Aki, Anishinaabek, kaye tahsh Crown

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> Direct action should take its shape and purposes from the intrinsic goodness embedded in indigenous epistemologies.[1]

> *With your feet in the air and your head on the ground*
> *Try this trick and spin it, yeah*[2]

The contemporary Canadian legal framework for Crown-indigenous dialogue regarding natural resource development on ancestral indigenous territory retains its colonial identity and therefore functions to the detriment of indigenous communities, who have always had their own legal orders. Anishinaabe concepts of relation to land and its natural resources cannot be articulated through or validated within a legal framework that practices colonialism: contemporary Anishinaabe and Canadian legal orders remain largely irreconcilable. Anishinaabe actors, subject to competing legal orders, are sometimes forced to violate one of them, resulting in direct action initiatives. The conflict of laws dynamic therefore promotes expensive and sometimes violent flashpoint encounters.

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1 Robert Lovelace, "Prologue. Notes from Prison: Protecting Algonquin Lands from Uranium Mining" in Julian Agyeman, Peter Cole, Randolph Haluz-Delay & Pat O'Riley, eds, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) ix at xvii [Lovelace, *Notes from Prison*].

2 The Pixies, "Where is My Mind?," Record: *Surfer Rosa* (Boston: 4AD, 1988).

In theorizing the Anishinaabe law relevant to natural resource development, this paper engages the causes and results of these conflict of laws scenarios and seeks to allow for new options for natural resource development, both peaceful and respectful, on Anishinaabe territory. Ultimately, resolution of these conflicts turns on what sort of a relationship Canada wants with indigenous communities. In the context of natural resource development, if we all want to get along, external recognition of and engagement with indigenous law is a necessity.

I Introduction: Reader, Writer and Relations

Boozhoo, nindinawemaaganagtok.	Hello, all my relations.
Wapshkaa Ma'iingan nidizhinikaaz.	I'm White Wolf.
Makwa nidoodem.	I belong to the Bear Clan.
Kajijing nidoonjii.	I'm from Couchiching First Nation.

Traditional Anishinaabek[3] habitually begin a conversation with someone new by situating themselves with an introduction like this one. Although it's brief, through its four simple sentences I've shared a significant amount of information with you. My greeting indicates the terms upon which I'm prepared to meet you (with welcoming invitation) and that I recognize our connection to one another. I've identified my spirit name, my clan and the land from which I come—all of which might bear great significance for you if you were from an Anishinaabe, Cree or Haudenosaunee tradition.[4] From an Anishinaabe

3 The Anishinaabek, to whom I belong, traditionally inhabited the lands surrounding the Great Lakes and share common cultural practices and beliefs, a common Origin Story (with regional variations) and a common language, *Anishinaabemowin*, part of the Algonkian language family. Peoples who identify as Anishinaabe include the Ojibwe, Potawatomi, Odawa, Algonquin, Nipissing, Saulteaux, Mississauga and Chippewa peoples. Their communities span Québec, Ontario, Michigan, Wisconsin, Minnesota, Manitoba, and to a lesser extent, Saskatchewan, Alberta, British Columbia, Kansas, Montana and North Dakota. We've always been the Anishinaabek, although regrettably early British colonial officials referred to us as Ojibbeway or Chippewa (spellings vary for either term), which is how British and other colonial histories have generally identified us. I'd like to add for those unfamiliar with indigenous cultures that this paper presents *an* and not *the* Anishinaabe perspective. Like any other people, we're intellectually diverse and that diversity is reflected in our viewpoints and cultural understandings. My traditional teachings mostly come from the Rainy Lake area of Turtle Island, Northwestern Ontario, described by early Europeans as the Boundary Waters region. Beginning with my First Nation and running all the way to the Lake of the Woods, Rainy River is all that separates Ontario from Minnesota.

"Anishinaabe" is the singular and adjectival referent for our identity; "Anishinaabek," the plural. However throughout this paper the spelling of terms presented in *Anishinaabemowin* and quoted from secondary sources often varies from the spelling I use. This isn't an oversight; rather *Anishinaabemowin* doesn't have a stable English orthography and it has four regional dialects.

4 These different peoples recognize each other's clan affiliations.

perspective, this information is important because essential to Anishinaabe world view is an omnipresent and robust notion of *relation*—a foundational understanding that all things exist contingently, in respect of one another.[5] In providing you access to this information about my identity, I thus present opportunities for you to relate to me.

Similarly, indigenous authors often begin a text by situating themselves with respect to their subject matter—a practice which can be frustrating for many non-indigenous readers, for whom such discussions can appear disconnected and rambling. However many indigenous authors write on the understanding that their text will be incomprehensible unless the reader can establish a relationship between it and its author. In non-indigenous academic writing (not only in Canada, but within Western academies generally) its most often thought unimportant for an author to introduce herself, or even that she should avoid doing so. The notion of relationship between reader and speaker is of greatly diminished importance; it's as if the author's words exist as self-producing sentences, a strong manifestation of Western thought's putatively objective and much idealized *in-itself*.[6] Authors writing within this literary tradition often do so in strained, formalized English admitting of no contractions and presented only ever from the voice of the third person. In sharp contrast to indigenous writing practices, there's actually a conscious effort to *remove* any indication of the speaker's identity from his or her text. Lawrence W. Gross, Anishinaabe, began one paper by tackling the issue directly:

> One of the challenges I have faced as an academic is the manner in which I should discuss my own people, the Anishinaabe. The fact of the matter is, I am an Anishinaabe academic, no matter how much the term sounds like an oxymoron. I feel I can no longer use the third person in discussing my people. The experience of the Anishinaabe is my experience, and there is no way I can imply the Anishinaabe are the "Other." As such, I have made a conscious decision to use the first person in my academic writing on the Anishinaabe. In one respect, I am surrendering the scholarly goal of supposed objectivity for a larger goal—academic precision.[7]

Imagine a world view in which truth value is derivative of lived experience, not a claimed association with objectivity. For many indigenous peoples, including the Anishinaabek, truth is generally considered a relative concept. It isn't that there's no such thing as truth, but rather that truth can never be

5 Within Anishinaabe thought there's no analogue to the *in-itself* identity so essential to Western thought, which has been variously construed, for instance, as pure forms (Plato), noumena (Kant), or in more contemporary Canadian thought, "nature" as opposed to "nurture."

6 There are many exceptions. I'm suggesting that this proposition constitutes a cultural norm, not a categorical truth.

7 Lawrence W. Gross, "The Comic Vision of Anishinaabe Culture and Religion" (2002) 26(3) American Indian Quarterly 436.

understood outside of agency—it inheres always in a given perspective, based in lived and inherited experience.[8]

What may seem like a strange beginning to this paper—introducing myself to you and explicitly discussing Anishinaabe notions of introduction—has been a deliberate strategy. In this paper I explore implications of the tremendous divergence between Anishinaabe and Canadian[9] perspectives specifically as they regard natural resource development on traditional Anishinaabe territory.[10] Fundamental to this discussion is an examination of how humans can and ought to *relate* to land under Anishinaabe and Canadian paradigms of thought. Given the relative dearth of publicly available information on Anishinaabe legal perspectives of land and the comparative wealth of information on Canadian understandings of the same, I focus on Anishinaabe legal perspectives. By supporting outsider understandings of Anishinaabe relations with land and the law that governs relationships with land, I aim to help demystify the flashpoint encounters between Anishinaabe communities and Crown or third-party actors (such as municipalities or for-profit resource development proponents) that manifest physically as direct action—protests, blockades and all manner of civil disobedience[11]—but ideo-

8 Regarding their work with the Anishinaabek of the Long Lake #58 Indian Reserve, Dr Leanne R. Simpson and Dr Paul Driben note that "[f]rom the elders' point of view, each person's perspective represented a version of the truth; we would need time together and apart to discover how best to amalgamate our individual contributions into a larger, collective truth" [Leanne Simpson & Paul Driben, "Learning to Understand the Environment from an Anishinaabe Point of View" (2000) 24(3) American Indian Culture and Research Journal 9].

9 Of course no homogenous Canadian perspective exists; claims to such a pan-Canadian understanding about land (or any other issue) are imaginary. Canada (mal)functions on the basis of an artificial and putatively shared understanding of Canadian law amongst all Canadians. However, it's well beyond the scope of this paper to challenge so foundational a fiction of Canadian legal and political identity.

10 The phrase "traditional [or ancestral] Anishinaabe territory" refers not to lands reserved for the Anishinaabek via s. 91(24) of Canada's *Constitution Act, 1867*, but rather to lands traditionally occupied by the Anishinaabek, which may or may not incorporate state-sanctioned Indian reserves. In virtually all cases in Canada, a people's traditional territory expands significantly beyond the borders of their reservation(s).

11 Considering only the last 25 years, Anishinaabe direct action has been engaged by, among others:
- the Teme-Augama Anishnabai (Temagami First Nation) in 1988 and 1989, regarding a forestry project;
- the Mitchinanibikok Inik (Algonquins of Barriere Lake) in 1988 and 1989, regarding forestry projects, and in 2008, regarding a trilateral co-management strategy not honoured by the government;
- the Chippewas of Nawash Unceded First Nation in1992 and 1993, regarding a housing development on a sacred burial ground;
- the Chippewas of Kettle and Stony Point First Nation in 1995 (the Ipperwash Crisis), regarding expropriation and failure to return of community land;
- the Constance Lake First Nation in 1997, regarding a mining project;
- the Aroland First Nation from 2001 to 2003, regarding a forestry project;
- the Asubpeeschoseewagong Netum Anishinaabek (Grassy Narrows First Nation) from 2002 to the present day, regarding a forestry project;

logically as a *conflict of laws*.[12] In many areas of central significance for the Anishinaabek, Anishinaabe law and Canadian law, although each is dynamic and constantly evolving,[13] have historically been and at present remain irreconcilable. An ideal case study for this claim is the mining conflict between

- the Kakinwawigak (Long Point First Nation) in 2004, regarding a forestry project;
- the Kitchenuhmaykoosib Inninuwug First Nation in 2006, regarding a mining project;
- the Shabot Obaadjiwan and Ardoch Algonquin First Nations in 2007, regarding a mining project;
- the Marten Falls and Webequie First Nations in 2010, regarding Ring of Fire mining projects;
- the Couchiching First Nation in 2010 regarding a right of way development and environmental contamination from a lumber mill.

12 This paper doesn't examine the contextual and historical factors contributing to Anishinaabe direct action initiatives regarding natural resource development on ancestral territory. For that discussion, see John Borrows, "Crown and Aboriginal Occupations of Land: A History & Comparison," A Report for the Ipperwash Commission of Inquiry (October 2005) [Borrows, *Occupations*]. However, to get a sense of the sort of natural resource struggles endured by some Anishinaabek before opting for a direct action initiative, the reader is directed to Christopher Vecsey, "Grassy Narrows Reserve: Mercury Pollution, Social Disruption, and Natural Resources: A Question of Autonomy" (1987) 11(4) American Indian Quarterly, 287-314. For a sense of what one of these actions was like from the inside, see Tony Hall, "Blockades and Bannock: Aboriginal Protests and Politics in Northern Ontario, 1980-1990" (1991) 7(2) Wíčazo Ša Review 58. This article offers unique insight into the frustration of the Anishinaabek of Long Lake Reserve #58 with their lack of voice in respect of forestry activities on their territory.

13 This is a critical point. Anishinaabe law, like Canadian law, is adaptive to contemporary realities. An adherence to tradition doesn't mean rejection of new ideas or of change (and for that matter, arguably the common law doctrine of precedent constitutes amongst the world's most dogmatic institutionalized adherences to legal tradition, strongly privileging certainty over adaptability). Much to the contrary, many elements of Anishinaabe world view are predicated upon unceasing, unalterable (albeit often cyclical) change. One Anishinaabe political territorial organization (PTO), the Grand Council of Treaty #3 (GCT3: described below), has said this of the matter:

> [O]ur ancestors provided for adaptation and as we move forward and remain true to our traditions, we will see the old become new again. This is not assimilation: it is reconciliation. We will then see the dynamic nature of our culture which has made the Anishinaabe so resilient and adaptable in the face of adversity since the beginning of time. In this way, we are also reviving our language and traditional roles as the basis for contemporary relationships. Our Elders hold this knowledge and we will involve them in confirming the spiritual orientation of traditional functions for use today [Grand Council Treaty #3, *Pazaga'owin—Reclaiming our Wings: Transition to Nationhood* at 12 (Grand Council, *Reclaiming Wings)*].

Approaching the same concern but from a different angle, Dr Borrows has stated:

> Ancient aboriginal traditions are only relevant if they have application in contemporary circumstances ... In order to make aboriginal traditions the living faith of their ancestors, these traditions need to be placed within their contemporary context. The preservation of traditions in some distant past and the failure to implement them in the present renders these traditions dead. They become a lifeless body of principle with no power to affect lives [John Borrows, "Stewardship and the First Nations Governance Act" (2003) 29 Queen's Law Journal at 112 [Borrows, *Stewardship*].

Expanding further on the distinction between principle and practice, Professor Borrows explains:

> Following ancient principles in contemporary life is not the same as returning to bygone practices. There can be a great difference between principles and practices ... Practices can change to meet shifting circumstances, while the principles guiding conduct can remain constant [*ibid*. at footnote 36.].

Kitchenuhmaykoosib Inninuwug (KI) First Nation,[14] Platinex Inc., and the Crown in right of Ontario. This conflict was recently resolved and the lands at issue withdrawn from staking and exploration, but only because Ontario decided to end it; not because any of the parties found a way to connect with one another to reconcile their differences.

I hope by explaining that in many of these situations the Anishinaabek are confronted not only with continued colonial injustice resulting from unresolved historic wrongs, but also with a genuine and ongoing conflict of laws, the approach of the Crown and of third-party proponents to natural resource development on ancestral Anishinaabe territory might begin to change.[15]

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14 An essential caveat: as an Oji-Cree (or Severn) community, the law of KI is a distinct subgroup of Anishinaabe law, which must be recognized in a paper examining Anishinaabe law more generally. Also, I can speak of KI only as an outsider. Nonetheless, KI remains a pertinent example of the contemporary incommensurability of Canadian and Anishinaabe law, because with one significant exception—the clan system—the Anishinaabe law examined in this paper holds true within the KI's sacred law, *Kanawayandan D'aaki* (explained in part in-text below). Therefore as I proceed in examining Anishinaabe law generally, I provide frequent examples and points of correspondence with KI law more particularly. Although the clan system (also discussed in more detail below) was once prominent at KI, Christianity's dominance in the community has eroded this system such that it's no longer a core aspect of KI law: "[a]s the clan system declined, the lines between different groups blurred" (Dianne Hiebert & Marj Heinrichs with Kitchenuhmaykoosib Inninuwug, *We Are One with the Land: A History of Kitchenuhmaykoosib Inninuwug* (Canada: Kitchenuhmaykoosib Inninuwug First Nation and Wasaya Airways LP: A Native Venture Partnership, 2007) at 23 [KI, *One with Land*]). This is the case in numerous Anishinaabe communities (and not always as a result of Christian imposition), although a revitalization movement of the clan system is underway. Other members of KI blame the erosion of the clan system not on missionization, but on externally imposed government. According to Frank Beardy, "[a]s soon as government system came in ... [the clan] system went out the window" (*ibid*. at 53).

15 Recent amendments to Ontario's *Mining Act* R.S.O. 1990, c. M.14, i.e., the *Mining Amendment Act*, 2009, S.O. 2009, c. 21 (Bill 173), stand to improve Anishinaabe-Crown relations. Although the proposed amendments make no reference to indigenous law, 14 provisions address issues specifically affecting First Nations. Section 2, the revised Purpose, now acknowledges that mineral staking and exploration must be consistent with s. 35 rights, including the duty to consult; s. 46 adds s. 86.1 to the existent *Mining Act*, stating that all leases granted under the *Act* (including those granted prior to these amendments) are limited by s. 35 protections for Aboriginal peoples; s. 78.2 requires that no person shall act on a mining claim, lease or license without submitting an exploration plan which accounts for Aboriginal consultation; finally, s. 170.1 allows for the creation of a dispute resolution mechanism with respect to Aboriginal or treaty rights (or assertions thereof) or consultation matters with Aboriginal peoples. However the details of the conflict-resolving apparatus are left entirely to the discretion of the Minister.

