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An Anishinaabe Tradition: Anishinaabe Constitutions in Ontario

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Abstract

Constitutionalism is an Anishinaabe legal tradition. This thesis explores modern Anishinaabe constitutions in Ontario, as they connect to traditional constitutionalism while meeting the unique governing needs of contemporary Anishinaabe First Nations communities. I address the scholarly and legal context in which these constitutional documents have been produced and shed an empirical light on these understudied legal instruments. Two questions shape this thesis: 1) what are the defining characteristics of Anishinaabe constitutions in Ontario; and, 2) what is their function within Anishinaabe communities? To answer these questions, I review both ratified and draft Anishinaabe constitutional documents of member communities of the Anishinabek Nation according to three elements of constitutional development: culture, power, and justice. I find that these constitutions, though comparable to Western constitutions, are distinctly Anishinaabe legal instruments that respond to the settler-colonial state while prioritizing the restoration of Anishinaabe law-making powers and jurisdiction. Modern, positivist Anishinaabe constitutions in Ontario seek to nourish Anishinaabe ways of living as they look toward the past, present, and future needs of the communities that produce them. I conclude that, whatever the state of current scholarly discussions on the theoretical compatibility of Indigenous law with state law, these constitutions exist as a form of practical self-empowerment.

Keywords

Anishinaabe, Anishinabek Nation, Indigenous, Aboriginal, Anishinaabe law, traditional law, self-determination, self-governance, constitutions, way of living

Summary for Lay Audience

Constitutionalism can be understood as an adherence to basic standards and principles that align with an overarching standard of ethics. In a more formal sense, it is the written or unwritten fundamental legal framework of a nation. It functions to empower and constrain government while outlining the basic principles by which the named government is expected to conduct itself. Its scope expands from governmental duties and relations with external governments to the most fundamental rights and protections of citizens.

A number of Anishinaabe First Nations communities throughout Ontario have written and begun using constitution style documents that contain some similarities to the Canadian constitution, as well as many unique points that come from Anishinaabe tradition. These constitutions contain both rules about how local government must be formed and guiding principles on how people should aspire to live. For the most part, they are part of an effort to create stability in advance of what many people hope is an agreement between the communities (in the form of the political advocacy organization, Anishinabek Nation) and the Canadian federal government that would allow these First Nations communities to exercise more control over their operation. Based on these points, Anishinaabe constitutions in Ontario can be understood as important documents. They are important documents. Even so, they are missing from academic conversations on how Indigenous laws and governance are growing today.

The purpose of this paper is to draw attention to Anishinaabe constitutions – what they have in common and what their role is in the operation of governance in the communities that have them. To examine these points, I first explain how Indigenous law might be understood, especially because people who are not from Indigenous communities are used to recognizing in the form that we see the most – how the government produces law. I then provide information on how Indigenous law has been undermined in the context of Canadian law. I move on to explain how constitutions – something that non-Indigenous people are used to thinking of as related to Western or European law – is actually also an Anishinaabe legal tradition. It is Indigenous law as much as what was discussed in the previous section. The next part of the thesis is an analysis of Anishinaabe constitutions to reveal how different communities approach issues in a way that is recognizable to outsiders, but which makes space for the use of Anishinaabe law. I conclude that Anishinaabe constitutions are important for governance and the empowerment of communities, even if their future power against interference by the Canadian government remains unclear.

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CHAPTER 1: INTRODUCTION

“We continue to occupy a physical and jurisprudential world that is made up of intermixed layers of ancient and recent origin. The interdependence of these elements for the diversity of life on the land cannot be over-emphasized. To look just on the surface, and think that what you see from the horizon to horizon is all that is needed to survive, is to misunderstand your place on the ground which you stand. To scale its heights – to learn its lessons – one must be alive to the underlying structures that support the visible and not-so-visible world around you.”

*- John Borrows, *Drawing Out Law*, 2010¹*

1.1 Introduction

There has been a recent proliferation of written Anishinaabe² constitutions among First Nations member communities of the Anishinabek Nation³ in Ontario, connected to the organization’s mission to restore Anishinaabeg jurisdiction and rebuild traditional governance.⁴ Written constitutions are a requirement for the exercise of Anishinaabeg jurisdiction as outlined in the *Anishinabek Nation Governance Agreement* (“ANGA”)⁵ – a central component of the

¹ John Borrows, *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010) at 72. [*Drawing Out Law*]

² The Anishinaabeg – the Ojibwe, Odawa, and Bodewadmi - lived in a clan-based legal structure around the western Great Lakes area since long before the arrival of European outsiders. These three nations, known as the Three Fires Confederacy (or the People of the Three Fires) established and maintained a complex system of law founded on kinship relations that managed domestic relations, property rights, and criminal law, among other areas of law. See: James A. Clifton et al, *People of the Three Fires: The Ottawa, Potawatomi, and Ojibway of Michigan* (Michigan: Grand Rapids Inter-Tribal Council, 1986) at 12. For a robust explanation of clan-based governance, see: Heidi Rosemary Bohaker, *Nindoodemag: Anishinaabe Identities in the Eastern Great Lakes Region, 1600-1900* (PhD Dissertation, University of Toronto, 2006).

³ The Anishinabek Nation (established as the Union of Ontario Indians) founded in 1949 for the purpose of political advocacy on behalf of Anishinaabeg communities, which lacked collective legal recognition for the purpose of entering into legally-binding agreements. The organization consists of 39 First Nations across Ontario and is charged with delivering programs and services (including, but not limited to: economic development, health, social development, and labour and market relations) to member communities. A primary goal of the Anishinabek Nation is to reinforce the existence of the Anshinaabek nation and to encourage unity among member Anishinaabeg First Nations. For more details on the Anishinabek Nation and its mandate, see: Anishinabek Nation, “Anishinabek Nation”, *Anishinabek Nation* (2019), online: < <https://www.anishinabek.ca/who-we-are-and-what-we-do/>>.

⁴ Anishinabek Nation, “Wii-Bskaadoodoong Maanda Eko-Kowaabjigaade Gimaawinan Dbaakgonigewin: Restoration of Jurisdiction”, *Anishinabek Nation* (2019), online: <<https://www.anishinabek.ca/governance/governanceactivities/overview/>>. [“Restoration of Jurisdiction”]

⁵ The final draft of the ANGA was signed on August 23, 2019, drawing an end to almost 25 years of negotiations. The ratification vote among First Nations members of the Anishinabek Nation was scheduled for early 2020, but has

project of jurisdictional restoration. These constitutions, produced and ratified by First Nations members of the Anishinabek Nation, are the primary tool for participating communities to exercise their own (i.e. not derived from the Indian Act) law-making authority and jurisdiction while striving toward stability and transparency in local governance.⁶ These constitutions are also the extension of traditional Anishinaabe law.

Chi-inaakonigewin,⁷ the term often used to embody the Anishinaabe constitutional tradition, is a verb in Anishinaabemowin.⁸ Anishinaabe constitutionalism is thus best understood in terms of action. It was and is based on action in relationships.⁹ Seen in this light, constitutionalism becomes an expression of something deeper than abstract governance. Constitutionalism describes how people belong to one another.¹⁰ For the Anishinaabe, Belonging to one another has been an exercise in diversity and local decision making, with an attentiveness to individual autonomy.¹¹ As an extension of this legal paradigm, Anishinaabe constitutions are part of a movement toward the revitalization of Indigenous law that embraces a renewed focus on relationality.

been postponed due to the COVID-19 pandemic. More information on the ANGA will be provided in Chapter 4. A ‘plain language’ version of the ANGA is available from the Anishinabek Nation. See: Anishinabek Nation, “Proposed Anishinabek Nation Governance Agreement: Plain Language Version”, *Anishinabek Governance Agreement* (2020), online: <<https://www.governancevote.ca/wp-content/uploads/2020/02/AN-Governance-Plain-Language.pdf>>.

⁶ Anishinabek Nation, “Restoration of Jurisdiction”, *supra* note 4.

⁷ ‘Chi’ can be translated to great or large, while ‘*inaakonige*’ means to “act through making a judgement or deciding to proceed in a certain way.” See John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution* (June 2014) at 2, online: <<https://cottfn.com/wp-content/uploads/2014/05/Chippewa-Thames-Constitution-Review-.pdf>>. This term is included, with some spelling variation, in the titles of the majority of constitutional documents reviewed for this thesis.

⁸ *Ibid.* Anishinaabemowin is the Ojibwe language. Spellings vary depending on the person, community, and region. Readers will notice spelling variations throughout this paper, in keeping with original sources.

⁹ John Borrows, “Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada”, in Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers, eds, *Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) at 26. [“Indigenous Constitutionalism”]

¹⁰ Aaron Mills (Waabishki Ma’iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD Thesis, University of Victoria, 2019) at 28. [unpublished] [*Miinigowiziwin*]

¹¹ John Borrows, “Indigenous Constitutionalism”, *supra* note 9 at 27-28.

The revitalization of Indigenous law in Canada is part a wider movement toward the revitalization of language, culture (including their relationship with the land), and Indigenous food security. This is more than a revitalization of abstract concepts – this is a revitalization of life. It is from this vantage point that we can best understand modern Anishinaabe¹² constitutions in Ontario. After all, constitutions are more than a written body of principles, rights, and governmental limitations – they are “a way of living.”¹³ Modern Anishinaabe constitutions in Ontario provide insight into Anishinaabe life in the past, present, and future. The themes found in these constitutions – language rights, connections to ecology, the rights of communities to define their own citizenship, the assertion of law-making rights - are the same themes of exploration that characterize the general study of Indigenous legal orders in Canada. And yet, despite increasingly robust scholarship on the revitalization of Indigenous legal orders, Anishinaabe constitutions have been overlooked in academic literature.¹⁴

This thesis explores how written Anishinaabe constitutions fit within the greater tradition of Anishinaabe constitutionalism. In doing so, this paper builds upon the work of Anishinaabe constitutional scholars like John Borrows and Aaron Mills, who present their understandings of Anishinaabe law and constitutionalism. The core objective of this thesis, rather than build on the theoretical underpinnings of Anishinaabe constitutionalism, is to shed some empirical light¹⁵ onto the ways in which Anishinaabe communities in Ontario are utilizing constitutional

¹² The Anishinaabe have a strong historical presence in the Great Lakes area. Traditional Anishinaabe territory is north of Lakes Ontario and Erie, and extends across the other Great Lakes into the southern woodlands and Canadian prairies. See John Borrows, “Indigenous Constitutionalism”, *supra* note 9 at 26.

¹³ See John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution*, *supra* note 7 at 1, online: <<https://cottfn.com/wp-content/uploads/2014/05/Chippewa-Thames-Constitution-Review-.pdf>>.

¹⁴ This is a curiosity that Christopher Alcantara and Greg Whitfield remark on in their stand-alone study of fourteen Indigenous constitutions on Canada’s west coast, published in 2010. See Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design: A Survey of Fourteen Aboriginal Constitutions in Canada” (2010) 44:2 *J of Canadian Stud* 122. [“Aboriginal Self-Government through Constitutional Design”]

¹⁵ This objective (and its wording) echoes that in Christopher Alcantara and Greg Whitfield, *ibid* at 124.

development as a means of managing issues of self-determination and legal revitalization in a context where Indigenous legal traditions are held by the settler-colonial state to be subordinate. The subjects of this study are ten Anishinaabe constitutions ratified in Ontario and five unrati ed constitutional documents, which together serve as informative examples of constitutional thought and development among member communities of the Anishinabek Nation.

The research questions investigated in this thesis are: *1) what are the defining characteristics of Anishinaabe constitutions in Ontario; and, 2) what is their function within Anishinaabe communities?* My approach to answering these questions is descriptive and analytic, as I compare the form and contents of the constitutions studied. Among matters of consideration are how and to what extent distinctive Anishinaabe culture is expressed within the documents, what sources of power are asserted as the foundation for Anishinaabe self-determination or self-governance, and to what extent these documents draw from traditional law. A comparison of Anishinaabe constitutions reveals common priorities among member communities of the Anishinabek Nation as they contemplate self-determination.

An analysis of these documents reveals a drive among Anishinaabe communities in Ontario toward democratic self-governance that honours traditional law and the right of citizens to Anishinaabe language and culture, while meeting growing challenges, such as economic growth. Through this approach, I demonstrate that, whatever the answers are to the ongoing theoretical debates about the incommensurability of Indigenous law with state law, a significant number of Anishinaabeg First Nation communities in Ontario are endeavouring to use democratic constitutions that reflect Western constitutions (to some degree) as a means of communicating and protecting traditional Anishinaabe law and empower local government.¹⁶

¹⁶ There are a number of Anishinaabe constitutions produced by communities in the USA. A comparison is outside the boundaries of this thesis, which is an analysis of Anishinaabe constitutions in Ontario only.

(And, significantly, that they are doing so with great stakes on the horizon of the ratification process of a self-governance agreement nearly 25 years in the making.) This thesis is one step to filling an academic gap and gaining a better understanding of the state of Anishinaabe constitutionalism in Ontario – an effort that I will continue in my doctoral studies.

1.2 Outline

One must understand the state of Indigenous legal thought in academia to appreciate the context of this constitutional review. For this reason, Chapter 2 explores Indigenous legal scholarship in Canada. I first focus on how Indigenous scholars have wrestled with the relationship between the revitalization of Indigenous legal orders and making improvements in the relationship between Indigenous peoples and the Crown. Next, I review the state of the academic discussion on Indigenous constitutionalism in Canada – an exercise that reveals the conspicuous gap into which Indigenous constitutions have fallen in Canadian legal scholarship.

Chapter 3 provides greater depth to this conversation with an evaluation of Indigenous legal orders as resilient in the face of state oppression. In this chapter, we review how Indigenous law has persisted in the settler-colonial context despite a lack of recognition by the state. If we accept that achieving state recognition of Indigenous legal orders is a desire among some First Nations communities endeavouring to revive their own law, then we must consider means of recognition as they arise. This strikes at the heart of the reason for this study of Anishinaabe constitutions in Ontario – not to evaluate the efficacy of these legal instruments, but rather to evaluate them on their own terms. I go on in this chapter to explore Indigenous legal thought as distinct from the legal traditions of a Eurocentric society. The purpose of doing so is to set the foundation for a discussion of Anishinaabe constitutionalism as an Indigenous legal tradition.

Chapter 4 is the beating heart of this thesis. It is also the longest chapter. Anishinaabe constitutionalism becomes our sole focus as we consider how constitutionalism functions as an Anishinaabe legal tradition. This discussion relies on the work of Aaron Mills, who provides us with his understanding of how Anishinaabe constitutionalism differs from liberal constitutional traditions. Through Mills' framework of rooted Anishinaabe constitutionalism, we can begin to grasp constitutionalism as an extension of kinship. Constitutionalism becomes action in this light, as ways of belonging to one another rather than a series of abstract structures.

The next component of this chapter introduces Anishinaabe constitutionalism in one of the forms it now embodies: modern written Anishinaabe constitutions. These constitutions, promoted as self-governance documents by the Anishinabek, have been widely pursued by Anishinaabe communities in Ontario. Though they are associated with a push toward to conclusion of a governance agreement between the Anishinabek Nation and the federal government, modern constitutions also exist outside of the context of a governance agreement that has yet to be agreed to by constitution-ratifying communities.

We then move toward an empirical analysis of ten Anishinaabe constitutions ratified by First Nations in Ontario. This empirical analysis illustrates the common elements of these legal instruments. Using three primary constitutional elements (culture, power, and justice), I show how modern Anishinaabe constitutions manifest Anishinaabe law while demonstrating a high level of constitutional cohesion. The differences between modern Anishinaabe constitutions, which have been guided in part by the Anishinabek Nation, reduce more to the absence of components in some documents rather than the presence of stark contrasts.

My conclusions are presented in Chapter 5. Having shined an empirical light on modern Anishinaabe constitutions in Ontario, I conclude that they are distinctly Anishinaabe legal

instruments, while they also contain elements that reflect Western constitutions (and, specifically, the Canadian constitution). Though they maintain a similar form, they are also nuanced in their differences. Above all, they prioritize Anishinaabe law and the nourishment of Anishinaabe life as the ratifying communities look toward the future. They seek to address the contemporary issues faced by Anishinaabe First Nations communities in Ontario while working from a foundation of relations. Much about their future is to be determined with the potential ratification of the *ANGA* and the ways that ratifying communities continue to live the principles within their constitutions. One thing is certain - they are expressions of ways of belonging to one another and are part of a long tradition of Anishinaabe constitutionalism. As such, they are deserving of continued study.

1.3 Methodology

There is no pure scholarly objectivity. Some readers will accept this statement; others will find it controversial. We debate as legal scholars the merits of politicizing our work. We struggle between notions of legal advocacy and objective realities as the foundation of legal studies. It is useful during these moments to step back from such debates to contemplate the nature of knowledge and experience themselves. As Paulo Friere explains:

[O]ne cannot conceive of objectivity without subjectivity. Neither can exist without the other, nor can they be dichotomized. The separation of objectivity from subjectivity, the denial of the latter when analyzing reality or acting upon it, is objectivism. On the other hand, the denial of objectivity in analysis or action, resulting in a subjectivism which leads to solipsistic positions, denies action itself by denying objective reality. Neither objectivism nor subjectivism, nor yet psychologism is propounded here, but rather subjectivity and objectivity in constant dialectical relationship...¹⁷

¹⁷ Paulo Friere, *Pedagogy of the Oppressed*, 30th ed (New York: Continuum, 2005) at 50.

To be blunt: there is no world without people and there are no people without the world.¹⁸ Our relationships with our subjects of study are not pristine but are rather muddied with human complexities. The reality of the dialectical relationship between subjectivity and objectivity stands in contradiction to dominant academic culture that holds that “the personal contaminates the search for meaning” and that the distance creates more reliable results.¹⁹

Who we are (and who we *think* we are) colours our interactions with the people and phenomena we study. It is important to be as aware as possible of these colourations and the stains they might leave behind once our ink has dried. Linda Tuhiwai Smith reminds scholars that the way we interact with our subjects of study – and, indeed, knowledge itself – exists within histories and present moments, which we need to take into account:

... it is surely difficult to discuss *research methodologies* 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.²⁰

The misappropriation of Indigenous knowledge by way of clumsy or purposeful colonial research practices is as foundational an issue to sovereignty as it is to race relations and rights violations.²¹

Linda Tuhiwai Smith points to anthropology as a classic example of a Western discipline implicated in imperialism. Anthropologists long framed the study of Indigenous peoples as “their” science, thereby attempting to legitimize antagonistic and dehumanizing myths about

¹⁸ *Ibid.*

¹⁹ Sarah Morales, "Locating Oneself in One's Research: Learning and Engaging with Law in the Coast Salish World" (2018) 30:1 CJWL 144 at 165.

²⁰ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books, 1999) at 2. (Original emphasis.)

²¹ Aroha Te Pareake Mead, “Misappropriation of Indigenous Knowledge: The Next Wave of Colonisation” (1994) 3:1 Otago Bioethics Report 4 at 4.

Indigenous peoples.²² Colonial studies of Indigenous peoples create an image of the “other”, caricatured as extreme versions of idealized or demonized beings. Tropes of Indigenous peoples as ‘noble savages’ (innately pure, corrupted only by the influence European civilization), as infantile and unintelligent, as violent, or as altogether vanishing remain prominent in Western academia and culture.²³ These tropes perform an important colonial function: to undermine the subjectivity, humanness, and sovereignty of Indigenous peoples in favour of the settler colonial project. The underlying assumption has been that Indigenous peoples were incapable of “[using] their minds or intellects” and were thus impossible participants in Western academia.²⁴ The “othering” of Indigenous peoples as subjects of scholarship continues to exclude Indigenous persons as participants of scholarship and reinforces the asymmetrical power relationship between Indigenous peoples and the academy (and, by extension, the state).²⁵ The academy has flattened images Indigenous peoples as subjects of studies while simultaneously seeking to exclude Indigenous peoples from academia itself.²⁶

We can extend this discussion to the realm of law, for tropes backed by colonial scholarship practices have informed and continue to reinforce the paternalistic relationship

²² Tuhiwai Smith at 11.

²³ For further explanation, see: Lesley Wylie, *Colonial Tropes and Postcolonial Tricks: Rewriting the Tropics in the novela de la selva* (Liverpool: Liverpool University Press, 2009); S.E. Bird, “Introduction: Constructing the Indian, 1830s-1990s” in S.E. Bird, ed, *Dressing in Feathers: The Construction of the Indian in American Popular Culture* (Boulder, CO: Westview Press) at 1-12; and Frances V. Rains, “Indigenous Knowledge, Historical Amnesia and Intellectual Authority: Deconstructing Hegemony and the Social and Political Implications of the Curricula ‘Other’” in Ladislaus M. Semali and Joe L. Kincheloe, eds, *What is Indigenous Knowledge?: Voices From the Academy* (New York: Falmer Press, 1999) at 317-332.

²⁴ Linda Tuhiwai Smith, *supra* note 20 at 25.

²⁵ For a discussion of this continued process of “othering” and exclusion as it is built into scholarship and university policies, see Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Halifax: Fernwood Publishing, 2008).

²⁶ For a deeper understanding of how Indigenous peoples are systemically excluded from academia, see: Heather Castleden, et al., “I Don't Think that Any Peer Review Committee . . . Would Ever ‘Get’ What I Currently Do’: How Institutional Metrics for Success and Merit Risk Perpetuating the (Re)production of Colonial Relationships in Community-Based Participatory Research Involving Indigenous Peoples in Canada” (2015) 6:4 IIPJ art 2; Martha L. Stiegman and Heather Castleden, “Leashes and Lies: Navigating the Colonial Tensions of Institutional Ethics of Research Involving Indigenous Peoples in Canada” (2015) 6:3 IIPJ art 2.

between the Crown and Indigenous peoples. Law as we know it was transported to Canada from Britain as a tool of colonization. The foundation of our legal system is designed to erase Indigenous sovereignty in order to fortify that of the Crown. This erasure moves beyond concrete oppressive actions to a more insidious denial of Indigenous lifeways and jurisgenerative powers. Indigenous law is characterized as less than, as unrefined, undefined non-law. Eurocentric Canadian culture seeks to define the conceptual boundaries of law to the exclusion of Indigenous paradigms. At the same time, Indigenous communities are forced to rely on the legal system that is also a source of oppression. Albert Memmi encapsulates this impasse:

Whenever the colonizer states, in his language, that the colonized is a weakling, he suggests thereby that this deficiency requires protection. From this comes the concept of a protectorate. It is in the colonized's own interest that he be excluded from management functions, and that those heavy responsibilities be reserved for the colonizer. Whenever the colonizer adds, in order not to fall prey to anxiety, that the colonized is a wicked, backward person with evil, thievish, somewhat sadistic instincts, he thus justifies his police and his legitimate severity. After all, he must defend himself against the dangerous foolish acts of the irresponsible, and at the same time-what meritorious concern!-protect him against himself! It is the same for the colonized's lack of desires, his ineptitude for comfort, science, progress, his astonishing familiarity with poverty.²⁷

Memmi demonstrates how tropes about Indigenous peoples, long promoted in academia and popular culture alike, reinforce the hold of a paternalistic relationship in law. A relatively recent movement of Indigenous legal scholars seeks to counter this caricaturizing erasure and to revitalize Indigenous legal orders from both outside and within the academy. At the same time,

²⁷ Albert Memmi, *The Colonizer and the Colonized* (London: Souvenir Press, 1974) at 125-126.

discussions of decolonizing²⁸ methodology²⁹ have become a natural and popular phenomenon in academia.

So, what does this have to do with methodology? If methodology is, as Indigenous scholar Shawn Wilson says, “how you are going to use your ways of thinking... to gain more knowledge about your reality”³⁰ – the answer is everything. Methodology is “about a process related to a worldview”.³¹ It is thus important that I identify myself as a white settler scholar studying an Indigenous legal topic. My relationship to this topic is that of an outsider who has had the great privilege of learning from those who have been willing to teach me, primarily at Deshkan Ziiibiing (Chippewas of the Thames First Nation, near London, Ontario). It was during an internship placement with their Community Justice Department, passionately led by Brenda Young, that I became immersed in community law and developed an interest in Anishinaabe constitutionalism. I have grown immensely during my legal education, but never so much as in the context of Indigenous legal education. I will always take every opportunity that I am offered to attend, learn, and listen.

As much as I am aware of the discourse of decolonization as a settler Canadian scholar, I believe that we settlers must be careful not to assume that our relatively newfound self-awareness compensates for what Arlo Kempf, a sociologist of education, describes as “various layers of latent racism”, “full-scale misunderstanding[s]”, and “overly dismissive attitude[s]”

²⁸ Franz Fanon tells us that decolonizing one’s mind is the first (but not the only) step to overthrowing colonial regimes. Franz Fanon defines decolonization as a “program of complete disorder” that “sets out to change the order of the world”. It is “a historical process: that is to say it cannot be understood, it cannot become intelligible nor clear to itself except in the exact measure that we can discern the movements which give it historical form and content”. See Franz Fanon, *The Wretched of the Earth* (New York: Grove Weidenfeld, 1963) at 36.

²⁹ One can insert your noun of choice here: schools, student thinking, the academy, research, pedagogy, etc.

³⁰ Shawn Wilson, *supra* note 25 at 12.

³¹ Sarah Morales, *supra* note 19 at 148.

towards oppression.³² Too often, the language of decolonization is propounded in academia and among social justice projects without taking time to consider what the work of decolonization means. Eve Tuck and K. Wayne Yang lament the adoption of decolonization as a metaphor for social improvement within the academy and society at large:

There is a long and bumbled history of non-Indigenous peoples making moves to alleviate the impacts of colonization. The too-easy adoption of decolonizing discourse (making decolonization a metaphor) is just one part of that history and it taps into pre-existing tropes that get in the way of more meaningful potential alliances.³³

This easy adoption of the language of decolonization by settlers may be a *move to innocence*³⁴ that seeks to “reconcile settler guilt and complicity, and rescue settler futurity”³⁵ and “ultimately represent settler fantasies of easier paths to reconciliation.”³⁶ It can be argued that this is what liberal settlers contributing to the colonial project do best: provide “kindhearted, palliative care for a lost people.”³⁷ Used in this way, the language of decolonization becomes as hollow as popularized calls for reconciliation³⁸ in Canada. We must remember that decolonization is, at its heart, answerable only to Indigenous sovereignty and futurity.³⁹

I am, for all of my efforts, studies, and relationships, not immune to the settler follies described by Arlo Kempf. It is with these follies and an awareness of their potential harm that I approach the study of Indigenous law. As such, my study of Anishinaabe constitutions is an

³² Arlo Kempf, “Contemporary Anticolonialism: A Transhistorical Perspective” in Arlo Kempf, ed, *Breaching the Colonial Contract: Anti-Colonialism in the US and Canada* (New York: Springer, 2010) at 19.

³³ Eve Tuck and K. Wayne Yang, “Decolonization is not a Metaphor” (2012) 1:1 DIES J 1 at 3.

³⁴ Janet Malwhinney, ‘*Giving Up the Ghost*’: *Disrupting the (Re)Production of White Privilege in Anti-Racist Pedagogy and Organizational Change* (MA Thesis, University of Toronto, 1998). [unpublished]

³⁵ Eve Tuck and K. Wayne Yang, *supra* note 33 at 3. (Original emphasis)

³⁶ *Ibid* at 4.

