 2000) at ix.
[16] Part of this ongoing future conversation should include more thoroughly bringing in work on affect.
[17] Manderson, *supra* note 15 at ix. Manderson focuses on state law and music in his work, though the broad points that he makes about legal aesthetics are useful here. An important point that he makes is that aesthetic judgments (and also state law) are often falsely treated as though they are objective processes in which one makes assessments and decisions (*ibid* at 8). He does not treat

about legal arguments and logic, but that there is also an aesthetic component to how legal claims are made.[18] Importantly, "the aesthetic is not some thing to be known but a way of knowing."[19] Further, Manderson describes aesthetics (similar to discourses) as relational – objects and ideas have histories and politics, as do the humans interpreting them – and these dynamics converge in aesthetic reactions.[20] Thus while I maintain that the representations in the materials are put forth in a way that makes claims to the niceties of Cree law and good relations, not everyone will experience the representations as pleasing.[21] For instance, when read from the lens of indigenous feminist legal theory, many of the representations make me feel uneasy. Indigenous feminist legal theory, along with legal aesthetics, helps to show how gendered norms and power dynamics are exercised through (and in resistance to) symbols and representations about law. Manderson notes that "[a]esthetics as a way of knowing is therefore the conjunction of two aspects: the sensory force, with which we engage something, and the symbolic meanings, which become attached to it."[22] Gender (like race, class, etc.) is always operating in our sensory reactions and also in how we interpret symbols, for instance, 'good relations' or what it means to be a good Cree citizen and legal actor.[23]

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aesthetics as objective, but rather as something that is necessarily connected to social values and norms.

[18] *Ibid* at x.

[19] *Ibid* at 27.

[20] *Ibid* at 17.

[21] Manderson contends that representations of law try to encourage particular readings of law (*ibid* at 27).

[22] *Ibid* at 21.

[23] When I say that gender operates through sensory reactions I do not mean to suggest that women, biologically react to objects in certain ways. What I mean is that objects have social meaning, and how we react to them, while it might feel bodily, is also very much social. For example, particular

6.2(b) Understanding the Aesthetics of Representations in a Colonial Context

> Identifying the spiritual (moral) basis of those laws and understanding the beauty, integrity, fairness and humanity of those laws and philosophies will enable us to proceed towards acknowledging the judicious reasonableness inherent within them. Addressing the peacefulness and harmony within those teachings is key in rejuvenation. In fact, the inherent peacefulness has been addressed by Indigenous scholars in the context of the Peacemaker as essential 'not for the establishment of law and order, but for the full establishment of peace.'[24]

Overwhelmingly, the general representations about Cree law are very positive in the educational materials. In the resources in which gender roles are talked about, '*traditional*' gender roles are also framed in a positive light. While there are some difficult discussions in some of the materials, Cree law itself remains quite perfect[25] and represented in terms of ideals such as balance, harmony, peace, and good relations. Traditional gender roles are treated as unproblematic and gendered conflict is usually depicted as something that came only with colonial oppression. The observation about the positive representation of Cree law and gender roles is of course not surprising, as the materials are about revitalization and empowerment. However what I have been discussing throughout this dissertation, informed by legal theorists such as Napoleon, Borrows, Webber, and Smart, is that revitalization requires moving beyond the 'nice stuff' of law (and culture) to

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objects are normatively defined as disgusting, while others are not. This is not to say that everyone will have the same reaction to the same object, rather as Manderson and Korsmeyer maintain, objects are not neutral (Manderson, *ibid* generally; Korsmeyer, *supra* note 4 generally).

[24] Lindberg (quoting from Akwesasne Notes), *Critical Indigenous Legal Theory*, *supra* note 10 at 340.

[25] When I use the term 'perfect' I am referring to problems that have been discussed throughout the dissertation: the conflation of ideals with practice, the perception that Cree law worked flawlessly until colonial contact, the denial of gendered conflicts in law, notions that suggest that Cree law cannot cause harm (as it was made and given by the Creator), and the treatment of Cree legal norms and cultural norms as universally accepted and desirable amongst Cree people. When using and critiquing the term 'perfect,' I do not mean to suggest that Cree people are instead characterized by only problems and flaws – that is a racist colonial stereotype about indigenous peoples more broadly. The binary of perfect/imperfect is wholeheartedly rejected here.

also thinking complexly about Cree law, conflict, and gender. I do not mean to suggest that Cree legal ideals are not complex; rather my concern is that they are not dealt with as such in the materials.

I have suggested that the representations of Cree law and gender limit Cree women and undermine the complexity of Cree law. I have also demonstrated that Cree law can perpetuate oppression, especially when power dynamics and critical engagement are absent. However is it possible to consider the 'nice' representations of Cree law as strategically deployed in a colonial context? What are these discourses doing in response to colonial violence? The educational resources are publically available and colonial context is necessary to consider in terms of harm done to indigenous legal orders,[26] negative impacts on gender,[27] and ongoing colonial imposition. Regardless of the intended audience, the discourses in the educational materials circulate in relation to dominant colonial discourses and power dynamics. The question then becomes – how would difficult, messy discussions about Cree law be received? Is it too dangerous, as Lindberg suggests, to provide detailed information about Cree law,[28] or discussions that challenge aspects of Cree law? Further, are the representations about gender roles used strategically? Would appeals for indigenous women's empowerment be heard when framed in the language of indigenous feminism? What are the various ways to interpret the aesthetically pleasing representations of Cree law?

[26] Napoleon, *Ayook*, *supra* note 8.
[27] See Chapter One of this dissertation.
[28] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 10 at 4.

One way to read the representations is that they speak back to colonial oppression by asserting Cree distinctiveness and by challenging negative stereotypes about Cree peoples as lawless and uncivilized. In one of McAdam's lectures, for example, distinctiveness is explicitly emphasized when describing Cree law. After talking about various ceremonies, including a ceremony that can be held during the first year of a child's life, McAdam says, "[h]ow does it apply today?"[29] In response to her question she teaches the class about the term *sui generis* and notes that three things are required for indigenous peoples' to maintain their distinctness: land, language, and culture.[30] She tells the students that

> if you don't have that [culture] and our children are not learning that, and if we don't continue our, our, our celebrations as a nation, and when I say we proclaim to the world, we proclaim to all of the other nations that we are a nation when we get together to do our powwows, when we get together to do our, our ceremonies.[31]

McAdam further explains, "if those things [that make indigenous peoples distinct] disappear or if they begin to diminish, then we are in our final stages of genocide."[32] Rather than actually engaging in a discussion about how some of the ceremonies and laws that she discussed might be taken up today, her response to questions about the contemporary relevance of Cree law is a broad assertion about distinctness.

Miller notes that the revitalization of indigenous legal traditions is often "premised, in various ways, on the idea of cultural distinction," which he explains

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[29] McAdam, ILP Lecture 2, *supra* note 10.
[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid*.

is often framed as "the opposite of whatever mainstream practices might be."[33] This tendency is evident throughout the educational materials and contributes to the extremely aesthetically pleasing representations of Cree law. Distinctiveness is asserted in the materials that directly talk about state law, as well as in the materials that do not. Regarding the indirect assertions of distinctiveness, in *Knowledge Quest*, for example, if Kaniskic does not play the game properly, then he is informed that he is not doing things the 'right' Cree way by Chief Moonias and is asked to try again.[34] In *Muskwa*, Cougar is depicted as a lost soul and as behaving in ways that are not Cree (greed, violence).[35] While explicitly critiquing dichotomies in her work, when talking about state law Lindberg ends up putting forth the following representations: indigenous laws as good and responsible/state law as flawed and oppressive; indigenous laws as different and untranslatable/state law as foreign and not understandable (except to deconstruct it); indigenous understandings of power are kind and functional/settler understandings of power are violent and harmful; indigenous conceptualizations of justice are real and actual/state conceptualizations of justice are failed and

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[33] Bruce Miller, "Justice, Law, and the Lens of Culture" (2003) 18:2 Wicazo Sa Review 135 at 136 [Miller, "Justice, Law"]. See also Wendy Brown on power and identity politics (Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* [Princeton: Princeton University Press, 1995]). Drawing on Nietzsche's *ressentiment,* she argues that "[d]eveloping a righteous critique of power from the perspective of the injured, it fixes the identities of the injured and the injuring as social positions, and codifies as well the meanings of their actions against all possibilities of indeterminacy, ambiguity, and struggle for resignification or repositioning" (at 27). This tendency is reflective of the oppositional politics discussed in this section of the chapter regarding indigenous distinctness, but also concerning the depictions of *an* authentic way of enacting Cree womanhood and distinctness. As I discuss, Cree identity is asserted in a particular (limited, normative) way, at the expense of the multitude of ways that Cree women express their politics. This includes exclusions of indigenous feminist politics as colonized or not 'authentically' indigenous in their orientation and experiences of injury.

[34] *Knowledge Quest*, online: <http://www.pathoftheelders.com/newgame#start> [*Knowledge Quest*].

[35] Greg Miller et al, *Muskwa: Fearless Defender of Natural Law* [Edmonton: BearPaw Legal Education & Resource Centre, second printing 2011] [Miller et al, *Muskwa*].

violent; indigenous laws equal truth/state laws equal deceit; indigenous gender roles are functional and therefore good/settler gender roles are oppressive and violent.[36]

Similarly, Hansen depicts Cree legal sanctions as healing in opposition to state legal sanctions as punitive.[37] Here Cree law is defined in relation to idealized principles, whereas state law is defined in terms of *practice* and idealized principles such as equality and fairness are absent. I do not mean to defend state law, as I think that both Lindberg and Hansen are correct to identify its violence; however, the dichotomies above oversimplify and depict Cree law as perfect or at least non-violent. While Hansen does have moments in which he acknowledges similarities between Cree law and state law,[38] these disappear from his overall analysis. He includes tables to provide summaries about his findings and what is striking about the presentation is that all of the factors that promote healing are traditional Cree practices, and all of the factors that impede healing are settler practices.[39] Again, it is understandable that settler practices impede healing, though it should not then be surmised that Cree traditions are necessarily healing for everyone – this dissertation has amply demonstrated otherwise. Cree legal principles and practices are not neutral and impact Cree women and men

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[36] Lindberg, *Critical Indigenous Legal Theory*, *supra* note 10 generally. Lindberg notes that she is trying to not perpetuate dichotomies in her dissertation. She explains in one of her journal entries, "I am not trying to see Indigenous peoples and non-Indigenous peoples as dichotomous peoples with opposite beliefs. If I did, I would be broken in half with a parent from each tradition" (*ibid* at 257 [italics removed from entire sentence]). She is committed to reconciliation and comments, "I suppose the divide is great, but the true challenge is not in finding our mutuality, but in agreeing to respect the differences" (*ibid*). Though Lindberg tries to avoid dichotomies, there are still significant problems that arise with this in her text.

[37] John George Hansen, *Cree Restorative Justice: From the Ancient to the Present* (Kanata: JCharlton Publishing, 2009) at 68 [Hansen, *Cree Restorative Justice*].

[38] *Ibid* at 33.

[39] See for example, *ibid* at 151-152.

differently. Altamirano-Jiménez maintains that a dichotomized us versus them approach erases gender relations. She explains,

> [i]n nationalist discourses, gender does not constitute a legitimate component because Indigenous nationalism's emphasis is on the distinction between 'them' and 'us' and on conforming [to] the terms demanded from Indigenous peoples by the national states. From this perspective, both Indigenous nationalist discourses and colonizing polic[ies] include boundaries of exclusion and silence that entrap men and women differently and contributes to the unequal representation of men and women.[40]

Parallels can be seen between indigenous political strategies and feminist strategies regarding responding to hierarchical binaries that perpetuate oppression. For instance one response could be to take up the 'empowered' terms that predominate in the binary. This can be seen with liberal feminists using arguments about women's rationality in response to the male/female, rational/irrational binaries. Using the 'valued' term in the binary can also be seen in some indigenous responses to gender, for instance with the binary of indigenous/white, dysfunctional/functional, the language of functionality is often embraced and deployed in discussions about indigenous gender roles and relations. Another response seen with both indigenous and feminist strategies is instead to take up and redefine the devalued term in the binary (e.g. embracing motherhood to respond to hierarchical constructions). An additional, crucial way for responding to hierarchical binaries is to deconstruct them (for example using poststructuralism), rather than working within them (either to value one side or the other of the binary). It is this third strategy that I am taking in this dissertation, and which is informed by scholars throughout who reject the violence of

[40] Isabel Altamirano-Jiménez, "Nunavut: Whose Homeland, Whose Voices?" [2008] 26:3,4 Canadian Woman Studies 128 at 133 [Altamirano-Jiménez, "Nunavut"].

binaries.[41] This strategy is also deployed so as to not overlook the oppressive patriarchal, heteronormative, colonial contexts from which these binaries are born. The focus of my research is on internal articulations of Cree law and materials produced by Cree people, for Cree people, however my emphasis on internal politics should not be misconstrued to mean that non-Cree people, particularly settlers, are not responsible for challenging the dominant constructs about race, gender, and law that the discourses in the materials circulate in relation to.[42] In thinking about how educators might engage with Cree law and gender more complexly, it is not my assertion that this work is the sole responsibility of Cree people. I hope that my dissertation demonstrates this.

In her work on the use of cultural revitalization discourses in educational contexts, St. Denis notes that narratives of loss are commonly deployed. These narratives maintain that indigenous peoples lost their cultures, rather than focusing on what was stolen and violently disallowed.[43] While questions do need to be asked about internal power dynamics, it is important to also not overlook the burden that is placed on indigenous peoples to reassert their cultures and laws (amidst still ongoing colonial violence), while the social conditions and power

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[41] Thank you to Lise Gotell for her insights concerning this observation.

[42] Thank you also to Matthew Wildcat for his engaging questions about audience and the responsibilities of non-indigenous peoples in relation to the educational materials and representations. These question were asked when I was presenting an earlier draft of this chapter, entitled, "Aesthetic Difficulties: Gender, Representation, and Rhetoric in Cree Legal Educational Materials" at the Law on the Edge conference hosted by the Canadian Law and Society Association and the Law and Society Association of Australia and New Zealand, hosted at UBC, July 1-4, 2013.