However another recent legislative development with respect to Anishinaabe territory is Bill 191, the *Far North Act*, which on September 23, 2010, passed its third reading in the Legislative Assembly of Ontario. Bill 191 has been unequivocally rejected by the Nishnawbe Aski Nation (NAN), a political territorial organization representing 49 Anishinaabek and Cree First Nations of the North, and by nearly every First Nation and municipality within the area designated under the Act for its overt colonialism. The Act gives the Minister of Natural Resources absolute discretion over the terms of reference and over final approval of a land use plan and requires that land use plans be developed pursuant to the Far North land use strategy; affected First Nations will therefore not be free to develop land use plans in accordance with their own ideas of relating to land or of land use.

Flashpoint encounters resulting from direct action initiatives aren't so much about the failure to recognize or adequately ensure enjoyment of s. 35 rights[16] as they are about sharply different legal orders imposing differing (and often conflicting) sets of obligations on the same group of people. The primary conflict resolution issue is therefore one of *jurisdiction*, not the status of existent indigenous constitutional rights.

Dr Kiera L. Ladner also argues that the primary conflict is jurisdictional, but that s. 35 provides adequate legal infrastructure to realize indigenous-Canadian jurisdictional reconciliation (not specifically regarding natural resource rights, but more broadly at the level of constitutions).[17] I'm not so optimistic, but state recognition of indigenous law outside of s. 35 doesn't lead to the legal apocalypse for settler populations that so many Canadians fear. The Anishinaabek, like other indigenous nations, have strong traditions of sharing, including jurisdiction. The most obvious example of this deep tradition is the *Dish with One Spoon Treaty* between the Anishinaabek and the Haudenosaunee, affirmed in June of 1700[18] and again shortly thereafter as part of the Great Peace of Montreal, in the summer of 1701.[19] Like so many nation to nation treaties, it was embodied as a wampum belt.[20] This Belt, one of the many exchanged at the Great Peace (which ended 50 years of war between

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The ongoing nature of these issues was recently underscored by Amnesty International in its *Report 2010*. The very first line under the "Indigenous Peoples rights" [sic] subheading of the Canada section states: "The authorities failed to ensure respect for Indigenous rights when issuing licences for mining, logging and petroleum and other resource extraction" [Amnesty International, 978-0-86210-455-9, *Amnesty International Report 2010: The State of the World's Human Rights*, online: Amnesty International <thereport.amnesty.org/en/download> 96].

16 Section 35(1) of the *Constitution Act, 1982*, provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

17 See Kiera Ladner, "(Re)creating Good Governance—Creating Honourable Governance: Renewing Indigenous Constitutional Orders" (Paper Presented at the Annual Conference of the Canadian Political Science Association, Ottawa, 27-29 May 2009) [unpublished] and Kiera Ladner, "Take 35: Reconciling Constitutional Orders" (Paper Presented at the 78th Annual Conference of the Canadian Political Science Association, York, 1–3 June 2006) [unpublished].

18 J.A. Brandao & William A. Starna, "The Treaties of 1701: A Triumph of Iroquois Diplomacy" (1996) 43(2) Ethnohistory at 217-218.

19 For a detailed history of the *Dish with One Spoon* through time, see Victor P. Lytwyn, "A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region" in David H. Pentland, ed., *Papers of the Twenty-Eighth Algonquian Conference* (Winnipeg: University of Manitoba, 1997) 210.

20 Wampum belts are white and purple beads woven together in rows to embody mutual understandings reached between nations. Traditionally the beads were painstakingly made from Quahog shells and were attached together with thin leather strips, sinew, or plant fibres. The iconography depicted on a wampum belt physically represents an agreement between peoples, often through metaphor. The Dish with One Spoon Wampum was presented on many occasions (see Lytwyn, *ibid*.). It depicts a circular bowl with one spoon. The bowl represents the recognition of common hunting grounds while the single spoon identifies the need to share it and its resources.

the Anishinaabek and the Haudenosaunee), represented an understanding of shared resources within mutually controlled territory.[21]

More recently, Robert Lovelace has stated that "although Shabot and Ardoch [i.e., Shabot Obaadjiwan and Ardoch Algonquin First Nations; both Anishinaabe] are politically separate, they represent a large interdependent and interrelated community with overlapping original jurisdictions covering three watersheds."[22] If Canada recognized the legitimate jurisdictional authority of Anishinaabe law, many Anishinaabek would be willing to see Canada as a community with which we are interdependent and even interrelated. After all, for many of us, many of our familial relations now spend much or most of their time in other (often urban) Canadian communities.

However in order to engage the question of competing jurisdictional authority, the reader must first develop at least a partial understanding of Anishinaabe world view and how it manifests in relations with land and in relevant Anishinaabe law. Only by acquiring a baseline familiarity with this information can Anishinaabe-Canadian conflict of laws scenarios be understood. Thus this paper proceeds first by examining relevant streams of Anishinaabe world view and how they are made manifest in Anishinaabe law; second, by examining ways in which outsiders might engage with Anishinaabe law, and third, by exploring how Canadian legal doctrine regarding indigenous rights, even after the advent of s. 35, fails entirely to grapple with indigenous law. Finally, I turn to the conflict experienced by KI regarding exploratory drilling on their ancestral territory and consider it in light of this previous discussion.

II *Waabanong* (East): Anishinaabe Law—Of Land, Clans, and Spirits

Nindinawemaaganagtok:[23] Anishinaabe Thought in Law

I began this paper illustrating the importance of relationships to Anishinaabe thought. This is because for the Anishinaabek, everything is alive. In our language, *Anishinaabemowin*, almost everything is considered alive—even rocks, drums or tea kettles. *Anishinaabemowin* has two "genders": *pimaatan* and *pimaatiz*, which identify different ways of existing in the world, not sexual identity. Animacy is assumed in both genders.[24] For most (but certainly not

21 See Leanne Simpson, "Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships" (2008) 23(2) Wíčazo Ša Review at 36-37 for more detail.

22 Lovelace, *Notes from Prison* at xii.

23 "All my relations."

24 Many *Anishinaabemowin* linguists still use a dated pedagogical convention when explaining *Anishinaabemowin* in English. This older convention holds that the two genders correspond to *animate* and *inanimate* but that since the Anishinaabe distinction between animate and inanimate is different from what it is in Canadian thought more generally, certain inorganic things are animate. With respect to this school of thought, according to the teachings I hold, all of Creation is ensouled

all) Canadians personhood is a category limited to *Homo sapiens sapiens*,[25] yet Anishinaabe world views hold that many animate non-human beings are fully persons, with temperaments, volitions and preferences (a truth widely available to outsiders, including government legislators and policy-makers, at least since A. Irving Hallowell published his oft-cited paper *Ojibwa Ontology, Behaviour, and World View*[26] 50 years ago and stated again 13 years ago, even more explicitly, by Paul Driben[27]):

> Creation stories are fundamental to understanding the scope of environmental justice from an Anishinaabe point of view. We have to rethink what the terms *we* and *our* mean in this context. Environmental justice includes our relationships with each other, including all plants and animals, the sun, the moon, the stars, the Creator, and so on. It is necessary to move beyond the human-centred approach to one of understanding, accepting, enacting, respecting, and honouring relationships with all of Creation.[28]

> [T]he Anishinaabe possess a fundamentally different view of the relationship between human beings and their surroundings than their European-Canadian counterparts, one that is based on a philosophy that simultaneously promotes the integrity of the environment and the well-being of those who reside there. Above all, that philosophy is based on the principle that the plants, animals, and minerals which coexist with humankind must be treated with the utmost respect.

(i.e., quite literally, *animated* by a soul). As such, when communicating Anishinaabe thought in English, speaking of one class of nouns as inanimate is, in my view, inadvertently misleading. Regarding this issue and Aboriginal languages more generally, Leroy Little Bear has stated:

> Aboriginal people can speak to and develop a relationship with a tree or a rock because the categorizing process in Aboriginal languages is not the same as in English. In Aboriginal languages most all things are categorized as animate, while in English most all things are considered inanimate [Leroy Little Bear, "Introduction" (1990) 15(2) Queen's Law Journal 175-177].

25 A reality represented in Canadian law, which while indicative of but not coterminous with Canadian world view, establishes that legal personality is attributed to a narrow class of persons, including, for our purposes, humans and certain legal fictions such as corporations [*Canada Business Corporations Act*, R.S., 1985, c. C-44, s. 2(1) at "person"]. Flora, fauna and what Canada understands as abiotic matter don't make the list.

26 "At the level of individual behaviour, the interaction of the Ojibwa with certain kinds of plants and animals in everyday life is so structured culturally that individual acts as if they were dealing with 'persons' who both understand what is being said to them and have volitional capacities as well" [A. Irving Hallowell, "Ojibwa Ontology, Behavior, and World View" in Stanley Diamond, ed., *Culture in History: Essays in Honor of Paul Radin* (New York: Columbia University Press, 1960) 36].

27 "Animals are ... regarded as persons in their own right and are treated accordingly; that is to say, the relationship between the Cree and Ojibwa and the animal-persons they pursue is governed by the same ethical considerations that govern human relationships" [Paul Driben *et al*., "No Killing Ground: Aboriginal Law Governing the Killing of Wildlife among the Cree and Ojibwa of Northern Ontario" (1997) 1(1) Ayaangwaamizin: The International Journal of Indigenous Philosophy 101 (citations omitted)].

28 Deborah McGregor, "Honouring Our Relations: An Anishinaabe Perspective on Environmental Justice" in Julian Agyeman *et al*., eds, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) 33.

> It would, for example, be unconscionable for an Anishinaabe to take more from the environment than necessary to maintain a moderate, satisfactory living. It would be equally disrespectful not to share what is taken from the land for subsistence. In fact, from the point of view of the Anishinaabe, the plants, animals, and minerals in their environment are best regarded as persons in their own right, non-human but intellectually and emotionally identical to humankind.[29]

For the Anishinaabe, the notion is best expressed in three words. At the outset of this paper, I acknowledged *all my relations*, a phrase many readers familiar with indigenous traditions will have come across, as the phrase isn't unique to the Anishinaabe. Leroy Little Bear offers an explanation of the breadth contemplated in this expression which I endorse as representative of Anishinaabe understandings as well: "'[a]ll my relations' includes, but is not limited to, animals, plants, inorganic matter such as rocks, and the land itself. In other words, 'all my relations' also have an interest in the land, just as humans do."[30]

Consider the tension between who enjoys legal personality under Anishinaabe law and under Canadian law using the example of rocks. Rocks provide an apt point of comparison, first, because they're abiotic, non-living things from the Canadian perspective, and second, because beneath all of the vegetation, humus and subsoil, rocks are what we speak of when we refer to land. As such they bear specific relevance for this paper. Professor John Borrows, Anishinaabe and one of North America's leading scholars of aboriginal law, presents an Anishinaabe perspective of rocks and personhood:

> The active nature of rocks means that they have an agency of their own that must be respected when Anishinabek people use them. As such, it would be inappropriate to use rocks without their acquiescence and participation because such action could oppress their liberty in some circumstances. Using rocks without their consent could be considered akin to using another person against his or her will. The enslavement of rocks could lead to great calamities for the Earth and her people. Therefore, to ensure that rocks and land are used appropriately, particular ceremonies or legal permissions are required.[31]

Given that everything—even rocks—are alive, the Anishinaabek must factor a great many interests into their land use and resource extraction decisions. The contemporary existence and political relevance of this world view is articulated concisely in the Grand Council of Treaty #3's visioning paper[32] on

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29 *Supra* note 8 at 14.

30 Leroy Little Bear, "Aboriginal Paradigms: Implications for Relationships to Land and Treaty Making" in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon: Purich Publishing, 2004). 35.

31 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 245, endnote omitted.

32 The PTO for the Treaty #3 Anishinaabek, which includes my community. It encompasses 28 First Nations and spans Eastward almost to Thunder Bay, Ontario; South to Ontario's border with Minnesota; West to the southeastern corner of Lake Winnipeg (near Fort Alexander) in

the transition of the Anishinaabek Nation in Treaty #3 territory from Canadian subjugation to nationhood. The second paragraph articulates the universality of animacy, stating, in part:

> Because everything is made by the Great Spirit, all life is imbued with the sacred: from the smallest insect to the biggest animal; from the tiniest grain of sand to the largest galaxy, all is alive and everything is intimately and spiritually connected.[33]

Because persons exist in so many shapes and forms, it's essential to recognize and to ensure respect for the personhood of others, across (often visible) differences. In order to do so, specific protocols exist for maintaining healthy relationships between the Anishinaabek and our many relations. These protocols are at once ancient and current and have been transmitted orally and kinaesthetically through countless generations. Given that the vast majority of Anishinaabe law is codified in stories,[34] dances, songs and ceremonies, not in treatises or court reporters, consider an Anishinaabe story illustrating the importance of protocol and the imperative to demonstrate respect for all Others and their lands. I present the story in two versions:[35]

> 37. THE THUNDER-BIRDS AND THE WATER-IMPS—At Thunder Bay (off the north shore of Lake Superior) two youths fasted, that they might learn the cause of the rumble among the clouds upon Thunder Cape. After fasting eight days, they set out upon their mission. The rumbling became louder the higher they went; and when the enveloping cloud opened, they beheld two big birds with their young brood of two. Flashes of light, as of fire, were seen when the birds opened and closed their eyes. One youth was content with what he had seen; but the other was curious to see more, and in an attempt to satisfy his desire he was killed by lightning. Thereupon the Thunder-Birds went away from the place. One was seen for the last time upon Thunder Mountain (McKay Mountain). After the departure of the birds, the people ceased to be afraid when paddling about

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Manitoba, and North to about 53°N. The visioning paper is Grand Council, *Reclaiming Wings*, *supra* note 13.

33 *Ibid*. at 1.

34 And even at this, "codification" is loose: "Anishinaabe storytellers never conclude with a moral as in Aesop's Fables. The narrator allows the listener to develop an individual understanding of the lesson being conveyed. As such, the stories are designed to engage the listener, implanting seeds for later reflection and contemplation" [Lawrence W. Gross, "*Bimaadiziwin*, or the 'Good Life,' as a Unifying Concept of Anishinaabe Religion" (2002) 26(1) American Indian Culture and Research Journal 15].

35 I've chosen these old stories because both the speaker and the subject matter are of my territory; I did a Smudge on Mount McKay as recently as May 2009 and July 2010—but not at the height which the Thunder Birds might consider their home. The stories come from Fort William, Ontario (which in 1970 amalgamated with Port Arthur to become Thunder Bay), where I have familial relations even today. The stories were recorded by William Jones, the first indigenous person in the United States to receive a doctoral degree in Anthropology (and a student of Franz Boaz). He specialized in Algonquian languages (of which *Anishinaabemowin* is one) and is a member of the Fox Nation. The stories were published posthumously in 1916 by the American Folklore Society.

> in Thunder Cape. On one of these occasions they caught sight of the water-imps that dwell in the rocks of the cliff. In form they were like human beings. They went out on the lake in a stone canoe, and could raise a thunder-storm by singing a magic song. When observed, they fled at once into the caverns under the water.
>
> 37a. Off toward the lake is a mountain. It is called "Thunder Cape." Clouds always hang about its top. It was common report that Thunder dwelt there, for the sound of it was always heard. Two men once thought that they would go and find the Thunder and see what it looked like. So they blackened their faces and went into a fast. In due time they set out for the mountain. Coming near, they decided that one go first, and the other afterward. So off one went. A heavy cloud hung over the top; but, strange to behold! the [sic] cloud parted, and the man saw two big birds with a brood of young. Fire flashed from the eyes of the big birds. The man had a good look, and, everything about the birds was clear and distinct. Of a sudden the cloud closed together, and the view of the birds was shut off. He retraced his steps to his companion, and told what he had seen. The companion, of course, wanted to see too. He went up alone to look. Presently the thunder cracked. The man went, and saw his companion dead, killed by the Thunder-Birds. Then he came home alone. Indians fear to ascend the mountain. They fear the Thunder-Birds.[36]

These respective story versions speak of the consequences for Anishinaabe if he should lose sight of boundaries, which, by virtue of the spiritualization of land (explained below), are at once both terrestrial and spiritual. Physically, the men intruded into territory not theirs; spiritually, they ascended into the domain of very powerful forces, and in the case of the man who dies, this was done knowingly. In each tale, one man perishes while the other survives to relay the events to others.