³⁷ Norman G. Dale, *Decolonizing the Empathetic Settler Mind: An Autoethnographic Inquiry* (PhD Thesis, Antioch University, 2014), 125. [unpublished]

³⁸ Eve Tuck and K. Wayne Yang argue that reconciliation, after all, is “about rescuing settler normalcy, about rescuing settler future”. *Supra* note 33 at 35.

³⁹ *Ibid*.

exercise in learning and it is my hope that its effect is a contribution in solidarity. I do not attempt to tell Indigenous stories or interpret Indigenous legal traditions. I rely on Indigenous legal scholars to describe meaning and assess legal value. My approach to Anishinaabe constitutions is descriptive and designed to call attention to them as an important continuance of Anishinaabe constitutionalism that aspires to meet communities where they are in the present, while looking toward both their past and futures.

My aim in this study is to present Anishinaabe constitutions as understudied significant legal instruments in Ontario, given that the Anishinabek Nation and individual communities have widely promoted their potential value to self-determination and self-governance. My hope is that the information and sources within this thesis contribute to burgeoning discussions of what self-determination means in a context where Canadian constitutionalism frames Indigenous rights.

On solidarity between the oppressor and the oppressed, Paulo Friere writes:

The oppressor is in solidary with the oppressed only when he stops regarding the oppressed as an abstract category and sees them as persons who have been unjustly dealt with, deprived of their voice, cheated in the sale of their labor—when he stops making pious, sentimental, and individualistic gestures and risks an act of love. True solidarity is found only in the plenitude of this act of love, in its existentiality, in its praxis. To affirm that men and women are persons and as persons should be free, and yet to do nothing tangible to make this affirmation a reality, is a farce.⁴⁰

I do not know where this work falls within the hazy discourse of settlers unsettling their work and striving toward an anti-colonial mindset, but I do know that I am listening, learning, and acting as conscientiously as I can within my means at this time. This is my small act of love.

⁴⁰ Paulo Friere, *Pedagogy of the Oppressed*, *supra* note 17 at 49-50.

CHAPTER 2: SURVEYING THE LANDSCAPE

“Those who continue their work – to pick up, to revitalize, and to maintain their laws, their institutions, and their ways – join with long lines of others, reaching back countless generations: others who have continued the efforts of those who came before them, efforts to maintain their communities, their traditions, and their roles within creation.”

- Dawnis Kennedy (Minnawaanagogiizhigook), “Reconciliation without Respect? Section 35 and Indigenous Legal Orders”, 2007⁴¹

2.1 Introduction

As the place of Indigenous legal traditions within the Canadian legal system receives increasing scholarly attention, so do potential means of realizing operational space for Indigenous laws. An inherent assumption in much of the literature appears to be that the reason for identifying and utilizing operational spaces is to secure the recognition of the state. Indigenous constitutions and constitutionalism – the focus of this review – fall squarely within this realm. The practical function of Indigenous constitutions is, however, scarcely mentioned. The prevalence and significance of Indigenous constitutions make their absence from the literature on the revitalization of Indigenous law conspicuous. The oversight is such that most direct writing on the topic of Indigenous constitutions (and constitutionalism) is by John Borrows, the foremost Indigenous legal scholar and constitutionalist in Canada. His publications on the topic are, however, limited. The Indigenous constitutional gap in Indigenous legal scholarship requires researchers of this topic to situate their study within a broader scope of literature on the revitalization of Indigenous legal orders. The demands placed on researchers befits the nature of Indigenous law: an investigation of Indigenous constitutions (and

⁴¹ Dawnis Kennedy (Minnawaanagogiizhigook), “Reconciliation without Respect? Section 35 and Indigenous Legal Orders” in the Law Commission of Canada, ed, *Indigenous Legal Orders* (Vancouver: UBC Press, 2007) 77 at 103-04.

constitutionalism) must be undertaken in light of the interconnectedness of studies of Indigenous law.

The dominant questions within the literature are what Indigenous law is or is not, how it can be identified and practically used, whether and how Indigenous law is cognizable to Canadian law, and what the relationship between Indigenous and non-Indigenous legal systems should be. A survey of the relevant literature cannot easily be defined; the researcher must carefully select an array of sources that capture the diverse field as it appears before them. This literature review here is thus organized into two thematic categories: first, sources that elaborate on the nature of Indigenous worldviews as they provide insight into Indigenous law and its operation in the Canadian legal context; second, sources that directly address Indigenous constitutions and constitutionalism. An analysis of these categories demonstrates that Indigenous constitutions (and constitutionalism) cannot be understood as a positivist project distinct from the efforts toward the revitalization of Indigenous law that require participants to alter their conceptual frameworks to understand the law as fluid, diverse in content and form, connected to ecology and land, and moderated by kinship.

The Indigenous constitutional gap that exists within the scholarship is not an insurmountable hurdle to the study of Indigenous constitutions (and constitutionalism), but rather an invitation to participate in a broader conversation. To seek to understand Indigenous worldviews as a non-Indigenous legal scholar requires one to attempt to erase the conceptual boundaries that are enforced by Eurocentric educational and legal institutions alike. This is a common point of emphasis for each of the surveyed scholars, though there exists some disagreement as to whether Indigenous legal concepts and methods are truly translatable and how one should make them so.

2.2 Indigenous Legal Thought

The dominant school of thought among Indigenous scholars in what we know as Canada is that Indigenous law is cognizable to Canadian law. Three of the primary scholars in the area — John Borrows (Anishinaabeg), Val Napoleon (Gitskan), and Hadley Friedland (non-Indigenous, but with close familial and community ties to Cree communities in Alberta) — have consistently argued that Indigenous law is perhaps more understandable and translatable than we may have thought in the past. They promote the idea that Indigenous law is capable of recognition within the Canadian legal system with the simple application of some common law tools. John Borrows, the most prominent among them, has consistently championed both the foundational nature of Indigenous law to Canadian constitutional law and the ability of Indigenous law to receive state recognition and approval through an expansion of our commitment to the rule of law and use of already existing models of legal pluralism within Canada. The entire premise of his foundational text, *Canada's Indigenous Constitution*,⁴² published in 2010, rests on these points. Borrows stresses that law societies and legal educational institutions bear responsibility in the pursuit of state recognition of Indigenous law, not only in advocacy but in shaping the minds of law students and lawyers to become receptive to the inherent legitimacy of Indigenous law.⁴³

John Borrows joins Val Napoleon and Hadley Friedland in the proposition that Indigenous law can be identified and explained through the use of Eurocentric common law tools. Borrows takes a specific focus on legal education and explains that for Indigenous law to

⁴² John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010). [*Canada's Indigenous Constitution*]

⁴³ *Ibid* at 228. John Borrows explains his advised methods for Indigenous legal education in the following publications: “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education” (2016) 61:4 McGill LJ 795 [“Heroes, Tricksters”]; “Outsider Education: Indigenous Law and Land-Based Learning” (2016) 33:1 Windsor YB Access Just 1.

be taught well, it must be a collective enterprise by legal scholars.⁴⁴ For Borrows, the role of law schools in countering Eurocentric notions of law should be seen as relational to the work of peoples, rather than as the driving educational force.⁴⁵ In other words, Indigenous peoples must be respected as the inalienable source. The reason for this conclusion is simple: despite Borrows' belief that Indigenous law can be categorized in kind with the common law or civil law, the truth remains that law is rooted and grows from communities in connection with their ecology.

Common law methods for studying (and teaching) Indigenous law provide a potentially useful means by which to understand Indigenous legal concepts and processes — inclusive of Indigenous constitutionalism. Val Napoleon and Hadley Friedland, the designers and promoters of the case study method, make the argument that common law tools are not only useful for drawing law from Indigenous narratives but that they can form the basis for a robust and respectful engagement across legal systems.⁴⁶ Their method is an adaptation of a case analysis method with which most law students are familiar and thus help to bridge some of the conceptual gaps between Indigenous and Eurocentric legal thought. This method allows unfamiliar and familiar listeners alike to engage in a means of listening that is both innovative and traditional in its application of formal legal analysis is comparable to traditional means of active listening that include listeners in the telling of stories containing what can be seen as akin to legal precedent.⁴⁷

The efforts of Val Napoleon and Hadley Friedland to make Indigenous legal concepts and

⁴⁴ John Borrows, *ibid*, “Heroes, Tricksters” at 802-804.

⁴⁵ *Ibid* at 805-807.

⁴⁶ Val Napoleon and Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” (2016) 61:4 McGill LJ 725 at 733. [“An Inside Job”] The case method adopted by Napoleon and Friedland was earlier used by Karl Llewellyn and Edward Hoebel as an exploratory tool in their exploration of Cheyenne jurisprudence in the mid-twentieth century. See: Karl N. Llewellyn and Edward Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma, 1941).

⁴⁷ *Ibid* at 738, 744. John Borrows touches on the internal architecture of stories that lend to legal analysis. See “Heroes, Tricksters”, *supra* note 43. Like Napoleon and Friedland, Borrows echoes the work of Llewellyn and Hoebel before him.

processes more understandable to a broader audience to argue for their legitimate recognition by the state, like John Borrows' work, speak to their view that Indigenous legal thought is translatable to Canadian law.

Chickasaw legal scholar James [Sákej] Youngblood Henderson disagrees, at least in part, with the image of Indigenous legal thought as translatable to Canadian law. Though perhaps he does not explicitly say that Indigenous legal thought is not cognizable to Canadian law or Eurocentric thinkers, Henderson does present a more complex view of what that translatability might look like. Published in the early 2000s, two of Henderson's most cited works focus on the cognitive hurdles between the current state of Indigenous law and what he wants to see it become.⁴⁸ For Henderson, Eurocentrism is the dominant barrier to bridging the gap between Indigenous worldviews and non-Indigenous worldviews — not because of the differences between them, but rather due to the power imbalance between Indigenous worldviews and Eurocentrism as a product of colonial violence and oppression.⁴⁹ The very legal and educational institutions championed by Borrows, Napoleon, and Friedland as potential tools in the revitalization of Indigenous law are in Henderson's eyes part of the Eurocentric strong-arm.⁵⁰ Their function to him is as vehicles for the cognitive imprisonment of Indigenous peoples into a paradigm that holds Eurocentric thought as superior to Indigenous thought.⁵¹

Two perspectives characterize Henderson's view: first, that Indigenous thought must break free from the conceptual boundaries enforced by Eurocentrism in the settler-colonial

⁴⁸ See James [Sákej] Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1 ["Postcolonial Consciousness"] and "Ayukpachi: Empowering Aboriginal Thought" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 248. ["Ayukpachi"]

⁴⁹ James [Sákej] Youngblood Henderson, "Postcolonial Consciousness", *ibid* at 5

⁵⁰ *Ibid.*

⁵¹ This is a concept that, at its most glaring, can be seen in the historical assimilative function of residential schools. *Ibid* at 23.

context; second, that it is perhaps unavoidable that Indigenous scholars engage with Eurocentric paradigms, but only to a certain extent. He acknowledges that Indigenous peoples must be mindful of Eurocentric worldviews in the earliest stages of decolonization for the sake of survival,⁵² but writes that Indigenous peoples must renounce Eurocentric models and learn to create Indigenous models that move toward a postcolonial existence.⁵³ For Henderson, to do so would mean to “exist with dignity and integrity.”⁵⁴ The need for Indigenous peoples to break free from Eurocentric models is not only a challenge to colonial power dynamics but also a necessity because Eurocentric thinkers cannot cast off their colonial assumptions to appreciate the elegance and subtlety of Indigenous thought.⁵⁵

No matter their opinion on whether Indigenous legal thought can be translated and understood in the Canadian legal context, every reviewed scholar takes particular care to redefine the boundaries of what most readers might understand to be law and to resist pan-Indigenous portraits of Indigenous worldviews and law. Val Napoleon and Hadley Friedland created a new model of case analysis for Indigenous stories because the law within those stories might otherwise not be understood by those unfamiliar with it.⁵⁶ Beginning with the principle that “some Indigenous stories embed law, legal principles, and legal processes,”⁵⁷ Napoleon and Friedland implement an analysis that is both traditional⁵⁸ and innovative. They explain how in one instance, through the use of a workshop activity that served as an analogy for Cree and Dene stores – in this case, a bannock-making context – a warm atmosphere developed among a diverse

⁵² James [Sákéj] Youngblood Henderson, “Ayukpachi”, *supra* note 48.

⁵³ *Ibid* at 250.

⁵⁴ *Ibid*.

⁵⁵ *Ibid* at 252. See also: Leroy Little Bear, “Jagged Worldviews Colliding”, in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77.

⁵⁶ Val Napoleon and Hadley Friedland, “An Inside Job”, *supra* note 46.

⁵⁷ *Ibid* at 738.

⁵⁸ It is traditional, they explain, because bringing back what one has learned to their community is a thousands-of-years-old practice of Indigenous peoples. *Ibid* at 744.

group of people, thereby setting a framework for respectful engagement. The communal atmosphere that developed during the activity carried into the segment of the workshop in which the participants listened to academics deliver papers, followed by participants deciphering, and later synthesizing, the law within a sample of Cree and Dene stories (with the help of a trained facilitator). The findings were presented at the end.⁵⁹ The use of an adapted model of legal analysis created a collaborative space in which participants were able to respectfully engage with Indigenous law, while also reflecting on their own group dynamics.⁶⁰ This model is one example of how bridges can be built between legal understandings. To create a conceptual bridge familiar to Eurocentric understandings of law was a practical means of closing the cognitive gap.

Tuma Young, a Mi'kmaq scholar from Malagawatch First Nation in Nova Scotia, acknowledges the conceptual gap between Indigenous and Eurocentric worldviews as the most difficult challenge to overcome and cites this as the reason for a high rate of failure among initiatives to establish operable Indigenous legal institutions.⁶¹ Rather than offer a model for bridging the gap, Young favours efforts to explain the foundational elements of Indigenous legal worldviews that make them what he calls a “practised attunement” (conceptual, experiential, and linguistic) that interlocks all life.⁶² Here, Young references and mirrors Henderson’s own attempts to explain the foundational distinction of Indigenous worldviews as the conceptual focus on a circular vision of all life forms.⁶³

Aaron Mills, whose work has positioned him as an respected Anishinaabe scholar with a focus on constitutionalism, approaches the conceptual gap by incorporating Anishinaabe legal

⁵⁹ For a more detailed description of the process and outcomes, see: *ibid* at 749-51.

⁶⁰ *Ibid* at 751.

⁶¹ Tuma Young, “L nuwita simk: A Foundational Worldview for a L nuway Justice System” (2016) 13:1 Indigenous LJ 75 at 102. See for Tuma Young’s description of this common difficulty faced by First Nations communities.

⁶² *Ibid* at 78.

⁶³ James [Sákéj] Youngblood Henderson, “Ayukpachi”, *supra* note 48 at 259.

thought and narrative structure into his 2010 article, “Aki, Anishinaabek, kaye tahsh Crown”,⁶⁴ to demonstrate an Anishinaabe way of understanding while also identifying discrete laws for his readers. He does so in a traditional sense before discussing Anishinaabe law today or evaluating the impact of Canadian law on Anishinaabe people. His focus is not on the intimacies of Indigenous worldviews and legal thought, as it is with Henderson and Young, but rather a more broad-scoped vision of basic principles, such as stewardship obligations, and how they differ from obligations in Canadian law.⁶⁵ Mills’ way of crossing the conceptual divide is that of a theoretical engagement that acknowledges distinctions without suggesting that it is anyone’s business to learn the finer details of Indigenous worldviews unless by experiencing them themselves.

John Borrows has gone to great lengths throughout his career to bridge that same gap while reminding his readers that it can never fully be done. His landmark 2010 publications, *Canada’s Indigenous Constitution*⁶⁶ and *Drawing Out Law: A Spirit’s Guide*,⁶⁷ identify and translate Indigenous legal traditions in the Canadian legal context while also demonstrating the basic conceptual differences that make Indigenous law distinct and worth hearing. Borrows argues that Indigenous legal principles are identifiable and provides an overview of eight Indigenous legal orders in *Canada’s Indigenous Constitution*.⁶⁸ He cautions that there will, of course, be the normal challenges of accessing Indigenous laws and of making them intelligible to Canadian law. He also anticipates common, uninformed criticisms that Indigenous peoples

⁶⁴ Aaron Mills (Waabishki Ma’iingan), “Aki, Anishinaabek, kaye tahsh Crown” (2010) 9:1 Indigenous LJ 107.

⁶⁵ *Ibid* at 109-139.

⁶⁶ John Borrows, *Canada’s Indigenous Constitution*, *supra* note 42.

⁶⁷ John Borrows, *Drawing Out Law*, *supra* note 1 at x.

⁶⁸ John Borrows, *Canada’s Indigenous Constitution*, *supra* note 42 at 59-106. In the third section of the book, Borrows provides overviews of Mi kmaq, Haudenosaunee, Anishinaabek, Cree, Métis, Carrier, Nisga a, and Inuit legal traditions. This sampling suggests an effort both to span the boundaries of what we know today as Canada, as well as to cover grounds of cultural diversity that has faced state discrimination (the recognition of Métis and Inuit traditions in kind with those of First Nations).

receive undue special treatment and reframes the argument to suggest that an equitable approach is one that makes room for the practice and recognition of Indigenous laws.⁶⁹

In *Drawing Out Law*, published at the same time as *Canada's Indigenous Constitution*, John Borrows changes his tone and methods. Whereas he took a more typically Eurocentric structure and approach to Indigenous law in *Canada's Indigenous Constitution*, he chooses instead to use *Drawing Out Law* as a vehicle for presenting Indigenous (Anishinaabeg) worldviews and methodology. The book is structured as a series of related semi-autobiographical narratives that attempt to demonstrate some aspects of an Anishinaabeg worldview and how the legal concepts within that worldview might be juxtaposed with Canadian law. Borrows includes stories written in the style of Anishinaabeg storytelling with pictographs and legal academic discussions of how Canadian legal policies interact with Indigenous communities. The stories within the book are designed to take readers at the pace of a listener in a traditional style of Anishinaabeg literacy and they feature supernatural beings, ancestors, animals, plants, insects, and rocks as legal sources and actors.⁷⁰ His emphasis that the reader should take care to search for the deeper symbolism within the work and his deliberate replication of the pacing of oral storytelling is a way of demonstrating Anishinaabeg law, rather than providing readers with a direct translation of concepts.

It is in *Drawing Out Law* that John Borrows appears to have the most in common with scholars like James [Sákej] Youngblood Henderson and Tuma Young. Borrows demonstration of the circular rhythms of Anishinaabeg law and his demonstration of the importance of experience, place, and language are aligned with Henderson's and Young's emphasis on the significance of the distinctiveness of Indigenous worldviews to understanding Indigenous law. Henderson

⁶⁹ *Ibid* at 150-151.

⁷⁰ John Borrows, *Drawing Out Law*, *supra* note 1 at x.

emphasizes that experience, knowledge, and physical space (or ecology) are intertwined.⁷¹ The language itself, the sounds of words, are related to consciousness and the multiplicity and fluctuations of ecologies.⁷² As Henderson elegantly writes, "Aboriginal worldviews are empirical relationships with local ecosystems, and Aboriginal languages are an expression of the relationships."⁷³ Tuma Young enthusiastically agrees with Henderson's descriptions of the relationship between lifeworlds and law by echoing how, in the L'nu context, "the language is actually derived from the sounds and rhythms of ecology, nature in action. The L'nu can thus not only fluently but naturally communicate ideas, thoughts, perspectives, values, needs, and desires with each other and other life forces."⁷⁴ For Young, an emphasis on the fluctuations of time and space are essential, distinctive elements of Indigenous worldviews.⁷⁵

Borrows' willingness to publish a monograph that mimics Anishinaabeg literacy counters what Henderson calls Eurocentric thinkers' perception of Indigenous worldviews as "lifeworlds without systems."⁷⁶ Unlike Henderson, a scholar with reservations about whether Eurocentric thinkers can truly grasp the distinctive conceptual boundaries of Indigenous worldviews, Borrows carefully presents his worldview with the trust that readers can engage with it and understand the deeper meanings within. In this way, Borrows has shown great faith in the cognizability of Indigenous worldviews and law, making *Drawing Out Law* a unique contribution to the scholarship on the revitalization of Indigenous law.

Indigenous constitutions and constitutionalism have been absent in the scholarly conversation to this point in this literature review. At least, these concepts have been absent in

⁷¹ James [Sákéj] Youngblood Henderson, "Ayukpachi", *supra* note 48 at 260.

⁷² *Ibid* at 262.

⁷³ *Ibid* at 259.

⁷⁴ Tuma Young, *supra* note 61 at 93.

⁷⁵ *Ibid* at 79. It is for this reason, Young writes, that space is considered more important than time as a constant connecting force that dictates the cyclical motions of life.

⁷⁶ James [Sákéj] Youngblood Henderson, "Ayukpachi", *supra* note 48 at 252.

the sense that they have not been directly mentioned by name. The nature of Indigenous worldviews and Indigenous law, including whether that law can be understood by outsiders, translatable, or cognizable to the Canadian legal system, is essential to the question of the function and place of Indigenous constitutions and constitutionalism. A question relevant to this study, for example, whether Anishinaabeg worldviews and law can be adequately expressed in a written constitutional document styled in a form suggestive of Eurocentric constitutional documents. One might ask who the arbiter of these questions is and whether any academic stance on the issue of the function of Indigenous constitutions is relevant to community understandings of their purpose. Looming is the question as to whether, if constitutionalism can be seen as inherent in Indigenous legal traditions, as will be explored in the second section of this literature review, written documents are a bastardization of those traditions that constrain them to Eurocentric conceptual boundaries.

2.3 Indigenous Constitutions and Constitutionalism

Constitutionalism can be understood as an adherence to basic standards and principles that align with an overarching standard of ethics. In a more formal sense, it is the written or unwritten fundamental legal framework of a nation. It functions to empower and constrain government while outlining the basic principles by which the named government is expected to conduct itself. Its scope expands from governmental duties and relations with external governments to the most fundamental rights and protections of citizens.⁷⁷ Democratic structures moderate the relationship between government and individuals, regulating the government and

⁷⁷ I have chosen here to reference the definition of constitutionalism that the Anishinabek Nation provides to community members. See: Anishinabek Nation, "What is a Constitution?", *Anishinabek Nation* (2019), online: <<http://www.anishinabek.ca/wp-content/uploads/2016/07/WHAT-IS-A-CONSTITUTION-w-LOGO.pdf>>.

demanding that the government regulate. Sovereignty is an intimate component of constitutionalism, resting at the heart of the authority of the government.⁷⁸

Constitutionalism is part of Indigenous legal traditions. However, very little has been published on matters of Indigenous constitution-building and constitutionalism. This appears to be a conspicuous gap in the academic literature on the revitalization of Indigenous law. John Borrows writes that Indigenous constitutional structures are entangled in Indigenous worldviews and describes these structures as shifting and transforming with the ebb and flow of political, economic, and social life.⁷⁹ Borrows argues that Indigenous constitutionalism can be understood to have influenced Canadian constitutional development – if at least through Parliament’s suppression of Indigenous constitutional structures.⁸⁰ Nevertheless, there exist at least some rumblings of questions regarding Indigenous constitutionalism in the absence of sustained scholarly study of the subject.

Stephen Cornell argues that any choice in governance framed as one between constitutionalism or traditional ways of life is a false choice because constitutionalism is an Indigenous tradition.⁸¹ The essence of Cornell’s argument is that constitutionalism can exist in unwritten legal principles and need not be confined to written documents. An underlying body of principles, transmitted orally from generation to generation to order processes of individual and collective action is enough to found constitutional traditions.⁸² Descriptions of Indigenous legal orders and the ordering legal principles found within them, as published by many Indigenous

⁷⁸ N.W. Barber, *The Principles of Constitutionalism* (Oxford: Oxford University, 2018) at 219-21.

⁷⁹ John Borrows, “Indigenous Constitutionalism”, *supra* note 9 at 14. The bulk of this chapter of Borrows’ chapter is descriptions of various examples of Indigenous constitutionalism as found within Indigenous nations in what we know as Canada.

⁸⁰ *Ibid.*

⁸¹ Stephen Cornell, “‘Wolves Have A Constitution’: Continuities in Indigenous Self-Government” (2015) 6:1 IIPJ art. 8 at 1.

⁸² *Ibid* at 44.

legal scholars, support Cornell's assertion and Borrows' acknowledgement of historic Indigenous constitutionalism. It is these underlying legal principles, whether they are found in kinship and stewardship responsibilities or more general understandings of how to exist in relation to one's ecology, that form the heart of Indigenous constitutionalism wherein individuals and collectives are held to a higher law than that which they manufacture.⁸³

It is clear that underlying legal principles and frameworks can be understood to be constitutional frameworks, at least in a loose Eurocentric understanding of constitutionalism. Certainly, unwritten constitutional principles remain key interpretive sources of Canadian constitutional documents.⁸⁴ More debatable is if constitutionalism is a functional, traditional Indigenous legal framework, why then communities might need or want to codify it. Cornell suggests that thinking constitutionally is more important than writing a constitutional document.⁸⁵ A written constitutional document, he suggests, is most valuable to communities that are geographically or culturally diverse.⁸⁶ Though Cornell does not state the purpose of his approach to questions of Indigenous constitutionalism, it appears that he is examining their existence and use as guiding frameworks for a community function. His study leaves open questions regarding how Indigenous constitutionalism interacts with state law and whether such frameworks might provide some jurisdictional relief for Indigenous communities living under the thumb of governance structures they do not control. A written constitution seems in Cornell's terms to be a means of non-binding unification rather than a hard-won expression of collective will.⁸⁷

⁸³ *Ibid* at 2.

⁸⁴ See: *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 52-54. [*Secession Reference*]

⁸⁵ Stephen Cornell, *supra* note 81 at 12.

⁸⁶ *Ibid* at 13.

⁸⁷ This might be reflective of Stephen Cornell as an American scholar studying American Indian tribes recognized as having sovereign authority. The Canadian context exposes a greater pressure for the practical performance of written Indigenous legal instruments.

John Borrows' descriptions of forms of inherent Indigenous constitutionalism and Stephen Cornell's adamant support of Indigenous constitutionalism as legitimate, whether written or unwritten, lead to the question of whether written constitutions are appropriately Indigenous. Cornell argues that constitutionalism is not inherently a Western colonial creation and can be found within the guiding principles of Indigenous legal orders. Borrows identifies Indigenous constitutionalism in a variety of Indigenous legal traditions and is known to provide support for communities drafting their own constitutions. On the other hand, James [Sákéj] Youngblood Henderson might disagree. Henderson's suspicion of using Eurocentric legal methods to examine Indigenous law and his desire to see Indigenous peoples break free of colonial conceptual boundaries with creative models of their own making⁸⁸ suggest that Henderson might critique the development of written Indigenous constitutions. Though constitutionalism may be Indigenous, the form and content of written constitutions might more closely mirror Eurocentric constitutional documents.

Henderson is adamant that "Indigenous peoples cannot construct Indigenous order, law, remedies and solidarity on Eurocentric foundations."⁸⁹ Henderson cites a well-known Audre Lord quote, that "the Master's tools have not been designed to dismantle the Master's house."⁹⁰ For Henderson, written Indigenous constitutions, though they may have value in some times and places,⁹¹ may well be one of the Master's tools. Henderson views the duty of those engaging with Indigenous law as being to stretch well beyond blending or unifying Indigenous and state

⁸⁸ James [Sákéj] Youngblood Henderson, "Ayukpachi", *supra* note 48 at 250.