[43] Verna St. Denis, "Real Indians: Cultural Revitalization and Fundamentalism in Aboriginal Education" in JoAnn Jaffe, Carol Schick & Ailsa M. Watkinson, eds, *Contesting Fundamentalisms* (Winnipeg: Fernwood Publishing, 2004) 35 [St. Denis, "Real Indians"]. Though talking about western feminist narratives of progress, loss, and return, see also Hemmings' analysis of the use of narratives (Clare Hemmings, *Why Stories Matter: The Political Grammar of Feminist Theory* [London: Duke University Press, 2011]). Her work is discussed more below.

dynamics that constrain indigenous peoples and sustain dichotomies go unaddressed.[44] St. Denis cautions that indigenous politics not treat culture as an external object of the past that needs to be found, but rather that culture be understood as continuous and created in the everyday. She is particularly troubled by fundamentalist assertions of culture (discussed more below) and explains that "[c]ultural revitalization has problematic implications because of a kind of cultural absolutism it imposes on the native Other. In particular, it encourages incompatibility with socio-cultural change as the native must remain Other, distinctly different and identifiable."[45]

Napoleon suggests that decolonization should not be the sole focus in indigenous political and legal projects as it can lead to defining indigenous identity, culture, politics and practices in reaction to colonialism.[46] Quoting Ayelet Shachar, Luther applies the idea of 'reactive culturalism' to rigid representations of culture – "'[r]eactive culturalism' is a process 'whereby the group adopts an inflexible interpretation of its traditions precisely because of the perceived threat from the modern state.' Hence, when their sphere of autonomy is narrowly defined, cultures tend to exaggerate their traditions."[47] Representing culture is particularly complex for indigenous peoples, as they have to prove legitimacy both within and externally.[48] Luther notes that state laws restrict how

[44] St. Denis, "Real Indians," *ibid*.
[45] *Ibid* at 42.
[46] Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Richardson, Imai & McNeil, *supra* note 8, 233 at 239 [Napoleon, "Aboriginal Discourse"]. See also Miller, "Justice, Law," *supra* note 33 at 140; St. Denis on cultural revitalization, "Real Indians," *supra* note 43.
[47] Emily Luther, "Whose 'Distinctive Culture'? Aboriginal Feminism and R. v. Van der Peet" (2010) 8:1 Indigenous LJ 27 at 51. See also Wendy Brown on the constraints of identity politics (*supra* note 33).
[48] Miller, "Justice, Law," *supra* note 33 at 136.

indigenous cultures, laws, and traditions can be imagined and how they ask after rigid, fixed representations of indigenous laws.[49] Thinking about the representations of Cree law in a colonial context is complex, as it is necessary to account for the power dynamics of that context, is necessary to respond to negative stereotypes and misconceptions about Cree law, without then being subsumed by colonial demands. In her examination of the impact of *Delgamuukw* on Gitksan law, Napoleon explains that the Crown's arguments problematically treated 'authentic' Gitksan law as something that "must remain locked in the past."[50] From this perspective, changes in tradition and any critical discussion about law are thus understood as damaging and inauthentic[51] – or as reiterating "'fatal-impact' notions of cultures."[52] The construction of Cree law as fragile when paired up with ultimate distinctiveness, also produces a particular aesthetic "wherein pre-contact traditions are elevated to quasi-sacred status."[53] St. Denis describes how "[c]ultural revitalization, in its fundamentalist form, harkens back to a pristine past that is uncritically regarded as good."[54]

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[49] Luther, *supra* note 47 at 50. Similarly, Christie reflects on state courts' expectations of what 'tradition' is, and he explains, "Aboriginal peoples engaged in the sorts of activities they did, in the ways they did, for reasons. These reasons, and not the activities, would have formed the core of their cultural identities (and ex hypothesi, would form the core of their "traditional" identities today). An Aboriginal people-as with any cultural community- should be defined not on the basis of their having hunted at night with torches, or fished with particular sorts of nets and hooked spears, but on the basis that they carried out these activities at certain times and in certain ways because they believed and felt certain things. If the law were interested in protecting Aboriginality, it would be interested in aiding Aboriginal people in protecting their ability to continue to believe and feel as they have for generations, all the while recognizing that it is unacceptable to simply equate contemporary identities with past cultural practices" (Gordon Christie, "Law, Theory and Aboriginal Peoples" [2003] 2:1 Indigenous LJ 67 at 85 [Christie, "Law, Theory and Aboriginal Peoples"]).

[50] Napoleon, *Ayook*, *supra* note 8 at 89.

[51] *Ibid*.

[52] Napoleon, drawing on James Clifford. The idea here is that change is seen as a threat to a culture, rather than being about transformation (*ibid* at 327).

[53] Luther, *supra* note 47 at 50.

[54] St. Denis, "Real Indians," *supra* note 43 at 43.

Borrows' work on constitutionalism and originalism is extremely insightful to draw on here. He explains that Canada's constitution is thought of as living (law and peoples change over time), yet this important approach to law is then denied when looking at state laws concerning aboriginal peoples.[55] The legal 'standard' to which aboriginal peoples are held is one of originalism:

> [t]he living tree does not operate when considering Aboriginal and treaty rights because history is said to be determinative in this field. The Supreme Court has concluded that Aboriginal and treaty rights are limited by the parties' historic intentions and the public meaning attaching to original actions. While non-discriminatory understandings of history must guide constitutional interpretation, the Court's current approach to Aboriginal rights overemphasizes the past by restricting the Constitution's meaning to certain foundational moments. This method, which goes by the name originalism, is alive and well in the field of Aboriginal rights.[56]

Borrows labels this problem "(Ab)originalism" ("abnormal originalism") as it is only aboriginal people who are held to this unreasonable legal standard in Canadian law.[57] He explains that any law (state or non-state) can be "weakened if too much emphasis is placed on either their origins, or our current obsessions, or our future predictions."[58] Distinctness arguments about indigenous laws, in response to state law, are important however Borrows insists that these arguments should not be articulated as originalism and that indigenous laws need to be understood as living and changing over time.[59] State expectations about originalism regarding indigenous laws are oppressive[60] – as are indigenous

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[55] John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR 351 [Borrows, "(Ab)Originalism"].
[56] *Ibid* at 358.
[57] *Ibid* at 360.
[58] *Ibid* at 353.
[59] *Ibid* at 362-363.
[60] Borrows explains, "[n]ot only is originalism out of step with Canada's wider constitutional traditions, it also risks perpetuating the discrimination Aboriginal peoples have encountered throughout the years. This is because originalism links and then limits interpretation to periods when the Constitution was formed. Since Canada's legal history is saturated with discrimination

assertions of originalism as they can freeze law at a point in history and deny the complexity of indigenous peoples' laws and legal agency.[61] When McAdam, and others, make arguments about distinctiveness, and over-emphasize rather than challenge qualities found within binaries, Cree people and law gets oversimplified.

In her work on harmony ideology, as used by the Talean Zapotec in Mexico, Laura Nader examines how aesthetically pleasing representations of culture are deployed in an effort to gain power. She explains that her research,

> suggests that compromise models and, more generally, the harmony model are either counter-hegemonic political strategies used by colonized groups to protect themselves from encroaching superordinate powerholders or hegemonic strategies the colonizers use to defend themselves against organized subordinates.[62]

Likewise, the aesthetically pleasing representations of Cree law, with their emphasis on perfection, can be seen as political efforts to minimize state interference.

Whether these 'nice' representations of Cree law are being purposefully strategically deployed is not something that I can speak to. While the aesthetically pleasing representations are speaking back to colonial violence and asserting distinctness, they also perpetuate oversimplified dichotomies, inaccurate depictions of Cree law, and promote an image of Cree peoples as being free of power dynamics. These romanticized representations also risk conflating ideals

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towards Aboriginal peoples, constitutional standards should not pass along the troubling attitudes, behaviours and intentions of past generations of constitutional actors" (*ibid* at 365-366).

[61] *Ibid* at 368-369, 394.

[62] Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford: Stanford University Press, 1990) at 1.

with practice, which as discussed in Chapter Five, erases gendered realities.[63] While McAdam occasionally acknowledges lived realities (discussed more below), including that it is difficult for Cree people to live together peacefully today, overall her discussions about Cree law still work to assert a romanticized narrative. For McAdam (and others), the problem is that people today do not know Cree laws and thus experience challenges with adhering to them – Cree law itself is represented as without difficulty. In a lecture to university students, McAdam repeats a familiar story in which gender conflicts are located in colonization:

> [s]o, when we talk about peace, be aware of how you affect people every day. This was our foundation in our relationships with *wakewtewin*.[64] Can you imagine? Our people used to live together not just in the hundreds, they lived together in, in uh, encampments, like, in the thousands. How did they get along? They got along really well. So well, that we don't have a word in our language for sexual assault. We don't have a word for it. Over time, there's a word that, that was developed, it's called *otihtin*,[65] but that's more like, um, it's more like, a, you know when a, a, a predator flies and swoops, you know [she laughs] and grabs, that, that's the kind of word that is, it doesn't – we don't have a word for it. We must have been doing something right. You know it, it was almost non-existent, it was unheard of.[66]

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[63] Though not writing about gender, Miller challenges the conflation of ideals with practice. He says, "[t]here is further danger in the difficulties struggling communities face in addressing internal diversity and in overcoming an inclination to use emergent legal/justice systems to address their relationship with the outside world (and to insulate themselves) rather than to address internal disputes or malfeasance. By this I mean that communities may choose to emphasize regaining control over legal processes, making a political statement about cultural differences, or foregrounding large-scale social dilemmas that are the outcomes of contact and colonization. None of these are the same as actually dealing with the nitty-gritty of regulating the community" (Miller, "Justice, Law," *supra* note 33 at 136).

[64] Spelled '*wahkohtowin*' throughout the dissertation.

[65] I have used this spelling and word here based on its similarity with McAdam's pronunciation in the lecture – her pronunciation and spelling may differ. In the dictionary that I used, *otihtin*, is translated as "rape" (Arok Wolvengrey [compiled by], nêhiyawêwin: itwêwina, vol 2: English-Cree [Saskatoon: Houghton Boston, 2001] at 505). In another dictionary, the word *otihtinew* is also translated as "s/he rapes her/him or s/he seizes or grabs her/him" (Nancy LeClaire & George Cardinal; Earle Waugh ed, *Alberta Elders' Cree Dictionary*: *alperta ohci kehtehayak otwestamâkewasinahikan* [Edmonton, University of Alberta Press, 1998] at 397).

[66] Sylvia McAdam, "Sylvia McAdam teachings pt. 1," online: <http://vimeo.com/31653388> [McAdam, ILP Lecture 1].

It is appreciable that McAdam emphasizes that Cree laws existed and aided social organization. It is, however, problematic that living in encampments is depicted as inherently peaceful and that she takes such a flippant approach to sexual assault. Elsewhere in her lectures she treats gendered violence with a more serious tone, though overall sexual violence is treated as a product of colonialism, which works to reinforce the construction of Cree peoples, culture, and laws as perfect.

In talking about sexism and oppression in relation to Cree law in this dissertation, I risk my work being *mis*used by people who might want to reinforce stereotypes that Cree people are brute and have uncivilized laws, or the racist perception "that without the civilizing restraints of Canadian law, [indigenous people] would immediately revert to oppressive sexist, homophobic, and who knows what other practices."[67] These responses are extremely concerning to me. I am uncomfortable about readers wrongfully concluding that Cree law is an unsafe or impractical resource, when the argument that I am making is that Cree law is a vital resource. It is crucial to engage with as it affects people, and people can affect it by working internally with it.[68] Yet I am concerned about romanticized representations that work to foreclose necessary discussions about education, gender, and law. When talking about colonialism, the *Indian Act*, and identity, Lawrence concludes that "no risk-free space exists in which to explore Native identity."[69] This is also true of Cree law.

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[67] Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17 CJLS 149 at 158 [Napoleon, "Raven's Garden"].
[68] Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada's Indigenous Constitution, supra* note 8; Friedland, "Reflective Frameworks," *supra* note 2 generally.
[69] Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18:2 Hypatia 3 at 22.

The materials that explicitly talk about gender roles also deploy discourses in a way so as present aesthetically pleasing narratives. While I (and presumably others) do not necessarily receive the representations as pleasing, I contend that the use of discourses about nurturing, loving, and gentleness, alongside the celebration of Cree women's traditional gender roles as empowering and decolonizing, works to persuade a positive aesthetic reaction. One interpretation of these representations could be that they are a response to profoundly devastating misconceptions about indigenous women as unfit mothers,[70] and as objects of sexual exploitation. The insistence on the sacredness and strength of indigenous women's bodies could also be understood as responding to colonial (and internal) violence in which indigenous women's bodies are rendered disposable and invisible. The violent ideologies should not define how indigenous women are talked about however similar to the discussion above, the opposite of extreme romanticized, pleasant representations are also problematic.[71]

George describes "in many non-western contexts, the political vocabulary of motherhood is understood to offer an enabling advocacy pathway for women and 'discursive opportunities' that can be usefully exploited."[72] This strategic use of motherhood is also deployed by the Native Women's Association of Canada

[70] Evident through sterilization practices, residential schools, and the staggeringly high number of indigenous children put into foster care. See for example, Karen Stote, "The Coercive Sterilization of Aboriginal Women in Canada" (2012) 36:3 American Indian Culture and Research Journal 117; Cindy Blackstock, "Residential Schools: Did They Really Close or Just Morph Into Child Welfare?" (2007) 6 Indigenous LJ 71.

[71] There are parallels between this dissertation and Patricia Hill Collins' work on black sexual politics. I do not have the space to discuss her work in detail, however crucially she shows how black sexual politics are shaped by the intersections of race, gender, and sexuality, and how they are embedded in power dynamics. See Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* (London: Routledge, 2004).

[72] Nicole George, "'Just Like Your Mother?' The Politics of Feminism and Maternity in the Pacific Islands" (2010) 32 Australian Feminist Law Journal 77 at 80.

(NWAC) (and is more generally found in the indigenous women's movement in Canada) through the notion of "the feminine Nation."[73] Fiske considers how motherhood is used by NWAC (and beyond) as a way for women to enter indigenous politics, and as a way to assert authority.[74] The feminine nation that she describes is consistent with the findings in my research – assertions of women as the foundation of the nation, life-givers, nurturers who are connected to the earth, and that these roles are dignified and should be honoured.[75] Fiske describes this mode of activism as women trying "to achieve full citizenship within their cultural communities and to restore the dignity their foremothers knew prior to European colonization."[76] Further, she explains the strategic use of motherhood as an effort to represent indigenous women as unlike white women.[77]

While I take heed from scholars such as George, who works to examine the complexities in Pacific women's strategic political use of motherhood,[78] I do not think that complexities are presented in the representations in the materials that I have examined. Instead, motherhood is offered in romanticized ways. Further, I have questions about the implications of motherhood discourses. As discussed, motherhood discourses work to compel indigenous women to engage

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[73] Jo-Anne Fiske, "The Womb Is to the Nation as the Heart Is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement" (1996) 51 Studies in Political Economy 65 at 78.
[74] *Ibid*.
[75] *Ibid* generally.
[76] *Ibid* at 65. She further explains that while indigenous women's activism often uses "essentialist womanhood" in their politics, "male leadership's goals emulate the masculinist nation-state (despite expressing a counterhegemonic resistance to state authority)" (at 72).
[77] *Ibid* at 74.
[78] George, *supra* note 72 at 77-78.

with citizenship and law in particular ways, which I have suggested are limited.[79] Rigid conceptualizations of gender roles constrain how women can be recognized and it is difficult to imagine how taking up those very constraints will lead to full political participation. The use of motherhood in the materials is essentializing and thus necessarily limits who is included. While essentialisms can be approached as strategically deployed, the perspective that I have taken throughout this dissertation is that essentialisms are not viable political strategies as they necessarily exclude. In patriarchal contexts, women in particular are burdened with these exclusions. Again, LaRocque cautions, "we must be careful that, in an effort to celebrate ourselves, we not go to the other extreme of biological essentialism of our roles as women by confining them to the domestic and maternal spheres, or romanticizing our traditions by closing our eyes to certain practices and attitudes that privilege men over women."[80]

Additionally, as discussed in Chapters Four and Five, many of the assertions about tradition and gender in the materials actually perpetuate a phallocentric approach to gender. Fiske comments that when "[f]aced with rationalist arguments to their disadvantage, [indigenous] women find little room in which to manoeuvre. Hence, it not surprising that feminine and masculinist discourses are enmeshed in a Western rationalist polemic even as they seek to

[79] Deckha cautions that there can be harm when an "ideal and imagined version of culture is being put forth as truth. These truths, then, more than selling products, encourage or even coerce people to behave in certain ways" (Maneesha Deckha, "Gender, Difference, and Anti-Essentialism: Towards a Feminist Response to Cultural Claims in Law" in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* [Vancouver: UBC Press, 2006] 114 at 121).

[80] Emma LaRocque, "Métis and Feminist: Ethical Reflections on Feminism, Human Rights, and Decolonization" in Green, *Making Space*, *supra* note 3, 53 at 65 [LaRocque, "Métis and Feminist"].

transcend the colonial past."[81] The very enactment of 'traditionally' and 'authentically' represented women's roles allow women to enter into dialogue at the very same time that they are then constrained as embodied mothering subjects. Fiske argues that "[t]he feminine Nation, is not a feminist Nation; men are neither estranged from the community body nor diminished by it; rather they are nurtured and honoured."[82] The risk exists that male privilege remains intact and we need to interrogate how motherhood discourses are received in patriarchal contexts.[83] Overall the findings in this dissertation show that the representations of Cree women – both the exclusions and the inclusions – suggest only partial agency, in contrast to Cree men's full legal agency.