As an observer and practitioner of Anishinaabe law in my daily life, the first thing that struck me about this story, given the result for the man struck dead, is the explicit reference—in both accounts—to observance of what the men hoped would be sufficient protocol. In both versions 37 and 37a the men are reported as having undertaken a Fast (in the one account, for eight days) to prepare and to purify themselves for the journey. I won't here explain the Fast other than to mention that although it presents in the narratives almost as an irrelevant data point, it's extremely significant. The purpose of the Fast was to put the men in the right state of being to enter sacred grounds, especially in 37a, in which it was said that "[i]t was common report that Thunder dwelt there." Birds of prey have a special spiritual status within Anishinaabe cosmology, and *Animikii*, the Thunder Bird (or Thunderer), is at the spiritual apex.

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36 William Jones, "Ojibwa Tales from the North Shore of Lake Superior" (1916) 29(113) The Journal of American Folklore 383-384.

So why was one man struck dead? Here the men had *abused* protocol, having entered the sacred ground neither to honour it and its inhabitants, nor to ask for their help. In both accounts it's merely their curiosity that drives the men to intrude into territory not theirs. Some land—and the spirits who call it home—are powerful and not to be taken lightly. Anishinaabe isn't meant to have unfettered access to satisfaction of his desires wherever he pleases. Nor does observance of protocol ensure safety if at heart one has in mind only one's own self-interest. From an Anishinaabe perspective, the implications for land use (or disuse), are clear. The world's largest supply of pricelessonium could be discovered at the peak of Mount McKay, and still it would have to be left undeveloped.[37] That said, it should also be understood that other lands *ought* to be accessed and used in order to facilitate the well-being of Anishinaabe and all Others (for instance, in the execution of Anishinaabe's stewardship obligation, which is discussed below). A critical point of this story is how Anishinaabe law works in terms of *boundaries*; it would be an error to interpret the story as being *generally* prohibitive of access to land beyond immediate living areas.

Anishinaabe Resource Extraction and Harvesting Laws

Within the contemporary context of land-use planning, mere access to tracts of land is but one issue. The majority of the legal action surrounds resource extraction (and hence massive land modification) upon lands already accessed. In the discussion below I examine two Anishinaabe natural resource laws that pertain to resource extraction and harvesting.

The Law of Necessity and Continuity

> Many groups maintain the necessity of not stripping bark (called "girdling") from the entire tree trunk when collecting inner or outer bark, since this stripping kills the tree.[38]

One Anishinaabe law with respect specifically to resource extraction or harvesting is that humans may only harvest from or transform land to the extent necessary for their well-being—and the acquisition of surplus resources is

37 For another Anishinaabe story grappling with the issue of human access to spiritually-charged land, see John Borrows' story of the alvar, its spirit trails, and the question of pow-wow relocation, *supra* note 31 at 247-248.

38 Amanda Karst describing the gathering practices of indigenous peoples of the Boreal Forest, the southern fringe of which begins a little more than an hour North of my community and expands northwards and eastwards across Anishinaabe territory (and Northwest, well beyond Anishinaabe territory) [Amanda Karst, 978-0-9842238-0-0, "Conservation Value of the North American Boreal Forest from an Ethnobotanical Perspective" (David Suzuki Foundation and the Boreal Songbird Initiative: 2010) 10-11].

generally understood to go well beyond the spirit of necessity.[39] However, for some communities temporary storage of surplus resources is acceptable if the purpose of the excess is to trade for resources which are unavailable or much less available and which are essential. Of course, in these situations it's a given that the imperative to not take so much that the continuity of the resource extracted is threatened is to be strictly observed.

It's equally important to understand that the necessity threshold for natural resource extraction is understood in reference to a degree of material stability commensurate with security and good health, not the bare minimum of material goods needed for survival. In the latter situation, stability itself is uncertain, and so long as this is the case, Anishinaabe may be unable to meet the high bar of his legal obligation to care and provide for others (explained below, under Creation and the Caretaker). This is particularly important in contemporary Canada where virtually no one feels it's sufficient merely to survive from one day to the next, and where moderate living standards are (putatively) ensured via complex governmental and commercial transactions. However, even in the complex, free-enterprise economic system of today, Anishinaabe law remains clear: while it may not be illegal for an Anishinaabe community, individual or entity to acquire surplus wealth from usage of land, it's illegal to acquire that wealth at the expense of the land's well-being.[40]

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39 Said Coyote to Raven:

> you know raven these human beings are a greedy lot
> they want more than their fair share they want everybody's share
> they want to make up all the rules including the rules of the natural world
> damming blasting clearcutting wiping out whole species
> how did they become like that is greed contagious
> and what is the epidemiology of consumerism
> kill everything destroy everything in the name of economics
> in the name of wreckonomics

[Pat O'Riley & Peter Cole, "Coyote and Raven Talk about Environmental Justice" in Julian Agyeman *et al*., eds., *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) 234.].

40 Within the thinking of the GCT3, this obligation respecting the interpretation and application of contemporary (and increasingly, positivist) Anishinaabe law is articulated as follows: "laws that we make as human beings are what we refer to as *temporal laws*—made on earth by the people—written or unwritten as the case may be. But they must be true to Eternal and Traditional Law" [Grand Council, *Reclaiming Wings* at 18]. By "Eternal Law," the GCT3 means the Creator-derived law we've been discussing. In their own words, "[o]ur Constitution comes from the Sacred Law of the Creator which the Elders refer to as '*Kagigewe Inakonigawin*' which effectively translates to *Eternal Law*" [*ibid*. at 15]. By "Traditional Law," the GCT3 intends something similar to but clearly more robust than customary law:

> Revealed in sacred ceremony, these laws have been observed and honoured throughout the ages and have become part of our life as Traditional Law. This Law is also unwritten in the conventional sense, however, we see it in the four directions, four levels of the sky, four layers of the earth, the feathers, the four drums, the four lodges, petroglyphs and pictographs, songs, dances, birchbark scrolls and in so many other sacred things, places

Professor George L. Cornell, Anishinaabe, contrasts the rationale undergirding this Law with historic European thinking on resource extraction:

> American Indian peoples, although their beliefs varied widely, had evolved environmental ethics based on strong, personal bonds with nature and founded on their own spiritual beliefs. Europeans attributed the creation of all life to God, yet they seldom allowed profit motives to be subjected to ecclesiastical doctrines. American Indian peoples, like Europeans, believed that all life forms were the result of divine action, but they, unlike Europeans, also believed that all products of the creation were sacred and to be treated with care and respect. Indian populations understood that all life forms had an essence, a reason for being, and were gifts from the Creator to sustain one another.[41]

Extrapolating on the practices of "American Indians," Cornell adds that:

> [S]piritual perceptions of other beings conditioned environmental responses of American Indians. At the core of these behaviors was the continued well-being of the collectivity of "the people," in the sense that hunting had to be conducted in ways so that game would return. These behaviors were internally regulated and culturally governed and placed great emphasis on the future of all life.[42]

The legal imperative to take only that which is needed is of course not a new Anishinaabe law. Peter Jones, the well-known Anishinaabe (Mississauga) Chief, Methodist minister, farmer and author lived from 1802–1856. Although for him being Methodist meant in some ways forsaking his traditional Anishinaabe beliefs, he nonetheless continued to study and write about them,[43] and in many other ways he was able to synchronize his Anishinaabe and Methodist beliefs. On the subject of respect for Others and the concomitant high bar of the necessity threshold for resource extraction, he wrote of the Anishinaabek:

> In addition to the belief in the immortality of their own souls, they suppose that all animals, fish, trees, stones, etc., are endued with immortal spirits and that they possess supernatural power to punish any one [sic] who may dare despise or make any unnecessary waste of them.[44]

This Law exemplifies the more general Anishinaabe obligation of stewardship

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and ceremonies. The Elders are the custodians of Sacred and Traditional Law and they are still with us to give us the interpretations [*ibid*.].

41 George L. Cornell, "The Influence of Native Americans on Modern Conservationists" (1985) 9(2) Environmental Review 106-107.

42 *Ibid*. at 107.

43 Peter Jones' notes were edited and published posthumously in 1861 by his wife, Eliza Field, an Englishwoman, in a book entitled *History of the Ojibway*.

44 William Christie Macleod, "Conservation among Primitive Hunting Peoples" (1936) 43(6) The Scientific Monthly 563 (quoting from Peter Jones, *History of the Ojibway* (1861) at 104).

towards Creation. Anishinaabe's role as steward means he must do his best to ensure the continuity and well-being of all his relations.[45]

The Law of Respect

A second Law connected to the first is that when resources are harvested or when a feature of land is modified, the person being altered needs to be respected and needs to have its[46] agency and sacrifice acknowledged.[47] With regard to the first and more general part of this Law—the demonstration of respect for the resource in the means of its extraction—the Anishinaabek accumulated a vast archive of knowledge and developed specific extractive practices as a result. Notes of American anthropologist Frank Speck from 1915 addressing the hunting practices of "northern hunting Algonkians" state that:

> Beaver was made the object of the most careful "farming"; the numbers of occupants, old and young, to each "cabin" of the animals was kept account of; breeders were not killed; each year only young or very old animals were slain. In certain districts moose or caribou would be protected during one year; in other districts during the next year. Some proprietary families went so far as to divide their own territories up into quarters around a center, "hunting in a different quarter each year and leaving the tract in the center as a reserve to be hunted over only in case of shortage from the exploited tract."[48]

And with respect to "northeastern Algonkian Indians," Speck observed:

> Economically these territories were regulated in a very wise and interesting manner. The game was kept account of very closely, so that the proprietors knew about how abundant each kind of animal was, and hence could regulate the killing so as not to deplete the stock.[49]

A critical point here is the powerful role of relationship driving Anishinaabe law. The relationship between hunter and resource doesn't allow for a division in labour between hunting (life-termination) and resource sustainability (life-preservation). In terms of actions, the two tasks aren't discrete; hunters bore the life-preservation obligation even as they took life. Imagine what North

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45 This discussion is expanded below within the section "Creation and the Caretaker," however for a more detailed examination still of one view of Anishinaabe stewardship, see note 13 [Borrows, *Stewardship*].

46 Recall that the third person singular possessive pronouns "his" and "hers" are incoherent from an Anishinaabe perspective since gender is construed in respect of the way in which something is understood to exist in the world, not sexual organs.

47 Note that "respect" is not synonymous with "reverence." See especially pages 302-303 and 318-320 of Paul Nadasdy, "Transcending the Debate over the Ecologically Noble Indian: Indigenous Peoples and Environmentalism" (2005) 52(2) Ethnohistory 291.

48 *Supra* note 44 at 564 [quoting in parts directly from Frank Speck, "Memoir 70," (1915) Canadian Geological Survey 189, and Frank Speck, *Penn Weekly* (University of Pennsylvania: 1914-1915) 5.]

49 *Ibid*. at 562, quoting from Frank Speck, "Memoir 70," (1915) Canadian Geological Survey 5.

America's food industry might be like if factory farming corporations were subject to the same legal obligation! While that's an alarming (or perhaps enlightening) hypothetical, I can share a real world example from home.

Pither's Point is a park immediately adjacent to my community, Couchiching First Nation. It's all that separates us from Fort Frances, the municipality on the other side. The park finds its namesake in Robert John Nicholson Pither, one-time Hudson's Bay Company employee and, after his retirement in 1909, Indian Agent. At the time Pither lived there, Canada had already designated the land by Order-in-Council dated February 27, 1875, as the Agency 1 Reserve (initially for farming and later for general use). The issue of precisely whose use and benefit the 14 hectare Agency 1 Reserve was set aside for is unresolved and is implicated in ongoing legal proceedings. However, regardless of the determination ultimately reached, the reserve will be found to have been set aside for Anishinaabek signatory to *Treaty #3*, including at a minimum Couchiching, Naicatchewenin, Nicickousemenecaning and Mitaanjigamiing (formerly Stanjikoming) First Nations.[50]

On May 18, 1910, the Department of Indian Affairs[51] leased the 70-acre section of the reserve which today constitutes Pither's Point Park to Fort Frances for a 99-year term. The rate set was an embarrassing $1 per acre per annum (later renegotiated to include only 35 acres),[52] despite protestation from affected communities, which objected because the land was and remains sacred territory. To put that claim beyond contestation, the Park contained rather visual evidentiary support: a Burial Mound was situated on the bank where Rainy River opens into Rainy Lake. Fort Frances' damming of the falls on Rainy River elevated the Lake so much that river bank erosion was washing away the Mound. The Royal Ontario Museum excavated the Mound in 1959 and found objects of Assiniboine and Anishinaabe peoples. This is a fine example of Canadian law disempowering the Anishinaabek, allowing them no voice in the treatment of their traditional lands or in natural resource development thereon, the result of which was the piecemeal aquatic and then

50 Simon Dawson, a land commissioner responsible for selecting reserves in the area, noted of the Agency 1 Reserve, that "[t]his Indian Reserve not to be for any particular chief or band but for the Saulteaux tribe generally ['Saulteaux' being the term that Alexander Morris, Treaty Commissioner for *Treaty #3*, used for all Anishinaabe within the *Treaty #3* boundaries] and for the purpose of maintaining thereon an Indian Agency with the necessary grounds and buildings" [*Couchiching First Nation v. Town of Fort Frances*, 2010 ONSC 2442 at 2(3)]. However when Indian Agent J.P. Wright surrendered the land in 1908 so that Fort Frances could establish the present-day Park, he did so on behalf of only the four named First Nations above [Tim Holzkam & Leo Waisberg, *Agency Indian Reserve 1: Selection, Use and Administration (a Confidential Draft Report Prepared for Grand Council Treaty #3)* (Tim Holzkamm Consulting and Seven Oaks Consulting Inc.: 19 September 2000 [unpublished]) at 2].

51 Today, Indian and Northern Affairs Canada. Hereafter, INAC is used for all references to this agency, regardless of year.

52 *Couchiching First Nation v. Town of Fort Frances*, 2010 ONSC 2442 at 2(11).

specifically human-sanctioned destruction of sacred Anishinaabe space. In this story, as the municipality created, it had no idea what it was at the same time destroying, and the consequential lack of respect demonstrated, given that the continuity of a burial mound was at issue, is difficult to articulate with words. Under Anishinaabe law, wherein relationships had been properly maintained, such a result could never have been realized.

It would seem the Crown doesn't easily learn over time. Over the past couple years, Couchiching has been struggling with dioxin and furan contamination on Harry's Road, at the site where a sawmill once owned by lumber baron James Arthur Mathieu used to stand. Despite several leases to sawmills on the land and the resulting plurality of Pentachlorophenol (a toxic substance used to preserve wood) dipping ponds, INAC never undertook any remediation work before formally designating the lands as Couchiching Indian Reserve #16A in 1967. A battery of recent tests determined unacceptable risks to human health and several residents were asked to relocate. The contamination is thought to have resulted from the unremediated dipping ponds. The former location of one such dipping pond, closest to the families asked to relocate, was identified not by employees of INAC, but by community Elders. How perfect for our purposes here: not only was Canada's knowledge of the environmental harm occasioned by local natural resource development projects so bad that it allowed a group of native people to set up homes on contaminated land, but the Elders of the community, who retained a connection with the land, *were* able to identify the location of a dipping pond. While the Elders didn't understand the science behind the toxicity of dioxins and furans and hence the long-term threat to community health that the site posed, they knew precisely where the unhealthy sawmill water used to be. This is yet another example of the government allowing a third-party developer to take from the land, while paying little (or in this case, no) attention to environmental impacts, with direct, negative consequences for an Anishinaabe community. If INAC leased the land to Mr Mathieu for the purpose of running a sawmill, surely it's beyond question that it was incumbent on INAC to ensure that terrestrial remediation occurred before re-designating the land. It's difficult to fathom how such an oversight might have occurred; at the very least it demonstrates a profound lack of respect for the untended land and for the Anishinaabek who call it home and whose lives may have been put at risk. The result was a direct action initiative. From May 21 to 31, 2010, Couchiching First Nation set up a toll both on Highway 11, which cuts through the centre of our community and feeds into Fort Frances. The environmental issue was one of two core issues that drove the action.[53]

53 Interested readers can find out more about this direct action initiative here: Couchiching First

Recall that the legal imperative to respect the resource is what's doing the work in Anishinaabe law with respect to ensuring the sustainability of resources. In addition to acknowledging the sacrifice of the *specific* resource extracted (i.e., a particular animal or a specific plant), generational and community-centred thought means that respect must be demonstrated too for the *relations* of that particular resource—thus in life-taking, Anishinaabe bears a legal obligation not only to the particular animal killed or plant harvested, but to others of its kind too, so that it might continue to thrive as Creator intended.