⁸⁹ James [Sákéj] Youngblood Henderson, "Postcolonial Consciousness", *supra* note 48 at 44.

⁹⁰ Audre Lord, "The Master's Tools Will Never Dismantle the Master's House" in *Sister Outsider: Essays And Speeches* (Freedom, Cal.: Crossing, 1984) at 110, as cited in *ibid*.

⁹¹ Henderson does accept that the synchronicity of Indigenous and Canadian law can have a practical use, though he philosophically rejects it. James [Sákéj] Youngblood Henderson, "Postcolonial Consciousness", *supra* note 48 at 55.

law.⁹² Henderson’s arguments on the limitations of the use of the master’s tools suggest that he would be critical of attempts to develop written Indigenous constitutions as a means of resisting colonial oppression, for in this form of resistance is still some measure of participation. This stance is in opposition to the school of thought to which most prominent Indigenous legal scholars ascribe; that is, for Indigenous law to see a robust revitalization, it must grow and operate in the current context and to the benefit of Indigenous peoples who have relationships to the Canadian state that cannot be relinquished (and which many would not care to sever).

Indigenous law, like Canadian law, is adaptive to contemporary contexts.⁹³ John Borrows is the most prominent opponent to the notion that Indigenous communities would be best served by denying their modern relationship with colonial governing bodies. Such a denial would contradict important conceptual commitments to relationship-building. In any case, to do so is a practical impossibility.⁹⁴ Without direct reference to Henderson, Borrows states that he “doubt[s] the truth of the idea that the master tools can not destroy the master’s house. A hammer, saw and backhoe are instruments of creation and destruction. It is possible to use these tools to undo the thing that has been created. The same can be said of legislation.”⁹⁵ Whatever the disagreements between scholars, written Indigenous constitutions have flourished in Canada.⁹⁶

The most descriptive study of Indigenous constitutions in Canada is Christopher Alcantara’s and Greg Whitfield’s 2010 article, “Aboriginal Self-Government through

⁹² *Ibid.*

⁹³ Aaron Mills (Waabishki Ma’iingan), *Miinigowiziwin*, *supra* note 10 at 111.

⁹⁴ John Borrows, “Seven Generations, Seven Teachings: Ending The Indian Act” (Prepared for the National Centre for First Nations Governance, 2007) at 19, online: <http://www.fngovernance.org/resources_docs/7_Generations_7_Teachings.pdf>.

⁹⁵ *Ibid.*

⁹⁶ The flourishing of Indigenous constitutions in Canada is noted by Alcantara and Whitfield. See: “Aboriginal Self-Government through Constitutional Design”, *supra* note 14.

Constitutional Design: A Survey of Fourteen Aboriginal Constitutions in Canada”.⁹⁷ As the title indicates, this publication takes the form of a survey of a sample of (West Coast) Indigenous constitutional documents rather than the form of a theoretical investigation of the nature of their content and legitimacy. Alcantara and Whitfield, in line with John Borrows’ arguments, argue that modern Indigenous constitutions “must” (to an undefined extent) reflect some of the core constitutional principles of Canada because modern Indigenous constitutions exist within the broad constitutional framework of Canada.⁹⁸ They provide no justification for this assertion, but it appears to be attached to their consideration of only constitutions that have been adopted by First Nations in relation to modern treaties or self-governance agreements. The conclusion of their empirical study is that the differences between Indigenous and non-Indigenous constitutions are small.⁹⁹

Whereas Cornell’s observations suggested that Indigenous constitutionalism takes a wholly internal approach,¹⁰⁰ Alcantara and Whitfield found that most Indigenous constitutional documents in British Columbia focus on the duties of their own governments to citizens as well as on the relationship between their government and external bodies, including the Canadian state.¹⁰¹ Echoing Borrows’ commentary on the nature of Anishinaabe constitutional articles as hortatory, rather than coercive,¹⁰² Alcantara and Whitfield note that citizenship responsibilities recognized within modern Indigenous constitutions tend to be constructed in the form of guiding principles rather than enforceable rules.¹⁰³ The function of these documents, according to

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at 126.

⁹⁹ *Ibid* at 140.

¹⁰⁰ Stephen Cornell, *supra* note 81 at 12.

¹⁰¹ Christopher Alcantara and Greg Whitfield, *supra* note 14 at 132.

¹⁰² See generally John Borrows, “Seven Gifts: Revitalizing Living Laws Through Indigenous Legal Practice” (2016-2017) 2:1 Lakehead LJ 2. [“Seven Gifts”]

¹⁰³ Christopher Alcantara and Greg Whitfield, Whitfield, *supra* note 14 at 131.

Borrows, is that they should empower communities to make independent decisions regarding issues that impact their lives and land, including decisions about wildlife management, conservation, housing, education, economic development, child welfare, and community membership. They empower elected government while ensuring that there are enforceable checks on its powers.¹⁰⁴ Constitutions may be written so as to encourage members to live life in a good way, including the encouragement of language revitalization. Alcantara and Whitfield observe that the use of a nation's own language and concepts varies across the surveyed constitutions,¹⁰⁵ but Borrows instead appeals to the view that the incorporation of a nation's language is important to facilitate living in the manner held within the worldview interconnected with the language.¹⁰⁶ Borrows appears to favour a more holistic, internally looking yet relational framework than Alcantara and Whitfield observed in British Columbia.

Aaron Mills' (Waabishki Ma'iingan) recently completed PhD dissertation examines Indigenous legalities, emphasizing the "earth-centric 'rooted' form of constitutionalism" that operates within Anishinaabe legality.¹⁰⁷ Mills advocates for treaty mutualism, defined as a simple extension of mutual aid kinships, in which relationships between peoples are the logical extension of relationships between persons.¹⁰⁸ This model rests on an understanding of rooted constitutionalism that requires an acceptance of the incommensurability of Indigenous and settler legalities¹⁰⁹ in order to function.¹¹⁰ Mills provides more texture to his theoretical analysis of rooted legalities (and Anishinaabe constitutionalism) in earlier publications that give substantive

¹⁰⁴ John Borrows, "Seven Gifts", *supra* note 102 at 12.

¹⁰⁵ Christopher Alcantara and Greg Whitfield, *supra* note 14 at 139.

¹⁰⁶ John Borrows, "Seven Gifts", *supra* note 102 at 13. This point notably aligns with James [Sákéj] Youngblood Henderson's and Tuma Young's perspectives on the importance of language. This is a point of overlap between John Borrows and these scholars that are recognized beginning at note

¹⁰⁷ Aaron Mills (Waabishki Ma'iingan), *Miinigowiziwin*, *supra* note 10 at iii.

¹⁰⁸ *Ibid* at 15.

¹⁰⁹ The term 'legalities', as used by Mills, refers to the underlying logic of legal systems. See note 207.

¹¹⁰ *Ibid* at 200.

insight into his perspective on the foundations and nature of Anishinaabe constitutionalism. These publications include “Aki, Anishinaabek, kaye tahsh Crown”, referenced in the previous section of this chapter,¹¹¹ and “An Anishinaabe Constitutional Order”,¹¹² co-written with Karen Drake and Tanya Muthusamipillai. Both publications provide readers with artful descriptions of how Anishinaabe constitutionalism tends to differ from liberal Western constitutionalism. Mills analyses the structure of Anishinaabe constitutionalism as one based on interdependence, mutual aid, and harmony rather than provide fine details of Anishinaabe law that would become distorted without an understanding of the underlying constitutional order.¹¹³ Actual Anishinaabe constitutional documents are absent from Mills’ work, in which he takes a more theoretical approach to understanding culture and history rather than address practical efforts of constitutional continuity by contemporary Anishinaabe communities.

The few publications on Indigenous constitutions (and constitutionalism) leave much to be explored. It is unknown whether the findings of the study conducted by Christopher Alcantara and Greg Whitfield bear current relevance or whether those findings are indicative of a broader trend in Indigenous constitutional development. Christopher Cornell has confirmed that, in his consideration of the topic, Indigenous constitutionalism is indeed a traditional framework that bears modern relevance, but he does not delve deeper into the consideration of written constitutional documents. John Borrows, the most prominent Indigenous legal scholar (as well as a constitutional scholar) recognizes traditional Indigenous constitutionalism and advocates for the development of modern written constitutions but does not examine their lived function or

¹¹¹ Aaron Mills (Waabishki Ma’ingan), “Aki, Anishinaabek, kaye tahsh Crown”, *supra* note 64.

¹¹² Aaron Mills (Waabishki Ma’ingan), Karen Drake, and Tanya Muthusamipillai, “An Anishinaabe Constitutional Order” (2017) *Articles & Book Chapters* 2695 at 1.

¹¹³ *Ibid.*

refer to a spectrum of constitutional documents.¹¹⁴ The gaps in available publications on the topic of Indigenous constitutions (and constitutionalism) call back, in a circular way, the academic investigation of Indigenous law and worldviews, and the debate as to whether their form and content can truly be translated, or ever be cognizable to the Canadian legal system. The production and ratification of Indigenous constitutions are themselves, I argue, evidence that the nations involved believe that their laws can be sufficiently translated.

Underlying this debate is the concern about whether Indigenous law will see revitalization and respect from the state if it is not seen as cognizable to the Canadian legal system. Kirsten Manley-Casimir, a non-Indigenous scholar, answers this concern with a powerful shrug: it does not matter whether Indigenous law is cognizable to Canadian law for it to strengthen and operate in a contemporary context. Commensurability itself mirrors the “single, great values” jurispathic approach of state law that would not allow for the operation of multiple legal systems founded in different normative values.¹¹⁵ Rather, she argues, scholars should fight for the incommensurability of Indigenous law in order to preserve its distinctiveness and to promote the continuation of multiple legal systems.¹¹⁶ Manley-Casimir and Mills share the position that an acceptance of incommensurability is vital to an operation of law that minimizes colonial violence. Recognition and acceptance of incommensurability as it applies to the relationship between Indigenous legal thought and Canadian law offers scholars and politicians

¹¹⁴ It is my understanding that John Borrows has acted as a consultant to a number of Anishinaabeg communities in Ontario during the development and drafting of their constitutional documents. It may be that that absence of a critical publication on modern Anishinaabe constitutions – what appears to be an academic oversight – is actually both a necessity of his contractual work as well as a means to provide communities with the space to develop these documents as the collective memberships instruct.

¹¹⁵ Kirsten Manley-Casimir, “Incommensurable Legal Cultures: Indigenous Traditions and the Colonial Narrative” (2012) 30:2 Windsor YB Access Just 137 at 160. [“Incommensurable”]

¹¹⁶ *Ibid.* This aligns with the resistance to notions of universality by Indigenous worldviews, as described by James [Sákéj] Youngblood Henderson and Tuma Young.

alike to seek the practical implementation of means of communication and operation between legal systems in a way that, though challenging, would better reflect Indigenous legal values.¹¹⁷

An acceptance of incommensurability also serves as a weight against the detrimental miscommunications that litter the gaps between Indigenous worldviews and Canadian law.¹¹⁸ Commensurability, then, is not a requirement to respect and forms of recognition that should stem from a nation-to-nation relationship between Indigenous nations and Canada. Acceptance of the incommensurability of Indigenous law is potentially significant within the literature surrounding Indigenous constitutions (and constitutionalism). Manley-Casimir's writing supports a community-focused approach to Indigenous constitutionalism that does not disregard external relationships. In essence, acceptance of potential incommensurability lifts the pressure of constitutional conformity and allows Indigenous constitutions, at least theoretically, to merit the same standard of recognition by the state whatever their makeup, as long as they have been developed and adopted with community consent.

2.4 Conclusion

Publications on Indigenous constitutions and constitutionalism are few in number and slight in their offerings, but a broader view of the foundations of Indigenous law presented in literature written primarily by Indigenous scholars serves as guidance for researchers attempting to understand the nature and function of Indigenous constitutions as legal instruments. The publications analyzed in this literature review offer a form of scholarly guidance that departs from the state-centred focus of publications focused on governance and sovereignty. While those publications are also important tools in the examination of Indigenous constitutionalism, it is

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid* at 153.

significant to first understand Indigenous constitutionalism as inherently Indigenous in form and as an expression of Indigenous law before endeavouring to place these understudied Indigenous legal instruments in direct relation to state law that bears significantly more scholarly and institutional power.

Writings on Indigenous constitutionalism, set within the broader context of publications on the nature and translatability of Indigenous law, offer a remarkable amount of space for new studies on the subject. Indigenous constitutions have much to offer in a context where Indigenous law is receiving increasing attention and there may be a movement toward a change in the relationship between Indigenous communities and Canada. As documents that are increasingly common as voluntarily adopted legal instruments by Indigenous communities, in part in relation to broader self-government agreements, Indigenous constitutions are an understudied means of moderating both internal governance and inter-governmental relations alongside the revitalization of Indigenous law.

CHAPTER 3: ROOTING LAW

“[O]ne cannot enact legislation to force one individual to respect another.”

*-Mead, Aroha Te Pareake, “Misappropriation of Indigenous Knowledge: The Next Wave of Colonisation”, 1994*¹¹⁹

3.1 Introduction

The study of Anishinaabe constitutions in Ontario is unthinkable without an examination of the treatment of Indigenous law in Canada. Law as it is typically espoused in our academic and political institutions is grounded in the authority of the Canadian state – an authority that draws its power from the subjugation and erasure of Indigenous law and legal authority. The erasing of Indigenous legal authority must be the foundation of Canadian legal authority because, as recognized by Canada’s highest court (by then Chief Justice Beverley McLachlin) in a statement that contradicts the foundations of Crown sovereignty, “[p]ut simply, Canada’s Aboriginal [sic] peoples were here when Europeans came, and were never conquered.”¹²⁰ Canada’s sovereignty, so far as it is an expression of singular or hierarchical power, is a cracked legal fiction.¹²¹ Nevertheless, the fiction persists.

Canadian and Indigenous sovereignties are both rooted in the land. Nowhere can this be better observed than in the Supreme Court of Canada’s jurisprudence on Aboriginal rights and title, which is characterized by the Court’s failure to recognize Indigenous legal authority. The common law has become a battle ground for those seeking to hold the state accountable for colonial violence:

¹¹⁹ Aroha Te Pareake Mead. “Misappropriation of Indigenous Knowledge: The Next Wave of Colonisation” (1994) 3:1 Otago Bioethics Report 4 at 4.

¹²⁰ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 at para 25.

¹²¹ For a deeper analysis of the flaws inherent in the fiction of Canadian sovereignty, see John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37 Osgoode Hall LJ 537.

From the “duty to consult”, the “honour of the Crown”, and Aboriginal rights, Indigenous peoples and Canadian courts have been in constant tension in attempting to forge new routes to improve Indigenous peoples’ place within the Canadian state, and to reconcile their claims with Canadian sovereignty.¹²²

Some gains are made, but courts are ultimately actors of the state. For example, the Supreme Court of Canada has rejected the doctrine of *terra nullius* (that Crown sovereignty was established in Canada through the assertion of occupation and control of empty lands), but immediately appeared to contradict that rejection. In *Tsilhqot’in Nation v British Columbia*, Chief Justice McLachlin (as she then was), writing for a unanimous court, declared that, “[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada.”¹²³ The Court then went on to declare that, “[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province.”¹²⁴ Thus, state sovereignty exists in a space where it was never rightfully nor lawfully gained, but state authority over Indigenous peoples is legitimized.

There is much criticism of the twilight zone of sovereignty. John Borrows calls attention to the Court’s contradictions and writes that, not only has the doctrine of *terra nullius* been used to justify singular state sovereignty, “Canadian law still has *terra nullius* written all over it.”¹²⁵ It is unmistakable in the Crown’s legal deeming of lands as vacant for the purpose of granting itself authority over those lands without necessitating the conquest or consent of Indigenous

¹²² Matthew Moulton, *Beyond Sui Generis: Situating Postmodern Legal Pluralism as a Framework to Reconstruct the Relationship Between Indigenous and Canadian Law* (LLM Thesis: Dalhousie University, 2016) at 11-12.

¹²³ *Tsilhqot’in Nation v British Columbia*, [2014] 2 SCR 257 at para 69. [*Tsilhqot’in*]

¹²⁴ *Ibid.*

¹²⁵ John Borrows, “The Durability of *Terra Nullius*: *Tsilhqot’in Nation v British Columbia*” (2015) 48 UBC L Rev 701 at 702 [“*Terra Nullius*”]. John Borrows suggests the following source for a discussion of the contradictions underlying Aboriginal rights jurisprudence in Canada: Mariana Valverde, “The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty” (2012) 21 Soc & Leg Stud 3.

peoples.¹²⁶ Those lands deemed vacant, which we now call Canada, were occupied by and under the stewardship of Indigenous nations. Precisely *how* the Crown assumed territorial sovereignty remains unexplained by the Court. The assumption of Crown sovereignty – in the absence of the agreement or conquest of Indigenous peoples – conjures a legal vacuum where we imagine the Crown’s territorial sovereignty must nevertheless exist.¹²⁷

Indigenous law has been reduced to what James [Sakéj] Youngblood refers to as a “constitutional whisper”.¹²⁸ The Supreme Court of Canada has declined to recognize or apply a specific Indigenous law even once, despite precedent for its integration into Canadian law as in *Connolly v Woolrich*.¹²⁹ In that landmark 1867 decision, Justice Monk of the Québec Superior Court recognized the legitimacy of customary Cree marriage law in a case of its conflict with Canadian law.¹³⁰ While the decision in this case is representative of the ability of Canadian courts to recognize Indigenous law in the Canadian common law, it is also representative of how such recognition has been largely relegated to the realm of family matters.

More recent case law ties the recognition of traditional adoptions to that of customary marriage, as in *Casimel v Insurance Corporation of British Columbia*,¹³¹ in which a man and woman had adopted their son’s child according to Carrier law and were held by the court to be dependent parents under the provincial *Insurance Act*. The court in *Casimel* held unanimously that a statute must clearly and explicitly state its intent to extinguish the rights conferred by a

¹²⁶ Tracey Lindberg, “Contemporary Canadian Resonance of an Imperial Doctrine” in *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010), 126 at 128.

¹²⁷ John Borrows, “*Terra Nullius*”, *supra* note 125 at 703.

¹²⁸ James [Sakéj] Youngblood Henderson, “Mikmaw Tenure in Atlantic Canada” (1995) 18 Dal LJ 196 at 55. [“Mikmaw Tenure”]

¹²⁹ *Connolly v Woolrich*, [1867] QJ No 1, *aff’d Johnstone c Connolly* (1869), 1 RL 253, [1869] JQNo 1 (QL) (Que CA).

¹³⁰ *Ibid* at paras 44, 138, 168. The purpose of this decision was to determine the rightful inheritance of the deceased’s heirs. Justice Monk found that the Cree marriage was valid and provided legitimacy to heirs produced through that union, while those heirs produced in a later marriage according to Canadian law were ruled illegitimate.

¹³¹ *Casimel v Insurance Corporation of British Columbia*, 1993 Carswell BC 231 (WL Can) (BCCA).

marriage in order to do so, and that extinguishment could not be assumed.¹³² In *Manychief v Poffenroth*, decided in Alberta only a year later, Justice McBain held that, “[t]he validity of customary Indian marriage and resulting status makes sense, provided native laws and customs are not repugnant to natural justice, equity, and good conscience.”¹³³ Such recognition of the validity customary marriage is not, however, treated as a flat recognition of the validity of Indigenous law and jurisdiction – if a customary marriage is recognized as valid by a court, then that marriage is made subject to any applicable provincial or federal laws.¹³⁴

The recognition of customary marriage may also be subject to scrutiny linked to the standards for Aboriginal rights recognition under s. 35(1) of the *Canadian Constitution Act, 1982*. An example of this view can be found in the Ontario Insurance Commission’s decision in *Hill v Zurich Insurance Co*,¹³⁵ in which it was held that, “marriage by custom requires more than simply following the current norms of the community...There must be an aboriginal dimension involving an integral component of the community’s traditional way of life or culture.”¹³⁶ And so, even where there is an opportunity to recognize customary Indigenous law in this form, such recognition may easily be confined to the framing of Indigenous law as frozen in time, pre-contact with European settlers. This recognition is a double-edged sword: a validation of Indigenous customary legal authority on one edge, a denial of its robustness and extended authority on the other. Observations of legal suppression are more realistic in the analysis of the treatment of Indigenous legal orders within Canadian law.

¹³² *Ibid* at para 36.

¹³³ *Manychief v Poffenroth*, [1994] AJ No 907 (QL) (Alta QB) at para 24. Justice McBain cites Justice Monk’s decision in *Connolly* to support this determination.

¹³⁴ *Ibid* at para 22.

¹³⁵ *Hill v Zurich Insurance Co*, 1997 CarswellOnt 4478 (WL Can) (Ontario Insurance Commission).

¹³⁶ *Ibid* at para 20.

3.2 Legal Suppression

A view into the issues surrounding the legal suppression of Indigenous legal authorities involves more than broad discussions of sovereignty. This suppression includes both the use of state law to structure Indigenous governance and restrict community activity, as well as the refusal of the state and its actors to recognize the legitimacy of Indigenous law. Law shapes the paternalistic relationship between the state and Indigenous peoples in which the state's institutions monopolize social dynamics.¹³⁷ The national culture is, to a large extent, dominated by the language of the state: "The entire bureaucracy, the entire court system, all industry hears and uses the colonizer's language. Likewise, highway markings, railroad station signs, street signs and receipts make the colonized feel like a foreigner in his own country."¹³⁸ The language of the colonizer persists in the positive law and common law of Canada, rendering Indigenous peoples subject to its commands.

The *Indian Act*¹³⁹ is an odious example concrete paternalism as legislation designed to restrict the activities of Indigenous communities and stifle their ability to self-govern in an effort to assimilate Indigenous people – all while professing the state's recognition of the special status of Indigenous peoples in Canada. The *Indian Act* is, as summarized in the 1983 *Report by the Special Committee on Indian Self-Government in Canada* (the "Penner Report"), a "mechanism of social control and assimilation."¹⁴⁰ Indigenous communities are left dependent on the *Indian Act*, while straining against its snare.¹⁴¹

¹³⁷ Albert Memmi, *supra* note 27 at 147.

¹³⁸ *Ibid* at 150-51.

¹³⁹ *Indian Act*, RSC, 1985, c I-5.

¹⁴⁰ Canada, Parliament, *Report of the Special Committee on Indian Self-Government in Canada*, 32nd Parl, 1st Sess, Vol 40 (12 October 1983, 20 October 1983) at 16.

¹⁴¹ Gordon Christie uses the metaphor of the colonial snare. See Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 *Indigenous LJ* 13.

The suppression of Indigenous legal authority (and governance) in the common law is more concealed. Aboriginal rights and title claims go to the heart of disputes over sovereignty and the potential for state recognition of Indigenous law. The Supreme Court of Canada has made minor gestures toward Indigenous law in this realm. In her dissent in *R v Van der Peet*, Justice McLachlin (as she then was) noted “the ancestral laws and customs” of Indigenous peoples and called their recognition “a golden thread” that can be seen “running through this history, from its earliest beginnings to the present time.”¹⁴² This explicit use of the language of law to refer to Indigenous legal orders echoed in later decisions. In *Delgamuukw v British Columbia*, the Court again took notice of Indigenous law in “the rules of property found in aboriginal legal systems.” and accepts that law as one of the sources of Aboriginal title¹⁴³ Again, in *Tsilhqot’in*, the Court took notice of “the perspective of the Aboriginal group, which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.”¹⁴⁴ The “perspective of the Aboriginal group” appears to give some reference to Indigenous legal orders but the language falls short of explicit recognition.

What appears to be a recognition of Indigenous law within the common law in Canada is deceptive. Once more, we can take examples from *Tsilhqot’in*. The Court reaffirms, with reference to its decision in *Delgamuukw*, that, “[t]he question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective”¹⁴⁵ and that, “[t]he Aboriginal perspective focuses on laws, practices, customs and traditions of the group.”¹⁴⁶

¹⁴² *R v Van der Peet*, [1996] 2 SCR 507 at para 263.

¹⁴³ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 112. [*Delgamuukw*]

¹⁴⁴ *Tsilhqot’in Nation v British Columbia*, [2014] 2 SCR 257 at para 41. See note 125

¹⁴⁵ *Ibid*, at para 34; *Delgamuukw*, *supra* note 102 at para 147.

¹⁴⁶ *Ibid*, at para 35; *Delgamuukw*, *ibid*, at para 148.

The Court's references to the 'Aboriginal perspective' and the 'ancestral laws and customs' of Indigenous peoples are evasive. Instead, the Supreme Court of Canada has established a precedent of a "lack of engagement with Indigenous law."¹⁴⁷ That lack of engagement is tied to the paradoxical qualification made by former Chief Justice Lamer in *R v Van der Peet* that the 'Aboriginal perspective' "must be framed in terms cognizable to the Canadian legal and constitutional structure."¹⁴⁸ This was echoed in *R v Marshall; R v Bernard*, a case concerning Mi'kmaq claims to Aboriginal title, in which the Court rejected the claims on the basis that the "the pre-sovereignty aboriginal practice" must "translate" into a "modern legal right."¹⁴⁹ Indigenous law, then, has the right to common law recognition as existing or previously existing, so long as it is translatable to the Canadian common law.¹⁵⁰ The disposition of the Court to both freeze Indigenous practices and legal rights in the past while interpreting their continued legitimacy according to the legal structures of the colonial state leaves only a narrow window for their recognition. That lack of engagement, or refusal to engage, with Indigenous law (and its distinctions) hinders the Court's stated goal of reconciliation and falls short of the decolonizing approach called for by Indigenous peoples.

State recognition of the authority of Indigenous law depends on much more than whether that law is commensurable to Canadian law. Juridical interpretation of Indigenous law — that is both of the authority of Indigenous peoples to create and conduct law and the weight of that law in the Canadian legal system — carries potential for harm and for help. To this point, the most

¹⁴⁷ Fraser Harland, "Taking the 'Aboriginal Perspective' Seriously: The (Mis)use of Indigenous Law in *Tsilhqot'in v British Columbia*" (2018) 16/17 Indigenous LJ 21 at 24.

¹⁴⁸ *R v Van der Peet*, *supra* note 142 at para 49.

¹⁴⁹ *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 48. Indigenous law is recognized here insofar as it fits within the categories of the common law.