When considering the aesthetically pleasing representations of Cree law and gender roles, it is crucial to account for colonial context *and also connectedly patriarchal context*. As indigenous feminists advocate, and as taken up by indigenous feminist legal theory, colonialism is necessarily gendered and colonialism, patriarchy, and heteronormativity intersect. Both women and men are perpetuating discourses of harmony and good relations,[84] and Fiske remarks, "[w]omen are not unaware of the discursive disjunctures between their appeals to the state and their idealized Nation; the former, it is hoped, will be a bridge to the latter."[85] Altamirano-Jiménez questions "who is mobilizing what in the articulation of the past, deploying what identities and representations, and in the

[81] Fiske, *supra* note 73 at 86.
[82] *Ibid* at 78.
[83] Kim Anderson, "Affirmations of an Indigenous Feminist" in Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: University of British Columbia Press, 2010), 81 at 87.
[84] See also Fiske, *supra* note 73 at 72.
[85] *Ibid* at 86-87.

name of what political purposes."[86] While the aesthetically pleasing representations are understandable in terms of hope and aspiration, there is a high cost for these 'niceties' that make them quite unpleasant and unacceptable. It is men who are benefiting from these discourses.[87] Principles such as harmony, balance, and good relations can of course be read in extremely complex ways in which lived realities, conflict, and power dynamics are accounted for and discussed. Yet these complexities are missing in the materials and seem to be discouraged when the ideals of Cree law are armored in fundamentalisms.

6.2(c) Fundamentalisms

> Perhaps there is nothing wrong with seeing beauty in order and coherence. The problem lies in the superhuman efforts of formalists to avoid all trace of dissonance and incoherence in the model of the law they present as 'real.'[88]

'Formalists' in this quote refers to those who take the stance that there is only one law. In Manderson's work, this issue is talked about primarily in terms of those who are against legal pluralism,[89] however it is useful to think about his quote here in relation to fundamentalist claims about Cree law, and representations that assert Cree law as homogeneous. I contend that the aesthetically pleasing representations of Cree law work to reinforce fundamentalisms but also that the fundamentalisms themselves are put forth as 'nice' when packaged up in assertions about spirituality and thus cultural authenticity. Cree citizens are compelled to enact their citizenship in particular ways via pronouncements and images of authenticity. It is key to remember, as Anderson attests, that

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[86] She is drawing here on the work of Ella Shohat (Altamirano-Jiménez, *supra* note 40 at 129).
[87] *Ibid* generally.
[88] Manderson, *supra* note 15 at 165.
[89] *Ibid* see the chapter titled, 'Quartet for the End of Time: Legal Theory Against the Law.'

> [a]s we fervently recover our spiritual traditions, we must also bear in mind that regulating the role of women is one of the hallmarks of fundamentalism. This regulation is accomplished through prescriptive teachings related to how women should behave, how they should dress and, of course, how well they symbolize and uphold the moral order.[90]

As discussed in Chapter Five, sacred law features prominently in the resources, and I want to further consider here how sacred law is used to regulate women through aesthetically pleasing assertions about tradition and authenticity that disallow questioning and which erase conflict and the possibility that Cree law is a product of human and social behaviour. St. Denis contends that fundamentalisms are "most often associated with religious beliefs and practices and [are] sometimes intertwined with nationalism."[91] In focusing on fundamentalisms in relation to sacred law, I do not mean to suggest that Cree law is fundamentalist because of the presence of sacred law – rather it is the ways that discourses about sacred law are deployed in the materials, alongside discourses about culture, authenticity, and as I have discussed, the past, that lead to this discussion about fundamentalisms. St. Denis argues that oversimplified notions about the 'right' way of living can play out in indigenous politics and "fundamentalism parallels the goals and strategies of cultural revitalization in Aboriginal communities, especially in the expectation of homogeneity, cultural preservation, unchanging traditions and historically anchored cultural values and conventions for governing social interactions."[92] I do think that revitalization politics can be complicated though I turn my attention here to the pervasive oversimplified representations in the educational materials.

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[90] Anderson, *supra* note 83 at 88.
[91] St. Denis, "Real Indians," *supra* note 43 at 36.
[92] *Ibid*.

In *Treaty Elders* it is explained that,

> [t]he presence of First Nations peoples in North America is seen by the Elders as evidence of the Creator's perfect love for the First Nations peoples. This perfect love gave birth to a continuing relationship between the Creator and First Nations, which over time manifested itself in the transmission of whole and complete laws and institutions from Him to them.[93]

This quote exemplifies a common finding in the resources, in which Cree law is explained as something that comes from the Creator, which Cree people just need to learn and follow in their lives. The language of 'complete' laws in the quote risks suggesting that laws were established in the past and need not change over time. Further the usage of the words "perfect" and "love" put forth a narrative of Cree law as flawless and working well for everyone. Yet in that same educational resource, Cree women are marginalized and Cree law is based primarily on male elders' authority and knowledge. What does it mean to depict Cree law so positively given what that (and other) resource is doing? These romanticized depictions risk normalizing current social contexts and silencing those who might want to suggest that things are not perfect. How can critical questions about Cree law be raised when law is stated as a product of the Creator, and spirituality is so heavily attached to Cree identity?[94]

One response to my questions might be that Cree laws are fine, but it is humans who are misunderstanding and misapplying the laws, because of colonialism. McAdam insists that

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[93] Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 30 [Cardinal & Hildebrandt, *Treaty Elders*].

[94] St. Denis also raises concerns about fundamentalisms shutting out critique ("Real Indians," *supra* note 43 at 41).

> [t]he roles and responsibilities of men and women were clearly defined in traditional First Nations' societies. These roles were based on respect, integrity and value for each other. The First Nations' law of balance and harmony is reflected in all of Creation. When there is imbalance in life, the result is dysfunction in families, communities and in larger society. This also leads to the erosion and loss of First Nations' identity and language.[95]

The perspective taken throughout this dissertation is that Cree law (like all law) is socially constructed, and that while colonialism causes profound violence to indigenous cultures, indigenous peoples and societies are not themselves perfect. The idea that Cree people just need to learn how to follow the laws seems extremely limited as it negates difficult discussions on how to actually go about living together.[96] McAdam's quote sets out a steep price to pay for not being 'properly' Cree, and as I have argued throughout when gender roles are "clearly defined"[97] rigidity abounds and exclusion can occur. The implication is that if one is not supporting the existence of dual, 'complementary,' 'traditional' gender roles, then they are compromising cultural claims and decolonization efforts.[98] This "hierarchy of Indianness"[99] excludes and treats those who are critical (for example, some indigenous feminists) as perpetuating colonial violence.[100] The representations of Cree law as monolithic and a product of the past are couched in the language of tradition. Manderson points out similar tendencies regarding fundamentalist approaches to state law. He notes, "[o]riginalism is one face of the

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[95] McAdam, *Cultural Teachings*, *supra* note 10 at 40.
[96] Napoleon on a substantive approach to law (Napoleon, *Ayook*, *supra* note 8).
[97] McAdam, *Cultural Teachings*, *supra* note 10 at 40.
[98] This dangerous either/or approach to gender and culture – the idea that you cannot prioritize both gender and culture, is discussed in the following report: International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, (Geneva, International Council on Human Rights Policy, 2009). This problem has also been discussed at various points in the dissertation regarding the idea that gender politics work against the nation (see for example, Altamirano-Jiménez, *supra* note 40 generally).
[99] St. Denis, "Real Indians," *supra* note 43 at 41.
[100] This is evident from the discussion in Chapter Two regarding the debates about indigenous feminism.

denial of the uncertainty and multiplicity of contemporary legal relations. Coherence is another."[101] Similarly, Borrows explains, "originalism has been called 'a paradigmatic form of legal positivism'" and he expresses concern that it "is often used in an exclusivist, either/or manner" that silences multiple interpretations of law and ways of being.[102]

Like Napoleon's findings about Gitksan law, my analysis of the educational materials demonstrates how youth are often represented as not knowing 'indigenous ways,'[103] while elders are all-knowing conduits of the Creator. As Napoleon contends the construction of youth as misguided

> is just as unsatisfying as some of the more rhetorical literature that suggests that indigenous people just have to be better indigenous people (i.e., respectful, knowledgeable, patient, obedient, spiritual, and wise), in order to return to some mythical, pre-contact time of social and political harmony. Such conflation of norms with behaviours, while not unusual, is the result of a failure to unpack and examine the implicit law which is part of the tacit background of shared understandings that guide the behaviour of humans in groups. [104]

Young people are often treated as unappreciative, out of control, and as not adhering to Cree culture.[105] Interestingly, young people are represented as colonized and threatening to Cree culture, while simultaneously being the hope

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[101] Manderson, *supra* note 15 at 163.
[102] Borrows, "(Ab)Originalism," *supra* note 55 at 358.
[103] See for example, *Wahkohtowin – Cree Natural Law*, DVD (Edmonton: BearPaw Media Productions, 2009) [*Wahkohtowin*]; Cardinal & Hildebrandt, *Treaty Elders, supra* note 93 generally; Online: *On the Path of the Elders* <http://www.pathoftheelders.com> [*Path of the Elders*]; Miller et al, *Muskwa, supra* note 35; McAdam, *Video Series* – when referring generally to this series, I will use [McAdam, *Video Series*]. Each video has its own URL, though they can all be found (alongside other videos) on vimeo at: <http://vimeo.com/channels/301066/page:1>; <http://vimeo.com/channels/301066/page:2>; <http://vimeo.com/channels/301066/page:3>.
[104] Napoleon, *Ayook*, *supra* note 8 at 322-323.
[105] See for example Online: *Four Directions Teachings.com* (Cree Teaching by Mary Lee) <http://www.fourdirectionsteachings.com/> [*Four Directions*]; *Path of the Elders, ibid*; Miller et al, *Muskwa, supra* note 35. As a note, when youth are depicted as unappreciative and out of control, Cree law is presented as something that will help them. Sometimes youth are then depicted as thankful for learning about Cree law, for instance in *Muskwa, ibid*; *Path of the Elders*, *ibid*; and in *Wahkohtowin* (in the story that Brertton tells about the youth at Poundmakers), *supra* note 103.

for the future.[106] Elders are represented through a discourse of authenticity as 'more Cree' than anyone else.

In *Path of the Elders* it is stated that "Elders help us learn who we really are. They hold the key to our history, traditions and ways of life."[107] Elders do hold a great deal of valuable knowledge and are vital authoritative figures in Cree law.[108] Sometimes though, the fact that they are complex social beings gets lost in the materials, and elders are deified. For instance elders are talked about as having "superior mental awareness" in the *Four Directions* lesson plans,[109] and McAdam, when reflecting on the quietness of some elders remarks, "when they do [speak], it's really profound."[110] The mundane things that elders might discuss, or the oppressive things that some elders might say, go unacknowledged. Elders are treated as sacred beings, rather than as social beings who "participate in relations of power."[111]

In his work on state law, Macdonald argues that it is through "the repetition of mantras and formulae by designated mystics (Parliament, judges, lawyers, and law professors)" that fundamentalisms are created and maintained.[112] He explains ideologies are shielded from critique by the language of rationality

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[106] See for example *Path of the Elders, ibid*; McAdam ILP Lecture 1, *supra* note 66.
[107] "The Elders' Stories," online: *Path of the Elders* <http://www.pathoftheelders.com/videos> ["Elders' Stories," *Path of the Elders*].
[108] See Appendix D.
[109] "Teachers Resource Kit," online: *Four Directions Teachings.com* <http://www.fourdirections teachings.com/resources.html>, Junior lesson plan at 2, Intermediate lesson plan at 2, Senior lesson plan at 2.
[110] McAdam, ILP Lecture 1, *supra* note 66.
[111] Miller, "Justice, Law," *supra* note 33 at 148.
[112] Roderick A. Macdonald, "Custom Made – For a Non-chirographic Critical Legal Pluralism" (2011) 26:2 CJLS 301 at 307.

used by authoritative figures,[113] and that they "deploy more abstract terms (liberty, equality, discrimination, fairness) as a cover for oracular pronouncement."[114] These patterns of deifying legal authorities and espousing fundamentalisms via their power and in the name of authenticity and culture are found in the Cree legal educational materials. These discourses are repetitive and work to assert a singular Truth about Cree law. Religious fundamentalisms can preclude critical discussion about gender because of their heavy-handed claims about one 'right' way of living.[115] Borrows insists that tradition, culture, and law need to be understood as dynamic, as contextually interpreted, and that there will exist a multitude of interpretations.[116] Understanding tradition, culture, and law in this way – as living – works against fundamentalisms and positivist declarations about law:

> (Ab)originalism should not be used to sustain discrimination. Discriminatory originalism is problematic, regardless of its nature and source. Whether used by distinguished members of the Supreme Court of Canada, or by respected elders within Indigenous communities, adverse discrimination should be rejected as contrary to other constitutional approaches within each tradition.[117]

6.2(d) Disrupting Dominant Narratives: Difficult Aesthetics

As Manderson emphasizes, it takes work to maintain narratives of fundamentalisms[118] and particular aesthetics such as harmony and balance. It takes work to assert coherent, nice representations of law, as everyday life will keep coming in to attest otherwise. Perhaps these narratives are able to remain

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[113] *Ibid*.
[114] *Ibid* at 308.
[115] ICHRP, *supra* note 98 at 36-37.
[116] Borrows, "(Ab)Originalism," *supra* note 55 at 388-391.
[117] *Ibid* at 391.
[118] Manderson, *supra* note 15 at 165.

relatively coherent in the educational materials, since the process of writing and scripting characters is fairly controlled. One exception to this is McAdam's online lectures. While I am not sure how much editing, if any, was done to the recordings of the lectures, they are quite different from the other resources in that other unscripted people are involved in the making of the resource, and McAdam's daily life is woven throughout the lectures. It is particularly interesting to watch for disruptions in McAdam's narrative, and how she works to piece it back together, rather than allowing for the complexities to profoundly reshape her discussion on Cree law. McAdam has extremely real moments in which conflict and difficult personal situations are discussed, which disrupt her broader aesthetically pleasing narrative. She talks about women, ceremonies, and the Creator as sacred and profound, while at the same time the audience learns that she has an umbilical cord (or 'belly button') in her purse, for which she has been tasked with finding an appropriate place, so as to nurture particular qualities in that child.[119] Her engagement with law in that moment is mundane – she is trying to figure out how best to carry through with a ceremony, and happened to go to McDonald's and to her job at the university along her way.[120] These are the mundane and real parts of her everyday engagements with law, and I wonder why it is that the unremarkable, and the troublesome aspects of a person's life that come through in the lectures do not reshape her narrative on Cree law. Instead everyday life appears only as disruptions to the narrative about law as profound and sacred that she creates.

[119] McAdam, ILP Lecture 2, *supra* note 10.
[120] I say this as she is drinking from a McDonald's to-go cup (*ibid*).