> [N]orthern Ontario is not now and has never been a lawless killing ground for Aboriginal people. Instead, the pursuit of game and fish by the Cree and Ojibwa people who reside there is governed by a time-honoured law which insists that wildlife must be treated with the utmost respect. Along with spelling out the ritual activities that should be performed before, during, and after pursuing game and fish in order to ensure ongoing success, this law, which has been handed down through countless generations via oral tradition and which still functions today, contains at least three subsidiary prohibitions. The first prohibits Cree and Ojibwa foragers from killing immature animals; the second prohibits them from killing mature females while they are rearing their young; and the third prohibits them from overkilling mature animals of either sex throughout the year, with overkilling understood to be killing beyond immediate needs. Save for taking animals for ceremonial purposes or to avoid starvation, these prohibitions have been in effect since what the Cree and Ojibwa say was the beginning of time.[54]

Dr Marc G. Stevenson explains that the obligation to ensure sustainability of a resource applies as much to plants and to land generally as it does to animals:

> Through their customary laws governing resource use, traditional hunting activities, uses of fire and other management practices, Aboriginal peoples for generations played a major role in shaping the biological diversity of Canada's landscapes.[55]

Usage of what Canadian natural resources officers would call prescribed burns were in frequent use amongst the Anishinaabek and other indigenous peoples in similar ecological zones. In a recent report on indigenous peoples of the Boreal Forest, Amanda Karst reported that "[l]andscape burning was a common practise in the Boreal region to maintain a diversity of habitats."[56] Regarding the Anishinaabek specifically, Marc G. Stevenson says, "[t]he Anishinaabe used both fire and ground surface disturbance techniques to initiate renewal cycles in ecosystems and to give rise to both spatial and temporal diversity."[57]

Nation, Toll Booth Initiative, online: *TollBoothInitiative.com* <http://www.couchiching.ca/page5/TollBooth/tollbooth.php>.

54 *Supra* note 27 at 98.

55 Marc G. Stevenson, "The Possibility of Difference: Rethinking Co-management" (2006) 65(2) Human Organization 173 [Stevenson, *Co-management*].

56 *Supra* note 38 at 13.

57 *Supra* note 55 at 173.

The Anishinaabek monitored their resource consumption closely and developed sustainability strategies to respect and protect their environment.

Thus far we've considered the Law of Respect (primarily in the sense of actively ensuring continued viability) of plants and animals, but the Law extends beyond such narrow taxonomical categories. The Grand Council of Treaty # 3 (GCT3) explores Anishinaabe obligations of respect in terms of Anishinaabe ontological categories derived from our own Creation Story: Earth, Air, Fire and Water. The Grand Council draws on the concept of *pimatiziwin*,[58] stating that *pimitaziwin* "entails the use and care of the land, air, water, and all life in our environment which defines our sacred relationship with Grand Mother Earth."[59]

The resource knowledge regarding the Law of Respect is vast and held by Elders and persons specifically designated and trained as Knowledge Keepers. It's of course shared with children, resource-harvesters and other interested persons in Anishinaabe communities, and via the growing number of publications on traditional ecological knowledge, to a limited degree with outsiders as well. Given that the Anishinaabek web of relations now includes a vast array of non-indigenous peoples—including the Crown—some Anishinaabek want to have their knowledge included (while retaining rights to their intellectual property) in mainstream environmental planning and land-use schemes.[60]

With respect to the second aspect of this Law—that a person being altered needs to have its agency and sacrifice acknowledged—this is accomplished by presenting an offering of *Asseyma*[61] to that person's spirit.[62] The offer is

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58 "Sacred life of the Great Spirit." This concept represents the ideal way of living, which many Anishinaabek strive to embody. Gross at note 40 provides a more detailed discussion of this cultural ideal.

59 *Supra* note 13 [Grand Council, *Reclaiming Wings*] at 3.

60 Having said this, it's essential to recognize the dangers for indigenous peoples entering into co-management schemes wherein the relational hierarchy is almost always determined from a western scientific (or environmental resource management) approach, which does violence to indigenous perspectives of resource development. See especially Stevenson, *Co-management* for an examination of this reality. Paul Nadasdy argues that the concept of Aboriginal title and the land claims process through which it might be realized process indigenous peoples in much the same, fundamentally inappropriate way. See Paul Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Subarctic: Some Theoretical Considerations" (2002) 104(1) American Anthropologist 247-261.

61 Tobacco. The other sacred medicines of the Anishinaabek (and of other indigenous groups too) are, moving around the Medicine Wheel, *Kiishig* (Cedar), *Mshkwaadewashk* (Sage) and *Wiingash* (Sweet Grass).

62 For a more involved examination of this protocol both accurate and comical, see especially pp. 455-460 of Kenn Pitawanakat & Jordan Paper, "Communicating the Intangible: An Anishinaabeg Story" (1996) 20 (3/4) American Indian Quarterly 451-465. Pitawanakat & Paper present a short anecdote in which Anishinaabe offers *Asseyma* to Whushkonse, a small plant, in order to harvest him for his medicinal value. The anecdote is presented in a humorous fashion, so as to be understandable by a wide audience, but for the discerning learner of Anishinaabe law it contains many intentional details demonstrative of precisely the relational issues discussed above. The

made with the left hand, because it's nearer the heart. Professor Linda Robyn expresses the same imperative but in respect of what she calls "natural law." That's a concept also invoked by Basil Johnston, one of Canada's leading Anishinaabe literary figures, although he explicitly defines natural law *as* Creator's law[63] which makes perfect sense given that the Anishinaabek cannot dissociate law, environment, Creation and spirituality from one another. Robyn appears to agree:

> Reciprocity, based on natural law, defines the relationship and responsibility between people and the environment. All parts of the environment—plants, animals, fish, or rocks—are viewed as gifts from the Creator. These gifts should not be taken without a reciprocal offering, usually tobacco or *saymah*, as it is called in the Ojibwa language.[64]

Because *Asseyma* is one of the four sacred medicines, Gitchi Manidoo[65] witnesses a compact in which it's offered. As such, there's no opportunity to break the compact post-fact. Unlike Canadian law, it isn't possible to calculate risk and, having done so, elect to pay damages for breach of contract or for unjust enrichment, upon being sued for same. Given that the Spirit World is involved in the legal transaction—indeed, is precisely what gives the transaction its solemnity—consequences for failure to uphold the bargain in an honourable way also involve the Spirit World, and retributivist notions of proportionality so popular in Canadian private and especially public law have no meaning insofar as that goes.[66]

Dr Leanne Simpson has described a tradition of her community in which Mississauga belonging to Fish Clans would meet the fish nations at Mnjikanming, the narrows between Lakes Simcoe and Couchiching. Her concise description beautifully incorporates and applies almost all of the details of both Anishinaabe natural resource laws discussed above:

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anecdote is particularly poignant because it also discusses the obligation to accept an offering of *Asseyma*—surely a contentious point for any observer/learner of Anishinaabe legal traditions.

63 According to Johnston:

> Kitche Manitou then [i.e., after creating all things] made the Great Laws of Nature for the well being and harmony of all things and all creatures. The Great Laws governed the place and movement of sun, moon, earth and stars; governed the powers of wind, water, fire and rock; governed the rhythm and continuity of life, birth, growth, and decay. All things lived and worked by these laws [Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland & Stewart Inc., 1976) at 13].

64 Linda Robyn, "Indigenous Knowledge and Technology: Creating Environmental Justice in the Twenty-First Century" (2002) 26(2) American Indian Quarterly 199.

65 "Great Spirit," often referred to simply as Creator.

66 *Supra* note 27 at 104-105 provides a clear example of this Anishinaabe reality as a motivating force.

> Our relationship with the fish nations meant that we had to be accountable for how we used this "resource." Nishnaabeg people only fished at particular times of the year in certain locations. They only took as much as they needed and never wasted. They shared with other members of their families and communities, and they preformed [sic] the appropriate ceremonies and rituals before beginning. To do otherwise would be to ignore their responsibilities to the fish nations and to jeopardize the health and wellness of the people.[67]

The Unity of Law and Spirit

The discussion above presents a fundamental aspect of Anishinaabe law: it admits of no distinction between secular and Spirit Worlds.[68] It's incapable of doing so, given that Anishinaabe world view itse lf doesn't draw a hard line between living and dead, or a contemporary corporal existence and an ethereal spirit-only presence in some great hereafter. This element of Anishinaabe world view was traditionally held also by the KI (recall that's Kitchenuhmaykoobsib Inninuwug): "[t]he physical and spiritual were aspects of a single wholeness in the traditional way of thinking;"[69] "[n]o line was drawn between the natural and the supernatural. All were a part of life, with some phenomena simply being more visible than others."[70] There's no Anishinaabe analogue of heaven, hell, or purgatory (although there are spirits who sit outside of

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67 *Supra* note 21 at 33-34.

68 Although many Anishinaabek recognize different levels of creation, which, while non-anthropocentric, nonetheless result in differing obligations borne by the Anishinaabek. Thus the erasure of difference between secular and Spirit Worlds does not imply the erasure of spiritual differentiation altogether.

Further, this can't reasonably be characterized as anti-democratic from the Canadian perspective. Rather, the Anishinaabe legal order is simply more forthright and explicit in its (deliberate) conflation of spiritual and corporal worlds and authorities. Although the common law (and hence Canadian public law) claims to respect a clear distinction between church and state, the reality of this distinction is highly contestable. In formal adjudicative proceedings, witnesses are still invited to legitimize their authority by swearing on a Bible, as though the act of doing so somehow promotes conscientious truth-telling in all peoples. Additionally, Canada's national anthem contains the lyric "God keep our land glorious and free," and Canada mandates nationwide holidays for Christmas and Easter, but not for sacred times of other religious traditions. More flagrant still, the Parliament buildings have scriptural passages engraved upon them in numerous places, including most notably for our purposes, the passage "He shall have dominion also from sea to sea" (Psalm 72:8), which appears over the eastern window of the Peace Tower. But more explicit still is the existence of the phrase "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law" which constitutes the preamble to the *Canadian Charter of Rights and Freedoms* (being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c.11). These are but a few examples of how Christian orthodoxy continues to permeate Canadian legal and political consciousness.

69 *Supra* note 14 [KI, *One with Land*] at 170.

70 *Ibid*. at 49.

ordinary categories).[71] In her expert report to the Ipperwash Inquiry, Professor Darlene Johnston, I.P.C.,[72] summarizes this point:

> In Anishnaabeg culture, there is an ongoing relationship between the Dead and the Living; between Ancestors and Descendants. It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance or desecration. Failure to perform this duty harms not only the Dead but also the Living. The Dead need to be sheltered and fed, to be visited and feasted. These traditions continue to exhibit powerful continuity.[73]

The Spirit World overlays the corporal; spirits are with and around us always (to the extent that for certain ceremonies we remove shiny objects as they attract some spirits whose attention we generally prefer to avoid). Spirits may even enter and exit a body while it is, from a Western perspective, still alive. A human does not "die" upon having her individual spirit depart her body because in each human there inheres not one, but a plurality of souls. In addition to having at least one individual soul, bodies contain the *Soul of the Nation*. This is a critical point for Anishinaabe law, which we shall return to shortly.

Earlier we considered that rocks are ensouled, but the notion that all things are ensouled of course includes land more generally as well. Professor John Borrows states, "[m]any Anishinabek people characterize the Earth as a living entity who has thoughts and feelings, can exercise agency by making choices, and is related to humans at the deepest generative level of existence."[74] Having more specific regard to Anishinaabe law, he adds that "[t]he land's sentience is a fundamental principle of Anishinabek law, one upon which many Anishinabek people attempt to build their societies and relationships."[75] And the Spirit World permeates not only into the physical world, but into ways of being not so readily visible. The GCT3 succinctly states, "the spiritual realm of life cannot be separated from the social, cultural and political spheres."[76] The Spirit World pervades all modes of being.

Thus far we've established that all of Creation is alive, which creates relational obligations between the Anishinaabek and their environment substantially more onerous than those adopted by Canadians generally. Even *physically inscribed* in Canada's most important legal and political edifices

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71 See for instance Kegedonce's story of Pauguk, in Kegedonce, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at Part Two, Scroll Five.

72 The I.P.C. notation stands for Indigenous People's Counsel; it's the highest designation awarded by the Indigenous Bar Association and functions as an analogue to the state's bestowal of the Queen's Counsel designation (which for many indigenous lawyers is a problematic recognition). It's generally awarded to one lawyer each year.

73 Darlene Johnston, "Respecting and Protecting the Sacred," at 6 (reproduced from Professor Johnston's *Expert Witness Report* to Part 1 of the Ipperwash Inquiry, dated July 2004).

74 *Supra* note 31 at 242.

75 *Ibid*. at 243.

76 *Supra* note 13 [Grand Council, *Reclaiming Wings*] at 16.

is the imperative to have dominion over the land from coast to coast, placing Canadians in an explicit hierarchy with respect to the natural world. In more recent years we could qualify the dominion imperative with the descriptor "responsible": many who accept the dominion paradigm now acknowledge that economic and physical dominion must be ecologically responsible, which at present we express through the concept of sustainability. While from an Anishinaabe perspective this is a significant improvement, Canadians nonetheless remain firmly entrenched within the relational paradigm of dominion over land.[77] Leroy Little Bear explains:

> Pursuant to British, Canadian, and American laws, land is not much different from any chattel or movable property. It can be the subject of use, disposal, or transfer to another for value. In fact, one can say that the estate fee system is set up to facilitate transfers from one person to another. "Title" evidences an exclusive interest in the land. Previous titleholders can be traced back to the original grantor: the state or the sovereign.[78]

Such an attitude is what Dr Gordon Christie has usefully described as a "user-thing vision" of human-land relations, wherein "resource extraction for trade is simple a means by which the land is used. The land itself is not held to have any interest in the relationship as it is not seen as a thing that has interests or that enters into relationships."[79] These two authors describe a perspective that entirely divorces law and spirit. With particular regard to Algonkian peoples, A. Irving Hallowell noted a radically different understanding of land in 1949:

> In the first place it may be pointed out that there is nothing in the economic culture of these people to motivate the accumulation of large tracts of land. The products of the land are a primary source of wealth rather than the ownership of land in the sense of "real estate." For land has no value in exchange.[80]

Professor Christie would explain that these Algonkian peoples adhere to a "land-people vision," which "understands resource acquisition, even for trade, as proof that the land is providing for the needs of the people: the land itself being thought of as a partner in the process."[81] Linda Robyn puts these perspectives squarely in tension with one another. She explains how the Euro-North American view that land has only instrumental value contrasts sharply

77 For a detailed account of the intellectual development of the western paradigm of relation to land, see R.D.K. Herman, "Reflections on the Importance of Indigenous Geography" (2008) 32(3) American Indian Culture and Research Journal 73-88.

78 *Supra* note 30 at 33-34.

79 Gordon Christie, "Aboriginal Resource Rights after *Delgamuukw* and *Marshall*" in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon: Purich Publishing Ltd, 2004) at 244.

80 A. Irving Hallowell, "The Size of Algonkian Hunting Territories: A Function of Ecological Adjustment" (1949) 51(1) American Anthropologist 42.