¹⁵⁰ Kirsten Anker, "The Law of the Other: Exploring the Paradox of Legal Pluralism in Australian Native Title" in Pierre Lagayette, ed, *Dealing with the Other: Australia's Faces and Interfaces* (Paris: Sorbonne University Press, 2008) at 41, as referenced in Matthew Moulton, *supra* note 122 at 13-14.

notable outcome of Canadian jurisprudence on Indigenous law has been that of harm. The goal of upholding the status quo and supporting the aims of the state favours Crown sovereignty, which in turn undermines the self-determination of Indigenous communities.¹⁵¹ The Canadian legal system (and actors like judges within it) has been complicit in the oppression of Indigenous communities.¹⁵² In the face of a history of legal oppression, Kirsten Manley-Casimir writes, “[m]onumental shifts” and a “significant restructuring of... institutions and relationships” are necessary and, until then, “it is entirely reasonable for Indigenous peoples to question whether Canadian institutions deserve Indigenous peoples’ respect”.¹⁵³

3.3 “Putting Words in the Cat’s Mouth”¹⁵⁴: On Understanding Indigenous Law

Indigenous legal orders,¹⁵⁵ as Val Napoleon commonly calls the laws of Indigenous peoples, are “embedded in social, political, economic, and spiritual institutions”¹⁵⁶ of those peoples who develop them, are distinct from Eurocentric law.¹⁵⁷ Indigenous legal orders are as

¹⁵¹ *Ibid* at 156. For a discussion of how Canadian law reproduces the colonizer-colonized power dynamic, see Shiri Pasternak, “Jurisdiction and Settler Colonialism: Where do Laws Meet?” (2014) 29:2 CJLS 145; and, Michael Coyle, “Negotiating Indigenous Peoples’ Exit from Colonialism: The Case for an Integrative Approach” 27:1 CJLJ 283.

¹⁵² Kirsten Manley-Casimir, “Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law” (2016) 61:4 McGill LJ 939 at 965.

¹⁵³ *Ibid*.

¹⁵⁴ This is a reference to a story recounted by Shawn Wilson, of a Cree Elder (John William Harris) from Opaskwayak being instructed to read as a child. In the story, John was instructed to read a line from a primer for young readers: “The cat says meow.” A child older than him leaned in to whisper, “Pakakum kinaskewuk... mona ayumiwik minnusak.” (Could be that they’re lying... Cats don’t talk.) Though the translation is rough and it is difficult to capture the true meaning, Wilson relates this story to a way of questioning the foundational worldview of the text. In something that seems so simple, the teacher, a participant in the dominant, colonial system, was attempting to shape the worldview of the Cree children present to make them believe something they knew was certainly false. In this case, whether the vocalization of a cat is speaking — a common statement regarding animals in the education of young children. The use of language is a vital representation of the perspective of the speaker. Wilson cautions against over-interpreting at the risk of “putting words in the cat’s mouth.” Shawn Wilson, *supra* note 25 at 37-38.

¹⁵⁵ I necessarily focus on the common elements of Indigenous legal norms and processes for ease of understanding before moving on to a specific discussion of Anishinaabe law and constitutionalism, but caution that it is generally inappropriate to reduce the nuance of Indigenous legal orders to a pan-Indigenous image. I appeal to the writings of Indigenous legal scholars for these descriptions and in no way intend to reinforce colonial caricatures.

¹⁵⁶ Val Napoleon, *Thinking About Indigenous Legal Orders* (Prepared for the National Centre for First Nations Governance, 2007) at 2.

¹⁵⁷ In the interest of dedicating as much attention to Indigenous law itself, I am declining to engage in depth with direct comparisons between Indigenous law and Eurocentric law in Canada. I will instead focus my discussion on

diverse as the communities and nations that produce and maintain them.¹⁵⁸ Common elements among Indigenous legal orders include similar sources of law, the function of kinship structures, an emphasis on language, reciprocal obligations among people, animals, and nature, and flexibility. Indigenous legal scholars from many nations emphasize these commonalities and appeal to them as foundational to the process of legal revitalization. The call for revitalization echoes in many languages.

Indigenous legal sources shape both the form and content of legal orders.¹⁵⁹ The connection between law and ecology plays a central role. The natural movement of ecology demonstrates the role of people within their environment and offers insight into their human obligations of stewardship over lands and waters. Natural law compels Indigenous peoples to care for foundational sources of all life, rather than conceptualize those sources as property to be parceled and owned (as in Canadian law). Henderson highlights two primary understandings in Indigenous worldviews: “First, they understand the ecosystem as an eternal system tolerant of flux and refined by endless renewals and realignments. Second, they understand that each ecosystem encapsulates and enfolds many forces or parts, none of which can enfold or encapsulate the whole.”¹⁶⁰ As the ecosystem exists in flux, so do understandings of one’s self

what Indigenous legal scholars and advocates say about the nature of Indigenous law. For a well-respected investigation of parallels to be found between Indigenous law and the law of Canada, see: John Borrows, *Canada’s Indigenous Constitution*, *supra* note 42.

¹⁵⁸ It bears emphasizing that this survey of Indigenous law is not intended to represent a complete view or minimize the challenges that Indigenous communities face in the resurgence of their own law. For more information on approaches to Indigenous law, please see: Hadley Friedland, “Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11 *Indigenous LJ* 1. For a more complete view of the emerging field of Indigenous law and its application in legal education, see: John Borrows, “Heroes, Tricksters”, *supra* note 43.

¹⁵⁹ John Borrows names five sources of Indigenous law: Natural Law, Customary Law, Sacred Law, Deliberative Law, and Positive Law. For more information, see: John Borrows, *Canada’s Indigenous Constitution*, *supra* note 42 at 23-58. For a more broad-ranging look at the resurgence of Indigenous law and the current state of the academic field, see Michael Coyle, “Indigenous Legal Orders in Canada - a literature review” (2017) *Law Publications* 92 at vi, online: <<https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1092&context=lawpub>>. In the interest of transparency, I note that I am acknowledged for assisting with the research and drafting of this report.

¹⁶⁰ James [Sákéj] Youngblood Henderson, “Ayukpachi”, *supra* note 48 at 260.

and relationship to the ecosystem and its beings. Stan Wilson provides an explanation of this fluctuation between self, relatives (human and non-human), and identity:

Like all living creatures, we as Indigenous people are sustained by our connection to the land. Many of us include all other living organisms and entities as part of our identity. I know Aboriginal people who refer to themselves as a squirrel, a hawk, a bear, and thunder being. These labels are not simple names they use to identify their individual characteristics or personalities; rather, at different times, they have identified themselves as the beings. This self-recognition enables us to understand where and how we belong to this world...¹⁶¹

These ‘labels’, Wilson expands, are not mere self-identifiers, but rather deeply impact those who claim and hold them, so as to provide them with grounding guidance and nourishment. In this way, ecology informs the relational understandings that underpin Indigenous legal duties to both environment and beings by compelling people to constantly evaluate their position and responsibilities in the world. The natural can mix with the sacred, with some Indigenous peoples understanding their law and obligations of stewardship as Creator-given.¹⁶² The link between Indigenous peoples and their ecology cannot be broken, nor can the connections built between Indigenous law and land.

The importance of kinship structures and responsibilities is emphasized by Indigenous legal scholars. In the words of Tuma Young: “kinship is all”.¹⁶³ These structures are drawn from and interact with ecology both through relationship modeling but also in the responsibilities of people that extend to the natural world. As Henderson explains, human beings are “but one strand in the web of life”¹⁶⁴ and they must therefore consider non-human beings on an even plane with themselves. Non-human beings can take on powerful roles, as Zoë Todd artfully describes:

¹⁶¹ Stan Wilson, “Self-as-Relationship in Indigenous Research” (2001) 25:2 Canadian J of Native Education 91 at 92.

¹⁶² Val Napoleon, *Thinking About Indigenous Legal Orders*, *supra* note 156 at 6.

¹⁶³ Tuma Young, *supra* note 61 at 90.

¹⁶⁴ James [Sákéj] Youngblood Henderson, “Ayukpachi”, *supra* note 48 at 259.

In my life, I have been bound to fish. Fish have been my teachers... My grandfather, *nimosôm*, was animated by a different animal, horses... I also imagine that he drew horses on the walls of settler-colonial prairie homes as a way of re-inscribing his/our reciprocal responsibilities to more-than-human beings within landscapes that had been heavily violated by settler-colonial economic and political exigencies.¹⁶⁵

This obligation-shaping perspective makes Indigenous legal thought distinct from that of Eurocentric law, which gives prominence to human beings over nature.

Relations between humans and non-humans is central to Indigenous legal thought and the legal obligations that are drawn from the land. Anishinaabeg scholar John Borrows provides us the humorous example of the importance of on-reserve dogs in relation to Indigenous communities and as a shifting symbol of how Indigenous life has changed and responded to settler colonialism. In the context of a story, Borrows writes that dogs are “mercurial, bearing the shifting personalities of those they [live] with.”¹⁶⁶ The central character of Borrow’s story muses that a focus on the legal status and behaviour of dogs, beings that remind him of Nanabozho,¹⁶⁷ might reveal much about life around them:

Such an article could be doctrinal and discuss band by-laws regulating dogs in Indian Country. It could develop the interpretation of these laws by various legal institutions. Or the piece could be socio-legal, exploring the interaction between customary norms associated with dogs in traditional Indian cultures and the adoption of more formal rules since Indigenous contact with colonial societies. Even better, he mused, a whole theoretical structure could be developed from such a study: ‘Critical Indian Doggie Studies.’ It could use hermeneutical methodologies to great effect. Or maybe someone could devise a few formulas and strive for predictive analysis with their theory: ‘Law and Dogenomics.’¹⁶⁸

¹⁶⁵ Zoe Todd, “Fish, Kin and Hope: Tending to Water Violations in amiskwaciwâskahikan and Treaty Six Territory” (2017) 43:1 *Afterall: A Journal of Art, Context and Enquiry* 102 at 105.

¹⁶⁶ John Borrows, *Drawing Out Law*, *supra* note 1 at 17.

¹⁶⁷ The trickster figure of Anishinaabe stories’ name can be spelled in different ways. This is the spelling used by Borrows in this source.

¹⁶⁸ *Ibid* at 17-18.

Borrows's example is designed to illustrate how Indigenous law and legal theory depart from Eurocentric thought in such a way that the distinction becomes humorous in the academy.

Language holds a special place in the revitalization of Indigenous legal orders. More than a mere means of communication or mode of transmission for law, language is intertwined with ecology and kinship. Language reveals essential elements of worldviews that can indicate whether a being or item is understood to be animate or inanimate. That knowledge can impart to the recipient whether they themselves hold responsibilities toward those beings or non-beings.¹⁶⁹ The oral transmission of legal knowledge is, in part, reliant on the formulation of language. Of course, Indigenous law can obviously be transmitted in any language to which the speaker has access, but this does indicate the extent of the importance of language resurgence to Indigenous life and self-determination. The resurgence of Indigenous languages is as much an element of the revitalization of law as it is a goal because, “[o]nly *that* language would allow the colonized to resume contact with his interrupted flow of time and to find again his lost continuity and that of his history.”¹⁷⁰ The basis for Indigenous language rights is itself derived from “Indigenous customary law, where language is recognized as a sacred, inalienable right.”¹⁷¹ Language rights are reflected today in the right of Indigenous peoples to the development and maintenance of their languages, including necessary educational and cultural institutions.¹⁷²

Stores and oral storytelling are vehicles of law. Tuma Young, writing on L’nu law, explains that stories help people to reflect on how they think and behave in their world, while

¹⁶⁹ See James [Sákéj] Youngblood Henderson, “Mikmaw Tenure”, *supra* note 128; Tuma Young, *supra* note 61.

¹⁷⁰ Albert Memmi, *supra* note 27 at 154. (Emphasis added.)

¹⁷¹ Lorena Sekwan Fontaine, “Our Languages Are Sacred: Indigenous Language Rights in Canada” in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws, Special Report by the Centre of International Governance Innovation* (Waterloo, ON: 2017) 89 at 90.

¹⁷² *Ibid*, at 91; Brian Slattery, “A Taxonomy of Aboriginal Rights” in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Aboriginal Rights*, (Vancouver: UBC Press, 2007) 111 at 119.

also acting as a “powerful means of cultural transmission.”¹⁷³ A story “can stand as a metaphor for the integration of the individual, as well as one for the integration of the group”.¹⁷⁴ Stories, bound as they are with language and morality,¹⁷⁵ are “rich and complex intellectual resources”¹⁷⁶ that contain “a logic, purpose, structure, and methodology.”¹⁷⁷ The lessons found within stories are often implicit, porous, and open to intentional interpretation, unlike state law.¹⁷⁸ Val Napoleon and Hadley Friedland provide prophetic stories as one example of how stories work with law.¹⁷⁹ Citing Julie Cruikshank, Napoleon and Friedland explain that prophecies can help unfamiliar circumstances seem more understandable.¹⁸⁰ Prophecies – or stories, more generally – can provide insight into the past while guiding the present and future:

Intellectual devices such as prophecies demonstrate how Indigenous people have always reasoned, individually and collectively, in order to find meaning and interpret the events in their worlds. As with the adaptive management stories, prophecies enable people to respond to new situations, and to bring in useful new knowledge and practices in a way that is understandable, and thus reconcilable, with familiar normative commitments.¹⁸¹

As such, stories occupy a special place in the revitalization of Indigenous law. Stories have become a site of engagement for legal scholarship, allowing for the adaptation of legal analysis and synthesis skills that are utilized in Canadian law. Scholars like Val Napoleon, Hadley Friedland, and John Borrows have led the scholarly endeavor to apply modified legal analysis to

¹⁷³ Tuma Young, *supra* note 61 at 93.

¹⁷⁴ RH Whitehead, *Tales from the Six Worlds: Micmac Legends* (Halifax: Nimbus, 1988) at 18, as cited in Tuma Young, *ibid*.

¹⁷⁵ John Borrows observes that oral traditions are “bound up with the configuration of language, political structures, economic systems, social relations, intellectual methodologies, morality, ideology, and the physical world.” John Borrows, “Listening for a Change: The Courts and Oral Traditions” (2001) 39:1 Osgoode Hall LJ 1 at 8.

¹⁷⁶ Val Napoleon and Hadley Friedland, “An Inside Job”, *supra* note 46 at 738.

¹⁷⁷ *Ibid* at 736.

¹⁷⁸ See: André Boisselle, *Law’s Hidden Canvas: Teasing Out the Threads of Coast Salish Legal Sensibility* (PhD Dissertation, University of Victoria, 2017) at 41-87.

¹⁷⁹ See *ibid* at 742 for an example of a prophetic story with an interpretation.

¹⁸⁰ Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Vancouver: UBC Press, 1998) at 78, as cited in Val Napoleon and Hadley Friedland, “An Inside Job”, *supra* note 46 at 743.

¹⁸¹ Val Napoleon and Hadley Friedland, “An Inside Job”, *supra* note 46 at 743.

Indigenous stories in order to “continue the rich traditional practices of active listening and lively thinking through stories.”¹⁸² This method is useful for directing the understanding of outsiders who, by listening as best they can, “can begin to learn how the [Indigenous people] think and what they value, and can hopefully even come to see what they see, know the laws as they know them, understand the sacred ecological spaces as they do.”¹⁸³

Indigenous law grows and breathes. The flexibility of Indigenous law is readily seen in the emphasis placed on customary law in Canadian Indigenous legal scholarship. Customary law – that is, the production of binding interactional norms that are generated over time, within communities and between generations – is not unique to Indigenous legal orders,¹⁸⁴ but has been a vital element of their development and survival.¹⁸⁵ Much of Indigenous law is implicit. As Val Napoleon writes, “many Indigenous peoples are not aware of the law they know—they just take it for granted and act on their legal obligations without talking about it.”¹⁸⁶ Customary law lays the groundwork for positive law in the modern context, rather than the other way around (as is the case in Western law, which includes customary law but generally holds positive law as king).¹⁸⁷

Indigenous law lives within Indigenous lifeways and paradigms. While this is also true of general state law in Canada, it is often taken for granted that state law is grounded in but one set of understandings of the world. That is, for example, that people can hold property in land and living things, that people exist in hierarchical relationships with nature, or that we rely on a

¹⁸² *Ibid* at 744. See also John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 16-20. [*Recovering Canada*]

¹⁸³ Tuma Young, *supra* note 61 at 93.

¹⁸⁴ Jeremy Webber, “The Grammar of Customary Law” (2009) 54:4 McGill LJ 579.

¹⁸⁵ See: Val Napoleon, *Thinking About Indigenous Legal Orders*, *supra* note 156; Andrée Boisselle, *supra* note 178.

¹⁸⁶ *Ibid* at 8.

¹⁸⁷ Recall the Supreme Court of Canada’s discussion of unwritten constitutional principles in the *Secession Reference*, *supra* note 84.

certain separation of spirituality from law. We have already referenced those differences in this chapter. Perhaps more difficult to comprehend are foundational differences in modes of thought. Consider approaches to knowledge: in a Western paradigm, we hold that knowledge is both individual and attainable in nature. As Shawn Wilson explains, this is “vastly different from the Indigenous paradigm, where knowledge is seen as belonging to the cosmos of which we are a part and where researchers are only the interpreters of this knowledge.”¹⁸⁸

Varied understandings of the passage of time and space present similar cognitive hurdles for outsiders. Western understandings of time assume singular realities and a linear passage of measured moments. Such perspectives counter the multiple realities and cyclical understandings of time that are related within some Indigenous teachings, such as in Anishinaabeg language and oral stories. Relations to the construction and passage of time are foundational to a people’s worldview, including the perception of those operating within that worldview have of human relations and patterns. As Linda Tuhiwai Smith, a Māori scholar writes, “[d]ifferent orientations towards time and space, different positioning within time and space, and different systems of language for making space and time ‘real’ underpin notions of past and present, of place and relationships to the land. Ideas about progress are grounded within ideas and orientations towards time and space.”¹⁸⁹ A Eurocentric understanding of time as linear, for example, imposes a different perception of ‘progress’ than might an Anishinaabeg understanding of rhythmic, cyclical time.

¹⁸⁸ Shawn Wilson, *supra* note 25 at 38.

¹⁸⁹ Linda Tuhiwai Smith, *supra* note 20 at 55.

3.4 Incommensurability

Discussions of the operation of Indigenous legal orders, whether or not one believes they should have or need state recognition to achieve optimal revitalization, come back to the issue of conceptual divides and bridges. While we have already touched on the scholarly debate on the incommensurability of Indigenous law (see Chapter 2.3), this debate is important in the setting of understandings of Indigenous law and its operation in the context of state law. As referenced earlier, Indigenous scholars and advocates can be seen to fall within one of two camps on this issue: the first group of scholars argues that Indigenous law is compatible with Canadian law and that any contrary argument is grounded in colonial portrayals of Indigenous law as frozen (or ‘primitive’); the second group of scholars argues that an understanding of the incommensurability of Indigenous legal norms and processes is not only *not colonial*, but may serve as a defence against entrapment in what Gordon Christie calls the “colonial snare.”¹⁹⁰ Advocates who promote state recognition of Indigenous law draw on parallels between Indigenous legal principles and processes and those found in Canadian law.¹⁹¹

Incommensurability itself, the latter argue, suggests a colonial perception that Indigenous law is weak. Narratives of incommensurability, they argue, are “[n]arratives of fragility... [and] narratives of colonialism. The stories, and the elders and communities we have learned from, all teach us that Indigenous laws are made of stronger stuff.”¹⁹² The association between incommensurability and weakness hangs on its own colonial hooks. To be so different from state

¹⁹⁰ Gordon Christie, *supra* note 141.

¹⁹¹ John Borrows, Val Napoleon, and Hadley Friedland make comparisons to promote state recognition of Indigenous laws. See, for example, arguments on comparable legal principles in John Borrows, “Indigenous Love, Law and Land in Canada’s Constitution” in Arthur Schafer, Steven Lecce, eds, *Fragile Freedoms: Human Rights in Global Context* (London: Oxford University Press, 2015) 123. For discussion of case briefing methods applied to law in oral stories, see John Borrows, *Recovering Canada*, *supra* note 182 at 16–20; Val Napoleon and Hadley Friedland, “An Inside Job” *supra* note 46; Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria Faculty of Law, 2009).

¹⁹² Val Napoleon and Hadley Friedland. “An Inside Job”, *supra* note 46 at 754.

law so as to be misunderstood and distorted by it is not by default to be weak – it is just to be different. An appreciation of essential distinctions between Indigenous world-views and the Eurocentric¹⁹³ world-views that underpin Canadian law may encourage more cautious, respectful approaches to seeking state-recognition than could emphasizing parallels.

Placing a disproportionate emphasis on the similarities that can be found between Indigenous legal orders and state law risks the distortion of the former. This is an issue that arises when Indigenous law enters a Canadian courtroom. In each instance of an Aboriginal title or rights claim, “a very real possibility arises that there could be a massive communication gap between the cultures and that any decision based on Eurocentric cultural values may fail to fairly resolve Aboriginal claims.”¹⁹⁴ This ‘massive communication gap’ is detrimental. As Aaron Mills writes:

If we were all asked to consider this matter today, perhaps a majority of Canadians and a great many indigenous persons, too, would feel deeply unsettled by and resist the incommensurability conclusion. As a general matter, people don’t want to be forced to make such an enormous, prefigurative choice, regardless of what their respective choices might be. In Canada they’re also likely to feel resentment at being asked to do so. Where alternative lifeways aren’t taken seriously and thus haven’t been disclosed, difference appears to exist only *within* one’s own lifeway and not *across* lifeways. This misunderstanding promotes an expectation of free normative interaction, occluding translation’s violence. Against such an assumption, claims of incommensurability are easily cast as conservative, protectionist, and backwards: as *anti-change*.¹⁹⁵

The problem with perceiving claims of incommensurability as conservative or anti-change, as Mills puts it, is that individuals who take approaches deemed to be more liberal may be trading a

¹⁹³ James [Sákéj] Youngblood Henderson calls the label ‘Eurocentrism’ a “gentle label academics apply to the legacy of colonization and racism.” I use this term with respect for his assessment and intend its use as inclusive of recognition of the violence of Eurocentrism in Canada. Eurocentrism, as defined here, refers both to the roots of Canadian law and the violent attempts of colonisation in which they are implicated. For his discussion, please see: James [Sákéj] Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 Indigenous LJ 1 at 5.

¹⁹⁴ Kirsten Manley-Casimir, “Incommensurable”, *supra* note 115 at 153.

¹⁹⁵ Aaron Mills (Waabishki Ma’ingan), *Miinigowiziwin*, *supra* note 10 at 200.

constitutional conversation for a line of reason that the other side (the state) will not (and possibly cannot) hear.¹⁹⁶

3.5 Legal Pluralism

Scholars of legal pluralism have done an admirable job of establishing a setting in which to address concerns about the revitalization of Indigenous law in a context where the hierarchy of the state has already been established. Legal pluralists, in a departure from the approach of legal realists, rely on elements of normative judgements that give weight to participants to law, rather than simply describe law as “whatever judges and lawyers happen to do.”¹⁹⁷ It has been the great project of legal pluralists to delve into the social realm of law in order to draw attention how law is created and maintained through dynamic acts of interaction.¹⁹⁸ As Brian Tamanaha writes, “[l]egal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level.”¹⁹⁹ In doing so, legal pluralists offer different modes for the recognition of multiple legal systems. Examples can be drawn from the work of John Griffiths, who explains the difference between strong and weak models of legal pluralism: strong legal pluralism refers to a context in which multiple systems of law deriving from more than one source of authority are functioning; weak legal pluralism describes a context in which multiple systems of law coexist on the basis of a

¹⁹⁶ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: CUP, 1995) at 57, as cited in *ibid* at 200.

¹⁹⁷ Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44:1 Osgoode Hall LJ 167 at 171. See this source for an excellent, succinct review of the state of legal pluralism in scholarship. Though the publication is little dated, Webber’s discussion of the fundamental literature still stands.

¹⁹⁸ For a comprehensive sample, see: John Griffiths, “What Is Legal Pluralism?” (1986) 24 J Leg Pluralism & Unofficial L. 38; Sally Engle Merry, “Legal Pluralism” (1998) 22:5 Law & Soc’y Rev 869; Sally Falk Moore, “Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999” (2001) 7:1 The J of the Royal Anthropological Institute 95; Brian Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Sydney L Rev 375. I have utilized each of these sources in my study of legal pluralism in the past, but this particular sampling is recommended by Aaron Mills (Waabishki Ma’iingan) in *Miinigowiziwin*, *supra* note 10 at 36.

¹⁹⁹ Brian Tamanaha, *ibid* at 375.

single source of legal authority, which may also include formal hybridity.²⁰⁰ Even strong models, however, present space for criticism.

There is less agreement among pluralists as to what law *is* than whether it can be plural. Classic empirical legal pluralists argue that law can be distinguished from other social phenomena through the identification of essential characteristics.²⁰¹ Part of the trouble with the application of any criteria designed to identify formal characteristics, however, is the application of a lens designed by particular cultural, social, and historical conditions.²⁰² What we view as an ‘essential’ characteristic of law privileges one worldview over others.²⁰³ Our understandings of law are, as Val Napoleon writes, founded in our beliefs and subjective experience, rooted in our formative understandings of relationships between people and the world.²⁰⁴ James [Sakéj] Youngblood Henderson is highly critical of the inappropriate application of colonial concepts of Indigenous law: “[o]ur diverse legal orders and consciousnesses are dismissed as imaginary and not coercive enough to qualify as law. Our humanity and our very essence as human beings are ignored in favor of failed Eurocentric models.”²⁰⁵ A critical post-modern legal pluralism is arguably better suited to the consideration of the function of Indigenous law within Canada because it provides more space for the consideration of the cultural contingencies of law.²⁰⁶

Even legal pluralism presents the issue of translation. Mills, in his discussion of Anishinaabe constitutionalism, warns against a usage of legal pluralism that fails to understand

²⁰⁰ See John Griffiths, *supra* note 198.

²⁰¹ Matthew Moulton provides an artful examination of schools of legal pluralists as he endeavours to find a post-modern model that might best suit Indigenous legal orders in Canada. For the beginning of his discussion of empirical legal pluralists, see Matthew Moulton, *supra* note 122 at 41.

²⁰² *Ibid* at 42.

²⁰³ *Ibid* at 58.

²⁰⁴ Val Napoleon, “Thinking About Indigenous Legal Orders,” in Colleen Sheppard and René Provost, eds, *Dialogues on Human Rights and Legal Pluralism* (New York: Springer, 2013) at 235.

²⁰⁵ James [Sakéj] Youngblood Henderson, “Postcolonial Consciousness”, *supra* note 48 at 16.

²⁰⁶ Matthew Moulton, *supra* note 122 at 74.

the relationship between rooted constitutionalism and rooted law.²⁰⁷ For Mills, the analytic order internal to Indigenous law is *legality*. This legality is comprised for four layers that do more than consider “why such and such a normative proposition is or isn’t *good* law, but also and more foundationally at how a community comes to have a concept of *what law is* and a view of *its purposes*.”²⁰⁸ The legality of rooted constitutionalism does the same thing as a Western liberal legality: “[explain] how creation stories yield up constitutional orders, how these in turn authorize unique legal processes and institutions, and finally, how these legal traditions ultimately produce a unique conception of law. That is, law is legitimate where the ascending conditions of its empowerment and constraint internal to its own legality hold fast.”²⁰⁹ The legality of Indigenous law, as Mills describes it, contains four levels: lifeworlds, lifeways, legal traditions, and law.²¹⁰ Rather than legal pluralism, Mills advocates for a theory of comparative legality. The reason for this argument is to avoid a misinterpretation of the rootedness of Indigenous constitutionalism.