In her work on the stories that western feminists tell about feminism, Clare Hemmings argues that oversimplified dominant narratives are repeatedly used to talk about feminism – even in the face of theoretical and on the ground realities that suggest otherwise.[121] These narratives are about what feminism has done (progress narrative), lamenting what has been lost (loss narrative), and thinking through ways to make feminism 'work' (again) (a return narrative). The feminist heroine functions as a central figure, though "[t]he right to be the heroine … is one of the main prizes fought over."[122] What is particularly important about Hemmings' work is that she shows how discourses are affectively deployed, and how this, along with particular modes of citation (establishing authority), work to position the teller – the stories that get told are "motivated by the position one occupies or wishes to occupy."[123] McAdam is clearly aware of lived legal difficulties and indeed includes these in her lectures, yet she still uses a positive, tidy narrative about Cree law to position herself. The celebratory, pleasing representations of Cree law deploy affect and a "political grammar"[124] about culture, tradition, and sacredness, so as to tell a particular story that is important to McAdam – one that she sees as necessary for the revitalization of Cree laws, and that is depicted as central to her own identity. She emphasizes and glorifies discourses that have currency (internally and externally) pertaining to culture, tradition, identity, and gender. Hemmings analyzes how dominant narratives work to affectively connect tellers to the past and present, yet like her, I am interested in

[121] Hemmings, *supra* note 43.
[122] *Ibid* at 191.
[123] *Ibid* at 13.
[124] This is a term that Hemmings uses (*ibid* generally).

understanding not just how discourses are told, but also what it would mean to tell stories differently.[125]

It is important to consider difficult aesthetics. Manderson approaches aesthetics in three different ways in his book – in terms of methodology, epistemology, and ontology or the "'normative dimension.'"[126] Concerning the first, aesthetics can be thought of as "a way of reading" – "its purpose to illustrate how aesthetic meaning *forms* the substance of the law."[127] In terms of epistemology, aesthetics shift from a method of inquiry to focusing on how meaning itself is articulated.[128] And with the latter, aesthetics is understood as a means of change. Manderson suggests that "aesthetics can be viewed as a kind of value system for implying strategies for accomplishing change, although not of course exclusive ones."[129] Thus overall, he shows how aesthetics can be used to form law,[130] inform law,[131] and put forth challenges to reform law.[132] I have already focused on the first two in my discussion and turn here to showing how a more difficult aesthetic via indigenous feminist legal theory could be taken up to work against romanticized versions of law, but also to highlight Cree law as law[133] – as a practical resource for *all* Cree citizens.

As illustrated in Chapter Two, indigenous feminist legal theory is an

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[125] *Ibid.*
[126] Manderson, *supra* note 15 at 45.
[127] *Ibid* at 43-44.
[128] *Ibid* at 44.
[129] *Ibid* at 45.
[130] *Ibid* at 43-44.
[131] *Ibid* at 44.
[132] *Ibid* at 45.
[133] Regarding the importance of treating indigenous laws as law see Napoleon, *Ayook*, *supra* note 8; Friedland, "Reflective Frameworks," *supra* note 2 generally; Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" [forthcoming] [Napoleon & Friedland, "An Inside Job"]; Borrows, *Canada's Indigenous Constitution, supra* note 8.

intersectional, multijuridical, anti-colonial, anti-essentialist approach that is attentive to power dynamics. In critically drawing out the gendered aspects of Cree law, romanticized depictions are necessarily challenged. Again, Cree law (or any law) cannot be perfect and wholly pleasant if it is actually accounting for gender, as gendered realities are difficult and complex. The analysis put forth in this dissertation is uncomfortable, and Ahmed's work on happiness and the feminist killjoy is insightful for thinking further about my own resistance to aesthetically pleasing representations of Cree law. Ahmed explains of her work on happiness,

> I am interested in how happiness is associated with some life choices and not others, how happiness is imagined as being what follows being a certain kind of being. The history of happiness can be thought of as a history of associations. In wishing for happiness we wish to be associated with happiness, which means to be associated with its associations. The very promise that happiness is what you get for having the right associations might be how we are directed toward certain things.[134]

Assertions that indigenous feminists are colonized or inauthentic reflects what Ahmed describes in terms of not associating with the 'right' things. Ahmed "offer[s] an alternative history of happiness not simply by offering different readings of its intellectual history but by considering those who are banished from it, or who enter this history only as troublemakers, dissenters, killers of joy."[135] The 'feminist killjoy' is commonly understood as a particularly unhappy figure, and I wonder here how indigenous feminist legal theory will be read as killing the joy of Cree law, or worse yet, with the "'fatal-impact' notions of cultures,"[136] in

[134] Sara Ahmed, *The Promise of Happiness* (London: Duke University Press, 2010) at 2 [Ahmed, *Promise of Happiness*].
[135] *Ibid* at 17.
[136] Napoleon, drawing on James Clifford. The idea here is that change is seen as a threat to a culture, rather than being about transformation (Napoleon, *Ayook*, *supra* note 8 at 327).

mind – attempting to destroy Cree law.

To reiterate, my intention in asking questions about the representations in the materials is not to undermine Cree law. Rather, I aim to treat it seriously and to take up the spirit of deliberative law. Ahmed's 'troublemaker' figures are extremely important, as they disrupt normative "'scripts'" of romanticized ideals and call into question how those who do not fit, are being compelled to act.[137] When feminists react to oppressive representations, conceptualizations, and practices, Ahmed argues that "[t]he violence of what was said or the violence of provocation goes unnoticed. However she speaks, the feminist is usually the one who is viewed as 'causing the argument,' who is disturbing the fragility of peace."[138] Thus, normative articulations of happiness (and here, also culture and law) are not seen to cause harm for others; rather it is those who disrupt these articulations that are read as harmful. I do not mean to suggest that feminists cannot be harmful. I am trying to instead work beyond oversimplified ideas about feminism to understand indigenous feminist legal theory as an analytic tool that can critically engage with the difficult tensions between assertions about Cree legal norms, Cree gender norms, and the realities of patriarchal, heteronormative, colonial violence.

For representations of Cree law to include women as complex legal actors, a more difficult aesthetic is required than what was found in the educational materials. This is in line with Napoleon, Borrows, Webber, and Smart's arguments that conflict must necessarily be accounted for when theorizing and

[137] Ahmed, *Promise of Happiness*, *supra* note 134 at 59.
[138] *Ibid* at 65.

practicing law.[139] In taking up difficult aesthetics, we can deconstruct the binary of wholly peaceful representations and entirely chaotic and conflict-ridden representations of Cree law. Such disruptive work can make way for complex engagements with both the positive and oppressive aspects of Cree law.[140] Both an aesthetic of peace and an aesthetic of conflict, as well as the tensions and possibilities in between these two then would be accounted for in this more difficult approach.

A difficult aesthetic might also better allow for dissent, making way for a plurality of approaches to engage with one another. From this perspective, Cree law is approached as a resource that needs to be worked with (as all law should be), rather than as a complete and ready-made entity that is simply accessed and applied.[141] Manderson ends up treating a plural approach to state law as beautiful. As he describes, in this "new aesthetic" that "the beauty of turbulence and, in our own lives as in our societies, appreciates the whorls and eddies of everyday life."[142] While I am somewhat sympathetic to his desire to find beauty in complexity, I think that it would be misguided to then fully frame difficult aesthetics as beautiful.[143] Difficult aesthetics are also really uncomfortable, and while law has many beautiful aspects, it also shaped by, and deals with, some very ugly realities.

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[139] See Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada's Indigenous Constitution, supra* note 8; Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed, *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart Publishing, 2009) 201 [Webber, "Naturalism"]; Smart, *Power of Law, supra* note 7.
[140] Again, this is in line with Borrows, *ibid* and Napoleon, *ibid*.
[141] *Ibid*.
[142] Manderson, *supra* note 15 at 183.
[143] Though talking about feminist art and disgust, the work of Michelle Meagher is useful here for thinking about the importance of not making that which is ugly, beautiful (Michelle Meagher, "Jenny Saville and a Feminist Aesthetics of Disgust" [2003] 18:4 Hypatia 23).

6.3 Indigenous Feminist Legal Studies – Future Research Directions

There is a lack of research on gender and indigenous laws. As indigenous legal theory is growing, and as indigenous legal traditions are being revitalized, it is crucial that critical analyses about gender are included. I have taken up one mode of gender analysis via indigenous feminist legal theory and methodology. As discussed in Chapter Two, indigenous legal theory, indigenous feminist theory, and feminist legal theory produce a valuable conversation when brought together to think about how indigenous laws are gendered. Cree law has been the focus of my discussion and analysis, however it is possible to apply the broader framework of indigenous feminist legal theory and methodology to various indigenous legal traditions. What might then emerge, as people work deeply with gender analyses within legal traditions, are even more specific modes of analyses – for example Cree feminist legal theory. I have taken the perspective that indigenous feminist legal theory is a tool for intellectual engagement, rather than a means for identity politics. Some readers might interpret that in an effort to not have critical feminist ideas silenced, I have in turn silenced other voices (for example regarding essentialisms, tradition, and originalism). It is true that indigenous feminist legal theory excludes some ideas and perspectives. These types of exclusions are the case with all theories. My intention is not to silence these other perspectives but is rather to critically engage with them, and to articulate tools for doing so.

I have noted at various points throughout the dissertation that Cree law needs to be critically analyzed as reproducing gendered conflicts and power dynamics, but that it can also be understood as a resource to challenge these social

problems. Cree law needs to be understood as a site of struggle. A significant amount of debate within feminist legal studies has focused on the question of whether feminists should work *with* the law and try to reform it (liberal feminism) or if people should take a more radical approach of dismantling the foundations of law itself as a state mechanism that is oppressive.[144] While there are certainly differences between decentralized legal orders such as Cree law, and centralized state legal orders, decentralized legal orders are also shaped and influenced by social and cultural norms.[145] The approach that I have taken here, should not be read as liberal feminism, as I have drawn on Smart and other scholars to deconstruct Cree law in a way that moves beyond reformation of rules. In thinking more deeply about the very foundations of Cree law however, my approach is also not meant to reject Cree law, nor to deem it a resource that is necessarily oppressive. In the context of revitalization, Cree law serves as a crucial resource for thinking about culturally relevant modes of social organization, which can change and shift over time so as to promote Cree sovereignty. Conaghan explains, "in many ways, feminist legal studies is about navigating this tension between the positive and negative possibilities of law within the context of a wider exploration of law's role in the construction, maintenance and modification of sexed/gendered social orderings."[146]

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[144] Margaret Davies & Kathy Mack, "Legal Feminism – Now and Then" (2004) 20 Australian Feminist Law Journal 1 at 3 [Davies & Mack, "Legal Feminism"].
[145] Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada's Indigenous Constitution, supra* note 8.
[146] Joanne Conaghan, "General Introduction" in Joanne Conaghan, ed, *Feminist Legal Studies: Evolution* Critical Concepts in Law Vol I (New York: Routledge, 2009) 1 at 3 [Conaghan, "General Introduction"].

New directions are developing in educational materials on Cree law. While working on the writing of this dissertation, a new resource was published – a graphic novel entitled, *Mikomosis and the Wetiko* (hereinafter *Mikomosis*).[147] The story in *Mikomosis* is written by Val Napoleon and was produced with Jim Henshaw, Ken Steacy, Janine Johnston, and Simon Roy, through the University of Victoria Indigenous Law Research Clinic.[148] *Mikomosis* is unlike the other resources I have analyzed and it could be seen as an example of an indigenous feminist legal educational resource that demonstrates at least one way of complexly engaging with Cree law and gender. Reading *Mikomosis* alongside the other materials works to show that there are various ways for educating people about Cree law. However, it is crucial to recognize that the perspectives put forth in *Mikomosis* are not the norm. Other materials (whether intentionally or not) work to silence the ideas in *Mikomosis* through the use of fundamentalisms and aesthetically pleasing representations of Cree law. By contrast, *Mikomosis* disrupts dominant narratives; it is what Ahmed might describe as a troublemaker. The resistance and agency of troublemakers is important to not overlook, however as Ahmed notes, attention also needs to be paid to the troubling social *circumstances* that estrange[149] certain groups and knowledges.[150] In the following

[147] Val Napoleon et al, *Mikomosis and the Wetiko* (Victoria: UVic Indigenous Law Research Clinic, 2013) [Napoleon et al, *Mikomosis*]. I had previously read and commented on an earlier, shorter text version of this story when it was a part of one of Napoleon's conference presentations (and not yet part of the graphic novel).
[148] Regarding funding, it is described that the "graphic narrative is part of a special national collaborative research project, 'Accessing Justice and Reconciliation', by the Indigenous Law Research Clinic, Indigenous Bar Association, and funded by the Ontario Law Foundation. Additional financial support from UVic faculty of Law and Indigenous Peoples and Governance (IPG)" (*ibid* inside cover).
[149] Ahmed, *Promise of Happiness*, *supra* note 134 at 86 (on estrangement).

section I explain how *Mikomosis* is an example of an indigenous feminist legal educational resource that works with difficult aesthetics.

6.3(a) *Mikomosis*

Mikomosis is a short graphic novel in which various characters analyze a Cree story, so as to think about Cree legal processes and reasoning.[151] The novel begins with the telling of a story about a Cree community that was having a difficult time attaining food one cold winter. Mikomosis, who was a hunter, was not able to find animals.[152] As the people were struggling to survive, one person in particular – Sap-was-te, "bec[a]me dangerous" and turned into a wetiko.[153] She had been ignoring her child and she was unsafe to be around.[154] Sap-was-te was tied up so that she would not harm others. After consulting with the chief, her family, a medicine person, and an elder, and after trying to help her with medicines,[155] it was decided that Sap-was-te would be killed, so as to keep the community safe.[156] It was Mikomosis who was instructed to kill her.[157] When the Cree people were trading at the HBC post the following spring, company authorities and then the state learned what had happened in the community over the winter.[158] Mikomosis

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[150] *Ibid* at 65. This is akin to what Smart talks about regarding "the power of law to disqualify alternative accounts" (*Power of Law, supra* note 7 at 11).
[151] Napoleon et al, *Mikomosis, supra* note 147. The text is 31 pages long. My numbering is based on the PDF draft that I analyzed.
[152] *Ibid* at 1.
[153] *Ibid* at 4.
[154] *Ibid* at 3-4.
[155] *Ibid* at 7.
[156] *Ibid* at 7-8.
[157] *Ibid*.
[158] *Ibid* at 10-11.

was then taken to a state court, and tried under "white man's laws" for the murder of Sap-was-te.[159] He was charged with murder and was hung.[160]

After the telling of this story, the reader is then taken to a present-day scene in which a woman named Headache Cho is leading a group discussion about the story of Mikomosis and Sap-was-te.[161] Headache Cho says to a small group of people – "[n]ow, we're in Cree lands with Cree peoples and the magic time-travelling court is called to order."[162] Three main characters – Loon Woman, Following Sun, and Buffalo woman, make legal arguments about the case/story by drawing on Cree law. Various legal interpretations emerge in this process, and this discussion is continued as the court is opened up to observers to raise questions about the uses and interpretations of Cree law, as well as about the relationship between indigenous laws and state laws. The Cree court then goes back in time to the state court, and the Cree lawyers work to exonerate Mikomosis by drawing on, and articulating Cree law to explain the reasoning for why Sap-was-te was killed.[163] Friedland emphasizes the importance of wetiko stories as a way in for thinking about and acting on (as a community) problems of violence.[164] The wetiko principle is still useful today for thinking about how to keep

[159] *Ibid* at 9.
[160] *Ibid* at 12.
[161] *Ibid* at 13-14.
[162] *Ibid*.
[163] *Ibid* at 27-30.
[164] Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishnabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] at 9 [Friedland, *The Wetiko*].

individuals and communities safe,[165] though Friedland notes that long-term solutions require addressing broad systemic problems.[166]

Mikomosis encourages readers to think about the legal reasoning that was involved in responding to Sap-was-te, as well as how the killing of Sap-was-te and the hanging of Mikomosis could be read more complexly when using Cree law. Both women and men are present throughout this text, and while the majority of authoritative figures in the historical story of Mikomosis are men, the legal interpretations that the Cree lawyers engage with bring in feminist analyses to call these power dynamics into question. Further, the person leading the legal discussion of the case of Mikomosis is an older woman, name Headache Cho. She is represented as an authoritative figure throughout most of the text and is explicitly feminist in her orientation. The first sentence that readers encounter in the graphic novel mentions indigenous feminism – Headache Cho is described as "a new trickster born of international indigenous feminist consciousness."[167] While someone (or a text) can certainly be feminist without having to explicitly say so, as mentioned in Chapter Two, indigenous feminist legal theory is purposefully feminist in orientation, so as to validate this perspective, and to work against the silencing and erasure of indigenous feminisms.