81 *Supra* note 79.

with Anishinaabe perspectives on environmental sustainability, which associate contemporary legal realities with Creator's legal framework:

> Linear concepts of progress sanctioned through laws created in a capitalistic stratified society make up the current experience of sustainability. What distinguishes the American Indian perspective on the environment from the dominant capitalistic paradigm of Euro-centric environmental exploitation is that Natural Law (all of life naturally moves in a circular fashion) is supreme law and should provide the guiding principles upon which societies and peoples function. The holistic view of sustainability for the Ojibwa people, for example, is that laws made by nations, states, and municipalities are inferior to Natural Law and should be treated in this manner.[82]

Creation and the Caretaker

Clearly a dominion-centred relationship with land isn't a model that works for the Anishinaabek, and although we've connected that reality to Anishinaabe's role as *steward*, we haven't thus far established how Anishinaabe acquired the stewardship responsibility. The answer pertains to the Anishinaabe Creation Story. Within Anishinaabe cosmology, all beings were created by Gitchi Manidoo in a specific order and with specific instructions. Basil Johnston recites that order as rock, water, fire and wind; from these, sun, stars, moon and Earth; on Earth, mountains, valleys, plains, islands, lakes, bays and rivers; plant beings: flowers, grasses, trees, vegetables; animals: two-leggeds, four-leggeds, wingeds and swimmers[83] (and if you think this enumeration is long, try sitting through an Anishinaabe Thanksgiving Address, which marks the beginning of ceremony). Gitchi Manidoo made Anishinaabe last—Anishinaabe is least important amongst all beings, least able to care for himself and "weakest in bodily powers."[84] Anishinaabe is thus at the very bottom of a web of interdependence.[85]

Gitchi Manidoo provided instructions for each part of Creation. Thus in the most foundational sense, much of Anishinaabe law is derivative of Creator's instructions.[86] As the least capable and most dependent, Anishinaabe was instructed to be steward for the rest of Creation; Anishinaabe was tasked

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82 *Supra* note 64 at 215.

83 *Supra* note 63 at 12-13.

84 *Ibid*. at 13.

85 *Ibid*.

86 According to Professor Borrows' typology, *sacred* Anishinaabe law. Professor Borrows describes four additional sources of indigenous law: natural, deliberative, positivistic and customary [*supra* note 36 at Chapter 2].

During the negotiations at the Northwest Angle which led to the signing of Treaty #3, *Ogimaa* (a title indicative of political and civil leadership) Mawedopenais, the primary spokesperson for the Anishinaabe delegates, expressly stated the divine origin of Anishinaabe law to Commissioner Morris, who negotiated on behalf of Canada:

with the difficult but honest job of taking care of everyone else. This is the legal basis for the two resource extraction laws discussed above—taking only the amount of a resource necessary and observing proper protocol when doing so, for instance, by presenting an offering of *Asseyma*.[87] If Anishinaabe failed in observing either of these laws, he wouldn't be properly caring for the land; he'd be violating his sacred instruction. Evidently the stewardship paradigm of relationship with land is far removed from the dominion paradigm—and this is so even if dominion is now said to be ecologically responsible. Professor John Borrows speaks of *bimeekumaugaewin*, the Anishinaabe notion of stewardship according to teachings he holds.[88] *Bimeekumaugaewin*, he explains, while similar at its core, nonetheless differs in important ways from the notion of stewardship that exists under Canadian law:

> Anciently, aboriginal people would learn how to *accomplish* their stewardships through instruction and practice. Learning would be assisted by participation in ceremonies that taught people how best to *acknowledge* "all their relations." This period of preparation was vital to understanding the laws and customs upon which stewardship was based.[89]

Professor Borrows' reference to participation in ceremony during a preparatory period describes the acquisition of protocol which we discussed above. Importantly, he emphasizes how learning and then observing that protocol is an essential part of stewardship.

The KI also embody the stewardship paradigm of relation to land. Community member Joel Chapman offers an anecdote regarding the caretaking obligation and land modification "development":

> We could have chopped our way through like some people do today, but we tried to make roads as small as we could and as unnoticeable as we could. Animals would be threatened by big roads. They taught us not to make too many marks because animals would see. If we made too many marks towards the sunlight, ducks would see it and not land in the lake.[90]

> This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property. I will tell you what he said to us when he he [sic] planted us here; the rules that we should follow—us Indians—He has given us rules that we should follow to govern us rightly [Alexander Morris, *The treaties of Canada with the Indians of Manitoba and the North-West Territories, including the negotiations on which they were based, and other information relating thereto* (Toronto: Belfords, Clarke & Co., Publishers, 1991) at 59].

87 This, too, was a law observed by the KI, although it appears not to be in wide practise today: "[i]n earlier times, when a hunter killed an animal, it was seen not only as a gift from the Creator, but also as a gift from the animal itself. The hunter thanked the animal he had killed and offered tobacco" [*supra* note 14, KI, *One with Land* at 49].

88 For one particular theoretical account of Anishinaabe stewardship, see generally Borrows, *Stewardship* [*supra*, note 13].

89 *Ibid*. at 116 (emphasis in original).

90 *Supra* note 14 [KI, *One with Land*] at 47.

The caretaking obligation forms part of KI resource harvesting law as well. The prohibition against taking more than is needed and the necessity of acknowledging the gift of the sacrifice are obligations existing within KI law. According to Bill Morris, "[f]or every branch we take, we thank the Creator. For every water, everything. That's why we, especially the elders, started to have power and visions and [the ability to] heal people."[91]

John Cutfeet provides perhaps the clearest and most poignant statement of the KI understanding of relationship with land and of their stewardship role in particular:

> This land was given to us by the Creator ... We cannot and do not take the land for granted. The land not only provides for us, it nurtures us; it is our teacher. However, that gift does not come without obligations—it is our job to stand together to protect the Creator's gift so that the land will continue to be there for all of us. That is what we have done for generations, what we did in signing the treaty, what is required of us if we are to live in balance and harmony.[92]

Thus far we have seen that for the Anishinaabek, all Creation is alive and that Anishinaabe law, as a spiritual imperative, holds Anishinaabe accountable for ensuring the welfare of all beings within Creation. This is perhaps already enough to demonstrate the incommensurability of contemporary Canadian and Anishinaabe law regarding a wide range of natural resource development projects. I have yet to hear of such a project intended (even collaterally) to satisfy even the foundational needs of an indigenous community. Rather, such projects are, from the developer's perspective, about accruing tremendous amounts of wealth for an economically elite group of individuals usually far removed—physically, emotionally and spiritually—from the community whose land and whose legal obligations are at issue. From the Crown's perspective, such projects are about optimizing efficiency (and hence democratic accountability) in how a province powers its grid, or economic development via international trade,[93] while allowing (in some cases) that indigenous communities impacted by the development will receive some negotiated economic benefits. Second, the *manner* in which resources are extracted is generally in gross violation of Anishinaabe law. Even when rigorously applied, environmental assessment standards—which favour development in the first place—fall far short of the mark set by treating environmental features as

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91 *Ibid*. at 52 (insert in original).

92 *Ibid*. at 172. The treaty reference is to Treaty #9, adhesion of July 5, 1929.

93 An example of this perspective implemented as policy is the massive and controversial James Bay Project, in which Québec, via Hydro-Québec and the James Bay Development Corporation, sought to create the economic foundation for Québec's sovereignty from Canada by selling much of the energy produced by Phase 1 of the James Bay Project (the damming of the La Grande River) to New York. More recently, consider the mass export of crude oil from Alberta's Tar Sands to the United States.

other persons.[94] And despite all of this, the degree of ideological conflict goes deeper still.

Doodemak and the Politicization of Spiritual Geography

At different points I've referred to the Soul of the Nation, to Turtle Island and to the Bear Clan. These Anishinaabe notions are connected in the concept of the *doodem*,[95] which has its origin in the Re-Creation Story. A time after Gitchi Manidoo created the world, it fell into a state of disharmony, and Gitchi Manidoo wanted to purify it. He created *mushko'bewun'*, a tremendous, unceasing deluge that flooded it, destroying everything and leaving all the non-aquatic animals stranded atop either Turtle's back or a raft, depending on where the story is told.

Taking turns, the animals known as the Divers struggle to reach the ocean floor, in order to procure some mud to recreate land. All fail—all, that is, until Muskrat dives. Although he knows it will cost him his life, Muskrat expends all his air to dive to the very bottom. With empty lungs, he floats up to the surface, a small lump of mud clenched in the palm of one small hand. The mud is placed on Turtle's back and with the help of the mighty steps of Michabous (the Great Hare and leader of the animals)[96] and the Winds of the Four Directions, it's expanded and transformed into land, known by most today as North America.[97] So it was that the Earth was repopulated with Creation once more.

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94 I've stated that while contemporary Anishinaabe communities may acquire surplus wealth from their lands, they may not put the well-being of the land at risk. Of course the Anishinaabek are as fallible as all other peoples and occasionally some Anishinaabe communities act in violation of Anishinaabe natural resource law. However this doesn't call into question the legitimacy or viability of Anishinaabe law. When a Canadian individual, legally recognized collectivity, or government (be it municipal, provincial or federal) breaches Canadian law, no one suggests that *there is no functioning law*; rather we affirm the legitimacy of the law in the face of the breach and *using the law*, require the breaching party to be held accountable for it.

95 *Anishinaabemowin* for "totem." The plural form is *doodemak*, not "doodems."

96 Or Nanabozhoo (depending on which version of the Story one carries). Nanabozhoo is known under various names, depending on where one lives, including Wenabozho or (perhaps best known to outsiders) Nanabush.

97 This is why many indigenous peoples refer to North America as Turtle Island. Not only the Anishinaabek, but a great many indigenous peoples across the continent share a version of the Earth Diver Story. The point of origin for the Re-Creation is an island named *Michilimakinac*, located in the straight separating Lake Huron from Lake Michigan, south of Sault Ste Marie. The notion of Turtle Island remains very real for many Anishinaabek today and not only personally, but politically. For instance, in the *Water Declaration of the First Nations of Ontario* (released October 2008), the Chiefs of Ontario included the following provisions:

> 1. First Nations in Ontario [which is divided between Anishinaabek, Haudenosaunee, and in the far North, Cree territory] are placed on Great Turtle Island by our Creator and;
> 20. We announce and proclaim our role as the First peoples of Turtle Island—the original caretakers—with rights and responsibilities to defend and ensure the protection, availability and purity of freshwaters and oceans for the survival of the present and future generations.

The next section of the story I take not from my own traditional knowledge, but from the 1718 memoirs of Nicolas Perrot, a French explorer and diplomat active in the Anishinaabe territory of Lake Superior between roughly 1660 and 1700, and fluent in *Anishinaabemowin*. This excerpt from his journal is important because it shows the remarkable consistency in the Oral Tradition between then and now—i.e., over a 350-year period:

> After the creation of the earth, all the other animals withdrew into the places which each kind found most suitable for obtaining therein their pasture or their prey. When the first ones died, the Great Hare caused the birth of men from their corpses, as also from those of the fishes that were found along the shores of the rivers which he had formed in creating the land. Accordingly, some of [them] derive their origins from a bear, others from a moose, and others similarly from various kinds of animals; and before they had intercourse with the Europeans they firmly believed this, persuaded that they had their being from those kinds of creatures whose origin was as above explained. Even today the notion passes among them for undoubted truth.[98]

According to Dr Heidi Bohaker, "[t]his story explains the origin of *Nindoodemag*:[99] people took as their identity that which they shared with their apical, or first, other-than-human ancestor."[100] Human descendants that arose from the corpse of these apical beings are literally descended from their animal ancestor, which is the basis for the contemporary, patrilineal clan-based kinship structure which traditionally was the primary Anishinaabe social unit. Thus as a member of the Bear Clan, I am descended from the Great Bear.

This reality is important with respect to the identity of Anishinaabek enmeshed in contemporary conflict of laws situations. Each clan has specific responsibilities to the community.[101] In the part of Anishinaabe territory I'm

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Chiefs of Ontario, *Water Declaration of the First Nations of Ontario* (October 2008).

98 Translated into English by E.H. Blair in *The Indian Tribes of the Upper Mississippi and the Region of the Great Lakes* (Cleveland: The Arthur H. Clark Company, 1911) at 37. It is unknown in what year this passage was written, only that Perrot's memoirs were completed in 1718, and first published in English in 1911.

99 *Doodem*-derived kinship networks.

100 Heidi Bohaker, "Nindoodemag: The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region, 1600-1701" (2006) 63 William and Mary Quarterly 1 at 32 [Bohaker, *Algonquian Kinship*].

101 *Doodemak* find applicability in Anishinaabe private law (i.e., obligations held to individuals, not to the community, clan or Nation as a whole) as well. Professor Borrows states:

> A person's *dodem* creates reciprocal obligations among fellow clan members, thereby establishing a horizontal relationship with different communities and creating allegiances that extend beyond the confines of the home village. For example, persons of one *dodem*, travelling throughout their 'Three Fires' [Ojibwe, Potawatomi and Odawa] territory, can expect social and material obligations with clan members situated hundreds of miles away [*supra* note 31 at 78].

Similarly, Professor Bohaker adds that, "[m]embers of the same nindoodem would, by custom and practice, regard each other as siblings upon meeting even if they came from separate communities and had never before met" [Heidi Bohaker, "Reading Anishinaabe Identities: Meaning

from there are nine traditional clans;[102] further south and eastward, the Anishinabek Nation[103] recognizes a clan system consisting of seven parent *doodemak* [104] with several sub-*doodemak* under each. As a member of the Bear Clan, in addition to the general obligation of stewardship I owe to Creation by virtue of being Anishinaabe, I have additional responsibilities pertaining to medicine and to legal protection. A community research paper by and for my community provides that:

> The bear clan is known as the police and protectors of the people. They are also the legal guardians and are noted for their knowledge of sacred medicines. They maintained the peace and order in communities. It is the bear clan who are the guardians and door keepers to the sacred lodges.[105]

The GCT3 takes a similar view:

> The Bear Clan members were the strong and steady police and legal guardians. Bear Clan members spent a lot of time patrolling the land surrounding the village, and in so doing, they learned which roots, bark, and plants could be used for medicines to treat the ailments of their people.[106]

It's no surprise then that I found myself in law school. It'll also be no surprise if I'm among the first at the barricades, should the welfare of my community

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and Metaphor in *Nindoodem* Pictographs" (2010) 57(1) Ethnohistory at 13 [Bohaker, *Nindoodem Pictographs*].

However colonization and its internalization by many Anishinaabek and their governments have disrupted Anishinaabe law in this regard. See for instance *In re Menefee*, WL 5714978, No. 97-12-092-CV (Grand Traverse Band Tribal Court, 2004), wherein the Grand Traverse Band of Ottawa and Chippewa Indians successfully argued that an individual with an ancestral connection to the community in which membership was sought ought not to be recognized because his indigenous status was recognized in Canada, and not the United States. The court reached this conclusion entirely on blood quantum and not on totemic identity, despite having explicitly acknowledged the respective communities' interconnection prior to the genesis of the Canada-United States border.

102 *Adik* (Caribou), *Makwa* (Bear), *Wazhashk* (Muskrat), *Name* (Sturgeon), *Maanameg/Awaazii* (Catfish/Bullhead), *Migizi* (Eagle), *Zhiishiib* (Duck), *Amik* (Beaver), and *Maang* (Loon).

103 A political territorial organization (PTO) representing 42 Anishinaabek First Nations, including Ojibwe, Odawa, Pottawatomi, Chippewa, Mississauga, Algonquin and Delaware peoples, primarily in southern and central Ontario and along the eastern and northern shores of Lake Superior. All references in this paper to the "Anishinabek Nation" refer to this PTO specifically, and not to the Nation of Anishinaabe peoples more generally.

104 *Ma-kwa* (Bear), *Gigoonh* **(**Fish), *Wa-wash-kesh-shi* (Deer), *Wa-bi-zha-shi* (Marten), *Ah-ji-jawk* (Crane), *Mahng* (Loon) and *Banais* (Bird) [all spellings here are those used by the Anishinabek Nation].

105 Robert Animikii Horton (Bebaamweaazh), descendant of Kaynahchiwahnung [his nominal self-identification], Waabizheshi Dodem, *Our Walk We Remember: A Comprehensive Analysis of Kaynahchiwahnung*, a report directed and coordinated by Willie Wilson, Elder and Former Rainy River First Nations Chief.