The primary issue is one that we have already touched on in this chapter: that Indigenous legal orders are not only different in content or sources of authority, but in their logic itself:

One may be able to translate distinct content across common logics, but translating across distinct logics just makes no sense: a logic is by definition the thing through which sense is made. Death awaits the spirit of those traveling the negotiated or hybrid paths between lifeways because eventually these travelers realize that in mixing content from distinct lifeways, they’re allowing one of them to serve as the ground upon which substantive difference across all of them is taken up. And in that moment of abstruse translation’s sudden disclosure, the journey abruptly ends. The traveller realizes she was never really there, has been stepping along another path all along, flickers, and is gone.²¹¹

²⁰⁷ Aaron Mills (Waabishki Ma’ingan), *Miinigowiziwin*, *supra* note 10 at 24.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid* at 38.

²¹⁰ *Ibid.*

²¹¹ *Ibid* at 28.

Mills writes that legality difference not legal pluralism, is the space between the rooted law of Indigenous peoples and liberal settlers.²¹² Thus, according to Mills, “we must choose either an indigenous path or a settler one, and not some combination of the two.”²¹³

²¹² *Ibid.*

²¹³ *Ibid* at 24.

CHAPTER 4: ANISHINAABE CONSTITUTIONALISM

“We are not a creation of the Government of Canada or its Indian Act.”

- Magnetawan First Nation *Gchi-Naaknigewin*, undated²¹⁴

“There have always been Anishinabe, and there will continue to be Anishinabe, who make these decisions according to their understanding of Anishinabe law and of the ways that we were given.”

- Dawnis Kennedy (Minnawaanagogiizhigook), “Reconciliation without Respect? Section 35 and Indigenous Legal Orders”, 2007²¹⁵

4.1 Introduction

Constitutionalism is an Anishinaabe legal tradition. At the beginning of this thesis, I stressed this point, as well as that constitutionalism is more than just a written document containing the basic principles, privileges, rights, and limitations of governments – it is a manner of living.²¹⁶ Traditionally, Indigenous constitutional structures resembled the customary legal orders in which they were entangled, and so “[t]hey shifted, transformed, or retrenched in accordance with the ebb and flow of political, economic, and social considerations at play across the continent.”²¹⁷ Of Anishinaabe constitutionalism in particular, Borrows writes that the transient, decentralized, and contextual approach to power within Anishinaabe communities “encouraged a constitutionalism which enhanced individual agency and decision-making power.”²¹⁸ It is constitutional thinking, as Stephen Cornell writes, that is more important than the enactment of positive legislation.²¹⁹

²¹⁴ Magnetawan First Nation, *Magnetawan First Nation Gchi-Naaknigewin* (Draft, September 1, 2016) at preamble, online: < http://www.magnetawanfirstnation.com/Final_Draft_September_1_2016.pdf>.

²¹⁵ Dawnis Kennedy (Minnawaanagogiizhigook), *supra* note 41 at 104.

²¹⁶ John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution*, *supra* note 7 at 1. In this document, John Borrows provides feedback on the COTTFN (Deshkan Ziibiing) constitutional document, many suggestions of which were adapted into the finalized version of the text.

²¹⁷ John Borrows, “Indigenous Constitutionalism”, *supra* note 9 at 14.

²¹⁸ *Ibid.*

²¹⁹ Stephen Cornell, *supra* note 81 at 13.

A review of Anishinaabe constitutionalism and modern constitutions reinforces the importance of Stephen Cornell's reminder that constitutional thought, as hard-won and flexible as it is, holds more significance than the written documents that may be produced as representation of such thought. We focus, when examining constitutional traditions, on fundamental questions:

What is the nation? What does it value? What is it trying to protect? What kind of future is it trying to create? What kinds of relationships does it wish to foster among its citizens, with its neighbors, with other governments, and with the natural and spirit worlds? And what kinds of governing tools—structures, systems, laws, processes—will such visions, priorities, and concerns require? Answering these sorts of questions requires constitutional thinking: What do we expect our governors to protect, sustain, and exemplify, and how do we make that happen? How do we constitute ourselves as an effective polity in contemporary times?²²⁰

To think constitutionally is to answer these questions in light of the core values, governing principles, and goals of a government.²²¹ Thus, the writing of a constitution becomes more of a question of how a community communicates with itself about those answers.²²²

A modern written constitution is not necessary for the continuance of constitutional orders, but the writing may be important. This is especially true in communities that have become geographically and culturally diverse; it may have become too difficult to transmit a constitutional tradition by traditional means (such as through storytelling or kinship structures).²²³ A written constitution can act as “a critical reference point, a map of meanings and

²²⁰ *Ibid* at 12.

²²¹ *Ibid*.

²²² For an example, please see A.C. Peeling, *Traditional governance and constitution making among the Gitanyow* (Prepared for the First Nations Governance Centre), online: <http://fngovernance.org/resources_docs/Constitution_Making_Among_the_Gitanyow.pdf>. Cornell uses the example of Gitanyow constitutional enactment as an example of a written constitution serving as a new means of communication for Gitanyow constitutionalism otherwise functioning effectively in unwritten form for generations. Also see: Stephen Cornell, *ibid*.

²²³ Stephen Cornell, *supra* note 81 at 13.

methods on the road to self-determination.”²²⁴ These documents may also represent an effort to reconcile the different legal and constitutional orders that operate in Indigenous communities and the state – a reconciliation that some legal scholars perceive as unwise, detrimental, or impossible.²²⁵ More than that, they can represent a forward-looking effort to establish the supremacy of Anishinaabe law in anticipating of changing relationships between Indigenous nations and the state.

4.2 An Anishinaabe Constitutional Order

Constitutionalism is a way of life. In a more nuanced sense, “constitutionalism is the logic and structure of how members of a people belong to one another.”²²⁶ The long-standing Anishinaabe constitutional structure (found among doodems,²²⁷ traditions and customs, treaties, etc.) is a functioning expression of this sentiment. Thus, as we consider the nature and function of modern written Anishinaabe constitutions, we must also consider them within the context of a Anishinaabe constitutional order.

Aaron Mills creates a useful earth-centred illustration of constitutional order. He paints the image of a wooded area with different varieties of trees – poplar, maple, white birch, and oak – and brings to our attention how the roots of the trees push deeply into the earth, holding each tree in place. The trees grow solidly and extend their branches, further and further from their

²²⁴ *Ibid.*

²²⁵ Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 123-24.

²²⁶ Aaron Mills (Waabishki Ma’ingan), *Miinigowiziwin*, *supra* note 10 at 28. Aaron Mills is cited as the authoritative descriptive source on Anishinaabe constitutionalism, which has otherwise received only the gentlest of treatment by John Borrows. Aaron Mills provides his understanding and perspective, which is in part shaped by the many interviews he conducted with elders. There are many others perspectives, but his is necessarily relied upon due to lack of published resources.

²²⁷ Doodems are traditional clans named for animals. The five traditional clans were Crane, Loon, Catfish, Bear, and Marten, though there are at least 21 clans in all. Clans have traditionally served as a system of governance and organization of labour.

trunks, eventually producing leaves that “sing in the wind, which explode into colour in fall, and finally which carpet the earth before *biboon*, winter, settles in, helping to renew earth once again.”²²⁸ Mills’ description of the trees is so vivid as to call to our senses the smell of earth and damp bark, or the whispers of soft leaves in the air. These living, breathing trees are his map for the relationship between lifeworld and law:

The roots of a society are its lifeworld: the story it tells of creation, which reveals what there is in the world and how we can know. Creation stories disclose what a person is, what a community is, and what freedom looks like. The trunk is a constitutional order: the structure generated by the roots, which organizes and manifests these understandings as political community. The branches are our legal traditions, the set of processes and institutions we engage to create, sustain, and unmake law. The trunk *conditions* the branches: it doesn't *determine* what they'll look like, but it powerfully shapes them. A constitutional order similarly settles which legal processes are legitimate within it, but without ever determining a necessary given set of processes as *the* legitimate ones. Subject to the conditions the trunk will support, legal processes and their institutions may vary considerably in object, scope, and means. Law, like leaves, experiences a still higher level of conditioning. It's subject to the branches, which are subject to the trunk, which is subject to what the roots will bear.²²⁹

Each component is connected to the next and last. No component can exist independent of the others. The connection between components is intimate, but never eliminates difference.²³⁰

There are many species of trees in these woods. They all grow strong in similar ways. It is important to remember that no two trees are the same, even if they bear the marks of the same species at the same age.²³¹ Anishinaabe communities are like these trees: even where they might have nearly identical constitutional structures, they will have differing laws²³² (or even written

²²⁸ Aaron Mills (Waabishki Ma'iingan), “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847 at 862. [“The Lifeworlds of Law”]

²²⁹ *Ibid* at 862-63. (Original emphasis)

²³⁰ *Ibid* at 863.

²³¹ *Ibid*.

²³² *Ibid*.

expressions of that constitutional structure). What Mills wants to say is that, “every people is a tree. We tell different stories of creation (even those of us who don't acknowledge doing so or who explicitly disclaim a view of creation) and the story we tell powerfully conditions the constitutional order we bring into being.”²³³ It is the constitutional order of peoples that shapes their law.

This image might evoke, for those of us educated at Western legal institutions, the celebrated imagining of Canada's constitution as a “living tree”.²³⁴ What Aaron Mills calls to our minds, however, is nothing like Canada's ‘living tree’, which seems somehow to stand in isolation. Mills' trees are rooted and those “roots are buried in and wrapped tightly against earth.”²³⁵ In an Anishinaabe constitutional order, “[a] lifeworld doesn't reflect the spontaneous ideas of those standing within it. Our creation stories are *of* something common: the earth beneath and all around us. What varies is how we understand it.”²³⁶ Indigenous people tell different stories about creation and generate different bodies of law from those stories, but the foundation of those lifeworlds is rooted in the earth.²³⁷

This rooted conception of Anishinaabe constitutionality is one without government. Government (or collective enforcement action) becomes unnecessary in empowered Anishinaabe communities²³⁸ when social cooperation is otherwise “sufficiently coordinated through the constitutional logic of mutual aid, exercised through its correlate structure, kinship.”²³⁹ Mills

²³³ *Ibid.*

²³⁴ See *Edwards v Canada (Attorney General)*, [1930] AC 124 at 136, 1929 UKPC 86, as referenced in Mills, *ibid.*

²³⁵ Aaron Mills, “The Lifeworlds of Law”, *supra* note 228 at 863.

²³⁶ *Ibid.* (Original emphasis.)

²³⁷ ‘Lifeworlds’ are “distinct ways of knowing and being in the world, or as Anishinaabe scholar (and now elder) James Dumont has put it, of “seeing the world” and of participating in the world seen.” James Dumont, “Journey to Daylight-Land: Through Ojibwa Eyes” (1976) 8:2 *Laurentian University Rev* 31, as referenced by Aaron Mills, , *Miinigowiziwin*, *supra* note 10 at 24.

²³⁸ This is Aaron Mills' choice of terminology. Mills associates traditional lifeways with empowerment. I make no comment on the nature of the relationship between empowerment and governance in Anishinaabe communities.

²³⁹ Aaron Mills (Waabishki Ma'iingan), *Miinigowiziwin*, *supra* note 10 at 44.

appeals to a traditional approach to Anishinaabe constitutionalism that does not connect with the production of modern written constitutional documents that are being produced by Anishinaabe First Nations in Ontario. Modern Anishinaabe constitutions, as I will discuss, rather address the role and restrictions of elected government and are adapted to the modern decisions and social orders of Anishinaabe communities. The form of Anishinaabe constitutionalism as Mills describes it is not, however, contrary to the modern movement toward ratified constitutions. Rather, it functions as an undercurrent or parallel structure. Mills does not address written constitutions, but instead focusses on constitutionalism as it is embodied by normative relations. Constitutionalism, viewed through the logic of belonging, clarifies that it is “an act: something done, not something had.”²⁴⁰ There is no distinct story of political formation – “community always already is” while it is also “always becoming, a constellation of countless pieces, the shifting connections between which are affirmed anew, time and again, through ongoing practices of belonging.”²⁴¹

The purpose of community rooted in this way is to pursue *bimaadiziwin*, or the Good Life.²⁴² To live in a good way is constant action, involving mutual aid and need within communities. *Bimaadiziwin* is itself the potential of those actions in coordination with others and the world around oneself. This is anything but easy when we consider, “the messiness and imperfection of human, animal, plant, and spirit life as each of us struggles to balance our interests with those of others.”²⁴³ As Eva Petoskey, a member of the Grand Traverse Band of

²⁴⁰ *Ibid.*

²⁴¹ *Ibid* at 44-45.

²⁴² *Bimaadiziwin*, or ‘the Good Life’, is the underlying moral framework of Anishinaabe life. It includes within it seven gifts to be practiced individually and communally: connection to the land, thinking, knowing, being, doing, relating, and language. Aaron Mills recommends as an introductory source: Lawrence W Gross, “*Bimaadiziwin*, or the ‘Good Life,’ as a Unifying Concept of Anishinaabe Religion” (2002) 26:1 *Am Indian Cult Res J* 15, as cited in *ibid* at 96.

²⁴³ *Ibid* at 96.

Ottawa and Chippewa Indians, and a former Vice-Chair of the Grand Traverse Band Tribal Council, described it, “when you say that, *mino-bimaadziwin*, you’re saying that a person lives a life that has really dependently arisen within the web of life.”²⁴⁴ This concept, Matthew Fletcher writes, was the foundational basis of traditional Anishinaabe society and, implicitly, law and order.²⁴⁵ To act fairly and in good faith is in line with *mino-bimaadziwin*.

This is not, of course, without exception. As Fletcher argues, there are examples of traditional exceptions to this foundational order of life, as seen in the rare and extreme examples of the banishment or execution of a lawbreaker.²⁴⁶ Stories of *windigos* – “an incredibly disturbing creature known for its giant, humanoid form, ravenous appetites, and murderous cannibalism”²⁴⁷ – arise in instances where a lawbreaker (a murder or criminal) continues their criminal actions without remorse or reform.²⁴⁸ The only known solution to a *windigo* is to kill the *windigo*.²⁴⁹ The killing of a *windigo*, as recalled in a story from Sucker Clan of the Sandy Lake First Nation, was a systematic and community-sanctioned affair – part of law and justice.²⁵⁰ Collective action is part of correcting the course of community relations. Collective action is an expression of law; it

²⁴⁴ Gloria Valencia-Weber, Rina Swentzell, and Eva Petoskey, “40 Years of the Indian Civil Rights Act: Indigenous Women’s Reflections” in Kristen A. Carpenter, Matthew L.M. Fletcher, and Angela R. Riley, eds, *The Indian Civil Rights Act at Forty* (Los Angeles, Calif: UCLA American Indian Studies Center, 2012) 39 at 47-48 (quoting Eva Petoskey, Address, Michigan State University College of Law, Indigenous Law and Policy Center 5th Annual Indigenous Law Conference (October 10-11, 2008), as cited in Matthew L.M. Fletcher, “Anishinaabe Law and the Round House” (2017) 10 Alb Govt L Rev 88 at 91.

²⁴⁵ Mathew L.M. Fletcher, *ibid* at 90.

²⁴⁶ *Ibid* at 96.

²⁴⁷ *Ibid* at 97. For more on *windigos*, Fletcher recommends: Basil Johnston, *The Manitous: The Supernatural World of the Ojibway*. (New York: Harper Collins, 1995) at 222; John Borrows, *Drawing Out Law*, *supra* note 1 at 223-24, 226; Linda LeGarde Grover, “Windigo Presence in Selected Contemporary Ojibwe Prose and Poetry”, in Rachel Selby, ed, *Indigenous Voices, Indigenous Symbols* (WINHEC, 2009) 19, online: <<https://journals.uvic.ca/index.php/winhec/article/view/18555/7937>>.

²⁴⁸ Mathew L.M. Fletcher, *supra* note 244 at 96-97.

²⁴⁹ John Borrows, *Drawing Out Law*, *supra* note 1 at 225-26; Matthew Fletcher, *ibid* at 97.

²⁵⁰ Phil Lancaster, “Omaminomowayak: Anishinaabe Justice in Muskrat Dam First Nation” (1994) 14 Windsor YB Access Just 331 at 335-36, as cited in Matthew Fletcher, *ibid* at 97.

is always a relational practice that intertwines one's relationship to themselves and to those around them.²⁵¹ In this view, the Anishinaabe constitutional framework relies on kinship structures and the customary growth of law based on the responsibilities of mutual aid that grow through kinship.

Written Anishinaabe constitutions are notably absent from Aaron Mills' description of an Anishinaabe constitutional order. He directs his gaze to a traditional understanding of constitutionalism among Anishinaabe communities that grows from the held hands of community members. Constitutionalism is breathing, fluid, and responsive to social and contextual changes. This image of Anishinaabe constitutionalism is one of indelibility; so long as there remains connections to land, use of language, kinship ties, and community, so is there constitutionalism at work. This form of constitutionalism is not vulnerable to outsiders. Indeed, it can – and has – survived violent attempts on its life through cultural and familial disruption by the state.

A rooted Anishinaabe constitutional order appears somewhat incompatible with a positivist expression of Anishinaabe constitutionalism – at least, as described by Mills. The difference, as he understands it, is that between an operational existence within existing social structures that do not require a distinct political formation story and a society that necessarily associates constitutionalism with a political community.²⁵² For the latter, constitutionalism is most critically to control governmental action: “constitutions (frequently, written constitutions) are the higher laws which constrain governmental action to law, ensuring the government doesn't break the belonging analytic which undergirds its legitimacy.”²⁵³ This becomes less

²⁵¹ Aaron Mills (Waabishki Ma'iingan), *Miinigowiziwin*, *supra* note 10 at 159-60.

²⁵² *Ibid* at 44.

²⁵³ *Ibid*.

important when a society operates on contingencies, thereby distributing the powers to both influence and comply with self-governing forces.²⁵⁴ And yet, Anishinaabe communities across Ontario are producing and ratifying positivist constitutions on the foundation of traditional Anishinaabe law as a means of self-empowerment.

4.3 An Agreement on Governance

The difficulty with an image of Anishinaabe constitutional order as described above is the risk of idealizing philosophical points at the expense of the practical. I do not mean to suggest that the revitalization or strengthening of this form constitutionalism is impractical – simply that it is one component of how Anishinaabe communities choose to empower themselves in a context where the state imposes governmental restraints that impact the constitutional logics described by Mills, such as kinship structures. Apprehension of potentially assimilationist models is well-warranted in a context where, for example, the federal government's 1969 White Paper²⁵⁵ called for the assimilation of Indigenous peoples into Canadian liberal constitutionalism.²⁵⁶ What is not immediately clear on the face of this discussion, however, is how modern written Anishinaabe constitutions relate to issues of empowerment and assimilation.

There has been a popular move towards the drafting and ratification of written Anishinaabe constitutions. The Anishinabek Nation,²⁵⁷ originally established as the Union of

²⁵⁴ *Ibid.* Mills is careful to note that there is some tension between certainty and contingency in all societies.

²⁵⁵ Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (First Session, Twenty-eighth Parliament, 1969).

²⁵⁶ Aaron Mills shows his apprehension of assimilationist models as the logic and structure of 'reconciled' Indigenous-settler communities. See Aaron Mills (Waabishki Ma'iingan), *Miinigowizwin*, *supra* note 10 at 210.

²⁵⁷ The Anishinabek Nation was established as a legal entity for the purpose of entering legally-binding agreements because the Anishinaabek nation did not otherwise have legal recognition by the state. This organization is a political advocate for 39 First Nation communities in Ontario, with an approximate population of 65,000 citizens (making up a third of Ontario's First Nations population). The purpose of the Anishinabek Nation as an organization

Ontario Indians in 1949, is the organizing force behind the proliferation of constitutional documents among Anishinaabe communities in Ontario. The organization strives toward the restoration of Anishinaabe jurisdiction over all aspects of Anishinaabe life. This position was cemented by the Anishinabek Grand Council Assembly's adoption of the Anishinabek Nation Declaration ("Declaration") in 1980 in the context of Canada's process of constitutional repatriation, during which time Indigenous nations across Canada worked to renew their relationship with the federal government. The 14 principles espoused in the Declaration were set as the foundation for the development of the Anishinabek Nation and its governing practices.

Key principles assert inherent Anishinaabe jurisdiction and sovereignty:

1. We are Nations. We have always been Nations.
2. As Nations, we have inherent rights which have never been given up.
3. We have the right to our own forms of government.
4. We have the right to determine our own citizens.
5. We have the right to self-determination.
6. We, through our governments, shall have full control of our land.
"Land" includes water, air, minerals, timber and wildlife.
7. We wish to remain within Canada, but within a revised constitutional framework.

...

14. Neither the federal government of Canada nor any provincial government shall unilaterally affect the rights of our Nations or our Citizens.²⁵⁸

The assertions made within the Declaration are in strong opposition to *de facto* state governance in Anishinaabe communities via the *Indian Act*. The principles replicated above inform federal and provincial governments that the Anishinaabek people are an assertion their rights of self-

is to provide support and services to its members. Anishinabek Nation, "About Us" (2019), online: <<https://www.anishinabek.ca/who-we-are-and-what-we-do/>>.

²⁵⁸ Union of Ontario Indians, *Declaration of the Anishinabek* (Toronto: November, 1980).

determination and self-governance. The Declaration is a definition of the Anishinaabek as a nation.

The principles of the Declaration contributed to the development of governing and advocacy strategies in the years moving toward the negotiation of a governance agreement between the Anishinabek Nation and Canada in 2019.²⁵⁹ With a Framework Agreement on Governance signed between the Anishinabek Nation and Canada signed on November 26, 1998, the development of the *Anishinabek Nation Governance Agreement* (“ANGA”) was set in motion. There is no requirement by the Crown for First Nations entering “self-governance” agreements with the Crown to adopt internal constitutions. Nevertheless, the development of community constitutions became integral to the pursuit of the ANGA. The reason for the incorporation of constitutionalism is the idea that Anishinaabe communities would require their own means of organizing governance and developing law if they were going to displace the guiding hand of the state. A popular view echoing among Anishinabek Nation member citizens was that constitutions were a desirable means of exercising the Anishinaabe right to self-determination and – at least, theoretically – one that would force Canada’s recognition of that right.²⁶⁰

There was a flurry of constitution-building activity among Anishinabek Nation member communities in the early 2000s, from the establishment of the Constitution Development Project

²⁵⁹ Notable intervening measures include the 1995 directive of the Anishinabek Chiefs-in-Assembly to negotiate with the Canada for the restoration of Anishinaabek jurisdiction (primarily focusing on governance and education), and the development of a Strategic Plan for Political Action (“Wedokdownin”, or Unity – Helping One Another) by the Board of the Union of Ontario Indians in 1997. For a timeline of significant events, please see: Anishinabek Nation, “History”, *Anishinabek Nation Governance Agreement* (2020), online: < <https://www.governancevote.ca/about-governance/history/>>.

²⁶⁰ Anishinabek Nation, “Restoration of Jurisdiction: FAQs About the Anishinabek Constitution” (December, 2007) 19:10 *Anishinabek News* 11, online: < chrome-extension://oemmndcblldboiebfnladdacbfmadadm/http://anishinabeknews.ca/wp-content/uploads/2013/04/2007-12.pdf>.

(which included community consultations to develop the *Anishinaabe Chi-Naaknigewin* and individual community constitutions) and a series of constitutional development workshops.²⁶¹ Following the adoption and ceremonial proclamation of the *Anishinaabe Chi-Naknigewin* in 2012, vigorous efforts to assist with the completion and finalization of individual member communities' constitutional documents began. Negotiation of the ANGA was well underway and time was running out in anticipation of the completion of the umbrella governance agreement, which would trigger citizen engagement and voting (to begin in 2020).²⁶²

Only member communities with ratified constitutions that have been approved by the Anishinabek Nation are eligible to vote on the adoption of the governance agreement.²⁶³ The number of ratified (or even draft) constitutions in Anishinaabe communities in Ontario is uncertain. An estimate²⁶⁴ by the Anishinabek Nation is that, as of May 16, 2019, 27 First Nations members of the organization had ratified constitutions.²⁶⁵ This estimate represents less than 70

²⁶¹ The Constitutional Development Project was established by the Anishinabek Nation in 2001. Constitutional development workshops in First Nations communities began in 2003. Anishinabek Nation, "History", *Anishinabek Nation Governance Agreement* (2020), online: < <https://www.governancevote.ca/about-governance/history/>>.

²⁶² The ANGA was finalized in 2019. The first voting period was scheduled for February, 2020. The vote was in progress at the time that the novel coronavirus interrupted civil life. In an uncertain context, the vote was rescheduled for October 2020 (at the earliest). There are no firm voting period dates as of the completion of this thesis.

²⁶³ Member First Nations that ratify the proposed ANGA will comprise the Anishinabek Nation Government, but the Anishinabek Nation will, as an organization, continue to advocate for all member communities. Anishinabek Nation, "Constitutions", *Anishinabek Governance Agreement* (2020), online: <<https://www.governancevote.ca/constitutions/constitutions/>>.

²⁶⁴ The Anishinabek Nation does not present this number as an estimate, but rather a certain figure associated with the governance agreement vote. I have termed this number an estimate because at least one community listed as having ratified a constitution has not done so. Dokis First Nation (located on the French River in the area of Parry Sound, Sudbury, and Nipissing) stated in an email communication with me, dated June 16, 2020, that a constitution has never been approved within the community, though they did draft a preliminary document some years ago. There is a similar area of ambiguity about the ratification of draft documents. For example, there is some indication that Magnetawan First Nation has ratified its constitution, but this could not be confirmed; the only available document is marked as a final draft. Based on the limited online presence and failed attempts to communicate, it was not possible to ascertain the exact number of First Nations that have ratified constitutions. I attempted to contact 13 First Nations Band Councils seeking confirmation on ratification and copies of the public document, if ratified. At the time of the completion of this thesis, the Anishinabek Nation has not responded to my request for a verification of the communities with ratified constitutions.

²⁶⁵ Anishinabek Nation, untitled or "Communities with Constitutions", *Anishinabek Nation Governance Agreement* (2020), online: < <https://www.governancevote.ca/wp-content/uploads/2019/05/constitutionstodate27.png>>.

percent of Anishinabek Nation member communities. In my research, I have been able to locate 15 constitutional documents: ten ratified constitutions, one of which is the *Anishinaabe Chi-Naaknigewin* (the overarching constitutional document for the whole of the Anishinaabe nation, which I treat as analogous to community constitutions), four draft constitutions, and one labeled a ‘final draft’.²⁶⁶ Given that the Anishinabek Nation provides templates and assistance to communities that want to ratify constitutions and that they require the Anishinabek Nation’s stamp of approval, ratified documents will be considered to be representative of the modern written Anishinaabe constitutional framework in Ontario.