Aside from identifying indigenous feminism, the graphic novel can also be described as in line with indigenous feminist legal theory as it works to gender Cree law. The three Cree lawyers who are reflecting on the case of Mikomosis

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[165] Historically, killing a wetiko should have been seen as a final resort, when other approaches to deal with harmful people failed. How harmful people are dealt with today would of course, be different (*ibid* generally).
[166] *Ibid* at 9.
[167] Napoleon et al, *Mikomosis, supra* note 147 at cover.

and Sap-was-te offer different legal arguments, or different legal interpretations about the facts in the case, and how Cree law was, and should be, drawn on. Loon Woman's "primary concern is the failure to provide help to Sap-was-te before she became dangerous."[168] She notes Cree legal principles about safety and taking care of those who are vulnerable. Loon Woman argues that the responsibilities to keep Sap-was-te safe were not met. Her interpretation adds texture to the story in that she looks at it from the perspective of Sap-was-te's rights, rather than Mikomosis' legal obligations. She complicates the community's obligation to protect all members when she argues that not everyone was consulted in line with Cree legal processes.[169]

Following Sun, a man who is visually depicted as hyper-masculine, offers a defence of Mikomosis' behaviour, and he contends that in the circumstances, the appropriate people were consulted.[170] The reader is thus able to see varying interpretations of law. Significantly, Cree law is shown to be deliberative, and it is represented as plural and contested. *Mikomosis* works against the other more common representations of Cree law as a coherent entity containing rules. While I did find traces of, for example, sacred law and customary law, Cree law is primarily represented as deliberative in this resource. Further, the details of Cree law are engaged, which sits in contrast to the often general representations in the rest of the sample. *Mikomosis* undertakes a substantive legal approach that is focused on practical contemporary application.

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[168] *Ibid* at 16.
[169] *Ibid* at 17.
[170] *Ibid* at 18-19.

Moreover, a gender analysis is depicted in Loon Woman's approach; Sap-was-te is centered in the story, so as to better understand her experiences and circumstances. While Following Sun seems quite ignorant to his own gender and social location in defending Mikomosis as straightforwardly, a noble guy, his and Mikomosis' positionality as men, as well as the gender of the authoritative decision-makers in the story are made obvious by Buffalo Woman's legal arguments. Buffalo Woman "represents the Cree law and gender division of the [time travelling] court."[171] She puts forth the following interpretation when trying to understand how Sap-was-te was perceived and responded to:

> [i]t is my job to explore how Cree laws are gendered and investigate the ways Cree women experience law in their lives.
>
> Law is a way of responding to human problems and violence against women is a problem both now and in the time of Sap-was-te and Mikomosis.
>
> We must push legal analysis and discourse beyond the pervasive stereotypes of Cree women …
>
> …forever skirted and idealized as one dimensional mothers, princesses or whores! We don't [hear] Sap-was-te's story and that is a serious omission in today's proceedings. Who was she? Was she respected and safe? Was she judged more harshly because she was a mother who hurt her child? Gender dynamics mean power dynamics.
>
> Cree men and women share similar experiences and challenges. Nonetheless, there are differences that are important to Cree law.[172]

Buffalo Woman makes obvious gendered power dynamics and interrogates the social context of the story. She notes the information that is missing about Sap-was-te and makes clear to the court that Sap-was-te was not being included as a complex socially embedded legal subject. That is to say, Sap-was-te had her own personal experiences, but these are shaped by social context; how she was

[171] *Ibid* at 15.
[172] *Ibid* at 20-21.

perceived in Cree legal processes was not disconnected from perceptions about her gender, worth, and agency.

Buffalo Woman's argument works against oversimplifications about gender and law. Her interpretation is uncomfortable and we can observe a difficult aesthetic in her legal arguments. She pushes up against romanticizations and fundamentalisms about gender roles, and promotes instead an anti-essentialist approach. Buffalo Woman works against common perceptions found in the other educational materials that contend that gendered conflict and violence are only a result of colonial influence. In doing this she challenges the idea that pre-contact Cree society was a perfect and entirely safe place for women. Importantly, her legal arguments also work to move beyond dichotomous representations of indigenous women, as either peaceful mothers or as morally corrupt. Buffalo Woman highlights the constraints of stereotypes and puts forth the interpretation that Cree women's lives are complex. It is *significant* that when Cree women are talked about in *Mikomosis*, that it is not done in relation to 'traditional' gender roles. The case for Sap-was-te's humanity is not made on the grounds of her being a mother, and questions are raised about the ways in which motherhood rhetoric may have constrained and morally policed her in ways that were unfair.[173] *Mikomosis* is different from the other educational resources in that Buffalo Woman works to disrupt rigid notions of tradition and phallocentric representations of gender, in favour of an interpretation in which Sap-was-te is to be afforded full citizenship and legal agency. Further, Sap-was-te's validity is not

[173] *Ibid* at 21.

based on her embodiment. *Mikomosis* encourages readers to think about the complex ways that the revitalization of indigenous laws is gendered.

I have argued that there is a connection between the oversimplification of Cree law and oversimplifications about gender. Headache Cho contends that "Cree law, like any other law is about contestation, collective problem solving and collaborative management of large groups."[174] *Mikomosis* is unlike the other educational resources in that it leaves open multiple questions and interpretations of Cree law. While resources such as *Cree Restorative Justice*, *Critical Indigenous Legal Theory*, and *Path of the Elders* include ideas from various elders, overall, a tidy narrative of Cree law still ends up getting asserted. Headache Cho's name is interesting to think about, as I imagine that she has a headache from an assortment of frustrations and difficulties that arise in Cree law, but also that she causes headaches – a thorny plural approach to Cree law can be uncomfortable.

There is a compelling moment in the graphic novel, in which a male elder named Authentic visually appears as Buffalo Woman is making her argument about Cree law being gendered.[175] Authentic is concerned that the discussion about Cree law is not 'Cree enough' and that there is "[t]oo much intellectual and not enough spiritual" discussion.[176] It is at this point that the discussion is opened up to everyone at the traveling court, as Headache Cho acknowledges Authentic's viewpoint but also raises her own concerns about the privileging of some

[174] *Ibid* at 21.
[175] *Ibid*.
[176] *Ibid* at 23.

perspectives at the expense of silencing others.[177] What is different about *Mikomosis* is that it opens up space for dissent and various interpretations.

There are questions that I have about some of the content of the graphic novel, and it is noteworthy that in asking them, I feel like I am contributing to a discussion about Cree law. This is unlike what I feel with the other materials in which discourses about sacredness, tradition, culture, and gender roles cause me to feel as though I am destroying Cree law with feminist oriented questions. At the end of the graphic novel, the Cree traveling court goes back to the state court to try to defend Mikomosis' behaviour, using Cree law. It is with this part of the story that I think further discussion is required. For example, why does the travelling court go back in time to help Mikomosis, but it does not then also go back in time to help Sap-was-te? Or why not only go back and help Sap-was-te to begin with? With Loon Woman and Buffalo Woman's arguments in mind, the court could arguably go back in time so as to better understand Sap-was-te's circumstances. Perhaps the court would conclude that not enough was done to help her before she became harmful. Or perhaps the court would conclude that the appropriate legal steps had been taken in executing her.

Importantly, the time travelling court was able to successfully make the case to the state judge that Cree law should be drawn on in this case, rather than state law.[178] But the not guilty verdict that this produces is unsettling because of the outstanding questions about Sap-was-te, and how the case might be read from her perspective. It is also troubling in that the power dynamics of the state

[177] *Ibid* at 24.
[178] *Ibid* at 29-30.

courtroom seem to too easily disappear. The ending in *Mikomosis* is similar to the re-negotiation of Treaty 9 on the final path in *Knowledge Quest*, in that Cree legal reasoning is given space, is heard, and alters the outcome of historical decisions. While the exercise is pertinent for showing how different interpretations can lead to different outcomes, I wonder how the constraints of power dynamics, and the ways in which some voices cannot be heard, or are heard in limited ways within dominant frameworks could be better accounted for. This returns to the complexity of exercising agency and resistance within social constraints that was discussed in Chapter Two. Additionally, with *Mikomosis*, arguments about gender do not factor into the discussion in the state court (despite Buffalo Woman from the gender division being present). What if the murder of Sap-was-te was the result of gendered perceptions and violence? What are the power dynamics in ascertaining who is dangerous and how they will be responded to? How might the celebration of Mikomosis' exoneration in state court to be interpreted? What would be the complex effects of bringing in gendered arguments about Cree law, in a state court? Why do Buffalo Woman's interpretations get relegated to a specific gender division of the court?

6.3(b) Concluding Reflections

I do not mean to suggest that all indigenous feminist legal educational materials have to look like *Mikomosis*, or like my own analysis. By engaging in an explicit conversation about indigenous feminist legal theory and methodology, it is my hope that the ideas in this dissertation will be considered, challenged, applied, and/or revised as people see fit. Although my analysis has focused on

representations, the findings from this dissertation are both significant and troubling. I have focused on representations though these are not detached from broader power dynamics and politics regarding gender and Cree law. Educational work in this area requires ongoing discussion, substantial improvement, and additional resources. I have raised arguments about how the perpetuation of anti-intellectual approaches to Cree law and gender foreclose critical discussion through the use fundamentalisms and through rigid assertions about culture. Working with indigenous laws as gendered requires a deliberative approach so that it is useful to all citizens. This work must also be done in educational resources so as to challenge, rather than sustain, sexist and heteronormative oppression.

My engagement with the materials feels uneasy in that it feels like I have been almost entirely negative about the materials in the sample. It is perhaps important to remember Ahmed's caution about how non-normative perspectives get read as negative and as causing trouble, when they are instead actually quite productive in terms of the questions and analyses they produce.[179] Yet how can I, as a white feminist, make this claim, when my voice is normative in feminist politics? How do I make sense of my anger and frustration that the ideas that I am trying to convey get thwarted by identity politics, or closed down through claims about culture and voice? The tensions here are difficult and challenging. Indigenous feminist legal analysis, for me, is about engaging with ideas, not about asserting identity or making claims about others' identity. Further, while I recognize the privileging of white voices in feminist politics, it seems an

[179] Ahmed, *Promise of Happiness*, *supra* note 134 at 65.

oversimplification to say that my particular approach is normative, given the work just laid out in this dissertation. Identity politics have tagged along throughout this dissertation – sometimes working usefully as a way for me to reflect on my own positionality, but also often acting as a constraint regarding critical engagement with indigenous laws. One interpretation of the analysis produced in this dissertation quite possibly will be that I have merely perpetuated a white settler perspective of gender and law. Tuhiwai Smith notes of some feminist work about indigenous women, that white feminist researchers often read indigenous women and gender roles through the lens of how they interpret white/European women.[180] I have worked in this dissertation, with both indigenous centered and western theories, and have done so in a way that aims to deconstruct oversimplified dichotomies so as to engage with the complexities of gendered power dynamics as the circulate in competing norms, varied assertions about gender, and different interpretations about indigenous laws. It has been my aim to work with the tensions between Cree cultural norms, articulations about aspirations, and patriarchal, heteronormative, and colonial realities and oppression. I have also worked internally with Cree law and understand it as a resource for engaging in discussion about gender oppression.

Although I have been attentive to these difficulties, the analysis feels both complex and oversimplified at times. Future work could be done examining each educational material in more detail. *Knowledge Quest* for example, is a particularly compelling educational resource, and while I have begun to draw out

[180] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, (New York: Zed Books Ltd.; Dunedin: University of Otago Press, 1999) at 8.

the patterns regarding gender and Cree law, working closely with this material just on its own could prove to be insightful. Through the data analysis guide in Appendix C, I engaged closely with each resource, however in the space that I have in this dissertation, some details have no doubt been lost. This dissertation has just begun to 'scratch the surface' on the topic of indigenous feminist legal analysis and in many ways is quite introductory. This introductory approach was necessary to take, given how little is written in this area. Engaging in work such as theory building requires much contextualization and positioning. Articulating theory and methodology is important work, and from here I plan to keep undertaking thinking about knowledge production but also aim to generate more specific analyses to work even more closely with the tensions and difficulties that require critical analysis. The discussion on motherhood for example has not been thoroughly addressed and developed here, as it was not the focus of the dissertation, however it should be more specifically engaged with in future work.

There is a need to develop indigenous feminist legal studies. In addition to ongoing discussions about theory and methodology, future research directions should also include articulations and considerations of indigenous feminist legal pedagogy. The overriding questions in this dissertation about how law and gender are talked about and represented are especially crucial to consider with regard to teaching about indigenous laws. I have begun to examine education here, through the analyses of educational resources, however more specific discussions need to take place about how to develop multi-juridical, anti-oppressive, intersectional indigenous legal educational resources. I have maintained throughout that law is

constructed through the articulation of discourses and human interpretations. Some discourses prevail and are heard better than others. I have not just engaged here with the construction of law, but also with the construction of gender. Gender is constructed in various ways and one of those ways is through law and legal education. In the expectant work ahead on indigenous feminist legal pedagogy, gender must be understood as a foundational element in teaching about indigenous laws. Gender cannot be an 'add on' to existing materials or a 'special topic,' as gendered power dynamics do not operate in those ways. Further, the teaching of indigenous laws is itself gendered. Gender is not tidy and compartmentalized; it is insidious and operating at all times.

This dissertation is not meant to say what Cree law is; rather it is about working with ideas, thinking about knowledge and the power of discourse and representations – both the theoretical and practical aspects. Indigenous feminist legal analyses – including theory, methodology, and pedagogy – will continue to push up against fundamentalist and anti-intellectual representations about indigenous laws in order to engage more critically with revitalization and good relations/*miyo-wîcêhtowin* for all citizens.

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LEGISLATION

Canadian Charter of Rights and Freedoms Part 1 of the *Constitution Act* 1982 being Schedule B to the *Canada Act 1982* (U.K.) 1982 c. 11

Appendix A:
Summary of Educational Materials Analyzed

	Description	Format
Public Educational Materials		
1.	On the Path of the Elders website (includes Knowledge Quest Online Adventure Game and accompanying lesson plans)	Website Video game Lesson plans
2.	Wahkohtowin – Cree Natural Law	Video
3.	Four Directions Teachings.com (Cree section)	Interactive website Lesson plans
4.	Treaty Elders of Saskatchewan (Cardinal and Hildebrandt)	Book
5.	Muskwa: Fearless Defender of Natural Law	Comic Book
6.	Cultural Teachings (McAdam)	Book
Academic Educational Materials		
7.	ILP Online Lectures (Part 1 and 2) (McAdam)	Lectures
8.	Online Video Series (McAdam)	Video series
9.	Critical Indigenous Legal Theory (Lindberg)	Dissertation
10.	Cree Restorative Justice (Hansen)	Book
11.	Cree Narrative Memory (McLeod)	Book

Appendix B:
Detailed Descriptions of Educational Materials

1. On the Path of the Elders[1]

On the Path of the Elders (hereinafter *Path of the Elders*) is an online educational resource about treaty relations. The focus of the website is on Treaty 9 and Omushkegowuk Cree and Anishinaabe involvement in, and interpretations of the treaty. This resource, which was developed from 2009 to 2010, emphasizes elders' interpretations in particular. The site is aimed at children, ranging from grades four to 10,[2] and although this wide age range is targeted, it is important to note that the information on the website is fairly advanced for younger audiences.[3] There are multiple components within this website including: a role playing game called *Knowledge Quest*;[4] teacher's guides;[5] and the general website itself has various components. I describe each of these in more detail below.