106 Leo Waisberg of Seven Oaks Consulting Inc., and Tim Holzkamm of Tim Holzkamm Consulting, *Traditional Anishinaabe Governance of Treaty #3* (Draft Confidential Working Paper) Prepared for Grand Council of Treaty #3, October 2001, online: Grand Council of Treaty #3 <http://www.gct3.net/wpcontent/uploads/2008/01/trad_gov.pdf>.

be threatened. It's for others—the Loon, Crane and Fish Clan members—to mediate a solution; my task is to ensure the safety of the community, and again, community as we understand that concept consists not only of the Anishinaabek, but of all peoples living within our territory—trees, rocks and others included.[107]

Finally, the Soul of the Nation—in my case, that which connects me to the Bear Clan—doesn't leave the body after death. It resides in the bones, creating obligations of care in perpetuity for all my descendants. Since bones remain ensouled, they need to be Feasted and cared for at particular times of the year. Thus some Anishinaabek will occasionally leave food at the gravesites of their ancestors. According to Professor Bohaker, "[t]he *aadizookaanag* (sacred stories) teach that Anishinaabe political geography cannot be separated from the spiritual landscape of the region. These stories ground firmly in the physical realm what Westerners would perceive as belonging to the spiritual and imagined realms."[108] The territory I'm from has a particular sacred significance—it contains *Kaynahchiwahnung*,[109] which has the most (23) and the largest (7.3 metres high by 34.5 metres in diameter) burial mounds[110] in all of Canada.[111] The oldest is 2,100 years old; the most recent, 400.[112]

In addition to all of Creation being alive and gravesites, too, retaining spiritual significance not only for those left behind but for the interred, Anishinaabe territory is ensouled in a third sense: traditional Anishinaabek maintain great attachment to the location wherein their apical animal ancestor died. In many cases, these locations are still known. All of this, especially this third and final aspect to ensouled land, leads Professor Darlene Johnston, I.P.C., to observe that:

> For the Anishnaabeg, the Great Lakes region is more than geography. It is a spiritual landscape formed by and embedded with the regenerative potential of the First Ones who gave it form and to whom they owe their existence. And

107 For a historical perspective of Anishinaabe clan identity, see the compelling research of Professors Darlene Johnston and Heidi Bohaker, who argue that *doodemak* identified geopolitical kinship-based collectivities, not the professional or responsibility based functions described above. Their research thus presents evidence of single-clan communities— a powerful tool for identifying territorial occupation and jurisdiction given the prominence of *doodemak* on treaty documents. See generally Heidi Bohaker, *Nindoodemag: Anishinaabe Identities in the Eastern Great Lakes Region, 1600-1900* (PhD Thesis, University of Toronto, 2006) [unpublished] [*Bohaker,* Dissertation]; Bohaker, *Algonquian Kinship*; *Bohaker, Nindoodem Pictographs* (especially at 13 and 27) and Darlene Johnston, *Litigating Identity: The Challenge of Aboriginality* (LLM Thesis, University of Toronto Faculty of Law, 2003) [unpublished].

108 *Supra* note 100 at 38.

109 "The Place of the Long Rapids," a section of Rainy River adjacent to which the mounds are situated.

110 Burial mounds are human-made structures that resemble hillsides, but which contain the bodies, spirits and belongings of people.

111 *Supra* note 105 at 9.

112 *Ibid*.

> landmarks in this creation story hold special significance, particularly those sites that are at once places of burial of progenitors and of the birth of peoples."[113]

Anishinaabe world view, and hence obligations arising under Anishinaabe law, are strikingly different from their Canadian counterparts. With respect to natural resource development, the differences are particularly stark (conflicting paradigms of stewardship and dominion), which has significance specifically for how a people relates to land traditionally occupied by the Anishinaabek and hence to whom (not to which—recall the expanded notion of personhood) the Anishinaabek owe legal obligations. This situation is complicated further by the fact that on Anishinaabe understandings, land is ensouled and that clan identity plays a large role in how the Anishinaabek respond to potential natural resource development destructive of land.

III *Zhaawanong* (South): Alive and Well—Using Anishinaabe Law Today

Applicability of Anishinaabe Law for Crown and Third-Party Actors

Imagine how much peaceable resolution of heated conflict of laws situations might be facilitated if government actors and third-party proponents tried to understand *why* some Anishinaabek adopt the confrontational or intransigent positions they sometimes do regarding development projects on their ancestral territory. This would be infinitely more productive than not caring about the motivations for the behaviour and focusing solely on its result, thinking a mediated solution is hopeless, or worse still, thinking that as far as direct action initiatives go, all indigenous peoples are the same (the "seen one angry Indian, seen 'em all" mentality). Would-be developers sharing in this mindframe would be well-advised to expand beyond this impoverished viewpoint, by adverting to the perspectival nature of the issue of control over resources. For instance, while speaking of his home community, Professor Borrows has expressed a view, shared broadly amongst the Anishinaabek, that inverts the norm regarding what many Canadians understand to be unwelcome or even hostile territorial occupation: "[t]he Chippewas of Nawash have had the experience of their lands being occupied by non-Aboriginal people for the past 150 years."[114]

If government or industry endeavoured to recognize the clan of the individuals involved in a direct action initiative, conflict resolution could be facilitated for there could be a much greater understanding of the Anishinaabe

113 *Supra* note 73 at 5.

114 *Supra* note 12 [Borrows, *Occupations*] at 42. See especially pages 19-21 for explanation of how non-indigenous Canadian parties have frequently been the originating parties of natural resource-inspired direct action initiatives.

interests underlying the dispute. Such information would allow the non-Anishinaabe party a much deeper, less abstract understanding of what is truly at stake for and what legal obligations are borne by the Anishinaabe participants in the action. Further, it would allow non-indigenous parties to anticipate reactions and to develop communications strategies accordingly. For instance, if an Anishinaabe party demonstrating at a site consists largely of Bear or Marten Clan members, the potential for physical confrontation may be higher, and parties would be wise to proceed with much more caution. Strong assertions of state-derived rights, however valid they may be under Canadian law, are unlikely to find purchase with a group of people focused not on mediating a peaceful solution, but on protecting the integrity (at all levels) of their community, which they take to be under attack. This is not to say that outsider appreciation of Anishinaabe clan identity will function as a magic wand waving conflict away, but it would certainly stand to improve things, not only for the reasons just presented, but even more fundamentally, because it would demonstrate to the Anishinaabek, for whom relations are so vital, a genuine effort at understanding and relating to Anishinaabe identity and values.

That's a critical point unto itself. If developing an outsider's appreciation of the clan system proves too daunting a task—which I don't think is a serious proposition, but which for the sake of argument should be considered—it still remains for government and third-party actors to develop a cultural and legal competence with arguably more accessible components of Anishinaabe natural resource law, such as the two harvesting laws discussed above. Indeed, the notion of cultural competency emerged as the second of seven principles in a 2005 paper specifically about resource extraction and indigenous peoples in Canada. Lertzman and Vredenburg advance their view of an ethical approach for sustainable development on ancestral territories of indigenous peoples in Canada, noting that "culturally literate people are a necessary element of effective bi-cultural interaction. These bi-culturally trained individuals play a role both in communication and in educating others."[115] I strongly agree with that statement, but really its just fancy talk for the view that if we're going to get along, we need to understand one another—especially those of us expressly given the task of resolving conflict. I wonder how many Crown land claims negotiators can claim to possess a basic knowledge of Anishinaabe law and world view?

Although the two resource extraction laws above function and cohere within a different world view and from different legal and normative frameworks than the Canadian legal mainstream, there's nothing in them, conceptually, that's fundamentally alien to the understanding of ordinary Canadians.

115 David A. Lertzman & Harrie Vredenburg, "Indigenous Peoples, Resource Extraction and Sustainable Development: An Ethical Approach," (2005) 56 Journal of Business Ethics 250.

Developing that baseline understanding is entirely within the capacity of state and private development actors, and turns strictly on genuine effort and on building sufficient trust, via the establishment of good relations, to surmount already existent barriers.[116]

Moreover, it may be possible to establish congruencies for natural resource development between the exercise of authority granted under Canadian and Anishinaabe law. For instance, the doctrine that Canada's Constitution is to function as a living tree could be used to judicially reinterpret s. 35 jurisprudence in a manner that recognizes and affirms Anishinaabe and other indigenous law. While this tool would only go so far, it could be an important start. As Professor Borrows so often points out, Canada already acknowledges its bijuridicalism; recognizing and giving effect to its multijuridical origins need not be so threatening. Although far from the present reality, with all sides to a conflict genuinely engaged in achieving a result that recognizes and validates interests other than their own, it may be possible for Anishinaabe and Canadian law to align, not in their respective underlying theories and assumptions about the world, but at least in the courses of action they support in a specific factual context.

All of this is of course predicated on the assumption that state and third-party natural resource development actors are ill-content with a might-makes-right conclusion to these flashpoint encounters.[117] Only when that perspective isn't in play do these actors *need* to grapple with Anishinaabe or other indig-

116 Which I acknowledge are not insignificant. Recently the Chiefs of Ontario (whose membership is predominately Anishinaabe) cheekily commented on the government's uncanny ability to manipulate power via positivistic law: "[a]lways remember that: parliament can make a man into a woman and a woman into a man" [Chiefs of Ontario, *Chiefs in Ontario Strategies to Implement the Water Declaration* (undated)].

117 I note, by way of some of the stronger examples of this approach, the Sûreté du Québec's, the RCMP's and ultimately the Canadian military's confrontations with the Mohawk Nation at Kanesetake (the Oka Crisis); the RCMP's and the Federal Department of Fisheries and Oceans' violent aquatic confrontations with the Mi'kmaq Nation post-*Marshall* (*Marshall v. Canada* [1999] 3 S.C.R. 533) (the Burnt Church Crisis); the Ontario Provincial Police (OPP) confrontations with the Chippewas of Kettle and Stony Point First Nation, in which Dudley George was shot and killed (or murdered, depending on one's standpoint; the Ipperwash Crisis) and the RCMP confrontation with members of the Secwepemc Nation (the Gustafen Lake Crisis). More recently, I note the June 2007 OPP confrontations with the Mohawk Nation at Tyendinaga in respect of the disputed Culbertson Tract in which OPP Commissioner Julian Fantino warned lead Mohawk demonstrator Shawn Brant, "your whole world is going to come crashing down" if the Tyendinaga Mohawk blockades on Highway 401 and the Canadian National Rail lines near Kingston were not immediately removed [Emily Mathieu, "Mohawks faced 'grave consequences': Fantino — 'You're gonna force me to do everything I can within your community and everywhere else to destroy your reputation,' OPP commissioner told native leader" *The Toronto Star* (19 July 2008), online: thestar.com <http://www.thestar.com/news/ontario/article/463324>]. Upon the lifting of a publication ban, it was revealed in the same police transcript that Fantino, even in the face of the Ipperwash Report recommendations for patient resolutions to such flashpoint encounters, discretely deployed a tactical unit, including snipers [*ibid*.].

enous law; only then is it insufficient for them to simply flex their institutionally entrenched constitutional, statutory, common law and physical might, which empowers them to disregard Anishinaabe law since Canada recognizes the domestic legitimacy of only federal and provincial law (and delegated legal authority thereunder) and the common law. In short, all of this is useful only if Canada's willing to look further than colonial oppression as a legitimating force for action.

Helping Others Help Themselves: Creating Legal Certainty through Positivist Anishinaabe Law

Both intense conflict with development companies and legal disempowerment by the Crown occasioned by a lack of understanding of Anishinaabe law have inspired some contemporary Anishinaabe polities to manifest parts of their law in a positivist form. A major initiative of the Anishinabek Nation is the revitalization of their traditional laws[118] as articulated through a positivist legal framework. A primary goal is to facilitate outsider understanding of Anishinaabe law, creating legal certainty for all. Most significant for our purposes is the *Anishinabek Declaration*. The document originated in November 1980 and contained a provision stating, "We retain the right to control our lands, water and resources."[119] In August 2007 a new *Anishinabek Declaration* was affirmed, the sixth provision of which reads, "We, through our governments, shall have full control of our land. 'Land' includes water, air, minerals, timber and wildlife."[120] Even more ambitious, the Anishinabek Nation has been developing *Anishinabe Chi-Naaknigewin*, the Anishinabek Nation Constitution.[121] This is an intensive process, involving significant critical legal thinking, ceremony and community engagement. The Constitution will combine the traditional *doodemak* governance structure with contemporary representative democracy.

One of the clearest and most elaborate examples of positivist Anishinaabe natural resource law comes from my own territory. *Manito Aki Inakonigaawin*[122] came into effect October 3, 1997, by proclamation of the GCT3's

118 The Anishinabek Nation has an entire Restoration of Jurisdiction department, with which Canada has so far agreed to enter into negotiations in respect of two matters: education and governance.

119 The Anishinabek Nation. *The Anishinabek Declaration*. November 1980.

120 The Anishinabek Nation. *Anishinaabeg/The Anishinabek Declaration*. August 2007.

121 Provision 7 of the 2007 Declaration provides that: "We wish to remain within Canada, but within a revised constitutional framework [*ibid*.]." Evidently *Anishinabe Chi-Naaknigewin* is intended to work with (perhaps a modified form of) Canadian constitutionalism, not to pre-empt it. This is yet another model by which shared jurisdiction might function.

For text of the draft Anishinabek Nation Constitution, see Anishinabek Nation, *Anishinabe Chi-Naaknigewin* (Anishinabek Nation Constitution) online: <www.anishinabek.ca/download/Anishinabek%20Nation%20Constitution%202010%20Final%20Draft.pdf>.

122 Referred to as "The Great Earth Law" and more simply as "The Resource Law."

National Assembly, presenting substantive and procedural law applicable within Treaty #3 territory regarding natural resource development. It represents a strong assertion of Treaty #3 Anishinaabe legal jurisdiction. In an explanatory note on *Manito Aki Inakonigaawin* reflecting on Treaty relationships, the GCT3 says:

> The Anishinaabe Nation did not surrender any rights of self-government and so continue to exercise its traditional government. But the Canadian and provincial governments historically have tried to undermine Anishinaabe government based on a denial of its jurisdiction.[123]

The GCT3 adds that "[o]ne of the more important jurisdictional disputes is lands and resources."[124] *Manito Aki Inakonigaawin* is an effort to help bring certainty to those disputes.

The written text of *Manito Aki Inakonigaawin*, accessible to all,[125] embodies so much of what has been discussed of Anishinaabe natural resource law so far, including for instance the importance of relational thinking and the indivisibility of spirituality from law. In the following paragraphs I proceed to map out how *Manito Aki Inakonigaawin* presents traditional Anishinaabe natural resource law, in a written, positivist form.

A dominant theme of *Manito Aki Inakonigaawin* is the relationship of the Anishinaabek with their territory. At 11 points in the eight-page document,[126] the Anishinaabek and their environment are linked in a legal couplet regarding possible developments or actions impacting upon "the environment in Treaty #3 territory *and on* the rights of the Anishinaabe" (emphasis added), with minor word variations. When it comes to development on their territory, the Anishinaabek of Treaty #3 have been explicitly clear that one cannot divorce the Anishinaabek from the land or vice versa; their relationship is such that where one is affected, so, too, is the other.

The prominence of this relationship and the importance of relationships generally is captured in some of the Law's most important defined terms. Consider "development" and "environment":

> "Development" includes the construction, operation, alteration, and decommissioning of any building, structure or work within Treaty #3 territory, which may affect the environment within Treaty #3 territory of the exercise of rights of the Anishinaabe;

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123 The Grand Council of Treaty #3, *Laws and Policies*, online: GCT3 < http://www.gct3.net/grand-chiefs-office/laws-and-policies/>.

124 *Ibid*.

125 National Assembly, Anishinabek Nation of Treaty #3, *Manito Aki Inakonigaawin* (3 October 1997), online: Grand Council of Treaty #3 <http://www.gct3.net/wp-content/uploads/2008/01/mai_unofficial_consolidated _copy .pdf>.

126 Preambular paragraphs 3, 4, and 5; the definition of "activity," "authorization" and "development" within paragraph 2; paragraphs 5, 10, 11, 13, and 16.

> "Environment" means the entire environment of the Anishinaabe as it affects them and the exercise of their rights and responsibilities, and includes the spiritual, social, physical, ecological and economic environment.[127]

First consider the concept of development as presented in *Manito Aki Inakonigaawin*. The Anishinaabek of Treaty #3 define the concept of development not in respect of intended or potential improvement with respect to what already exists, but rather in respect of potential impacts on the environment. This is a foundationally different notion of development; one not derivative of the linear modernist narrative of Progress. It's equally important, however, to recognize that nor is development constructed as inherently bad: development is defined as activities which "affect" the environment; it's not confined to those activities which damage it and hence is not vilified merely on principle. The Anishinaabek of Treaty #3 aren't intrinsically *anti*-development.