This is not to say, however, that Anishinaabe First Nations communities who are members of the Anishinabek Nation and have ratified constitutions must vote on and adhere to the umbrella governance agreement. Though the ratification vote on the ANGA has been postponed due to the COVID-19 pandemic, there has been at least one community with a constitution reviewed for this thesis that has chosen not to participate in that ratification vote. Feedback from within the Chippewas of the Thames First Nation community revealed concerns that the umbrella agreement would simply turn the Anishinabek Nation into an external

²⁶⁶ The following are the Anishinaabe constitutional documents considered in this review. Ratified constitutions include (in no particular order): Anishinabek Nation, *Anishinaabe Chi-Naaknigewin* (2012), last amended May 1; Beausoleil First Nation, *Beausoleil First Nation Constitution for Education* (undated); Nipissing First Nation, *Nipissing Gichi-Naaknigewin* (August 8, 2013); Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin* (June 14, 2014); Atikameksheng Anishnawbek, *Atikameksheng Anishnawbek Gchi-Naaknigewin* (July 24, 2015); Aamjiwnaang First Nation, *Aamjiwnaang Chi’Naaknigewin* (October 27, 2016); Pic River First Nation, *Biigtigong Nishnaabeg Gchi-Naaknigewin* (December 15, 2015); Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin* (March 15, 2015); Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin* (2016), and; Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* (August 11, 2018). Draft constitutional documents include (in no particular order): Munsee-Delaware First Nation, *Munsee-Delaware Nation Constitution* (draft, 2016); Sheshegwaning First Nation, *Sheshegwaning First Nation Kchi-Naaknigewin* (Draft, February 20, 2016); M’Chigeeng First Nation, *M’Chigeeng Naaknigewin* (Draft, April 14, 2015), and; Dokis First Nation, *Dokis First Nation Constitution* (Draft, 2011). The document labeled as ‘final draft’ is: Magnetawan First Nation, *Magnetawan First Nation Gchi-Naaknigewin* (Draft, September 1, 2016). In total, these documents represent approximately 35 percent of Anishinabek Nation members, with only 23 percent eligible to vote on the ANGA.

government.²⁶⁷ Indeed, criticisms of the umbrella agreement include that it forces Anishinaabe governance into harmony with Canadian law. For example, it would allow communities to control membership, but not make decisions about Indian Status under the still operable *Indian Act*.²⁶⁸ Finally, both federal and provincial laws would continue to apply on First Nations reserve land. Brock Pitawanakwat, in his review for the Yellowhead Institute, draws attention to reference within the umbrella agreement to the continued prevalence of a federal law over the law of a First Nation or the *ANGA* itself where that law is “a federal law in relation to peace, order and good government, criminal law, the protection of the health and safety of all Canadians, the protection of human rights or other matters of overriding national importance.”²⁶⁹ And so, even though the purpose of the agreement is promoted as the restoration of Anishinaabeg jurisdiction, state law and its interpretive powers remain paramount.

Advocates for the *ANGA* argue that the agreement extends Anishinaabeg jurisdiction and that it provides protection for culture and language. As we will discuss, these are key elements of Anishinaabe constitutions. There is, however, criticism that the *ANGA* does not go far enough. First Nations’ jurisdiction would be expanded just beyond the boundaries of that found within the *Indian Act* and may not provide equivalent benefits than a First Nations gains if it proves Aboriginal title recognition.²⁷⁰ Assertions of language revitalization are undercut by the requirement within the agreement that the Anishinabek Nation “establish and maintain an official

²⁶⁷ Chief Jacqueline French, Untitled Letter from Band Council Chief to Chippewas of the Thames First Nation (January 21, 2020), online: < <https://www.facebook.com/OfficialCottfn/photos/a.1631417310465639/2491385134468848/>>.

²⁶⁸ Brock Pitawanakwat, “The Anishinabek Nation Governance Agreement: A Pre-Ratification Review”, *Yellowhead Institute* (May 17, 2019), online: < <https://yellowheadinstitute.org/2019/05/17/the-anishinabek-nation-governance-agreement-a-pre-ratification-review/>>.

²⁶⁹ *Ibid.*

²⁷⁰ For a table of detailed analysis, see: Sara Mainville, “Re: Legal Review of the “Anishinabek Nation Governance Agreement” for NSTC communities”, Olthuis, Kleer, Townshend, LLP (September 24, 2019) at 3-4, online: < https://www.mississauga.com/uploads/1/0/2/6/102634872/legal_review_of_the_anga_for_nstc_v.2_for_chief_and_councils_.pdf>.

registry of its laws in English and, at the discretion of the Anishinabek Nation, in Anishinaabemowin.”²⁷¹ A more daunting concern for those who seek the revitalization of Anishinaabe law and restoration of jurisdiction is that the law-making powers are “circumscribed by liberal values throughout the agreement.”²⁷² Though ratified Anishinaabe constitutions do not contain elements that express their operable dependence on the ratification of the *ANGA*, their subordination to the agreement, if adopted, undermines the many articles that assert broader law-making jurisdiction.²⁷³

4.4 A New Framework for Traditional Governance

Modern democratic constitutions serve as a lens into the societies that produce them. In practical terms, these documents contain five primary elements: first, a discussion of the nature of democracy and the resulting structure of the government; second, clarification of individual and collective rights; third, explanation of the rights and duties of citizenship; fourth, explanation of the role of constitutional courts, and fifth, an amending formula.²⁷⁴ This is the formula advocated for the examination of Indigenous constitutions, generally, by Christopher Alcantara and Greg Whitfield. Anishinaabe constitutions can be observed to possess these elements, but the elements themselves deserve some attention before we turn our eye to document analysis.

The first category, a discussion of the nature of democracy and the resulting structure of the government, tends to be complex. This element contains views on how the structure will be

²⁷¹ Brock Pitawanakwat, *supra* note 268.

²⁷² Sara Mainville, *supra* note 270 at 1.

²⁷³ This thesis is not intended to be a review or analysis of the *ANGA*. I have included criticism of the agreement only where it is relevant to do so.

²⁷⁴ These elements are provided in Jon Elserer, Claus Offe, and Ulrich K. Pruess, *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge: Cambridge University Press, 1998) at 80-81, as referenced in Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 124.

both representative and able to accommodate differences, reflect the history and values of the people while also able to achieve public goals.²⁷⁵ Aiming toward reasonable understandability by all members of the society, a focus is placed on creating balance between “tradition, democracy, and efficiency”.²⁷⁶ The second element of constitutional development, which concerns individual and collective rights, can include everything from the rights of individuals to the protection of their freedoms from the interference of the state²⁷⁷ to rights such as health care and education.²⁷⁸

The requirements and duties of citizenship – the third element – tends in Western traditions to be narrowly defined to those citizens granted the definition by place of birth or parentage.²⁷⁹ There are, of course, extensions to the boundaries of citizenship from society to society, though granting citizenship by more than a single generation of removal is comparatively rare in Western traditions. The duties and rights attached to citizenship vary widely and may include those items such as compulsory jury duty or open-ended periods of military service, or mandatory voting.²⁸⁰ The role of constitutional courts (or the role of the judiciary and advisory councils, more broadly) comprises the fourth constitutional element. This element may include the definition of a separate constitutional court or apply more generally to the judicial oversight, tasked with ensuring that the constitution remains whole and abided by in the creation and application of law. The fifth and final element, which governs constitutional amendments, is vital to ensuring that a constitution remains adaptable in changing circumstances and that it is always responsive to the will of the people. Formulae for amendments are often

²⁷⁵ Christopher Alcantara and Greg Whitfield, *ibid* at 125.

²⁷⁶ *Ibid.*

²⁷⁷ Jon Elserer, Claus Offe, and Ulrich K. Pruess, *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge: Cambridge University Press, 1998) at 80, as referenced in Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 125.

²⁷⁸ Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design”, *ibid* at 125.

²⁷⁹ *Ibid.*

²⁸⁰ These examples are provided by Christopher Alcantara and Greg Whitfield. See *ibid.*

provided and tend to favour constitutional stability, thereby requiring large majorities to validate amendments.²⁸¹

While I use this basic formula produced by Alcantara and Whitfield for the empirical examination of Indigenous constitutions in a context where it might be useful to examine their comparison to Western constitutional traditions, it is also important to keep in mind that these specifications favour constitutional development insofar as it adheres to Western traditions. Alcantara and Whitfield acknowledge this, but state that Indigenous constitutions must to some extent reflect Western constitutions because they exist within the constitutional framework of Canada.²⁸² Thus, I offer the following as additional criteria to consider in such a study, as provided by Donald Lutz. While Lutz does not profess himself to be an expert on Indigenous constitutionalism, the framework that he provides is highly adaptable to Indigenous constitutions. Lutz' defining constitutional framework is presented in broad categories that encompass the elements of Anishinaabe constitutions without an implied expectation that the documents tick all of the precise boxes that we would expect of a Western state-centred constitution. This, along with the inclusion of traditional societies in his analysis, is why I favour his categorical constitutional analysis.

Constitutions worthy of their name, Lutz argues, contain three foundational elements: culture, power, and justice.²⁸³ The cultural element – the first in Lutz' formula – appeals to Aristotle's characterization of constitutions as documents defining "a way of life in general terms by laying out and using as organizing principles the values, major assumptions, and definitions of justice toward which a people aspire."²⁸⁴ The cultural element is wide-ranging and includes a

²⁸¹ *Ibid.*

²⁸² *Ibid* at 126.

²⁸³ Donald Lutz, *Principles of Constitutional Design* (Cambridge: Cambridge University Press, 2006) at 18.

²⁸⁴ *Ibid* at 16.

variety of components expressed in many ways. Definitions of citizenship or the characterisation of who belongs to the people or nation are a foundational example of this element.²⁸⁵ High levels of explicit cultural content can be found in constitutions adopted by more traditional societies.²⁸⁶

Power is the second element of constitutions as presented by Donald Lutz. This element is found within the decision-making institutions within the constitution. In a coherent constitution, institutions organizing power are dependent on culture and accomplish multiple goals.²⁸⁷ The power element creates structures to manage conflict to avoid violence. It does so by identifying a supreme power that is always determinative and distributes that power in a manner that promotes effective decision-making over a broad range of issues.²⁸⁸ The third and final element, connected to elements of culture and power, is justice. Justice is the key element; after all, as Lutz writes, “[c]onstitutionalism as a political technology attempts to marry power with justice. It attempts to do so in a variety of ways.”²⁸⁹ The purpose of a written constitution is to represent relatively predictable decision-making processes that serve to limit power.²⁹⁰

The framework of constitutional development provided by Lutz makes space for the inclusion of the specifications described by Alcantara and Whitfield, but in a manner that allows for more fluidity. Thus, I will structure my empirical analysis of a sample set of Anishinaabe constitutions in Ontario according to Lutz’s framework, but with reference to the framework provided by Alcantara and Whitfield. This approach will be more adaptable to the recognition of

²⁸⁵ *Ibid.* This is a departure from the Westernized model discussed above, where citizenship serves as a distinct constitutional element.

²⁸⁶ Donald Lutz provides the examples of Kiribati, Western Samoa, and Papua New Guinea. The Mexican Constitution of 1917 is provided as a more detailed example, in which Mexico went to great lengths to define “the dominant *mestizo* culture as the base of nationality in place of the colonially imposed Spanish culture.” See *Ibid* at 16-17.

²⁸⁷ *Ibid* at 17.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid* at 18.

²⁹⁰ *Ibid.*

traditional Anishinaabe law as it appears within modern constitutions than an examination of these documents through a lens coloured by Western constitutions. Looking at Anishinaabe constitutions with wider eyes is important because, though they may exist within the broader framework of the Canadian constitutional framework, these are distinct documents designed to give meaningful life to local culture.²⁹¹

The First Element: Culture

Culture is foundational to constitutional development. As an element of constitutional design, culture predates written constitutionalism. Culture contributes to constitutional development, which, in turn, contributes back to culture. Culture is identifiable in many components of constitutions, including the definition of membership, shared stories of creation, and expressed community values. Culture can be seen in general or specific terms, such as constitutional preambles or individual rights. It is no surprise that the cultural element is dominant in the constitutional documents produced by Anishinaabe communities in Ontario, given that Indigenous nations so regularly find themselves in disputes over culture-based practices with the settler-colonial state. The prominence of traditional culture and law within these constitutions aligns the majority of Anishinaabe constitutions within the sample set with Donald Lutz's categorization of traditional societies.²⁹²

The inclusion of Anishinaabemowin is a significant cultural element within the constitutions reviewed as part of this study. As explained in Chapter 3.3, language is itself intertwined with ecology, kinship, and the revitalization of Indigenous legal orders. Language

²⁹¹ Christopher Alcantara and Greg Whitfield, "Aboriginal Self-Government through Constitutional Design", *supra* note 14 at 126.

²⁹² Donald Lutz, *supra* note 283 at 17-18.

reveals understandings of the world that inform relationships and responsibilities.²⁹³ The significance of language to the preservation of knowledge, ways of knowing, and understandings of the world place it as a cornerstone sacred, inalienable right.²⁹⁴ Every ratified Anishinaabe constitution reviewed as part of this empirical study contains recognition of the importance of Anishinaabemowin. There are, however, some interesting variations in how this recognition manifests.

The Anishinaabe language is included as the official language of each community and of the Anishinabek Nation, sometimes alongside English and other times with priority over English. For example, the *Anishinaabe Chi-Naaknigewin*, the supreme law of the Anishinabek Nation generally, lists Anishinaabemowin as the official language of the nation with English serving as a second language.²⁹⁵ The *Nipissing Gichi-Naaknigewin*²⁹⁶ and the *Biigtigong Nishnaabeg Gchi-Naaknigewin* provide the same recognition, with the later categorizing English as “the working language”²⁹⁷ of the First Nation. Interestingly, however, these community-produced documents contain scarce use of Anishinaabemowin within their text.²⁹⁸ While a few constitutions contain Anishinaabemowin versions of *Ngo Dwe Waangizid Anishinaabe*, or “One Anishinaabe

²⁹³ See James [Sákéj] Youngblood Henderson, “Mikmaw Tenure”, *supra* note 128; Tuma Young, *supra* note 61.

²⁹⁴ Lorena Sekwan Fontaine, “Our Languages Are Sacred: Indigenous Language Rights in Canada” in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws, Special Report by the Centre of International Governance Innovation* (Waterloo, ON: 2017) 89 at 90.

²⁹⁵ Anishinabek Nation, *Anishinaabe Chi-Naaknigewin* (2012) at art 2.1, *online*: < <http://www.anishinabek.ca/wp-content/uploads/2019/03/Anishinaabe-Chi-Naaknigewin-Amended-May-1st-2018-FINAL.pdf>>.

²⁹⁶ Nipissing First Nation, *Nipissing Gichi-Naaknigewin* (August 8, 2013) at art 5.1, *online*: < <https://www.nfn.ca/wp-content/uploads/Documents/Laws/Gichi-Naaknigewin.pdf>>.

²⁹⁷ Pic River First Nation, *Biigtigong Nishnaabeg Gchi-Naaknigewin* (December 15, 2015) at arts 7,8, *online*: < <http://www.picriver.com/index.pl?page=21&top=20>>.

²⁹⁸ Anishinaabemowin is barely used in the text of the *Nipissing Gichi-Naaknigewin* but appears in the terms and definitions of the *Biigtigong Nishnaabeg Gchi-Naaknigewin*. Greater use of the language is present in the *Anishinaabe Chi-Naaknigewin*, which contains an Anishinaabemowin Preamble as well as includes some terms and definitions.

Family”,²⁹⁹ only the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*³⁰⁰ is written in Anishinaabemowin (with translations into English). The full publication of the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* in Anishinaabemowin before English serves three purposes: first, it is a demonstration of the priority that Anishinaabe constitutions place on the revitalization and protection of Anishinaabemowin despite the rarity of fluent speakers;³⁰¹ second, the document preserves Anishinaabe worldviews and understandings of specific terms by first including those terms in the language;³⁰² third, the fluid use of Anishinaabemowin provides access to language-speakers and promotes Anishinaabemowin literacy among members as the community pursues immersive language learning.³⁰³

The right to learn and speak Anishinaabemowin intersects with the inclusion of individual and community rights and responsibilities, as described by Alcantara and Whitfield. In their study of West Coast Indigenous constitutions, Alcantara and Whitfield identify first-

²⁹⁹ This is a statement and symbol of the unity of Anishinaabe peoples that serves as the pictograph for the ANGA. For a description of its elements, please see: Anishinabek Nation, “The Pictograph”, *Anishinabek Governance Agreement* (2020), online: < <https://www.governancevote.ca/the-pictograph/>>. Ratified constitutions including this statement are: *Anishinaabe Chi-Naaknigewin*, *Pic Mobert First Nation Chi-Naaknigewin*, and *Aamjiwnaang Chi’Naaknigewin*.

³⁰⁰ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* (August 11, 2018), online: < <https://www.cottfn.com/home/deshkan-ziibiing-chi-inaakonigewin-final-7-24-18-wo-crop-marks/>>.

³⁰¹ The *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* was translated into Anishinaabemowin by an Elder in a more northern community on Ontario. This appears to be the reason that the document is written in a slightly different dialect than that of the community. (For example, the document includes references to “Anishinaabemwin” rather than “Anishinaabemowin”.) This point was explained to me during my time working with the COTTFN Community Justice Department.

³⁰² The inclusion of Anishinaabemowin terms for concepts such as “natural law”, which have alternate meanings in Western traditions, was a recommendation of John Borrows upon review of a draft of the constitution. The community opted to produce an Anishinaabemowin-first constitutional document as well as a list of terms and definitions. See: John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution*, *supra* note 7 at 6.

³⁰³ None of the draft constitutional documents considered as part of the review conducted for this study includes Anishinaabemowin translations, though the language is regularly listed as an official language of the drafting First Nations. For examples, see: Dokis First Nation, *Dokis First Nation Constitution*. (Draft, 2011) at art 4(c), online: < <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbmxb2tpc2NvbnN0aXR1dGlvbmNvbW1pdHRlZXxneDo1NGE4NjczNDZMmNiMDg3>>; Sheshegwaning First Nation, *Sheshegwaning First Nation Kchi-Naaknigewin* (Draft, February 20, 2016) at arts 4, 5, online: < <http://www.sheshegwaning.org/kchi-naaknigewin.asp>>.

second-, and third-generation rights. First-generation rights (“political, legal, property, and conscience”) are common elements of democratic constitutions.³⁰⁴ Of the ten ratified Anishinaabe constitutions I studied, four had enumerated individual rights,³⁰⁵ one references members’ entitlement to the rights and freedoms provided by the *Canadian Charter of Rights and Freedoms* instead of enumerating rights, and five (including the general constitution of the Anishinabek Nation) exclude direct mention of individual rights.³⁰⁶ The right to learn and speak Anishinaabemowin is an enumerated individual right contained in three of the four constitutions that contain such enumerations.³⁰⁷ The right to live in a manner in keeping with one’s Indigenous traditions³⁰⁸ and to freely practice one’s spirituality or religion³⁰⁹ also take the role of highly cultural enumerated rights.

Each of the ratified Anishinaabe constitutions that contain enumerated individual rights include rights that are otherwise commonplace in democratic constitutions. Rights of political participation are the apparent focus of the constitutional drafters, with reference to rights to

³⁰⁴ Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 129.

³⁰⁵ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 10; Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin* (June 14, 2014) at art 13, online: <<https://wiikwemkoong.ca/wp-content/uploads/2019/08/Gchi-Naaknigewin.pdf>>; Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin* (March 15, 2015) at art 19, online: <https://www.mississauga.com/uploads/1/0/2/6/102634872/misswezahging_constitution_2.pdf>; Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin* (June 24, 2015) at art 6.2, online: <https://atikamekshenganishnawbek.ca/wp-content/uploads/2020/01/Atikameksheng-GChi-Naaknigewin-Constitution_Ratified-July-24-2015.pdf>.

³⁰⁶ Those excluding direct mention of individual rights are the *Anishinaabe Chi-Naaknigewin*, *Beausoleil First Nation Constitution for Education*, *Nipissing Gichi-Naaknigewin*, and *Biigtigong Nishnaabeg Gchi-Naaknigewin*. While the comparison is beyond the scope of this paper, it is notable that this is a stark contrast with the constitutional documents of West Coast Indigenous nations studied by Christopher Alcantara and Greg Whitfield, for whom 12 of 14 contained enumerated individual rights. Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 129.

³⁰⁷ The exception being *Wiikwemkoong Gchi-Naaknigewin*.

³⁰⁸ This right is enumerated in the same three constitutions that list the right to language learning. Again, *Wiikwemkoong Gchi-Naaknigewin* is the exception.

³⁰⁹ This enumerated right echoes Western constitutional tradition and is present in all four ratified constitutions containing enumerated individual rights. The right to practice one’s Aboriginal or Treaty rights is also notably present. *Supra* note 305.

“participate in the public decision-making processes”³¹⁰ and participate in the selection of the leadership³¹¹ of each First Nation. These rights are expressed in largely uniform language.³¹² The freedom of non-political speech is a rarity, only held as an individual right in the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*,³¹³ which notably reproduces other rights and freedoms comparable to those found in the *Canadian Charter of Rights and Freedoms*, such as the freedom of peaceful assembly³¹⁴ or the freedom of association.³¹⁵ Though not always stated in the constitutions reviewed, the absence of these rights and freedoms, which we expect in a modern democratic constitution, might be the result of an assumed or stated reliance on the applicability of the *Canadian Charter of Rights and Freedoms*.³¹⁶

Equal access to services and provisions, what Alcantara and Whitfield call second-generation rights, are a notable feature in modern Anishinaabe constitutions. Each of the four ratified constitutions containing enumerated rights contain such provisions. The language

³¹⁰ Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 13.1.2; Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 19(f); Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 10.2(f), and; Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 6.2(f).

³¹¹ Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 13.1.1; Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *ibid* at art 19(e); Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 10.2(e), and; Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 6.2(e).

³¹² This is an observation also made by Christopher Alcantara and Greg Whitfield in their review of West Coast Indigenous constitutions. Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 29.

³¹³ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 10.2(h).

³¹⁴ *Ibid* at article 10.2(i).

³¹⁵ *Ibid* at article 10.2(j).

³¹⁶ The *Pic Mobert First Nation Chi-Naaknigewin* does not include enumerated individual rights but does reference the entitlement of all members to the rights and freedoms guaranteed in the *Canadian Charter of Rights and Freedoms*. See *Pic Mobert First Nation, Pic Mobert First Nation Chi-Naaknigewin* (2016) at art 16, online: https://d51c508b-a25b-43c8-a115-4ec6e8c2ae31.filesusr.com/ugd/d8bed7_3f8b736972654a0da4984daa35c6cfca.pdf>. Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* asserts that every citizen/member has the right to equally participate as Citizens of Canada and Ontario, consistent with the Canadian Constitution (*supra* note 300 at art 11.4). Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin* asserts the same (*supra* note 305 at art 4.5), and; Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 19.

expressing these rights varies a little more than expression of political rights, with phrases such as that in the *Wiikwemkoong Gchi-Naaknigewin*, which provides for the “right to apply for programs and services” and to be “served by the administration, boards, committees, and other entities... in a manner that is free from discrimination or arbitrary decision...”³¹⁷ Others use the language of “fair and equal” access to programs and services.³¹⁸ Thus, the language used guarantees access, but does not specify services or guarantee an adequate standard for those services.³¹⁹

Alcantara and Whitfield observe that third-generation rights, which include rights to a healthy environment or commitments to an improved economy, tend to be less common in non-Indigenous democratic constitutions than they are in Indigenous constitutions.³²⁰ This is demonstrable in modern democratic Anishinaabe constitutions in Ontario. For example, three of the four ratified constitutions containing enumerated rights include the right to practice one’s Aboriginal and treaty rights to harvest the gifts provided by the Creator in a “sustainable manner”.³²¹ More general calls are made in constitutions without enumerated rights, such as in the *Nipissing Gichi-Naaknigewin*, for conduct according to “principles of sustainability and preservation of natural resources for generations.”³²² Two constitutions make explicit that economic development is a priority of the ratifying First Nations, calling for a balance between

³¹⁷ *Wiikwemkoong Unceded Territory, Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 13.1.4.

³¹⁸ Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 19(g); Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 6.2(g).

³¹⁹ This observation has also been made by Christopher Alcantara and Greg Whitfield. See Christopher Alcantara and Greg Whitfield in their review of West Coast Indigenous constitutions. Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 129.

³²⁰ *Ibid* at 130.

³²¹ Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 19(a); Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 6.2(a); Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 10.2(a).

³²² Nipissing First Nation, *Nipissing Gichi-Naaknigewin*, *supra* note 296 at art 18.1(c).

sustainable natural practices and “interests of pursuing economic advancement”³²³ or to maintain a “sustainable economy”.³²⁴ The presence of these components more commonly in Anishinaabe constitutions rather than democratic constitutions, generally, is logical in a context where First Nations economic growth has been hindered by the state.

The responsibilities of citizenship or membership are fairly consistent in both ratified and draft constitutional documents. Rather than place strict constraints on the behaviour of individuals (or, more broadly, the community), responsibilities are framed as guidance.³²⁵ Unlike enumerated individual rights, found in only four of ten ratified constitutions, responsibilities are more broadly distributed with declarations of a commitment to protecting an Anishinaabe way of life and stewardship over the land, waters, and resources. Individuals are not held to specific standards of conduct but rather find themselves within broader directions to the community. These directions can appear strict, but leave room for broad interpretation and generally lack references to sanctions. For example, in the *Wiikwemkoong Gchi-Naaknigewin*, direction is given that the community “shall honour and abide by our Anishinabeadziwin through the values of our Seven Grandfather teachings...”³²⁶ The use of the word *shall* indicates a required action, but the requirement made is aspirational and contains no specific enforcement power.³²⁷

Definitions of citizenship, categorized by Donald Lutz as a foundational component of the cultural element of constitutions, are included in a handful of Anishinaabe constitutions. More specifically, it is the right of First Nations to define their own citizenship or membership

³²³ *Ibid.*

³²⁴ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at preamble.

³²⁵ This is an observation that overlaps Christopher Alcantara and Greg Whitfield’s study of West Coast Indigenous constitutions. See: “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 131.

³²⁶ *Wiikwemkoong Unceded Territory, Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 1.3.

³²⁷ Articles and enforcement relative to this discussion are included in the third and final constitutional element: justice.

that is asserted in constitutional documents. Only four of nine constitutions³²⁸ ratified by First Nations communities contain pointed assertions of the right of the community to define its own citizenry or membership.³²⁹ Matters of citizenship are contained within statements on jurisdiction³³⁰ or may be more distinctly directed toward processes for the determination of citizenship. For example, legislative authority to both define and determine Atikameksheng Anishnawbek *Debendaagziwaad*³³¹ is asserted in the *Atikameksheng Anishnawbek Gchi-Naaknigewin*.³³² The *Nipissing Gichi-Naaknigewin*, using the same Anishinaabemowin terminology, asserts the “exclusive jurisdiction” of the First Nation to “make laws for determining *Debendaagziwaad*.”³³³ The use of the term *Debendaagziwaad* is significant; the communities describing themselves in Anishinaabemowin take control of the term and definition from the hands of the state. Belonging becomes more than ‘citizenship’ or ‘membership’ as Eurocentric minds might interpret it. The interpretation of the entity over which the community asserts jurisdiction becomes the authority of the community itself.³³⁴

A high level of cultural expression in modern Anishinaabe constitutions can be found in declarations of Anishinaabe culture, connection with lands and waters, guiding principles of life, and citizenship itself. This goes beyond the use of Anishinaabemowin terms. The *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, for example, includes the following as equal

³²⁸ The tenth ratified constitution is the *Anishinaabe Chi-Naaknigewin*, which references organizational membership rules for First Nations. References to citizen definitions are applicable only to community constitutions.

³²⁹ One draft constitution asserts the right of the First Nation to “determine who our citizens are” as part of the reproduction of the Declaration of the Anishinabek Nation. See the Magnetawan First Nation, *Magnetawan First Nation Gchi-Naaknigewin*, *supra* note 214 at preamble.

³³⁰ For an example, see Pic River First Nation, *Büigtigong Nishnaabeg Gchi-Naaknigewin*, *supra* note 297 at art 16.