The main feature of the website is *Knowledge Quest*, a game in which a young boy named Kaniskic is guided by Chief Moonias and several other elders along the way, to re-negotiate Treaty 9 to be more advantageous for the Omushkegowuk Cree and Anishinaabe nations involved. By going on various paths, the player acquires culturally specific skills and knowledge that are deemed necessary for re-negotiating the treaty. Kaniskic begins in a village where he can

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[1] Online: *On the Path of the Elders* <http://www.pathoftheelders.com> [*Path of the Elders*].
[2] "Teachers," online: *On the Path of the Elders* <http://www.pathoftheelders.com/teachers> ["Teachers," *Path of the Elders*].
[3] This is evident from the language and concepts used on the website.
[4] *Knowledge Quest*, online: <http://www.pathoftheelders.com/newgame#start> [*Knowledge Quest*].
[5] "Teachers," *Path of the Elders*, *supra* note 2.

walk around and speak to some of the characters[6] and the game is historically set to the time when the treaty was negotiated (1905).[7] The player works to complete their self-governance wheel, in which there are six segments that each represent a path. The paths include: 1) the security path where one plays a hunting game, 2) the culture path where one plays a trapping game, 3) the education path where one plays a canoeing game, 4) the economy path where one plays a game about environmental sustainability, 5) the health path where one plays a game that is like a scavenger hunt for medicinal plants, and 6) the self-governance path in which Kaniskic is involved in renegotiating the treaty.[8] These do not have to be played in this order, except that the self-governance path is completed at the end.

Throughout the game, Kaniskic 'interacts' with various players (as discussed in the dissertation, primarily men) and can engage in discussion with them. The game is described as a role playing game because there are choices in how one can respond to other players. On the *Path of the Elders* blog it is explained that the game "allows youths to freely explore different facets of Cree and Ojibway culture, to drive their own narrative, and to take control of their own learning process."[9] It is crucial to note that while it appears that the player has choices, there is ultimately one 'appropriate' answer that will enable you to win the game most successfully. *Path of the Elders* is very much a game about citizenship and notions of what constitutes 'good' and 'culturally appropriate'

[6] Some of these characters invite the player to watch videos, look at photos, look at an interactive map of the territory of Treaty 9.
[7] *Knowledge Quest*, *supra* note 4.
[8] "Learn the Paths," online: *On the Path of the Elders* <http://www.pathoftheelders.com/learnthe paths> ["Learn," *Path of the Elders*].
[9] "How Can Online Gaming Foster Positive Self-Identity?" (4 March 2010 blog entry), online: *Path of the Elders* blog <http://www.pathoftheelders.blogspot.ca/2010/03/how-can-online-gaming-foster-positive.html>.

Cree and Anishinaabe behaviour shape the interactions in the game. This disciplinary aspect of the game is discussed in the dissertation in relation to citizenship, law, and gender.

Path of the Elders also includes Teacher's Guides for grades four to 10 and which work to engage with both the game and the content of the website.[10] The lesson plans follow the paths in terms of subjects to be discussed and various activities are suggested, from including class discussion, group work, research, art projects, re-enactments, debates, and a mock trial. The lesson plans speak to students who are both indigenous and non-indigenous, as does *Knowledge Quest* to a degree, however the game arguably treats players more so as indigenous. The game is emphasized as a means to teach information about Cree and Anishinaabe culture to kids who might not have direct access to elders.[11]

The general website also serves as an educational resource and includes various components such as: a plain language history essay about Treaty 9,[12] a description of *Knowledge Quest*,[13] links to additional resources,[14] a blog,[15] a

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[10] Though there is a peculiar disconnect between the materials on the website – the game appears to be the most central feature when on the home page for the overall educational package, yet the lesson plans do not focus a great deal on the game ("Teachers," *Path of the Elders, supra* note 2). There are *many* questions that need to be asked about the game in terms of gender, notions of culture, and the ways in which youth are responsibilized for community safety, for example. The lesson plans do not explicitly guide teachers or students into these types of discussions.

[11] "What Does New Media Mean for Oral Traditions?" (21 April 2010 blog entry), online: *Path of the Elders* blog <http://www.pathoftheelders.blogspot.ca/2010/04/what-does-new-media-mean-for-oral.html>. Further, it is described that, "We wanted On the Path of the Elders to have an effect on this appalling suicide rate, and we thought an online role-playing game would be a relevant way for youths to celebrate and explore their culture. Even though youths are increasingly using the Internet for socialization, education, and entertainment, there are surprisingly few quality online resources aimed at aboriginal youths" ("How Can Online Gaming Foster Positive Self-Identity?" *supra* note 9)

[12] This is a four chapter essay: "History," online: *Path of the Elders* <http://www.pathoftheelders.com/history>.

[13] "Learn," *Path of the Elders, supra* note 8.

[14] "Resources," online: *On the Path of the Elders* <http://www.pathoftheelders.com/resources> ["Resources," *Path of the Elders*].

photo collection,[16] a video collection,[17] and an audio collection.[18] In my research I analyzed the game, lesson plans, and general website, though I did not focus on the photo, video, and audio collections a great deal. Although all of these collections are Cree, and are part of the educational package, to include these substantially large archival, historical collections, would shift the temporal focus in my research.

Knowledge Quest and *Path of the Elders* more generally are described as being about Cree and Anishinaabe culture, however it is important to note why I approach these resources as being primarily Cree in focus. While *Path of the Elders* does include Cree and Anishinaabe content, all of the archival collections that are on the site and used in the game are about Cree society. When looking at the game, one of the descriptions of it that is continuously posted at the bottom of the page reads: "[t]he Mushkegowuk and Anishinaabe Peoples and Treaty No. 9. A Cree Culture and History Education Game."[19] The focus on the game is also predominantly Cree. Although Chief Moonias is Anishinaabe, the majority of the

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[15] It is described online that the blog "discusses issues related to game-based learning, Aboriginal concerns, education and technology, and PathoftheElders.com" (online: *Path of the Elders* blog <http://www.pathoftheelders.blogspot.ca/>). The entries for the blog span from February 2010 to May 2010, in which the last blog post is made. Though the blog was only active for a short amount of time and included few comments from 'the public,' there are still several entries and this content has been analyzed for my dissertation.

[16] This collection is the Deschâtelets Archive and consists of historical photos (though includes a wide date range, as some photos are from the 1960s and 70s) focused on the Cree ("Deschâtelets Archive," online: *Path of the Elders* <http://www.pathoftheelders.com/photos?func=viewcategory &catid=1> ["Deschâtelets," *Path of the Elders*]).

[17] It is described of the video collection, "Elders help us learn who we really are. They hold the key to our history, traditions and ways of life. In this collection, Cree Elders pass along their knowledge of Mushkegowuk life, both past and present. First Peoples everywhere share similar views" ("The Elders' Stories," online: *Path of the Elders* <http://www.pathoftheelders.com/ videos> ["Elders' Stories," *Path of the Elders*]).

[18] This is the Doug Ellis Collection, which focuses on James Bay Cree stories ("The Doug Ellis Collection," online: *Path of the Elders* <http://www.pathoftheelders.com/audio> ["Doug Ellis," *Path of the Elders*]).

[19] *Knowledge Quest, supra* note 4.

language aspects of the game refer to Cree, and Kaniskic is potentially Cree as when he tries to speak to a white lawyer on the self-governance path,[20] the lawyer responds to him, "I don't speak Cree."[21] In talking about the game and website as educational resources about Cree law, I do not mean to mitigate the importance of Anishinaabe law and do not mean to suggest that the two should be tidily and divisively talked about. Clearly nation to nation relationships existed, and still exist between the Omushkegowuk Cree and Anishinaabe in Treaty 9.[22] Since my focus is on Cree law, and there is an evident Cree focus in the resource, I refer to it as a Cree educational resource.

The various partners that created the resource consist of: BlackCherry Digital Media, the Centre for Indigenous Research, Culture, Language, and Education (CIRCLE), the Mushkegowuk Council, Neh Naak Ko (a Mushkegowuk Cree research company), Pinegrove Productions, and Wendy's Company (Wendy Campbell, an Educational Consultant with the Learning Methods Group).[23] The website is funded by the Department of Canadian Heritage, Indian and Northern Affairs Canada, the Inukshuk Fund, as well as the project partners.[24]

2. Wahkohtowin – Cree Natural Law[25]

Wahkohtowin – Cree Natural Law (hereinafter, *Wahkohtowin*) is a 24-minute video, which the producers describe as "a cultural educational tool for those trying

[20] The text used to speak to him is in English, as is the majority of all text in the game.
[21] Self-Governance Path, *Knowledge Quest*, *supra* note 4 [Self-Governance Path].
[22] *Path of the Elders*, *supra* note 1.
[23] "Partners," online: *On the Path of the Elders* <http://www.pathoftheelders.com/partners>.
[24] "Funding," online: *On the Path of the Elders* <http://www.pathoftheelders.com/funding>.
[25] *Wahkohtowin – Cree Natural Law*, DVD (Edmonton: BearPaw Media Productions, 2009) [*Wahkohtowin*].

to understand Cree law from a Cree perspective."[26] The video, via four male elders, discusses the importance of Cree law historically, and today. State laws are analyzed as an imposed legal system that is harmful and does not work for Cree society. Further, Cree law is discussed primarily in relation to citizenship and the principles of *wahkohtowin* and *wetaskiwin*.[27] The audience for the video includes indigenous and non-indigenous people, both adults and young adults. The video, which was produced in 2009, was publically available for free online when I first started my research but is now available only at some public libraries or for purchase.[28] The video is produced by BearPaw Media Productions, through the BearPaw Legal Education and Resource Centre, which is sponsored by Native Counselling Services of Alberta and the Alberta Law Foundation.

3. Four Directions Teachings.com[29]

Four Directions Teaching.com (hereinafter *Four Directions*) is a free online educational resource that was developed in 2006. It consists of separate sections that focus on Cree, Blackfoot, Ojibwe, Mohawk, and Mi'kmaq teachings. In my analysis, I look only at the Cree section of the website, which focuses on tipi teachings, as told by elder Mary Lee. Her discussion is narrated with a woman's voice, and her words are also accompanied by animation. The visuals and audio

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[26] This description is from when the video was available online at <http://www.bearpaweducation.ca/wahkohtowin-cree-natural-law> accessed 28 October 2010.

[27] "Wahkohtowin is a Cree name for the rules that govern the relationship of one thing to another. The guidelines ensure all people respect one another and the other living things on this earth. When people come to live together in peace and harmony, it is called wetaskiwin. Healthy relationships are the result of following the intent of wahkohtowin and wetaskiwin" (*Wahkohtowin*, *supra* note 25).

[28] At a cost of five dollars (<http://www.bearpaweducation.ca/videos/wahkohtowin-cree-natural-law> accessed 5 May 2013).

[29] Online: *Four Directions Teachings.com* (Cree Teaching by Mary Lee) <http://www.fourdirectionsteachings.com/> [*Four Directions*].

include a lot of nature imagery, but also include images of women, of the tipi, the drum, and the four directions. Lee's teaching focuses on explaining the four directions and she describes what the 15 tipi poles and the control flaps mean.[30] It takes approximately 40 minutes to go through the entire lesson.[31] The lesson plans developed to accompany the animation cover a large range of grades and are divided into junior, intermediate, and senior lesson plans (covering grades one to 12).[32]

The website speaks to a wide audience, though the lesson plans make clear that the primary audience is children and youth.[33] Further the educational resource is broadly framed so as to speak to Cree and non-Cree audiences. Various advisors for the project (the entire website) include: Marie Battiste, James (Sákéj) Youngblood Henderson, Reg Crowshoe, Diane Hill, and Sylvia Maracle.[34] It is noted of the project that the elders "were approached through a National Advisory Committee of Indigenous people" that was developed for the project.[35] Funding for the project came from the Department of Canadian Heritage. Further, the

[30] *Ibid*.
[31] I include here the general animated introduction to the website, in addition to the Cree section. I have only analyzed the Cree animation though.
[32] "Teachers Resource Kit," online: *Four Directions Teachings.com* <http://www.fourdirections teachings.com/resources.html>.
[33] *Ibid*.
[34] "About Four Directions Teachings," online: *Four Directions Teachings.com* <http://www.four directionsteachings.com/about.html> ["About Four Directions"].
[35] *Ibid*.

website was produced by Invert Media,[36] in association with the National Indigenous Literacy Association.[37]

4. Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations [38]

This resource (hereinafter *Treaty Elders*) is a general audience book about treaty relations, written by Harold Cardinal and Walter Hildebrandt, in the year 2000. It is an 84-page plain language book that includes a considerable number of photos. Cardinal and Hildrebrandt met with many elders in Saskatchewan, to record "First Nations understanding of treaties and treaty making"[39] (the province of Saskatchewan falls in seven treaty territories[40]). It is explained at the start of the text that part of what led to this book being produced was that "The Federation of Saskatchewan Indian Nations (FSIN) and the Government of Canada realized that the divergent paths they were following were not reducing the difficulties, frustration, and pain being experienced by First Nations people."[41]

The audience for the book includes indigenous and non-indigenous people, though as with the other sources analyzed in my sample, the text intends to empower indigenous peoples by recognizing the importance of their understandings of treaties, and indigenous legal principles that inform their

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[36] The approach on the *Four Directions* site is informed, in part, by the 'full circle cultural learning framework,' which invert media draws on (online: *Invert Media* <http://www.invertmedia.com/index.php?option=com_content&task=view&id=24&Itemid=>). I include this as a note because this learning framework is very centered on spirituality, which is evident in the Cree section of the *Four Directions* website.
[37] "About Four Directions," *supra* note 34.
[38] Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) [Cardinal & Hildebrandt, *Treaty Elders*].
[39] *Ibid* at viii.
[40] Treaty 2; 4; 5; 6; 7; 8; and 10 (at 2).
[41] Cardinal & Hildebrandt, *Treaty Elders, supra* note 38 at vi.

interpretations. Reconciliation is also framed as empowering, as it promotes non-oppressive nation-to-nation relations. This book covers several treaty territories and includes Dene, Assiniboine, Saulteaux, and Cree elders.[42] Despite the various First Nations represented in the book, I included it in my sample of materials on Cree law because there is a substantial Cree focus throughout the text. The chapters have Cree titles, and information in the book is organized in a way that features a different Cree principle per chapter. Further, overwhelmingly, the indigenous words that are listed and translated in the glossary are Cree words.[43]

5. Muskwa: Fearless Defender of Natural Law[44]

This comic (hereinafter, *Muskwa*) is a 20-page story produced in 2010 by the BearPaw Legal Education and Resource Centre. It is a short story about three youth who crash their go-cart in a forest. With the help of animals who teach the youth about Cree law, Sam (the main character) and his friends Isaiah and the girl character (she does not have a name) learn how to survive (for further information about the story see Chapter Three of the dissertation, section 3.3[a][i]).