In fact contrary to Canada's national narrative of indigenous subsistence as nomadic hunting and gathering, the Anishinaabek of Treaty #3—the same Anishinabek who in 1997 passed *Manito Aki Inakonigaawin*—engaged in agricultural development schemes of their own. Treaty #3 made provision for farming reserves and for the annual provision of farming implements. Hudson's Bay Company (HBC) records from at least as far back as 1819 described gardens in the Lake of the Woods area containing potatoes, Indian corn, beans, pumpkins, onions and carrots[128] and, in 1825, a chief factor for HBC noted with frustration that some Anishinaabek "hardly ever lose sight of their field either [in] winter or summer" focusing on agriculture almost exclusively.[129] However the best known example of Anishinaabe agricultural development is *manomin*[130] which has been used, at least within Treaty #3 territory, for 3,000 years.[131] Successful harvesting of *manomin* was (and for the Anishinaabek, remains) development intensive. It includes:

> seeding, caretaking during the growing period (for example, eliminating competing plants, trapping predators such as muskrats, shielding the rice from blackbirds by bundling the rice, and holding the water levels constant for the growing period by using the beaver dams), carrying out ceremonies, harvesting, processing, and [later] marketing. While the commercial use of resources by Treaty and

127 *Supra* note 125 at 2.

128 Tim E. Holzkamm & Leo G. Waisberg, "Agriculture and One 19th-Century Ojibwa Band: 'They Hardly Ever Lose Sight of Their Field'" in William Cowan, ed., *Papers of the Twenty-Fourth Algonquian Conference* (Ottawa: Carleton University, 1993) 409.

129 *Ibid*. at 420, quoting from the HBC archives.

130 "Wild rice." *Manomin* has a unique status for the Anishinaabek. The Seven Fires Prophecy explains why.

131 Kathi Avery Kinew, "Manito Gitigaan: Governance in the Great Spirit's Garden—Wild Rice in Treaty #3 from Pre-Treaty to the 1990s" in David H. Pentland, ed., *Papers of the Twenty-Sixth Algonquian Conference* (Winnipeg: University of Manitoba, 1995) 183.

> Aboriginal peoples is just beginning to be recognized in Canadian law, it is a documented historical fact for manomin.[132]

The Anishinaabek even developed specialized tools for the production of *manomin* including canoes for seeding, caretaking and harvesting; threshing sticks, poles, paddles also for harvesting, and pots, paddles, poles, threshers and winnowing baskets for processing.[133] Far from reactionary to contemporary development discourse, inclusion of culturally appropriate development in *Manito Aki Inakonigaawin* is consistent with the historical practices of the Treaty #3 Anishinaabek.

Manito Aki Inakonigaawin's definition of "environment" is striking too. Far from being relegated to a notion of the non-human, natural or out-of-doors worlds, the definition of "environment" encompasses also the *super*natural world and economics. The reason of course is simple: our relational mode of being doesn't allow us to artificially hive off our agency into discrete categories of being (such as physical, spiritual, economic, ecological, emotional, etc.) and our law necessarily reflects this understanding. We are at once connected to all our relations. Imagine the Ministry of Natural Resources (MNR) trying to meet its mandate under this concept of environment! On the contrary, the very concept of the MNR becomes incoherent; the foundations that give it meaning, destabilized.

Finally, I note—perhaps the most important point with respect to the entrenchment of relational thinking in *Manito Aki Inakonigaawin* for our purposes—third-party proponents aren't left out of the relational web. Paragraph 5, "Objectives of consultation," reads in part:

> 5. The Grand Council and the proponents should, through consultation:
> • Seek a mutually beneficial continuing relationship between the proponents and the Anishinaabe.[134]

This is critical. Not only do the Anishinaabek of Treaty #3 desire a genuine relationship as opposed to a mere series of transactions with developers, but they want that relationship to continue throughout the project and perhaps even afterwards. The emphasis isn't on the transaction, but rather on the peoples involved and their interactions with one another. Impersonal one-off transactions, a legal necessity for sustaining Canada's current economic order, are alien to Anishinaabe legal thought. In the spirit of honouring good relations, in April of 2008 one mining company, Canadian Arrow Mines Limited, was recognized by a Treaty #3 Chief for its relationship-building efforts under *Manito Aki Inakonigaawin*.[135]

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132 *Ibid*. at 187. HBC records demonstrate the sale of *manomin* to HBC employees and fur traders.
133 *Ibid*. at 191.
134 *Supra* note 125 at 3.
135 Canadian Arrow Mines Limited, "Management's Discussion and Analysis: Second Quarter End-

Another fundamental component of *Manito Aki Inakonigaawin* is recognition of the legitimate, ongoing role of traditional, non-positivist Anishinaabe law.[136] This theme pervades the document from the preambular paragraphs to the closing information about the Law's coming into effect. The Law begins and ends by acknowledging the authority of Elders in bringing it into being and by acknowledging that it has been validated through ceremony.[137] This theme is also manifest in several defined terms and in paragraphs containing procedural law:

> "Community" means a community of the Anishinaabe, recognized in accordance with the traditional constitution of the nation;[138]
>
> "Consent" means formal agreement on behalf of the Nation in accordance with traditional law;[139]
>
> "Consult" means undertake a process of communication with the Nation pursuant to this Law and in light of Anishinaabe traditions[.] [140]

The definition of consent is particularly interesting in that its express reference to "traditional law" makes explicitly clear that despite the existence of *Manito Aki Inakonigaawin*, non-positivist Anishinaabe law retains applicability in respect of natural resource matters.

Additionally, paragraph 8, "Traditional consultation," provides that "[n]otwithstanding this Law a proponent may consult the Nation in the traditional manner"[141] and paragraph 27 similarly provides that, "[n]otwithstanding this Law a person may seek consent in the traditional manner to engage in a designated activity, and an officer of the Grand Council may grant consent accordingly."[142] Both of these paragraphs permit would-be developers to pursue their request for permission to engage in development projects outside of the processes provided for in the *Manito Aki Inakonigaawin* if they wish to proceed via non-positivist Anishinaabe law.

Finally, a version of the specific Anishinaabe harvesting laws discussed earlier is codified in *Manito Aki Inakonigaawin*. Paragraph 11 speaks to the need for developers to respect the various relations of the Anishinaabek:

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ed June 30, 2008" at 5, online: Canadian Arrow <http://www.canadianarrowmines.ca/investor_relations/mdna/mdna_q2_08.pdf>.

136 Which we might think of analogously as the continuation of Canadian common law alongside Canadian statutes.

137 Preambular paragraphs 6 and 7, and subparagraphs 2 and 3 of paragraph 42.

138 *Supra* note 125 at 2.

139 *Ibid*.

140 *Ibid*.

141 *Ibid*. at 4.

142 *Ibid*. at 6.

> The proponents should ensure that a development is designed, constructed, operated and decommissioned with *respect* for the environment in Treaty #3 territory and for rights of the Anishinaabe.[143]

Preambular paragraph 4 draws substance from this Law as well: "[t]he Anishinaabe law of respect requires those who may affect the environment of Treaty #3 territory or the exercise of rights of the Anishinaabe to consult with the Nation."[144]

A form of the legal obligation to extract only that which is necessary appears in codified form in *Manito Aki Inakonigaawin* also, albeit in the much watered down notion of *conservation*. Paragraph 13 provides that:

> The resolution should specify, and is subject to, such conditions of authorization as the Executive Council in consultation with the proponents deems may assist in promoting good governance, *conserving the environment within Treaty #3 territory* and protecting rights of the Anishinaabe.[145]

In addition to the simple fact that Anishinaabe law in Treaty #3 territory, like all law, evolves and adapts to the contemporary needs of its subjects, there are many other explanations as to why, upon deciding to codify a form of the Law of Necessity, the GCT3 preferred using the much broader and more inclusive notion of conservation. For instance, it may be that they preferred to risk interpretive breadth over narrowness, given the risk of Crown or other parties seeking to invoke *Manito Aki Inakonigaawin* in collateral contexts. The anti-indigenous fishing lobby might try to evoke it against an aboriginal group exercising its s. 35 right to fish for food or ceremonial purposes, or an environmental group may seek to use the Law against the Anishinaabek regarding a particular hunt or their hunting practices generally. It's frequently the case that environmental groups or government ministries disagree with a First Nation's environmental practices or whether members ought to engage in harvesting of a particular resource.[146] By using the language of conservation and by having maintained the ongoing legitimacy of traditional Anishinaabe law, the GCT3 has ensured a minimum threshold of environmental stewardship on the part of developers, while having reserved its own capacity to invoke the narrower and more restrictive necessity threshold for resource extraction in occasional circumstances where it may be necessary.

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143 *Ibid*. at 4 (emphasis added).

144 *Ibid*. at 1.

145 *Ibid*. at 4 (emphasis added).

146 For a very well-articulated example of this form of conflict, see the story of the Aishihik Wolf kill in note 49 at 316-321. For an example pertaining to a Treaty #3 Anishinaabe community, see Robert H. Keller, "Lac La Croix: Rumour, Rhetoric & Reality in Indian Affairs" (1988) 8(1) Canadian Journal of Native Studies 59.

IV *Ningaabii'anong* (West): Canadian Law Then and Now—Relationship-Defining, Section 35, Consultation & Accommodation

Thus far I've argued that by virtue of its focus on relationships, Anishinaabe natural resource law, as representative of Anishinaabe world view, is distinct from Canadian natural resource law in significant ways and doesn't sit comfortably within it. I've also been careful to argue that the irreconcilability of Canadian and Anishinaabe law regarding natural resources is contingent; that it need not be there and that at least in some ways, the respective jurisdictions could function together. The critical question then is what obstacle bars that possibility from manifesting as reality? The answer is simple and obvious.

Colonialism: The Dominion Paradigm of Relationship Applied to Persons

We've learned that for the Anishinaabek, all persons—a broadly inclusive identity category—are interconnected and that the relationships they share are regulated through law. What we've so far left out (except for noting one clause in *Manito Aki Inakonigaawin*) is that this includes human–human relationships as well: Anishinaabe world view holds that Anishinaabe is not above or even other-than the environment or the "natural world" for those who find that identifier useful; Anishinaabe is, in an immediate sense, as much a part of the environment as is a stone, gust of wind or lake ripple.

What then of the Crown-Anishinaabek relationship? How has Canada used its law to govern this relationship? Consider the question from an Anishinaabe perspective: has Canada acted in a manner that respects Anishinaabe?[147]

147 The sting of this question, specifically as regards natural resources, traces all the way back to the formalization of the Anishinaabek-Crown relationship. In his "short-hand report" to the Earl of Dufferin, Alexander Morris, the Crown's commissioner for the Treaty #3 negotiations wrote of the Anishinaabek that "[t]hey asked if the mines would be theirs; I said if they were found on their reserves it would be to their benefit, but not otherwise. They asked if an Indian found a mine would he be paid for it. I told them he could sell his information if he could find a purchaser like any other person" [*supra* note 87 at 50; the alleged dialogue of the exchange is at 70]. Yet despite these admissions, somehow the Anishinaabek retention of mineral rights on their reserves didn't make it into Morris's version of the Treaty, which Canada even today considers the official account. That right did survive in the version recorded by August and Joseph Nolin, Métis gentlemen, for Ogimaa Powassin of Animikiwazhing, one of the lead Ansishinaabe negotiators. Article 12 of the Nolin version provides that "If some gold or silver mines be found in their reserves, it will be to the benefit of the Indians but if the Indians find any gold or silver mines out of their reserves they will surely be paid the finding of the mines" [Joseph & August Nolin, *Paypom Treaty* (3 October 1873), online: Grand Council of Treaty #3 <http://www.gct3.net/wp-content/uploads/2008/01/paypom_treaty.pdf >]. The Crown's behaviour here is all the more vile given its knowledge of gold within the Treaty territory. Several Ogimaa from Shebandowan were unable to attend the Treaty congress, but committed to the Treaty in advance, their signatures to be obtained afterwards. Morris wrote of Ogimaa Ke-ba-quin that "[t]he gold bearing country is in this Chief's district" (*supra* note 87 at 328).

Neither was this an isolated incident; the Crown used law in a way that disrespected the Anishinaabek, specifically in regard to natural resources, from the beginning of our relation-

Has it ensured the continuity of Anishinaabe and imposed upon Anishinaabe's liberty only as much as was necessary?[148] The legal record is well known: legislation confining the Anishinaabek and other indigenous peoples to their reserves, empowering the forced removal of their children from their communities to residential schools, disallowing the procurement of legal counsel, forbidding indigenous ceremonies and imposing a foreign governance model. These are but a few of the better known examples in public consciousness, echoing still today for those targeted, of how the Crown has used law as an oppressive tool to control indigenous peoples in Canada. These examples need no further analysis here. But what of natural resources more specifically? Is there a connection between the state's treatment of what it identifies only as resources for consumption and (ongoing) colonization of indigenous peoples? Unequivocally, yes—the upshot of which is that Canadian and Anishinaabe legal orders will remain irreconcilable until this relationship changes.

That's the focal point that direct action initiatives revolve around: the relationship. Dr Simpson has expressed the connection concisely:

> Maintaining domination over the land and Indigenous Peoples has characterized the relationship between settler governments, the environment, and Indigenous Nations. The Effects of colonization, colonial of domination, and environmental destruction on Indigenous Peoples and their Territories present them with some of the most catastrophic environmental problems in Canada today.[149]

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ship. The notorious *St. Catharines Milling* case (*St. Catharines Milling & Lumber Co. v. R.*, C.R. [10] A.C. 13, 4 Cart. B.N.A. 107, 58 L.J.P.C. 54, 6 L.T. 197, (1889) L.R. 14 App. Cas. 46) involved forestry operations of the St. Catharines Milling & Lumber Company on the traditional territory of the Anishinaabek of Treaty #3. By 1888, only 15 years after formalizing the Treaty relationship, the federal and provincial Crowns were already litigating upon a presumption of extinguishment of Anishinaabek title, the legal issue instead being in which Crown title to the territory now vested. This wasn't the Anishinaabe understanding of the Anishinaabek-Crown relationship, and the Anishinaabek, of whom it was said "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign," weren't invited to participate in the proceedings (*ibid*. at 7).

148 Shortly after *Manito Aki Inakonigaawin* was passed, the federal government halted a payment of $355,000 to the GCT3, closing it for a week (Wawatay News, "Grand Council Treaty #3 temporarily closed its offices and laid off its 50 employees last week because of a delay in funding from Indian Affairs" Wawatay News (19 September 2002), online: Wawatay News Online http://www.wawataynews.ca/node/10162). Sara J. Mainville, a councillor for my First Nation, has argued that Canada pulled the funding to demonstrate to the GCT3 the consequences of superseding its minimal legislative authority recognized by Canada (Sara J. Mainville, "Treaty Councils and Mutual Reconciliation Under Section 35" (2007) 6(1) Indigenous Law Journal at 144 [Mainville, *Treaty Councils*]).

149 Leanne Simpson, "Listening to Our Ancestors: Rebuilding Indigenous Nations in the Face of Environmental Destruction" in J.A. Wainwright, ed., *Every Grain of Sand: Canadian Perspectives on Ecology and Environment* (Waterloo: Wilfrid Laurier University Press, 2004) at 123.

For an example of such a problem, see Leanne Simpson, "Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge" (2004) 28(3/4) American Indian Quarterly 373. In this paper, Dr Simpson describes the relationship between indigenous land and indigenous knowledge, and explains how when traditional indigenous territory is destroyed

Looking forward, she adds that:

> Issues of environmental protection and the management of natural resources cannot be resolved until the colonial relationship Canada insists on having with Indigenous Peoples is dismantled, and jurisdiction over Indigenous lands is restored to the hands and hearts of Indigenous Peoples.[150]

Robert Lovelace has also articulated the connection between Canada's treatment of natural resources and its treatment of indigenous peoples, namely that from Canada's perspective, indigenous peoples are in the way of the resources: "[c]olonialism supports the Canadian dominion as a system that claims the privilege of pillaging the earth and displacing the original human beings for its own wealth and security."[151] Evidence of the Anishinaabek being "in the way" of natural resource development is ample and spans many generations. The Anishinaabek have suffered catastrophic impacts culturally and in their ability to feed themselves in respect of flooding resulting from hydroelectric projects as far back as the late 1800s[152] and, as I've discussed, more recently; historically, Canadian law has been used to categorically exclude the Anishinaabek from competitive forestry contracts[153] so as to avoid Canada having to engage with Anishinaabe law, a process which continues today.[154] The Anishinaabek have either been in the way of or left out of mining activities since at least the mid-1800s (despite evidence of their traditional use of metals)[155] and,

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(or developed, depending on one's perspective), so too is the knowledge of the indigenous inhabitants of that territory.