³³¹ “*Debendaagziwaad*” is defined in the *Atikameksheng Anishnawbek Gchi-Naaknigewin* as referring to “the people of the Atikameksheng Anishnawbek. Those people who are recognized as “those who belong” and are registered with the Atikameksheng Anishnawbek.” See: Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at “Definitions”.

³³² Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *ibid* at art 18.1(b).

³³³ Nipissing First Nation, *Nipissing Gichi-Naaknigewin*, *supra* note 296 at art 9.1.

³³⁴ John Borrows recommends the use of Anishinaabemowin for significant terms as an interpretive advantage. See: John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution*, *supra* note 7 at 6.

citizens before the law: “fish, rocks, plants, flyers, crawlers and four-legged beings”.³³⁵ The *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* is the only constitutional document in my study, ratified or in draft format, that defines non-human citizens of the community. This is an explicit recognition of significant relationships between the community and its ecology and implies the existence of reciprocal responsibilities between humans and non-human entities.³³⁶ To include non-human citizens, “equal before and under the law, without discrimination or prejudice” contrasts with the state’s legal prioritization of humans and aligns with Anishinaabe values to acknowledge all living things as “worthy of respect, honour and dignity.”³³⁷ This stewardship relationship is an integral part of Anishinaabe law.³³⁸

The enjoyment and protection of Anishinaabe culture is an expressed value or responsibility in all of the 15 constitutional documents studied. A communal commitment to the continuance of Anishinaabe culture can be found both within constitutional preambles and articles. Though the language in these constitutions varies with reference to future generations, it generally echoes that found in the *Anishinaabe Chi-Naaknigewin*, which asserts the right to enact laws “in order to protect and preserve Anishinaabe culture, languages, customs, traditions, and practices for the betterment of the Anishinabek.”³³⁹ Variations include: a statement on the encouragement and practice of traditions and the traditional way of life,³⁴⁰ a commitment to

³³⁵ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 10.4.

³³⁶ As Zoe Todd writes of her own experience, “[i]n my life, I have been bound to fish. Fish have been my teachers...” Zoe Todd, *supra* note 165 at 105. See Chapter 3.3 of this thesis for a more detailed description of non-human kinship.

³³⁷ John Borrows recommends the use of Anishinaabemowin for significant terms as an interpretive advantage. See: John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution*, *supra* note 7 at 19.

³³⁸ *Ibid.*

³³⁹ Anishinabek Nation, *Anishinaabe Chi-Naaknigewin*, *supra* note 295 at art 5.1. Similar language can be found in the Nipissing First Nation, *Nipissing Gichi-Naaknigewin*, *supra* note 296 at art 20.1 and in Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316 at art 7.

³⁴⁰ Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 art 2.2.

“honour and abide by our *Anishinabeaadziwin*”;³⁴¹ a protected right to living in a manner in keeping with tradition,³⁴² and an affirmation that the constitutional document is “consistent with the values, principles and spiritual beliefs upon which our lives are based.”³⁴³ A stated commitment to *mino-bimaadiziwin* (“to live, to teach, and to embrace Anishinaabemwin and Anishinaabe *aadzowin*”)³⁴⁴ falls within the same category.

The Second Element: Power

Power, the second element of a constitution in Donald Lutz’ framework, relies on culture in coherent constitutions. Such a constitution identifies a supreme power and distributes that power among organizing institutions. Modern Anishinaabe constitutions in Ontario meet this specification by Lutz. In my review, I found two categories of power within the surveyed constitutions: inward-looking sources of power and outward-looking sources of power. Within the inward-looking category are inherent rights, sometimes with reference to spiritually granted rights. The outward-looking category includes treaties, the Canadian Constitution, and the *United Nations Declaration on the Rights of Indigenous Peoples*.³⁴⁵ Most modern Anishinaabe constitutions contain references to both categories of power.

Inward-looking sources of power are the express sources of power in modern Anishinaabe constitutions.³⁴⁶ This is perhaps unsurprising in light of the strong emphasis they

³⁴¹ *Anishinabeaadziwin* is the Anishinaabe way of living. See Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 1.3. (Italicization added)

³⁴² Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 19(d).

³⁴³ Pic River First Nation, *Biigtigong Nishnaabeg Gchi-Naaknigewin*, *supra* note 297 at preamble.

³⁴⁴ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 2.2.

³⁴⁵ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UNGAOR (2007), online: <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>. [UNDRIP]

³⁴⁶ It is on these sources of power that articles of enforcement, included in the discussion of rights and defining citizenship above, are founded.

place on cultural practice and protection. Every ratified or draft document that I reviewed contains reference to inherent rights. It is common for First Nations to assert their inherent rights on the basis of having lived on and governed over their lands, “as [their] ancestors have since time immemorial.”³⁴⁷ Statements that the First Nation has never “ceded, surrendered, or in any way extinguished”³⁴⁸ their rights and interest in the land and waters³⁴⁹ of their territories serves as a foundation for the inherent right of self-government.³⁵⁰ This is a source of power that appeals to logic in Indigenous or Western legal traditions, as will be discussed in relation to the Canadian constitution as an external source of power.

The inclusion of spiritually-granted inherent rights to self-governance and connections with one’s ecology is a remarkable feature of modern Anishinaabe constitutions. The Creator is a source of rights and responsibilities in traditional law. Eight of ten ratified constitutional documents reviewed refer to the Creator or spiritually granted rights. All five draft constitutions contain such references.³⁵¹ Some overlap between length of the relationship between the people and the ecology and the spiritual realm is provided because it is the Creator who placed people on the land to uphold their “sacred obligations”.³⁵² The Creator is credited as the source of the

³⁴⁷ Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at preamble. The *Aamjiwnaang Chi’Naaknigewin* provides an example of this statement as an article. See: Aamjiwnaang First Nation, *Aamjiwnaang Chi’Naaknigewin* (October 27, 2016), at art 2, online: < <http://www.aamjiwnaang.ca/wp-content/uploads/2016/09/Aamjiwnaang-Chi-Naaknigewin.pdf>>.

³⁴⁸ Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316 at preamble.

³⁴⁹ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* contains a strong provision in this regard, in which the inherent right and title to all waterways defined in the story of Anishinaabe migration, found in the preamble, is asserted. *Supra* note 300 article 10.5.

³⁵⁰ This right can be referred to either as “self-government” (see: Aamjiwnaang First Nation, *Aamjiwnaang Chi’Naaknigewin*, *supra* note 347 at art 2) or the right to “govern ourselves” (see: Beausoleil First Nation, *Beausoleil First Nation Constitution for Education* (undated) at preamble, online:< <http://www.chimnissing.ca/governance/AES-CONSTITUTION.pdf>>.

³⁵¹ In each set (ratified documents and drafted documents) there is one constitution that contains reference to the Creator only in the reproduction of *Ngo Dwe Waangizid Anishinaabe* (“One Anishinaabe Family”). They are the *Aamjiwnaang Chi’Naaknigewin* and the *Dokis First Nation Draft Constitution*, respectively.

³⁵² Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at preamble.

inherent right of self-governance, having “bestowed the right to enact any laws necessary in order to protect and preserve Anishinaabe culture, languages, customs, traditions, and practices for the betterment of the Anishinabek.”³⁵³ This right is sometimes framed as a responsibility, as in the *Pic Mobert First Nation Chi-Naaknigewin*, in which the community is stated to be “responsible for preserving and protecting our inherent rights, our values, our language and our culture for future generations.”³⁵⁴ In other documents, such as in the *Nipissing Gichi-Naaknigewin*, the Creator is credited as the source of the right to self-government as well as all natural gifts, for which the Anishinaabe are responsible for caring and harvesting only in a sustainable manner.³⁵⁵ Each person is tasked with stewardship of the land, part of “sacred trust” from the Creator to protect the natural environment.³⁵⁶

We now turn to outward-looking sources of power referenced in modern Anishinaabe constitutions. Unlike inward-looking sources of power, outward-looking sources of power sit (mostly) beyond the boundaries of traditional Anishinaabe law, with the exception being treaties. Outward-looking sources of power (treaties, the Canadian Constitution, and the *United Nations Declaration on the Rights of Indigenous Peoples*) operate alongside and are dependent upon inward-looking sources of power. The ability to enter treaties, to gain recognition of Aboriginal title and rights under section 35(1) of the *Canadian Constitution Act, 1982*,³⁵⁷ and to fall within the purview of the UNDRIP all depend upon the pre-existence of an Anishinaabe legal order. Eight of ten ratified constitutions I reviewed contain references to outward-looking sources of power. Of those eight, six constitutional documents refer to treaties as both continuing legal

³⁵³ Anishinabek Nation, *Anishinaabe Chi-Naaknigewin*, *supra* note 295 at art 5.1.

³⁵⁴ Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316 at preamble.

³⁵⁵ Nipissing First Nation, *Nipissing Gichi-Naaknigewin*, *supra* note 296 at preamble, art 7.1(d).

³⁵⁶ Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 1.1(a), 3.3.

³⁵⁷ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

commitments and sources of rights.³⁵⁸ Treaty rights are referred to in general terms with little exception.³⁵⁹

References to the Canadian Constitution often coincide with treaty references due to the recognition of treaty rights under section 35(1) of the *Constitution Act, 1982*. Seven of ten ratified Anishinaabe constitutions reviewed contain references to the Canadian Constitution.³⁶⁰ These references are most commonly made either in reference to the applicability of the *Canadian Charter of Rights and Freedoms* or in reference to Aboriginal title and rights in their preambles. The language tends to be a brief affirmation of existing Aboriginal title, rights, and treaty rights under section 35(1) of the *Constitution Act, 1982*.³⁶¹ As an outward-looking source of power, the Canadian Constitution can be better understood as an affirmation of rights otherwise grounded in inward-looking sources of power, rather than as a source of Indigenous authority.

The *United Nations Declaration on the Rights of Indigenous Peoples* serves a similar function as an outward-looking source of power that affirms Anishinaabe rights of self-governance rather than establish them. Articles 3 and 4 of the UNDRIP are cited as particularly important in this regard: Article 3 as recognition of the right of Indigenous peoples to self-

³⁵⁸ Anishinabek Nation, *Anishinaabe Chi-Naaknigewin*, *supra* note 295 at preamble; Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 3.2.1; Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316 at preamble; Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at preamble; Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at preamble.

³⁵⁹ The *Nipissing Gichi-Naaknigewin* is the only constitutional document that references a specific treaty, that between the nation and the Crown (the Robinson Huron Treaty of 1850). See Nipissing First Nation, *Nipissing Gichi-Naaknigewin*, *supra* note 296 at preamble.

³⁶⁰ For the purpose of this review, documents that reference the *Canadian Charter of Rights and Freedoms* but do not reference the Canadian Constitution by any other means are considered as affirming the Canadian Constitution as an outward-looking source of power. The same inclusion has been made for documents that generally reference treaty rights without identifying specific treaties.

³⁶¹ Examples can be found in the Preambles to Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305, and Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316.

determination and by virtue of that right to freely determine their political status and pursue economic, social, and cultural development; Article 4 as recognition of the right of Indigenous peoples, by virtue of their right to self-determination, to autonomy or self-government in matters that relate to their internal or local affairs, as well as means of financing those affairs.³⁶² The UNDRIP recognizes the inherent rights of Indigenous peoples, based in their own legal traditions.

References to the UNDRIP are pointed toward the state and the ratifying First Nation. First Nations are careful to note that Canada joined other countries in April of 2016 to finally support the UNDRIP and reaffirm the commitment of the state to promote and protect the rights of Indigenous peoples.³⁶³ By noting Canada's commitment to the UNDRIP in their constitutional documents, Anishinaabe communities are calling on Canada to uphold the document at home and abroad. These constitutional documents are an assertion of inherent rights that demand a changing relationship between Canada and the state. References to the authority of UNDRIP are also, however, a declaration by ratifying First Nations that they will uphold the rights of their citizens/members. This declaration is made in specific terms by Deshkan Ziibiing (Chippewas of the Thames First Nation) in the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* at Article 10.3: "Deshkan Ziibiing Anishinaabe Aki will adhere to the United Nations Declaration on the Rights of Indigenous Peoples and uphold the rights its citizens possess against their own and

³⁶² For examples, see the preambles of: Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316 at and Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305. UNDRIP, *supra* note 345 at arts 3,4.

³⁶³ *Ibid.*

other governments.”³⁶⁴ Such a declaration takes ownership of ethical governance, toward an international “gold standard” of rights recognition.³⁶⁵

Assertions of exclusive jurisdiction and inherent rights to self-governance ensure that inward-looking sources of power take precedence over outward-looking sources of power. It is worth emphasizing once more that outward-looking sources of power are only cited as supportive of inherent, inward-looking Anishinaabe rights.³⁶⁶ While all modern Anishinaabe constitutions assert the right of the ratifying First Nation to enact laws concerning its community and territory, four ratified constitutions assert exclusive law-making authority. This is not to suggest that those First Nations that did not include specific provisions on exclusive law-making powers did not intend the implication.³⁶⁷ The language used to express the primacy of inward-looking sources of power varies, and includes references to “exclusive jurisdiction”³⁶⁸ and “sole jurisdiction”.³⁶⁹ An even stronger assertion of jurisdiction is made in the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* at Article 11.3: “Deshkan Ziibiing Anishinaabe Ai Chi-Inaakonigewin is paramount over the Canadian Constitution and the Constitutions of other

³⁶⁴ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 10.3.

³⁶⁵ John Borrows refers to the UNDRIP as such and recommends a reference to the document as made in the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*. See John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution*, *supra* note 7 at 19.

³⁶⁶ Consider the closing remark of the preamble to the *Pic Mobert First Nation Chi-Naaknigewin*: “Therefore, through this Chi-Naakinigewin, we the people of the Pic Mobert First Nation exercise our responsibilities that have been bestowed to us by the Creator and which are recognized and affirmed in section 35(1) of the *Constitution Act, 1982*, and which are further affirmed and strengthened in accordance with the United Nations *Declaration on the Rights of Indigenous Peoples* in 2007 in order to, among other things, govern ourselves in a way which is reflective of our Anishinaabe culture and which will ultimately help to improve the quality of life for the people of the Pic Mobert First Nation.” Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316.

³⁶⁷ The implication may be drawn from a wholistic reading of documents that reference inherent rights to self-government or sovereignty. The overarching Anishinabek Nation constitutional document serves as an example. See: Anishinabek Nation, *Anishinaabe Chi-Naaknigewin*, *supra* note 295 at preamble.

³⁶⁸ Nipissing First Nation, *Nipissing Gichi-Naaknigewin*, *supra* note 296 at art 9.1.

³⁶⁹ Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 3.1.

sovereign Nations.”³⁷⁰ Though there is no mechanism nor venue suggested for the enforcement of this asserted paramountcy, this is a strong statement on a commitment to community development and adherence to laws that align with their own constitution.

The inclusion of a list of law-making powers is a fairly common element in the constitutional documents reviewed. These powers are expressed with some variation, but there is a general consensus among ratifying and drafting First Nations on their jurisdiction over: citizen health and well-being, education, the protection of human rights, definitions of community citizenship and associated rights, the protection of lands and waters, culture (including language and traditions), economic development, and social development (including child and family services).³⁷¹ While some of the enumerated areas of jurisdiction align with the authority given to Band Councils to enact by-laws under the *Indian Act*,³⁷² others are broader reaching. For example, jurisdiction is claimed over criminal law and procedure, taxation, natural resource activities (fishing, forestry, and mining), and family matters (including marriage, divorce, adoption, and child custody) in article 16 of the *Biigtigong Nishnaabeg Gchi-Naaknigewin*.³⁷³ Similar jurisdictional assertions are made in article 5 of the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* over taxation, wills and estates, matrimonial real property, child welfare, and regulation and licensing of businesses and corporations.³⁷⁴ The jurisdiction expressed overlaps

³⁷⁰ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 11.3.

³⁷¹ Five ratified constitutions and one draft constitution include jurisdictional lists. See: Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 5; Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 11; Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 8, and; Pic River First Nation, *Biigtigong Nishnaabeg Gchi-Naaknigewin*, *supra* note 297 at art 16.

³⁷² Some examples are traffic regulation, health regulation (to some extent), and reserve residency. See *Indian Act*, RSC, 1985, c. I-5, s.81(1).

³⁷³ Pic River First Nation, *Biigtigong Nishnaabeg Gchi-Naaknigewin*, *supra* note 297 at art 16.

³⁷⁴ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 5.

that of the provincial and federal governments of Canada. The inclusion of enumerated law-making powers appears to be meant, then, to claim jurisdiction over areas that have otherwise been taken from the control of First Nations' Band Councils by the *Indian Act*.

As well as law-making power, the assertion of jurisdictional rights often includes territorial rights with the “environmental protection of natural resources”³⁷⁵ as a focal point. Such assertions of jurisdiction reflect the legal relationship between Anishinaabe communities and ecology as discussed above.³⁷⁶ The *Pic Mobert First Nation Chi-Naaknigewin* provides an example of this overlap at article 8: “The Pic Mobert First Nation has the inherent right bestowed by the creator to enact any laws it believes are necessary to protect and preserve our Anishinaabe culture, to protect our lands and waters, our language, customs, traditions and practices...”³⁷⁷ Here, territorial jurisdiction is implied in a manner that evidences the entwined nature of Anishinaabe life and territory. The protection of each of these things is the protection of all of these things. Of course, more explicit assertions of territorial jurisdiction are made in ratified constitutions, such as in the *Aamjiwnaang Chi'Naaknigewin*, which asserts at article 3: “Our jurisdiction covers our Bendaazig³⁷⁸ and our traditional territory.”³⁷⁹ The responsibility of a community to the “protection and management of the land, air, water, lake beds, and all resources”³⁸⁰ is related to the assertion of some communities of “inherent rights and title to all water ways”³⁸¹ and lands of their historical territories.

³⁷⁵ Nipissing First Nation, *Nipissing Gichi-Naaknigewin*, *supra* note 296 at art 17.1.

³⁷⁶ See the section on the first constitutional element: culture.

³⁷⁷ Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316 at art 8.

³⁷⁸ This term is used in this document to refer to a citizen or community member.

³⁷⁹ Aamjiwnaang First Nation, *Aamjiwnaang Chi'Naaknigewin*, *supra* note 347 at art 3.

³⁸⁰ Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 4.1.1.1(a).

³⁸¹ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 10.5.

Sources of power recognized in modern Anishinaabe constitutions are diffuse and hierarchical, with local law given primacy over the law of other Indigenous nations or the state. This is observable in the relationship between Anishinaabe constitutions themselves as well as in the relationship with the Crown as asserted by Anishinaabe First Nations. The umbrella Anishinaabe constitutional document, the *Anishinaabe Chi-Naaknigewin*, contains the recognition that, while “Anishinabek Nation laws and Anishinabek First Nation laws are equally operative,” it is the local law of individual First Nations that “will take precedence” in cases of difference or conflict.³⁸² At least two ratified constitutions express a relational recognition of the primacy of their own constitutional law over the constitutional law of either the Anishinabek Nation³⁸³ or other nations (including Canada), generally.³⁸⁴

It is significant to note, as Alcantara and Whitfield do, that “most sovereign states do not cast self-determination and territorial control in the language of constitutional rights because they believe there are no overarching or external entities that can legally interfere in their affairs.”³⁸⁵ References to inward-looking and outward-looking sources of power can be interpreted as responses to external threats, “namely the Canadian federal, provincial, and territorial governments.”³⁸⁶ References to the length of territorial occupation and inherent rights granted by the Creator stand in opposition to trends of land dispossession in Canadian law. The strongest statement on external threats to the jurisdiction of the First Nation are found in the *Deshkan*

³⁸² Anishinabek Nation, *Anishinaabe Chi-Naaknigewin*, *supra* note 295 at art 8.1.

³⁸³ The Pic Moberg First Nation, *Pic Moberg First Nation Chi-Naaknigewin* includes an assertion of the primacy of its own law over the Anishinabek Nation constitution to “the extent of the conflict”, *supra* note 316 at art 19.1.

³⁸⁴ A declaration is made in the Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* that the local constitutional document is paramount over all other constitutional documents, including that of Canada. There is no specification that this should be the case only in the case of direct conflict. *Supra* note 300 at art 11.3.

³⁸⁵ Christopher Alcantara and Greg Whitfield, “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 130.

³⁸⁶ *Ibid.*

Ziibiing Anishinaabe Aki Chi-Inaakonigewin. In the preamble of this document, attempts at colonization are formally recognized as violations: “Whereas, we, the Peoples of Deshkan Ziibing Anishinaabe Aki recognize the injustices flowing from Canada’s attempts to colonize our lands and people, we wish to forge healthy, respectful relationships with other Nations, Canada, Ontario, and local governments.”³⁸⁷ With the recognition of external threats comes a statement of expected relations between the First Nation and Canada moving forward.

Turning the eye inward, every modern Anishinaabe constitutional document provides implicit visions of democracy in its focus on the composition of local government and the relationship between its government and citizens.³⁸⁸ For example, article 7.4 of the *Atikameksheng Anishnawbek Gchi-Naaknigewin* states that the elected government has the “moral and legal responsibility to conduct their affairs in office” in a matter that respects the best interests of the community, promotes peace and unity, is cooperative and honest, upholds the constitution, protects treaty and inherent rights, provides for accountable decision-making, and provides fair and equitable access to public programming.³⁸⁹ The *Misswezahging Debaakinagewin Naakinagewin* and *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* require the same governmental promotion of peace and accountable decision making while also emphasizing that the local government must strive to respect, honour, and abide by the seven grandfather teachings.³⁹⁰ These statements are representative of the general articulation of

³⁸⁷ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at preamble.

³⁸⁸ Christopher Alcantara and Greg Whitfield make the same observation in their review of West Coast Indigenous constitutions. , “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 132.

³⁸⁹ Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 7.4.

³⁹⁰ Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 10; Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 4.5. As previously noted, the seven grandfather teachings will receive more attention in the discussion below, concerning justice as the third constitutional element.

expectations of governance in the constitutional documents reviewed. Included are both references to specifically Anishinaabe legal expectations (adherence to the seven grandfather teachings) and general democratic values such as transparency, accountability, and effectiveness.³⁹¹

Articles on the financial administration of First Nations are commonly included in modern Anishinaabe constitutions.³⁹² These articles reflect the same democratic values expressed within those determining local governance, though the specifics of financial administration may vary. Prized are the requirement that those charged with administering the First Nation's funds be prudent, transparent, and accountable, and that they preserve and protect community funds while making effective and efficient use of those resources.³⁹³ Where communities do not express these democratic values in association with their financial administration, they imply them with terms that require community access and participation in budget hearings, as well as audits.³⁹⁴

Constitutional amendment processes are the final component of the element of power in modern Anishinaabe constitutions and are included in every constitutional document reviewed in this study.³⁹⁵ Amendment requirements vary across the documents, but all require a majority of some kind to validate a constitutional amendment. The basis of the required majority is either the total number of eligible voters in the First Nation or the total number of cast/accepted ballots.

³⁹¹ Again, this observation echoes the findings of Alcantara and Whitfield. *Supra* note 14 at 132.

³⁹² Of the ratified First Nations Anishinaabe constitutions, only three lack specific principles on financial administration: *Misswezahging Debaakinagewin Naakinagewin*, *Wiikwemkoong Gchi-Naaknigewin*, and *Biigtigong Nishnaabeg Gchi-Naaknigewin*.

³⁹³ These examples are drawn from Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 7.

³⁹⁴ This example is drawn from Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316 at art 13.

³⁹⁵ The general Anishinabek Nation constitution is excluded from this point of review because amendment procedures concern member First Nations and not citizens.

Only three First Nations with ratified constitutions base the required majority vote on the total number of eligible voters, with the *Biigtigong Nishnaabeg Gchi-Naaknigewin*³⁹⁶ and *Aamjiwnaang Chi'Naaknigewin*,³⁹⁷ requiring affirmative votes by more than fifty percent of eligible voters, and the *Deshkan Zibiing Anishinaabe Aki Chi-Inaakonigewin*,³⁹⁸ requiring a supermajority of at least sixty percent of the total community membership. These are relatively high standards.

Most of the constitutional documents however can be amended at a lower standard of voter assent. For example, both the *Misswezahging Debaakinagewin Naakinagewin*³⁹⁹ and *Beausoleil First Nation Constitution for Education*⁴⁰⁰ may be amended if at least fifty-one percent of thirty percent of the eligible voters of the First Nations cast affirmative ballots. Amendments to the *Wiikwemkoong Gchi-Naaknigewin* require an unusual mix of a more than seventy-five percent majority of the elected Council and more than fifty-one percent of accepted ballots,⁴⁰¹ thereby ensuring that both elected government and a majority of membership approve any constitutional changes. The amendment procedure of the *Pic Moberg First Nation Chi-Naaknigewin* is also unique, in that it requires any request for a constitutional amendment made to elected Council to be signed by at least twenty-five percent of eligible voters and a majority of greater than fifty-one percent of twenty-five percent of eligible voters to vote in favour of the amendment. The *Nipissing Gchi-Naaknigewin* may be amended with the affirmative vote of sixty percent of ballots cast, with no imposed ballot minimum.⁴⁰² Amendments to the

³⁹⁶ Pic River First Nation, *Biigtigong Nishnaabeg Gchi-Naaknigewin*, *supra* note 297 at art 18(d).

³⁹⁷ Aamjiwnaang First Nation, *Aamjiwnaang Chi'Naaknigewin*, *supra* note 347 at art 35.

³⁹⁸ Chippewas of the Thames First Nation, *Deshkan Zibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 12.

³⁹⁹ Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 22.

⁴⁰⁰ Beausoleil First Nation, *Beausoleil First Nation Constitution for Education*, *supra* note 350 at art 30(d).

⁴⁰¹ Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 18.

⁴⁰² Nipissing First Nation, *Nipissing Gchi-Naaknigewin*, *supra* note 296 at art 24.3(4).

Atikameksheng Anishnawbek Gchi-Naaknigewin only require a majority of those who attended the vote to vote favourably, with no imposed minimum.⁴⁰³ The variation in the required voting thresholds might reflect the level of community participation in past community votes. Lowering voting thresholds, on the other hand, might have the effect of ensuring the continued growth and function of the First Nation and act as a defense against apathy or lack of participation.

Dissenters need only vote in the negative. Despite a broad variation in the required level of assent to constitutional amendments, most processes include a comparable series of referendums and votes within a standard ninety-day period. The creation of time constraints ensures that elected government moves forward with the amendment process and that community concerns regarding amendments are heard without delay.

Power, as a constitutional element, extends to the distribution of authority within governance. As John Borrows is careful to note, Anishinaabe people did not traditionally allow their leaders to “accumulate and consolidate power.”⁴⁰⁴ Although Anishinaabe leadership values changed over time,⁴⁰⁵ there was a long-term emphasis on the decentralization of power through situation-based leadership.⁴⁰⁶ The protection of individual liberties and the ability of individuals to contribute their voices are parts of the Anishinaabe constitutional tradition. This is reflected in

⁴⁰³ Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 14.7.

⁴⁰⁴ Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University, 1991) at 31-40, as cited in John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution*, *supra* note 7 at 25.

⁴⁰⁵ Anton Truer, *The Assassination of Hole in the Date* (St. Paul, MN: Borealis Books, 2011) at 9-34, as cited in John Borrows, *ibid*. Borrows notes that any past move toward the centralization of power is obscured by the state’s attempts to colonize Anishinaabe governance. There is no evidence that the Anishinaabeg moved toward centralized power of their own accord (see John Borrows, *ibid* at 26).