The audience for this resource is youth, particularly indigenous youth. The comic is available for order (for free) and can also be found as a PDF online.[45] Although the story depicts natural law as a broad indigenous practice,[46] I include

[42] *Ibid* at vi.
[43] *Ibid* at 78-80.
[44] Greg Miller et al, *Muskwa: Fearless Defender of Natural Law* (Edmonton: BearPaw Legal Education & Resource Centre, second printing 2011) [Miller et al, *Muskwa*].
[45] *Muskwa* is also available as a PDF online at: <http://www.bearpaweducation.ca/sites/default /files/Muskwa.pdf>.
[46] The story starts with an explanation that "Aboriginal people have always lived by natural law" (Miller et al, *Muskwa, supra* note 44 at 1).

it in my sample on materials about Cree law because the main spiritual leader in the text (Muskwa) is described in Cree, and Cree is used in the text.[47]

The story is written by Greg Miller; the character design, pencils, and cover inks are done by Kelly Mellings; the interior inks are done by Christy Dean; the letters are done by Pulp Studios; and the colours are done by Corey Lansdell with Meaghen Hicks.[48] The BearPaw Legal Education and Resource Centre is part of Native Counselling Services of Alberta, and funding for the centre comes from the Alberta Law Foundation.[49]

6. Cultural Teachings: First Nations Protocols and Methodologies[50]

This resource (hereinafter *Cultural Teachings*) is a 57-page general audience book, written by Sylvia McAdam, and produced by the Saskatchewan Indian Cultural Centre in 2009. The purpose of the book is explained as follows,

> to provide the reader with an overview of First Nations' ceremonial etiquette and protocols. This book is not intended to provide spiritual teachings that may compromise the integrity of First Nations' knowledge and practices. However, it will impart general understanding and awareness necessary to attain respectful and appropriate behaviour at First Nations' ceremonies and gatherings. In the event the reader is seeking further information on any First Nations' ceremonies, appropriate protocols should be followed.[51]

McAdam's text seems like it could be addressing non-indigenous readers at times, though for the most part I interpret it as addressing indigenous readers. This is particularly evident through her discussions about revitalizing indigenous laws.

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[47] The girl character refers to 'mooshum' – the Cree word for grandfather (*ibid* at 12).
[48] *Ibid* at inside cover.
[49] *Ibid*.
[50] Sylvia McAdam, *Cultural Teachings: First Nations Protocols and Methodologies* (Saskatoon: Saskatchewan Indian Cultural Centre, 2009) [McAdam, *Cultural Teachings*].
[51] *Ibid* at ix.

She discusses 'cultural teachings' in relation to indigenous laws, ceremonies, gender roles, and elders' roles.

There is a "[d]isclaimer" early on in the text that the information in the book comes from "Dene, Nakawé, Lakota, Dakota and Nakota, and Cree knowledge keepers and Elders."[52] I draw here on information from this book that falls in line with information in her other educational resources, which are described as Cree in focus. I do not draw on information that is specified as pertaining to other indigenous legal orders (e.g. Dene law).

7. ILP Online Lectures

'ILP' is the Intercultural Leadership Program, and I am analyzing two lectures that were given by Sylvia McAdam in a 100 level class at the First Nations University. These lectures are posted as videos on vimeo, and can be accessed by anyone. The videos are titled, "Sylvia McAdam teachings pt. 1"[53] and "Sylvia McAdam teachings pt. 2."[54] Part one is described as being "about the Cree laws and the human birth."[55] Part two includes several topics of discussion (as does part one) and is described as being "about the Cree Laws" including a "story about her uncle freezing to death and coming back to life three days later bringing an important message."[56] The direct audience is the indigenous students who are

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[52] *Ibid* at iii.
[53] Sylvia McAdam, "Sylvia McAdam teachings pt. 1," online: <http://vimeo.com/31653388> [McAdam, ILP Lecture 1]. I do not know the exact date of when these lectures happened. At the time of accessing the videos (13 March 2013), it was noted that the lecture was posted a year ago. The video is 59 minutes and 9 seconds long. As of 5 May 2013, the video had 1,507 views.
[54] Sylvia McAdam, "Sylvia McAdam teachings pt.2," online: <http://vimeo.com/31616141> [McAdam, ILP Lecture 2]. The video is 49 minutes and 30 seconds long. As of 5 May 2013, this video had 412 views.
[55] ILP Lecture 1, *supra* note 53.
[56] ILP Lecture 2, *supra* note 54.

in the classroom,[57] but from this it is clear that the discussion targets indigenous young adults and adults more broadly. Because the lecture is taking place in a university classroom, I have classified this resource under the academic materials, though as explained in Chapter Three, this categorization is a bit trivial in light of my findings, but also the similarities between this educational resource and McAdam's 'public'/general audience resource, *Cultural Teachings*.

8. Online Video Series[58]

This educational resource is comprised of 12 separate videos that are part of an overall series.[59] The videos are available for free online, on vimeo. Each video is of Sylvia McAdam, speaking about a particular subject including: human birth,[60] spiritkeepers,[61] Wesakechak,[62] breaking laws,[63] protocol,[64] pipe laws,[65] suicide,[66]

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[57] The viewer cannot see the students. It is clear from how McAdam is speaking to the students and framing the lecture, that she is speaking to a primarily indigenous audience.

[58] Although McAdam refers to these videos as a DVD, I was not able to find them in DVD format, therefore, I am referring to them as a video series. It is worth noting that in addition to this video series, and the ILP lectures, there is also an audio lecture of Sylvia McAdam (posted on vimeo) from a class on 7 February 2012 ("Sylvia McAdam audio lecture – Feb 7," online: <http://vimeo .com/36493547>). I have not included this audio clip in my sample, as the information in the McAdam materials, when taken together, becomes repetitive. Given that the inclusion of the audio will not offer anything particularly new, and given that the audio file has the lowest number of plays (25) compared to the videos, I have not included it.

[59] When referring generally to this series, I will use [McAdam, *Video Series*]. Each video has its own URL, though they can all be found (alongside other videos) on vimeo at: <http://vimeo. com/channels/301066/page:1>; <http://vimeo.com/channels/301066/page:2>; <http://vimeo.com/ channels/301066/page:3>. I am unsure of when the videos were produced though it is noted on vimeo that they were uploaded a year ago.

[60] Before this video, there is a short introductory video (Sylvia McAdam, "Introduction," online: <http://vimeo.com/34670740> [McAdam, *Video Series*, "Introduction"], 1 minute and 47 seconds long, 44 plays as of 5 May 2013). The information for the human birth video is: Sylvia McAdam, "Human Birth," online: <http://vimeo.com/34671557> [McAdam, *Video Series*, "Human Birth"]. This video is 9 minutes and 48 seconds, and had 140 plays as of 5 May 2013.

[61] Sylvia McAdam, "Spiritkeepers," online: <http://vimeo.com/34672155> [McAdam, *Video Series*, "Spiritkeepers"]. This video is 7 minutes and 3 seconds, and had 58 plays as of 5 May 2013.

[62] Sylvia McAdam, "Wesakechak," online: <http://vimeo.com/34672485> [McAdam, *Video Series*, "Wesakechak"]. This video is 4 minutes and 51 seconds, and had 69 plays as of 5 May 2013.

women's teachings,[67] treaties,[68] 'Uncle's four laws,'[69] and land prophecy.[70] The videos are all about Cree laws. Because she is described as the ILP instructor, I have categorized these videos as academic, though they are very plain language. Each video is a headshot of McAdam speaking, with a plain monochromatic screen behind her. The audience is primarily adults, and to a lesser extent, young adults. Her videos could be useful for a range of viewers, be they Cree or not, however she does emphasize that in producing the videos, she hopes that "Nehiyaw teachings" will "be shared, and transferred, and transmitted" to the next generations.[71]

9. Critical Indigenous Legal Theory

This resource is a 437-page dissertation, written by Tracey Lindberg, in 2007.[72] Though there are some parts of the dissertation that are plain language (for example, the letters written to the reader), the text is overall quite academic, and

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[63] Sylvia McAdam, "Breaking the Laws," online: <http://vimeo.com/34672951> [McAdam, *Video Series*, "Breaking"]. This video is 6 minutes and 3 seconds, and had 38 plays as of 5 May 2013.
[64] Sylvia McAdam, "Protocol and Smudging," online: <http://vimeo.com/34673264> [McAdam, *Video Series*, "Protocol"]. This video is 3 minutes and 54 seconds, and had 65 plays as of 5 May 2013.
[65] Sylvia McAdam, "Pipe Laws," online: <http://vimeo.com/34673551> [McAdam, *Video Series*, "Pipe Laws"]. This video is 3 minutes and 48 seconds, and had 45 plays as of 5 May 2013.
[66] Sylvia McAdam, "Suicide," online: <http://vimeo.com/34673969> [McAdam, *Video Series*, "Suicide"]. This video is 5 minutes and 28 seconds, and had 48 plays as of 5 May 2013.
[67] Sylvia McAdam, "Mossbag and Womens teachings," online: <http://vimeo.com/34674317> [McAdam, *Video Series*, "Mossbag"]. This video is 5 minutes and 11 seconds, and had 47 plays as of 5 May 2013.
[68] Sylvia McAdam, "treaties," online: <http://vimeo.com/34674834> [McAdam, *Video Series*, "treaties"]. This video is 8 minutes and 13 seconds, and had 41 plays as of 5 May 2013.
[69] Sylvia McAdam, "Uncle's four laws," online: <http://vimeo.com/34675421> [McAdam, *Video Series*, "Uncle's four laws"]. This video is 9 minutes and 3 seconds, and had 60 plays as of 5 May 2013.
[70] Sylvia McAdam, "land prophecy," online: <http://vimeo.com/34675660> [McAdam, *Video Series*, "land prophecy"]. This video is 3 minutes and 38 seconds, and had 153 plays as of 5 May 2013.
[71] McAdam, *Video Series*, "Introduction," *supra* note 60.
[72] Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, University of Ottawa, 2007) [unpublished] [Lindberg, *Critical Indigenous Legal Theory*].

targets an academic audience. At the beginning of the dissertation, she starts with a letter to the "[r]eaders of this [b]ook," who one can surmise is a white Canadian.[73] She speaks to the reader in a way so as to explain that state laws and indigenous laws are different, and works to address misconceptions about indigenous laws.[74] Though non-indigenous readers are spoken to in the introduction to the dissertation, her dissertation can be described as for indigenous peoples and as engaging in decolonization, given her emphasis on writing about the importance of indigenous laws. She says to her (white) readers, "I am writing you, in essence, to begin dialogue about both newcomer legal history and Indigenous legal history. My hope is that by doing so, we can construct a critical Indigenous legal theory that can enable us to reconcile our legal histories in a way which is participatory, critical and respectful."[75]

It is necessary for me to explain why I have included Lindberg's dissertation as an educational resource about *Cree* law, when she is writing broadly about indigenous legal theory, and makes generalized statements throughout her dissertation about indigenous laws. Though Lindberg is of Cree-Métis descent, this is not my reason for including her text in my sample. Rather, my reasoning is that when she does discuss particular aspects of indigenous laws, such as legal principles, she tends to do so in relation to Cree law.[76] For instance, she talks about the Cree legal principle of *wahkohtowin*,[77] as well as several other

[73] *Ibid* at 1.
[74] *Ibid* at 3-4.
[75] *Ibid* at 5.
[76] See for example, *ibid* at ch 2.
[77] She explains, "[i]n a Cree context, there are codes of conduct that govern a person's behaviour. These are directly connected to and dependent upon the relationship you have with the person or

Cree legal principles.[78] Her framing for talking about indigenous laws is thus informed by Cree law, though I acknowledge that including her dissertation in my sample is not as straightforward as it is with some of the other educational materials.

10. Cree Restorative Justice: From the Ancient to the Present[79]

Cree Restorative Justice is a 192-page academic book, published in 2009. The focus of the text is on Cree law, though for the author, John George Hansen, Cree law is described as Cree restorative justice. More specifically, Hansen is writing about Omushkegowuk (Swampy Cree) approaches to law,[80] and his work draws on interviews that he did with six Swampy Cree elders.[81] The focus in much of the text is on contrasting state law with Cree restorative justice, and showing the value of Cree law being drawn on today. He also uses the medicine wheel to discuss the emotional (social) realm,[82] the spiritual (cultural) realm,[83] the mental (political) realm,[84] and the physical (economic) realm[85] of justice.[86] In his overall findings he emphasizes the importance of stories in Cree restorative justice,[87] argues that Cree perspectives of justice are framed by healing (compared to

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nation that you are interacting with. The Cree principle / word related to this code of conduct is called *wahkohtowin*" (*ibid* at 23).

[78] "In the Cree traditions, our values and ethics include *manatisiwin* (respect), *yospatisiwin* (gentleness), *kisewatisiwin* (kindness), *kwayaskatisiwin* (honesty and fairness), and *kanatisiwin* (cleanliness)" (*ibid* at 27).

[79] John George Hansen, *Cree Restorative Justice: From the Ancient to the Present* (Kanata: JCharlton Publishing, 2009) [Hansen, *Cree Restorative Justice*].

[80] *Ibid* at 'Pre-chapter.'

[81] *Ibid* at 1.

[82] *Ibid* at ch 8.

[83] *Ibid* at ch 9.

[84] *Ibid* at ch 10.

[85] *Ibid* at ch 11.

[86] Hansen's pairings in each chapter are unclear to me. I do not understand, for example, why the political realm is paired with only the mental realm.

[87] *Ibid* at 175.

punitive state approaches),[88] draws attention to the spiritual aspects of Cree law,[89] discusses traditional means for addressing conflict,[90] speaks to collaborative and community based approaches,[91] notes the impact of colonialism on gender relations and advocates traditional gender roles as a way to address this harm,[92] and he emphasizes the role of the offender in the justice process.[93]

Although the text is academic, it is written more accessibly than most academic sources. Part of this is facilitated by Hansen's narrative approach which includes reflections and notes to his family.[94] He does speak to non-indigenous readers in much of his book, in a way so as to educate them about colonialism, the impacts of state law, and the importance of Cree law. However the book does read in a way that could speak to any reader.

11. Cree Narrative Memory: From Treaties to Contemporary Times[95]

This book, by Neal McLeod, is a short academic text that was published in 2007.[96] He describes 'Cree narrative memory' as collective memory that spans across generations[97] and which is part of a broader 'Cree critical theory.'[98] McLeod surveys particular historical moments, examining Cree people's involvement and interpretations, and focuses on the concept of Cree narrative

[88] *Ibid*. As discussed in the dissertation, Hansen's view of Cree law is very romanticized when he frames Cree law as always, necessarily healing. Hansen deals very poorly with internal power dynamics in his work.
[89] *Ibid*.
[90] *Ibid*.
[91] *Ibid* at 176.
[92] *Ibid*.
[93] *Ibid*.
[94] *Ibid* generally.
[95] Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich Publishing, 2007) [McLeod, *Cree Narrative Memory*].
[96] The book is 143 pages long.
[97] McLeod, *Cree Narrative Memory, supra* note 95 at 8.
[98] *Ibid* at 97. Unfortunately McLeod's articulations of these concepts are quite general.

memory in relation to treaty relations. In the final chapter, he considers what 'Cree narrative imagination' might mean, and how it contributes to Cree sovereignty. He explains,

> Cree narrative imagination can be best articulated by the Cree term *mamâhtâwisiwin*, which could perhaps be best translated as 'tapping into the Great Mystery,' or 'tapping into the Life Force.' The term used to describe the elder Brother *wîsahkêcâhk, ê-mamâhtâwisit*, was also used to describe *mistahi-maskwa* [Big Bear]. All these beings struggled to move beyond the ordinary, and to rethink the space and world around them.[99]

His book includes both text and images.[100]

This book is informative for both indigenous and non-indigenous readers, though it is clear that it targets indigenous, particularly Cree, people as key audience members, in the discussion about empowerment via Cree narrative memory and imagination. Adults are the main audience of this academic educational resource.

[99] *Ibid* at 100.
[100] Though there are not a large amount of images.

Appendix C:
Data Analysis Guide

BACKGROUND:

- What type of material is being looked at?
- What is being analyzed (e.g. text, images, sound)?
- Who is the stated or imagined audience?