⁴⁰⁶ John Borrows, *ibid*.

the constitutions' references to clan-governance,⁴⁰⁷ restorative justice,⁴⁰⁸ and the enumerated rights of individuals.⁴⁰⁹

The Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewini*, is an example of an effort to decentralize local government. A draft document of the constitution, reviewed by Borrows, referred to five branches of government. Three of those branches (the General Assembly, Elders, and Youth Council) served only to advise the elected council in its role. Borrows noted in his review of the document that, while the advisory role of these councils would help the council to make decisions in a more democratic way, their lack of accountability, authority also serves to centralize power in a manner that is arguably contrary to the decentralization of power that is characteristic of traditional Anishinaabeg governance as well as typical contemporary constitutional governance.⁴¹⁰ The ratified document instead establishes three branches of government: council (the elected governing body), administration (a body that administers day-to-day operations in accordance with the law and policy of the community), and a justice system (an “independent branch” of the government that will have the “power of judicial review and the jurisdiction to interpret and construe the laws, ordinances, regulations and actions of the other branches of government” under the constitution).⁴¹¹ An additional article asserts that no branch of the local government may exercise any power allocated by the constitution to another branch of government, except as specifically authorized by the constitution itself.⁴¹²

⁴⁰⁷ See note 416.

⁴⁰⁸ See note 418.

⁴⁰⁹ See note 305.

⁴¹⁰ John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution*, *supra* note 7 at 23. Borrows notes that constitutional governance typically involves the decentralization of powers to prevent one person or body from oppressing other individuals and institutions.

⁴¹¹ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 4.2.

⁴¹² *Ibid* at art 4.3.

Government structure is typically defined in these documents as more centralized than traditional forms of Anishinaabeg governance (as clan-based and situational), but checks on government are included as an important component of the balance of power. A common form of a check on government, familiar in Western administrative law, is the establishment of systems that provide for the appeal and review of administrative decisions.⁴¹³ Three of the ten ratified constitutions and one draft constitution contain articles referring to the establishment of processes for the review of administrative decisions or laws.⁴¹⁴ The inclusion of administrative law within these constitutions is evidence of an effort within those communities to balance the powers of elected government, whatever its form, with individual liberties and collective responsibilities, and to ensure that government operates according to the ideals espoused within each constitution. The inclusion of these articles is an example of striving toward responsible, transparent relations.

The Third Element: Justice

Justice is the third and final element of a constitution as outlined by Donald Lutz. Justice is that which binds together culture and power. The purpose of a constitution is, after all, to marry power with justice.⁴¹⁵ Modern Anishinaabe constitutions reviewed in this study, whether ratified or draft, serve the purpose of asserting the right of Anishinaabe communities to enact and oversee the enforcement of laws that the community considers consistent with their traditional

⁴¹³ As in the Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *ibid* at art 8.2.

⁴¹⁴ The ratified constitutions are: Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *ibid* at art 8.2; Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at arts 5.5-5.9 and; Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, note 305 at arts 8, 9. The draft constitutions is: Sheshegwaning First Nation, *Sheshegwaning First Nation Kchi-Naaknigewin*, *supra* note 303 at art 12.

⁴¹⁵ Donald Lutz, *supra* note 283 at 18.

values, as well as those contemporary values expressed within their constitutions. The goal is to govern Anishinaabe lives and futures in Anishinaabe ways. As illustrated in their constitutional documents, communities are pursuing a number of means of achieving that goal.

One means of pursuing the goal of governing Anishinaabe lives and futures in Anishinaabe ways is the expressed recognition of the continued legitimacy of clan governance. Traditional clan governance is recognized in two ratified constitutions (including the overarching Anishinabek Nation constitution) and two drafted constitutions. In the *Anishinaabe Chi-Naaknigewin*, clan governance is presented as the required foundation of the Anishinabek Nation government: “The Anishinabek Nation Government *shall* be based on the Dodemaag system of governance.”⁴¹⁶ Clan governance is not, however, presented as the mandatory form of organization in all of the community documents. More fluidity is provided in the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*: “Deshkan Ziibiing Anishinaabe Aki *recognizes* the Dodemaag system of governance in its administration of government and the administration of a justice system.”⁴¹⁷ Recognition of clan governance is given, but adherence is not mandatory. Clan governance, rather than a requirement, has a place within the governance and administration of justice.

The draft constitution of Munsee-Delaware Nation, which borders Deshkan Ziibiing (Chippewas of the Thames First Nation), elaborates on the role of traditional dispute resolution practices in the community: “The Munsee-Delaware Nation may establish any traditional or restorative justice processes, tribunals, panels, services or courts it deems necessary to provide for the effective administration and enforcement of its laws and to provide mechanisms for the

⁴¹⁶ Anishinabek Nation, *Anishinaabe Chi-Naaknigewin*, *supra* note 295 at art 4.1. (Emphasis added)

⁴¹⁷ Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 4.1. (Emphasis added)

appeal of any of its decisions or laws.”⁴¹⁸ The wording does not suggest exactly what those processes, panels, services or courts may look like, but rather creates a broad category that allows the community to implement administrative and justice systems as desired.⁴¹⁹ Maintaining recognition of traditional means of governance and justice without confining those systems creates space for the revitalization of those systems in a context where they have suffered the harms of attempts to colonize Indigenous peoples.

Traditional Anishinaabe guiding principles are an expression of law in modern constitutions. Commitments to the seven grandfather⁴²⁰ teachings (Zaagidiwin-Love, Debwewin-Truth, Mnaadendmowin-Respect, Nbwaakaawin-Wisdom, Dbaadendiziwin-Humility, Gwekwaadziwin-Honesty, and Aakedhewin-Bravery)⁴²¹ are an expression of traditional law. These teachings, which John Borrows calls “among the most sacred laws and teachings we have”, are meant to animate Anishinaabe life and should lie at the heart of all action.⁴²² Elder Fred Kelly calls the seven grandfather teachings “the seven laws of creation”.⁴²³ Thus, they are intertwined with both the culture and power elements of modern Anishinaabe constitutions as guiding legal principles that are both embedded in distinctive Anishinaabe culture and one of the

⁴¹⁸ Munsee-Delaware First Nation, *Munsee-Delaware Nation Constitution* (Draft, 2016) at art 14.0, online: <<http://munseedelaware.squarespace.com/constitution/>>; Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin* includes the same statement, *supra* note 316 at art 14.0.

⁴¹⁹ The Munsee-Delaware Nation Constitution also includes a direction to protect and promote the cultural teachings and language of the Big House or Lunaape way of life. See Munsee-Delaware First Nation, *Munsee-Delaware Nation Constitution*, *ibid* at art 3(a).

⁴²⁰ These teachings can also be referred to as the seven grandfather and grandmother teachings. I have chosen the above version because it is the one regularly used in the constitutional documents under review.

⁴²¹ These translations are drawn from Aamjiwnaang First Nation, *Aamjiwnaang Chi'Naaknigewin*, *supra* note 347 at art 4.

⁴²² John Borrows, “Seven Generations, Seven Teachings: Ending the Indian Act”, Report Prepared for the National Centre for First Nations Governance (May, 2008) at 11, online: <<http://www.fngovernance.org/resources_docs/7_Generations_7_Teachings.pdf>>.

⁴²³ *Restoule v Canada (Attorney General)*, 2018 ONSC 114, Transcript vol 21, examination-in-chief of elder Fred Kelly (Court File Nos: C-3512-14 & C-3512-14A) at 2916, as referenced in Aaron Mills (Waabishki Ma'iingan), *Miinigowiziwin*, *supra* note 10 at 73.

roots of inherent Anishinaabe rights. The seven grandfather teachings are present in both the preambles and articles of the constitutional documents reviewed for this study. Seven of the ten ratified constitutions that I reviewed contain explicit references to the seven grandfather teachings. Though the language varies, a tone of deep respect for the teachings is constant. Rather than a certain achievement, these teachings are presented as something which community members (and members of local leadership or government) should strive to embody.

Only four of the ten ratified constitutions⁴²⁴ (and one of five draft constitutions)⁴²⁵ reviewed contain reference to mechanisms of enforcement. Mechanisms to ensure compliance are not attached to specifically required conduct, but are rather generally included. Enforcement provisions can be written in general, future-focused terms, such as in the *Misswezahging Debaakinagewin Naakinagewin* (“Misswezahging laws will include enforcement provisions appropriate to the subject matter and the nature of the law”)⁴²⁶ or in terms so specific as to note the extent of enforcement action, as in article 6.1 of the *Wiikwemkoong Gchi-Naaknigewin*: “Wiikwemkoong laws will include enforcement provisions appropriate to the subject matter and nature of the law and may include sanctions such as banishment from Wiikwemkoong Unceded Territory. The Wiikwemkoong Gchi-Naakingewin will allow enforcement of these laws by Police and by Chief and Council.”⁴²⁷ Though still future-focused, the inclusion of a significant sanction and bodies with jurisdiction of enforcement bares sharper teeth with reference to a traditional form of punishment.

⁴²⁴ Atikameksheng Anishnawbek First Nation, *Atikameksheng Anishnawbek Gchi-Naaknigewin*, *supra* note 305 at art 11; Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 22; Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 6; Nipissing First Nation, *Nipissing Gchi-Naaknigewin*, *supra* note 296 at art 23.1.

⁴²⁵ Magnetawan First Nation, *Magnetawan First Nation Gchi-Naaknigewin*, *supra* note 214 at art 12.

⁴²⁶ Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 21.

⁴²⁷ Wiikwemkoong Unceded Territory, *Wiikwemkoong Gchi-Naaknigewin*, *supra* note 305 at art 6.1.

The *Nipissing Gichi-Naaknigewin* and *Magnetawan First Nation Gchi-Naaknigewin*, a ratified constitution and draft constitutional document, respectively, frame enforcement as a matter of ensuring “compliance” and extend their ambit to non-citizens. Both documents assert that both citizens and “all others who enter the traditional lands” of the community “shall be obligated to abide by and respect” the laws of the community, which emanate from the constitutional documents themselves.⁴²⁸ Though no specific enforcement mechanism is mentioned, the enforcement of law under these constitutions is an asserted right of the First Nations.⁴²⁹ The right of enforcement is explicitly territorial as it applies to non-citizens visiting the territory, who are expected to adhere to local law. Mechanisms of enforcement, whether they are included in articles on ‘enforcement’ or ‘compliance’ remain open to traditional sanctions as well as Westernized forms of punishment. It is for governance institutions as defined in the constitution to determine what is appropriate to each law it enacts.

Limits placed on government are those expected in a democratic constitution. The majority of constitutional documents contain a provision on reasonable limits of governmental power. The language varies only slightly, with the underlying statement being that the constitutional document guarantees the rights and freedoms set out within it, subject only to reasonable limits. Though bodies with the authority to determine those limits are unnamed, the standard of reasonableness is founded on the collective interests of the ratifying First Nation and must be demonstrably justified.⁴³⁰ On this point, modern Anishinaabe constitutions align with

⁴²⁸ These documents use the same language on this point. The assertions are mirrored. See: Magnetawan First Nation, *Magnetawan First Nation Gchi-Naaknigewin*, *supra* note 214 at art 12.2; Nipissing First Nation, *Nipissing Gichi-Naaknigewin*, *supra* note 296 at art 23.1.

⁴²⁹ Magnetawan First Nation, *Magnetawan First Nation Gchi-Naaknigewin*, *supra* note 214 at arts 12.2, 12.3; Nipissing First Nation, *Nipissing Gichi-Naaknigewin*, *ibid* at arts 23.2, 23.3.

⁴³⁰ For examples, see: Mississauga First Nation, *Misswezahging Debaakinagewin Naakinagewin*, *supra* note 305 at art 20; Pic Mobert First Nation, *Pic Mobert First Nation Chi-Naaknigewin*, *supra* note 316 at art 15; Chippewas of the Thames First Nation, *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, *supra* note 300 at art 10.6.

the *Canadian Charter of Rights and Freedoms*, which includes the permissible limitation of rights if demonstrably justifiable. The prioritization of the interests of the collective when necessary aligns with traditional law.

There is a need for respected, impartial, and independent bodies to adjudicate constitutional issues within the framework of modern Anishinaabe constitutions. Though a number of the constitutions identified contain references to traditional values as a form of accountability to one's relations and communities, matters of accountability are lacking in these documents. It is inevitable that constitutional issues and tensions will arise in communities with ratified constitutions that identify various constitutional players (such as council, administrators, citizens), and that some means of managing those disputes fairly and independently must be devised. This is a point that John Borrows presses in his review of an earlier draft of the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin*, in which he points to the independence of a dispute resolution body as “the hallmark of modern constitutional practice”.⁴³¹

In his recommendations to Chippewas of the Thames First Nation, Borrows advocates for the establishment of an independent “dispute resolution court” that consists of an elected Chief Judge. Additional recommendations for the court incorporate term limits for judges, citizenship requirements, the maintenance of Elders Council consent for Associate Judge appointments, and the requirement that all judges “have knowledge of Anishinaabe culture, traditions, and general history, and must uphold the provisions of this Constitution in discharging their duties.”⁴³² This recommendation, rather than rely on the implicit accountability of one's commitments to traditional culture and values, makes a demonstration of those values within a constitutionally defined independent body mandatory. This gestures to the importance of the inclusion of such

⁴³¹ John Borrows, *Review: Chippewas of the Thames First Nation Draft Constitution*, *supra* note 7 at 24.

⁴³² *Ibid* at 24-25.

independent bodies to ensure accountability, not only as a constitutional principle, but in response to the changing dynamics of governance. As John Borrows explains, Anishinaabe people traditionally did not allow for leaders to accumulate and consolidate power.⁴³³ Leadership was most often contingent on the situation or task at hand, rather than the particular person, and was thus often transient.⁴³⁴ A traditional Anishinaabe emphasis on individual autonomy and decentralization of power⁴³⁵ suggests the importance of the inclusion of respected, independent adjudicative bodies within a modern Anishinaabe constitutional framework.⁴³⁶

The reasons for a relative absence of impartial, independent adjudicative bodies within modern Anishinaabe constitutions in Ontario are not addressed in the documents themselves. One can, however, imagine any number of reasons for this phenomenon. One reason could be that communities drafting and ratifying constitutions are already subject to the accountability measures placed on band councils and did not at the time feel it a necessary inclusion. Another possibility is that some communities may lack the resources and manpower to implement these structures in the near future. A third reason may lie in the distrust of some for structures that resemble Canadian institutions because justice initiatives that attempt to combine two different worldviews have often been seen to fail.⁴³⁷ Whatever the reasons, the absence of such constitutionally significant bodies is an important critique of modern Anishinaabe

⁴³³ *Ibid* at 25.

⁴³⁴ *Ibid*.

⁴³⁵ *Ibid*.

⁴³⁶ Chippewas of the Thames First Nation did not adopt the specific articles recommended by John Borrows, but rather appealed to them in only in spirit. Article 4.2(c) of the *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* asserts that a justice system will act as an “independent branch of *Deshkan Ziibiing Anishinaabe Aki* government and shall have the power of judicial review and the jurisdiction to interpret and construe the laws, ordinances, regulations and actions of the other branches of government under *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* in accordance with the rule of law and Anishinaabe tradition.” No specific body to enforce accountability is defined, but the accountability of the government to members of the community in the exercise of its jurisdiction or authority is emphasized again in article 5.8. See *supra* note 300.

⁴³⁷ Tuma Young makes this point regarding attempted justice initiatives that have failed in the wake of the report of the Marshall Inquiry due to the coercive nature of Canadian law, which cannot easily coexist alongside L’nuwey law. See Tuma Young, *supra* note 61.

constitutions.⁴³⁸ Nevertheless, it is important also to recall that these documents, even once ratified, are a beginning point in constitutional self-government within the identified communities and their development will continue into the future.

4.5 Conclusion

Constitutionalism is an Anishinaabe legal tradition based on action. As Aaron Mills explains, these actions are the embodiment of belonging to one another.⁴³⁹ This belonging is manifested in the written constitutions reviewed in this study in the form of origins, governance, citizenship, and expectations of conduct. They combine traditional Anishinaabe law and culture with modern democratic values (and constitutional structures) while maintaining traditional Anishinaabe legal values of collective cooperation and accountability. Individual rights, prioritized as part of the collective in Anishinaabe law and generally in Canadian law, must yield to the preservation of the collective.

The Anishinaabe constitutions I have studied contain more similarities than they do differences. The majority of these documents make explicit reference to the inherent responsibility of Anishinaabe people to preserve and protect their language, culture, law, and ecology for future generations. The right of each First Nation to define its own citizenship is a key element, while individual rights receive somewhat less attention in view of compared to the general rights of the Anishinaabe collective. Governance is expected across communities to respect and adhere to traditional Anishinaabe ways and legal principles while also acting transparently and with accountability (whether in general governance or financial

⁴³⁸ A critique that requires in-community research, and which I look forward to addressing in more detail in my PhD research.

⁴³⁹ Aaron Mills (Waabishki Ma'iingan), *supra* note 10 at 28.

administration). Similarly, these documents contain a comparable absence of constitutionally entrenched bodies to ensure governmental accountability – a point that may or may not be developed in the future. Most constitutional documents contain some assertion of inherent rights based on inward-looking power, while also recognizing outward-looking power. There is not a single modern Anishinaabe constitutional document in this study that attributes its right to self-determination or self-governance to Canadian law, but rather refer to Canadian law (among other sources) as recognizing those rights. Traditional Anishinaabe law is regularly expressed in the form of principles, rights, and responsibilities. These constitutional documents are optimistic and forward-looking as they seek greater control over local affairs and to improve the quality of life for citizens/members.

CHAPTER 5: CONCLUSION

“I am not so concerned with how we dismantle the master's house, that is, which sets of theories we use to critique colonialism; but I am very concerned with how we (re)build our own house, or our own houses. I have spent enough time taking down the master's house, and now I want most of my energy to go into visioning and building our new house.”

*- Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence*, 2011*⁴⁴⁰

Whatever the current state of scholarly discussions on the compatibility of Indigenous law with state law, or on the commensurability/incommensurability of Indigenous law, the practical reality of the Anishinaabe constitutions deserves to be addressed. Though Aaron Mills favours a theoretical approach and chooses not to engage with modern Anishinaabe constitutions, he does make a statement that I believe frames the sentiment behind the production of these documents: “[t]he unchanging constitution serves as the boundary for perpetual change in law: a people can both *change* and *stay* the same.”⁴⁴¹ The intent behind these modern constitutions, when read as a whole, can be interpreted as an effort to revitalize Anishinaabe law and to nourish Anishinaabe life as communities look to the future. By ratifying these documents, communities are meeting members, some of whom may well not have access to traditional forms of the distribution of law, in the present with an accessible resource that communicates fundamental principles of the ways that people within the community belong to one another and their territories, without constraining those ideals to specific, long descriptions. The production

⁴⁴⁰ Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring Publishing, 2011) at 32.

⁴⁴¹ Aaron Mills (Waabishki Ma'iingan), *Miinigowiziwin*, *supra* note 10 at 25.

and ratification of these documents also suggests that some communities are willing to attempt to translate their law – at least to an extent that might provide for the basic understanding and respect of outsiders while the law operates in more nuanced ways in communities themselves.

These constitutions are legal instruments, produced and ratified by Anishinaabe communities in Ontario, that seek to address the contemporary issues faced by First Nations communities. The form and, to some extent, content of Anishinaabe constitutions suggests that they are designed to be recognizable as constitutional documents to Western outsiders. And, yet, they are distinctly Anishinaabe legal instruments. They address these issues from a foundation of traditional Anishinaabe law and aim to nourish Anishinaabe lifeways while contending with continued impact of the settler-colonial state on local life. They rely primarily on the authority derived from Anishinaabe as part of an effort to restore Anishinaabeg jurisdiction, while looking toward the past, present, and future. Part of a tradition of Anishinaabe constitutionalism, they are a demonstration of how people belong to one another and to their ecologies.

At this time, the ten ratified constitutions I have studied are in operation outside of a signed agreement between the Anishinabek Nation and Canada. That means that, for an indeterminate time, these documents are free-standing constitutions that make claims to self-determination and self-governance that overlap with jurisdiction claimed by the Canadian federal government and the provincial government of Ontario. First Nations members of the Anishinabek Nation are free to vote ‘no’ to the *ANGA*, in which case they will remain members of the organization (unless they withdraw), but not as governing representatives of that organization. One First Nation with a ratified document examined in this study, Deshkan Ziibiing (Chippewas of the Thames First Nation), has abandoned that vote altogether, on the grounds that the proposed umbrella governance agreement is a replication of settler governance

structures and that the community has already sufficiently outlined its distinctly Anishinaabe future in its own constitution.⁴⁴²

The continued operation of these constitutions outside of a ratified self-government agreement⁴⁴³ is only one example of difference between the constitutions studied by Alcantara and Whitfield and those I have reviewed.⁴⁴⁴ Despite making similar observations as Alcantara and Whitfield regarding the uniformity of language on some points, I found that the documents containing examples of uniform language were in smaller numbers and varied on different points. For example, the constitutions that contain references to the rights of individuals to access programs and services offered by the ratifying First Nation are not necessarily the same constitutions as those requiring the establishment of administrative review processes so as to balance the power of elected government with individual liberties and constitutional values, such as transparency. Like Alcantara and Whitfield in their review of West Coast Indigenous constitutions, I observed a high degree of “first-generation” rights, including rights such as those to security of the person or freedom of speech. However, where Alcantara and Whitfield recorded large majorities for many of their points of analysis, I found smaller majorities or minorities on each point within my own analysis. Despite the guidance provided by the

⁴⁴² In a significant move, the COTTEN Council rescinded a Band Council Resolution that authorized a vote on the ratification of the ANGA. This decision was made in response to strong community opposition to the self-governance agreement over the course of the last quarter of 2019. In a letter to the community, Chief Jacqueline French wrote: “Although the Anishinabek Governance Agreement isn’t in COTTEN’s best interest, it did spark a discussion about governance and the work that must be done internally. As a Nation, we are already ahead of the curve by having sanctioned our Chi-Inaakonigewin.” This is a statement on the community’s decision to rely on its constitution for its future, rather than the self-governance agreement for which the Anishinabek Nation encouraged constitutional ratification. This is only one example of such a turn. Because the vote has been indefinitely postponed, only time will tell how other Anishinaabe First Nations with ratified constitutions respond to the self-governance agreement. See *supra* note 267.

⁴⁴³ Including the potential for some communities to maintain their constitution without voting on the ANGA, as in the case of Chippewas of the Thames First Nation.

⁴⁴⁴ This difference bears qualification. The constitutions reviewed by Alcantara and Whitfield were, like those I have reviewed, drafted and ratified prior to the signing of final governance agreements. The difference may stand so far as some of the Anishinaabe communities that I have identified with ratified constitutions are, at this time, refusing to take part in the governance agreement vote altogether.

Anishinabek Nation to its First Nations members (and despite their consistent form), Anishinaabe constitutions within Ontario appear to contain more variations than those in the West Coast study by Alcantara and Whitfield.⁴⁴⁵ In the case of both of our studies, the constitutions reviewed do, to some extent, “reflect some of the core constitutional principles of Canada” while also attempting to “give meaningful life to distinctive local political cultures.”⁴⁴⁶

The purpose of this thesis is to shine an empirical light on modern Anishinaabe constitutions in the context of the movement toward the revitalization of Indigenous law. Though some variation exists in the sample of ratified and drafted constitutional documents reviewed for this study, clearly manifest is the commitment to honouring Anishinaabe life. Ratifying First Nations assert, without exception, their inherent right to self-government or self-determination, with reference to Canadian law (or other legal sources, such as the UNDRIP) only as a source of recognition for those inherent rights. In keeping with the discussion of Anishinaabe constitutionalism in the introduction of this thesis, modern Anishinaabe constitutions look toward empowering a way of living under the guidance of Anishinaabe law in a modern context. They seek to limit the powers of elected government and emphasize the rights and responsibilities of individuals, subject only to the best interests of the collective. A handful of the constitutions make a concerted effort to balance the power of elected government with individual liberties. As documents produced in a cooperative effort toward the completion of the Anishinabek Nation Governance Agreement, modern Anishinaabe constitutions seek renewed nation-to-nation relationships with Canada. In doing so, they prioritize local constitutional law at

⁴⁴⁵ This thesis does not contain a direct constitutional comparison between the Anishinaabe constitutions from First Nations within Ontario and other Indigenous nations elsewhere. Such a comparison is outside the scope of my research, but would constitute an interesting future analysis.

⁴⁴⁶ Alcantara and Whitfield. See: “Aboriginal Self-Government through Constitutional Design”, *supra* note 14 at 126.

the First Nations level before the constitution of the Anishinabek Nation and, in at least one case, the Canadian Constitution.⁴⁴⁷

The stakes are high for Anishinaabe communities in Ontario that move forward with the ratification of the *ANGA* and those who choose not to participate. As noted in Chapter 4.3, the as yet unratified umbrella agreement is far from a radical change in governance. The restriction of First Nations governance under Canadian law, its containment of governance to liberal values, and the prevalence of Canadian law as the state interprets it makes the constitutions reviewed in this thesis appear in some respects aspirational. For those communities who enter into the Anishinabek umbrella agreement, their law will undoubtedly be made subject to the dominance of state law, which shall prevail to the extent of any conflict.⁴⁴⁸ For those communities who choose not to participate in the vote, the matter of membership within the Anishinabek Nation remains a key factor. To decline to vote or ratify a local constitution does not exempt a member community from the *ANGA*, but rather makes them non-governing members. Should the *ANGA* be ratified, the fate of communities who might choose either to act contrary to the direction of the Anishinabek Nation or to withdraw their membership is even less clear.⁴⁴⁹ Within communities, however, the stakes are no less high. These constitutions are a representation of the desire of Anishinaabe First Nations communities to revitalize Anishinaabe law and nourish Anishinaabe life.

Modern Anishinaabe constitutions are a written continuance of traditional Anishinaabe constitutionalism. They present a coherent expression of culture, power, and justice that,

⁴⁴⁷ The *Deshkan Ziibiing Anishinaabe Aki Chi-Inaakonigewin* is the only constitutional document within the studied sample set that contains a claim of paramouncy over the Canadian Constitution.

⁴⁴⁸ Brock Pitawanakwat, *supra* note 268.

⁴⁴⁹ Certainly, the asymmetrical power balance between First Nations and the provincial and federal governments of Canada place them at a disadvantage in negotiations. See Michael Coyle, "Negotiating Indigenous Peoples' Exit from Colonialism: The Case for an Integrative Approach" (2014) 27:1 CJLJ 283.

according to Lutz, make constitutions worthy of their name.⁴⁵⁰ These documents, a marriage of traditional Anishinaabe culture and law with modern democratic principles, are a representation of the current reality of Anishinaabe communities as they look to the future. Scholars might debate whether these constitutional documents are based on tools used originally to build the Master's house and, if so, whether such tools can also be used to dismantle that same house. While this is a theoretically interesting discussion, these modern constitutions will remain a practical reality of Anishinaabe communities acting in the interest of self-empowerment. As Leanne Simpson writes in the above epigraph, what matters most is that action is taken now to build a new house for Indigenous peoples recognizing that we are in a context where the Canadian state will also endure.

⁴⁵⁰ Donald Lutz, *supra* note 283 at 18.

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