LEGAL ANALYTIC FRAMEWORK:[1]

- Legal processes:
  - What are the characteristics of legitimate decision-making processes?
    - Who is included? Is this gendered?
  - Who are the authoritative decision-makers? Is this gendered? If so, who is making decisions about what?
  - What steps are in place for responding to the conflict? Are both women and men a part of these steps? Are there particular gendered roles or expectations in this process?
  - What is the relationship between gender, authoritative speakers, and perceived legitimacy of the process?
- Legal responses and resolutions:
  - What are the responses?
  - What are the principles underlying these responses and means for resolving conflict?
  - Do these responses have different implications for women and men?
  - Are there explicit or implicit assumptions or ideas built into the principles?
- Legal obligations:
  - What are the principles governing individual and collective responsibilities?
  - What legal obligations are there?
  - How does gender factor into or complicate these obligations?
- Legal rights:
  - What should people be able to expect from others (procedural and substantive)?
  - Are any of these expectations gendered?

[1] Friedland's legal analytic framework is in green and my additions are in black (Hadley Friedland "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 at 30 [Friedland, "Reflective Frameworks"]; Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" [forthcoming] at 18 [Friedland & Napoleon, "Gathering the Threads"].

        - Are certain rights overlooked?
    - General underlying principles (underlying principles that emerge from the materials)
        - Are women and men impacted differently by the principles? Can women and men access legal principles similarly?

- Further questions:
    - Is there a focus on one particular aspect of Cree law (e.g. family)?
    - How is law being articulated or imagined (e.g. as just rules, general discussion about principles, discussion about process)?
    - What type(s) of law are discussed (e.g. Borrows – sacred, natural, positive, deliberative, customary[2])?
    - Are there prominent discourses and rhetoric used throughout the material?

GENDER:

- Is gender addressed either explicitly or implicitly in the material?
- Are both women and men present in the material?
    - What are they doing or saying? In what contexts do women and men appear?
- How is 'gender' imagined (e.g. binary)?
- Is there any mention of sexuality? If yes, how? If not, is there still an implied expectation of sexuality throughout?
- Is there any mention of gender roles or expectations?
- Are women and men represented as having similar or unique lived circumstances and interactions with law?
- Is gendered conflict mentioned (e.g. violence, resources, political participation)?
- What sorts of social and political issues or concerns are identified as relevant in the materials/what conflicts are used to talk about law?
    - How is conflict talked about (e.g. as something to be eradicated? Or worked with?)?

GENERAL REFLECTION:

- Is tradition talked about? Are both women and men a part of given discussions on tradition?
- Is there anything beyond what has been mentioned above that stands out for you, that needs to be addressed?
- Did anything about this material surprise you? Why?

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[2] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, "Canada's Indigenous Constitution"] at ch 2 [Borrows, *Canada's Indigenous Constitution*].

- Do you think that this material is useful for teaching people about Cree law?
    - If you think this is a valuable resource, reflect on why that is.
    - If you have concerns about this resource, reflect on your concerns.
- Reflections on aesthetics – either with the representation of law or people:
    - Do the materials focus on the positive? How are Cree law and Cree peoples talked about?
- Is this material valuable for your dissertation/should it be included in your analysis – why or why not?

Appendix D:
Legal Synthesis[1]

It is important to note that what is below is simply a summary of some aspects of the educational materials that I pulled out, so as to provide evidence that the given resource was about Cree law, and to show examples of how Cree law is or needs to be understood as gendered. Given the general nature of many of the educational resources, I was not able to adequately speak to all categories with all of the materials. What is below is partial, and I include this information here not to be representative of Cree law, or even the sample, rather it is merely meant to show some of the information that was filled in during my data analysis. Furthermore, as Appendix C shows, I worked to answer a multitude of questions while going through each educational resource, and thus what is in this legal synthesis is only a small part of a larger analysis, and should not be detached and decontextualized from the broader examination of a given resource. Without consideration of the rest of the findings discussed throughout the dissertation, the synthesis below does not appear to include gender in an explicit or obvious way. Again, what is below is just an initial summary for identifying law in the materials that should be considered superficial in its presentation. Some of the findings are competing, which speaks to the variation that emerges somewhat between the materials.

Cree legal processes:

Authoritative decision-makers:
-elders[2]

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[1] I will list all resources generally in full here. Only the short forms for each will then be listed in subsequent footnotes. The resources include: online: *On the Path of the Elders* <http://www.pathoftheelders.com> [*Path of the Elders*] (*Path of the Elders* is referring broadly to the entire educational package here, including the game *Knowledge Quest*); *Wahkohtowin – Cree Natural Law*, DVD (Edmonton: BearPaw Media Productions, 2009) [*Wahkohtowin*]; Online: *Four Directions Teachings.com* (Cree Teaching by Mary Lee) <http://www.fourdirectionsteachings.com/> [*Four Directions*]; Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) [*Treaty Elders*]; Greg Miller et al, *Muskwa: Fearless Defender of Natural Law* (Edmonton: BearPaw Legal Education & Resource Centre, second printing 2011) [*Muskwa*]; Sylvia McAdam, *Cultural Teachings: First Nations Protocols and Methodologies* (Saskatoon: Saskatchewan Indian Cultural Centre, 2009) [*Cultural Teachings*]; Sylvia McAdam, ILP Lectures 1 and 2: "Sylvia McAdam teachings pt. 1," online: <http://vimeo.com/31653388> and "Sylvia McAdam teachings pt.2," online: <http://vimeo.com/31616141> [*ILP Lectures*]; Sylvia McAdam Video Series, online: http://vimeo.com/channels/301066/page:1>; <http://vimeo.com/channels/301066/page:2>; <http://vimeo.com/channels/301066/page:3> [*Video Series*]; Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, University of Ottawa, 2007) [unpublished] [*Critical Indigenous Legal Theory*]; John George Hansen, *Cree Restorative Justice: From the Ancient to the Present* (Kanata: JCharlton Publishing, 2009) [*Cree Restorative Justice*]; Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich Publishing, 2007) [*Cree Narrative Memory*].

[2] *Four Directions*; *Wahkohtowin*; *Treaty Elders*; *Video Series*; *ILP Lectures*; *Path of the Elders*; *Critical Indigenous Legal Theory*; *Cree Restorative Justice*; *Cree Narrative Memory*; *Muskwa; Cultural Teachings.*

-spiritual leaders (human and non-human)[3]
-the Creator[4]
-medicine people[5]
-leaders, such as chiefs[6]
-women[7]

Steps for responding to conflict:[8]
-collective/community process[9]
-gathering evidence[10]
-taking responsibility for one's behaviour if you broke a law.[11]
-teaching about Cree law[12]
-ceremonies[13]
-offering tobacco[14]
-consulting with the appropriate authorities[15]

Legal Responses and Resolutions:

Responses:
-support from kinship[16]
-giving space for people to learn from minor mistakes[17]
-healing circles[18]
-dialogue[19]
-ceremonies[20]
-shaming[21]

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[3] *Muskwa*; *Video Series*; *ILP Lectures*; *Critical Indigenous Legal Theory.*
[4] *Video Series*; *ILP Lectures*. In listing the Creator here, I include the caveat that the Creator and sacred laws are interpreted by humans.
[5] *Cree Restorative Justice.*
[6] *Treaty Elders*; *Path of the Elders*; *Cree Restorative Justice*; *Cree Narrative Memory.*
[7] In some circumstances (though mainly these women are elders). *Four Directions*; *Video Series*; *ILP Lectures*.
[8] These are listed in no particular order.
[9] *Path of the Elders*; *Cree Restorative Justice*; *Wahkohtowin*; *Muskwa* (particularly in terms of the animals working together); *Cree Narrative Memory*.
[10] *Muskwa.*
[11] *Video Series*; *Path of the Elders*.
[12] *ILP Lectures*; *Video Series*; *Four Directions*.
[13] *Four Directions*; *Cultural Teachings*; *Critical Indigenous Legal Theory*.
[14] *Four Directions*; *Cultural Teachings*; *Video Series*.
[15] *Four Directions*; *Wahkohtowin*; *Path of the Elders*; *Critical Indigenous Legal Theory*; *Cree Restorative Justice*; *Cree Narrative Memory.*
[16] *Four Directions.*
[17] *Four Directions*; *Path of the Elders* presents itself as taking this approach with *Knowledge Quest* however some of the consequences are grave (though, virtual and not real, nonetheless).
[18] *Cree Restorative Justice.*
[19] Specifically regarding nation-to-nation relations, *Treaty Elders*. In *Knowledge Quest (Path of the Elders*), one can purchase a 'peaceful sit-in' to address conflicts with the white loggers and miners on the economy path. One can also (with enough money) eventually buy police enforcement on this path.
[20] *Cree Restorative Justice*; *Wahkohtowin*; *Cultural Teachings*; *Video Series*.

-reparations[22]
-counseling with elders (which could include educating about Cree laws)[23]
-banishment[24]
-death (historically)[25]

Principles that inform responses:[26]
-restoring balance[27]
-protection of those who are vulnerable[28]
-connectedness (understanding how one's actions impact others)[29]
-healing[30]
-forgiveness[31]
-*opintowin* ("'involves the principles of repairing harm, healing, restoring relationships, accountability, community involvement and community ownership'")[32]

Legal Obligations:

-children should be protected.[33]
-children should be nurtured, taught, and encouraged.[34]
-obligations to family and kinship.[35]
-obligations to the land (treating animals with respect, the land with respect).[36]
-women's knowledge should be valued and listened to.[37]
-obligations to the Creator.[38]
-obligation to protect those who are vulnerable.[39]
-obligation to share with others and to help those in need.[40]
-obligation to respect elders.[41]

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[21] *Cree Restorative Justice.*
[22] *Cree Restorative Justice*; *Wahkohtowin.*
[23] *Cree Restorative Justice*; *Wahkohtowin*; *Muskwa*; *ILP Lectures.*
[24] *Cree Restorative Justice.*
[25] *Cree Restorative Justice.*
[26] I have mainly listed principles in the final section of the framework below.
[27] *Four Directions.*
[28] *Muskwa.*
[29] *Muskwa.*
[30] *Cree Restorative Justice.*
[31] *Cree Restorative Justice.*
[32] *Cree Restorative Justice* at 4.
[33] *Four Directions*; *Muskwa*; *Cultural Teachings*.
[34] *Muskwa*; *Cultural Teachings*; *Wahkohtowin*; *ILP Lectures*; *Video Series*. In *Wahkohtowin*, an obligation to be loving is discussed.
[35] *Four Directions*; *Treaty Elders*; *ILP Lectures*; *Wahkohtowin.*
[36] *Treaty Elders*; *Four Directions*; *Cultural Teachings*; *Muskwa*; *Video Series.*
[37] *Four Directions*; *Critical Indigenous Legal Theory*; *Cultural Teachings.*
[38] *Four Directions*; *Muskwa*; *Treaty Elders*; *Cultural Teachings*; *Video Series*.
[39] *Four Directions*; *Cree Narrative Memory*.
[40] *Treaty Elders*; *Cultural Teachings*; *Path of the Elders*; *Cree Restorative Justice*; *Cree Narrative Memory*.
[41] *Cultural Teachings*; *Path of the Elders.*

-obligation to restore/revitalize law.[42]
    -obligation to learn about Cree law (though one also has the right to resources and information from others, and the right to be taught).[43]
-obligation to respect everything around you (the creator, people, non-human beings).[44]
-obligation to act respectfully toward oneself.[45]
-obligation to follow through on your promises.[46]
-obligation to be a contributing member of your community.[47]

Legal Rights:

Substantive:
-children have the right to be protected[48]
-elders have the right to be protected if vulnerable[49]
-women have the right to be respected[50]
-the right to be taught about Cree law[51]
-non-human beings have a right to be treated with respect[52]
-the right to safety, to not be harmed[53]
-women have the right to bodily integrity[54]
-right to sovereignty (including the right to one's beliefs, culture, and law)[55]
-the "right to livelihood"[56]
-the right to be a part of one's community[57]
    -the right for women to be included[58]
-the right to fulfill gendered obligations[59]
-the right to live well[60]
-the right to protect the land[61]

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[42] *Video Series*.
[43] *ILP Lectures*.
[44] *Wahkohtowin*; *Treaty Elders*; *Video Series*; *Path of the Elders*.
[45] *ILP Lectures*; *Video Series*.
[46] *Path of the Elders*.
[47] *Path of the Elders.*
[48] *Four Directions*; *Muskwa.*
[49] *Four Directions.*
[50] *Four Directions.*
[51] *Wahkohtowin*; *Cultural Teachings*; *Video Series.*
[52] *Muskwa*; *ILP Lectures.*
[53] *Treaty Elders*; *Cultural Teachings*; *ILP Lectures.*
[54] *Critical Indigenous Legal Theory*; *ILP Lectures.*
[55] *Treaty Elders*; *Video Series*; *ILP Lectures*; *Critical Indigenous Legal Theory*; *Cree Narrative Memory.*
[56] *Treaty Elders* at 36.
[57] *ILP Lectures*; *Video Series*.
[58] *ILP Lectures*; *Critical Indigenous Legal Theory.*
[59] *Critical Indigenous Legal Theory.*
[60] *ILP Lectures.*
[61] *Path of the Elders.*

Procedural:
-the right to fair governance/to be treated fairly[62]
-the right to one's own laws[63]
-the right to be consulted with, if you possess pertinent knowledge[64]
-the right to be heard[65]
-the right to learn about Cree law[66]

Legal Principles:

-*miyo-wîcêhtowin* (good relations)[67]
-*wâhkôhtowin* (kinship, relatedness)[68]
-*kisewatisiwin* (kindness)[69]
-*manatisiwin* (respect)[70]
-happiness[71]
-generosity[72]
-reciprocity[73]
-gentleness[74]
-*kwayaskatisiwin* (honesty, fairness)[75]
-*kanatisiwin* (cleanliness)[76]
-balance[77]
-harmony[78]
-*wetaskiwin* (living together peacefully)[79]
-keeping promises[80]

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[62] *ILP Lectures*; *Cree Restorative Justice*; *Muskwa*; *Critical Indigenous Legal Theory.*
[63] *ILP Lectures*; *Video Series*; *Treaty Elders*; *Cree Narrative Memory*; *Path of the Elders.*
[64] *Four Directions*; *Path of the Elders*; *Treaty Elders.*
[65] *Wahkohtowin*; *Treaty Elders.*
[66] *ILP Lectures*. I think that this right is both substantive and procedural.
[67] *Treaty Elders*; *Critical Indigenous Legal Theory.*
[68] *Treaty Elders*; *Video Series*; *Cree Narrative Memory*; *Wahkohtowin*; *ILP Lectures*; *Critical Indigenous Legal Theory*; *Video Series.*
[69] *Cultural Teachings*; *Critical Indigenous Legal Theory*.
[70] *Cultural Teachings*; *Critical Indigenous Legal Theory*; *Path of the Elders*; *Treaty Elders*; *Wahkohtowin*; *Video Series*; *Cree Restorative Justice.*
[71] *Video Series*. I have questions about why happiness would be labeled as a *legal* principle or a law, however I include it here as McAdam articulates it as law (one of the seven pipe laws) in her work.
[72] *Video Series*; *Cree Narrative Memory*; *Path of the Elders*; *Treaty Elders*.
[73] *Critical Indigenous Legal Theory*; *Treaty Elders*; *Path of the Elders*; *Cree Restorative Justice.*
[74] *Treaty Elders*; *Critical Indigenous Legal Theory.*
[75] *Critical Indigenous Legal Theory.*
[76] *Critical Indigenous Legal Theory*; *Treaty Elders*; *Cultural Teachings.*
[77] *Four Directions*; *Muskwa.*
[78] *Four Directions*; *Treaty Elders.*
[79] *Wahkohtowin*; *ILP Lectures*; *Treaty Elders*; *Cree Restorative Justice.*
[80] *Critical Indigenous Legal Theory*; *Cree Narrative Memory.*