150 *Supra* note 148 at 122.

151 *Supra* note 1 at xvii.

152 Joan A. Lovisek, Leo G. Waisberg & Tim E. Holzkamm, "'Deprived Of Part Of Their Living': Colonialism and Nineteenth-Century Flooding of Ojibwa Lands" in David H. Pentland, ed., *Papers of the Twenty-Sixth Algonquian Conference* (Winnipeg: University of Manitoba, 1995) 226.

153 Mark Kuhlberg, "'As the Indians were wards of the Dominion Government': The Anishinabe of McIntyre Bay in the Hepburn-King Constitutional Battles" in Dimitry Anastakis & P.E. Bryden, eds, *Framing Canadian Federalism: Historical Essays in Honour of John T. Saywell* (Toronto: University of Toronto Press Incorporated, 2009) 95. A similar form of oppression presented itself to Anishinaabe south of the United States border too. This history is tracked, with respect to timber and one community, the Bad River Band of Ojibwe, in Michelle M. Steen-Adams, Nancy E. Langston, & David J. Mladenoff, "Logging the Great Lakes Indian Reservations: The Case of the Bad River Band of Ojibwe" (2010) 34(1) American Indian Culture And Research Journal 41.

154 As recently as 2003, the GCT3 petitioned the US Under Secretary for International Trade with respect to what would soon become the softwood lumber dispute, noting that "[n]ot only have our people been excluded from the forest industry with the companies failing to take our traditional knowledge and Anishinaabe law into account, but we have also not received any remuneration for the extraction of resources in our traditional territories" (Letter from Grand Chief Leon Jourdain, Grand Council of Treaty 3 to Grant D. Aldonas, Under Secretary for International Trade (6 August 2003), online: Department of Commerce, International Trade Administrationhttp://ia.ita.doc.gov/download/canada-softwood-lumber/rebuttals/gct3-softwood-lumber-rebuttal.pdf).

155 Tim E. Holzkamm, "Ojibwa Knowledge of Minerals and Treaty #3" in William Cowan, ed., *Papers of the Nineteenth Algonquian Conference* (Ottawa: Carleton University, 1988) 89.

as we shall see, much more recently in the case of KI. More commonly known to most readers will be the many conflicts between Anishinaabek and other indigenous fishers on the one hand, and non-indigenous food and sport fishers on the other. Much of the Supreme Court of Canada's s. 35 jurisprudence has been preoccupied with indigenous fishing rights.[156] Fishing has long been a significant tool of colonial oppression wielded against the Anishinaabek. In 1929, H.J. Bury, supervisor of Indian timber lands, wrote: "I have seen many Indians practically starving on the shore whilst they watched whitemen fishing commercially in the bays, adjacent to their reserves, the Indians themselves being refused fishing licenses by Ontario, although quite willing to pay the license fee and purchase their nets and equipment."[157]

Legal Orientation: Communities and Individuals

Canadian law regulating relationships to land in which the Anishinaabek and other indigenous peoples have an interest (and for the Crown, a constitutional obligation) is articulated primarily in respect of the doctrines associated with s. 35 rights,[158] and the correlative doctrines of consultation and accommodation emergent from this jurisprudence. Regardless of which specific legal doctrines are relevant in a given circumstance, this entire area of Canadian law (generally termed "aboriginal law" because of the definition of "aboriginal peoples" provided in s. 35(2)[159] of the *Constitution Act, 1982*) is limited in scope to land over which a state-recognized aboriginal group has proven (or has a reasonable future claim to) unextinguished aboriginal rights (including aboriginal title) or treaty rights pursuant to the respective legal tests established in the case law. However even at the broadest, most general level of abstraction, neither the concept of aboriginal rights nor of aboriginal title fits comfortably with the Anishinaabe foundations we've explored for Anishinaabe legal interests in their territory and its resources.

The tension in legal orders arises from the very different world views. Anishinaabe law is much more relationally oriented and community-centred than is Canadian law. Canadian law (perhaps most clearly evidenced in the *Canadian Charter of Rights and Freedoms*) privileges individuals over com-

156 For a more detailed, community-based examination of a fisheries conflict involving the Anishinaabek, see Edwin Koening, "Fisheries Conflicts on the Saugeen/Bruce Peninsula: Toward a Historical Ecology" in David H. Pentland, ed., *Papers of the Twenty-Eighth Algonquian Conference* (Winnipeg: University of Manitoba, 1997) 200.

157 Mainville, *Treaty Councils*, *supra* note 148 at 163, quoting from H.J. Bury, "Memorandum to the Deputy Minister, Department of Indian Affairs, Treaty rights and Treaty 3" (17 September 18[sic]29), Library and Archives Canada (RG10, vol. 1912, file 2563-2).

158 There are Canadian statutory tools and common law protections which also regulate this relationship to varying degrees, but all are subject to the constitutionally-entrenched authority of s. 35.

159 Section 35(2) of the *Constitution Act, 1982*, provides that, "In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

munities. By way of illustrating the depth of this divide, consider that under Anishinaabe law, one's *home* had to be shared with another clan member in need, even if the parties had never met before.[160] This is in stark contrast to the legal claims strangers might make under Canadian law to seek lodging and nourishment in your home! Further, seasonal aggregations and dispersals of Anishinaabe communities[161] emphasized less value on most personal property—you had what you could carry, while you needed it.[162] If one accidently acquired more than he or she needed (say for instance, if two hunters from the same family returned from hunting with, between them, more game than the family needed), then the excess would not be theirs to keep, including by transfer or trade into another, more permanent form. If someone else within the kinship network needed that food, his or her need would have priority regarding the resource. Elders, for instance, were cared for and provided with the necessities of life by younger community members. This holds true for the KI as well: according to Eliza Childforever, children,

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160 For the KI also, "[m]embers of the same clan considered themselves as closely related, even if they were from different communities" (*supra* note 14, KI, *One with Land*, at 137).

161 I wish to be explicitly clear that although groups of Anishinaabek seasonally aggregated into and dispersed from fluid communities, they constantly possessed and occupied defined territories as against other human groups, such as the Haudenosaunee to the East, the Sioux to the South and Southwest, and other Assiniboine and Cree peoples to the West. We were not nomadic peoples; we moved throughout our territories in a routinized, cyclical pattern that followed seasonal developments and their cultural and economic opportunities. See Bohaker *Dissertation*, *supra* note 107 at 11-16 and 280. The incorrect but stubborn notion of Anishinaabek nomadism is the contemporary result of historical misunderstandings. Speaking of Jesuit Priests and Algonkian peoples, Frank Speck and Loren Eiseley, two of America's most noted anthropologists of their time, observed that,

> A careful reading of the evidence suggests that the fathers, associating property to a large degree with settled agricultural existence, may have seen in the winter hunting of their peoples a life more chaotic and unplanned than was actually the case. Certainly subjective and relative judgments by the fathers as to the lack of arts, laws, etc. of the Indians do not always suggest discernment upon non-material aspects of culture, particularly in the case of so abstract and fluid a concept as that of band of family ownership of hunting territories, whichever type of ownership may actually have obtained among these people at the time of contact [Frank G. Speck & Loren C. Einseley, "Significance of Hunting Territory Systems of the Algonkian in Social Theory" (1939) 41(2) American Anthropologist 269].

162 While evidently the Anishinaabek, like all peoples, had need of personal property, further evidence of a radically different cultural valuation of personal property is evidenced in a recent publication by Paul Hackett:

> John McLoughlin [of the Hudson's Bay Company] explained of the Ojibway of the Boundary Waters region between Fort William [present day Thunder Bay] and Lake of the Woods that "on extraordinary occasions, such as the death of friends or Relations, they will throw away everything they can possibly spare and some time indeed will leave them in a manner naked" [Paul Hackett, "Historical Mourning Practices Observed among the Cree and Ojibway Indians of the Central Subarctic" (2005) 52(3) Ethnohistory 506, citation omitted].

Hackett tracks this trend amongst many Anishinaabe communities.

> are to be of help to the elder and to not just stand there and look at their need. The fathers also told the same teachings; to give them food if they are hungry and not to expect to be paid for it. I see them doing what we passed on to them.[163]

Another community member, Jemima Morris, adds that:

> They never kept all the meat for themselves. Everything was shared amongst themselves. They showed their gratefulness for what they were able to do by sharing their food with their neighbours. They believed that if they showed their kindness they would be blessed by the Creator for all the things that are on the land. That was part of their way of life, to look after one another.[164]

The concept of aboriginal title is even more poorly matched to Anishinaabe law than are aboriginal rights. Under Anishinaabe law, humankind has been given access to and use of particular lands created by Gitchi Manidoo, in accordance with the caretaking instruction also given. The land is not only alive, but is fully a person, as are all of the beings it hosts. To claim ownership *over another person* in the same sense that the common law contemplates title to mean *ownership over land* amounts to slavery.[165] Anishinaabe is the steward of all these people, not their master. As such, the Canadian concept of aboriginal title connotes a relationship to land that not only conflicts with, but which in fact *inverts* the human-land relationship contemplated under Anishinaabe law.

Infringement and Erasure: The Constitutional Privileging of Others

If at a broad, conceptual level contemporary Anishinaabe and Canadian law are at odds with one another regarding how traditional Anishinaabe land may be treated, when all the details are considered the irreconcilability of the respective paradigms of human-land relationship are even more clearly seen. In the *Sparrow* decision, the Supreme Court of Canada's first interpretive effort at s. 35, Dickson C.J.C. determined, despite the fact that s. 35 rights were specifically entrenched within the Constitution outside of the *Charter* so as not to be subject to the s. 1 override, that "[r]ights that are recognized and affirmed are not absolute."[166] A doctrine of infringement was thus created. In the *Van der Peet* decision, Lamer C.J.C. introduced a new, transformative doctrine: the very purpose of s. 35 rights is to reconcile prior aboriginal occupation with the assertion of Crown sovereignty.[167] This constitutional

163 *Supra* note 14 (KI, *One with Land*) at 41.
164 *Ibid*. at 43.
165 However this didn't preclude the Anishinaabek from claiming absolute possession over land *as against other peoples*; it means simply that, for reasons already discussed, Anishinaabe persons couldn't relate with land in a way that would allow them to treat it as property as against the land itself or against Creator.
166 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 62.
167 *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 31.

elevation of non-indigenous interests at the *definitional* stage of indigenous rights has allowed for the vast expansion in grounds for infringement articulated cumulatively in *Van der Peet*, *Gladstone*[168] and *Delgamuukw*.[169]

In *Sparrow*, the court held that infringement could occur only for purposes of "conservation and management of our resources."[170] In *Van der Peet*, the Chief Justice cracked opened the floodgates of change, warning that there may be additional substantial and compelling legislative objectives capable of infringing aboriginal rights, and specifically adding public security to the list.[171] In *Gladstone*, economic and regional fairness and non-indigenous "historical reliance" on a resource were added.[172] Finally, in *Delgamuukw*, development of agriculture, forestry, mining, hydroelectric power, general economic development, environmental protection, protection of endangered species and the building of infrastructure and settlement of foreign populations were all added.[173] Non-indigenous statutory and even mere *historic* rights—rights which, *ceteris paribus*, are ordinarily possessed of no legally binding force—were given constitutional authority as against indigenous rights claimants, *and in the name of indigenous rights*. To the extent that an aboriginal right can be proven, it can later be infringed by just about every form of natural resource development under the Sun. Canada's aboriginal rights paradigm doesn't seem to do much for Anishinaabe understandings of relationship with land. In its putative attempt to provide for indigenous peoples, Canada provided for everyone else at indigenous expense.

However, before aboriginal or treaty rights can be infringed, would-be developers must discharge their procedural duty of meaningful consultation with indigenous peoples who stand to be potentially affected. The scope and nature of consultation necessary in a given circumstance turns on the scope of the potential impact of the intended development project on indigenous communities and their rights claims, potential or actual, and on the apparent strength of their claim(s). If potential impact is thought to be significant or the claim strong, a substantive duty of accommodation of indigenous concerns may result from the consultation. The *Haida*[174] case established that the doctrine of the honour of the Crown necessitates that consultation occur even where aboriginal rights are as of yet unproven. However, the simultaneous *Taku River Tlingit*[175] decision clearly established the existence of limits: the

168 *R. v. Gladstone* [1996] 2 S.C.R. 723.
169 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.
170 *Supra* note 166 at 74.
171 *Supra* note 167 at 136.
172 *Supra* note 168 at 75.
173 *Supra* note 169 at 165.
174 *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S. C. R. 511 at 27.
175 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 at 43-44. This legal finding is in direct conflict with *Manito Aki Inakonigaawin*,

duty to consult in good faith doesn't amount to a veto power for indigenous communities in respect of either the occurrence or the course of development in their traditional territories.

Commensurate with the broadening base for infringement of aboriginal rights is a prominent shift in the language used to articulate and interpret the ideas said to underlie and support claims of aboriginal rights. This shift is demonstrated in the same line of cases. In *Sparrow*, the Supreme Court of Canada draws on the conceptual framework of *Guerin*[176] to state unequivocally that "the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples."[177] The Court interpreted this duty in respect of priority of resource allocation; after conservation goals were met, the Musqueam were to have priority for food fishing with respect to other groups: "[t]he constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing."[178]

The language of fiduciary duty was repeated in *Van der Peet*, *Gladstone* and *Delgamuukw*. However in *Gladstone*, the concept of priority was lost. Unlike *Sparrow*, in which an aboriginal right to fish for food and ceremonial purposes was at issue, in *Gladstone* the right asserted was to derive a commercial benefit from fishing. As such, the right was construed as having no internal limit.[179] Nonetheless, for Chief Justice Lamer's majority, this perceived difference necessitated a reinterpretation of the Crown's fiduciary duty to aboriginal peoples. Albeit still invoking the word "priority," in substance the Court abandoned that notion, preferring the concept of balance between competing interests:

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paragraph 16 of which specifically requires the consent of the Treaty #3 Anishinaabek before a proponent is authorized under Anishinaabe law to pursue its development plan [*supra* note 125 at 5]. However, the most explicit statement of the legal necessity of Treaty #3 Anishinaabe consent for a development project to proceed comes from the GCT3's explanatory note to the Law:

> [T]he Anishinaabe Nation in Treaty #3 maintains rights to all lands and water in the Treaty #3 territory commonly referred to Northwestern Ontario and south-eastern Manitoba. Accordingly, any development in the Treaty #3 Territory such as, but not limited to, forestry, mining, hydro, highways and pipeline systems that operate in the Treaty #3 Territory *require the consent*, agreement and participation of the Anishinaabe Nation in Treaty #3 [The Grand Council of Treaty #3, *Laws and Policies*, online: GCT3 < http://www.gct3.net/grand-chiefs-office/laws-and-policies/>, (emphasis added)].

176 *Guerin et al. v. R. and National Indian Brotherhood*, [1984] 2 S.C.R. 335.

177 *Supra* note 166 at 59.

178 *Ibid*. at 78.

179 *Supra* note 168 at 58-60. Professor Borrows comments on the eurocentrism of this arguably racist proposition: "[t]his concern is curious, from an Aboriginal perspective, because there are limitations placed on these rights—the laws and traditions of Aboriginal peoples" [John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997/1998) 22(1) American Indian Law Review 59].

> The doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users.[180]

The move to a notion of balance was further entrenched a day later in the *Van der Peet* decision, where the Court acknowledged that "[a]t a minimum, this fiduciary duty commands that *some* priority be afforded to the natives in the regulatory scheme governing the activity recognized as [an] aboriginal right."[181] How much priority remained unclear, but that aboriginal constitutionally enshrined rights were to be traded off with non-aboriginal common law rights was perfectly clear. McLachlin J. dissented on precisely the issue of relegating aboriginal rights to a balancing of interests: "[t]o follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the constitution."[182]

To fail to do so would amount to *extinguishment* of the general public's common law right to fish commercially, reasoned Lamer, which could not have been the intention of the Court in *Sparrow*.[183] Thus the floodgates of infringement were flung wide open and in the name of aboriginal rights, "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery *by non-aboriginal groups*"[184] were given constitutional status.

The *Haida* and *Mikisew*[185] cases lessened the constitutional obligation to indigenous peoples further still by dropping the language of fiduciary obligations altogether and relying solely on the honour of the Crown, a concept which in *Van der Peet* existed alongside the fiduciary duty.[186] This is even more troubling still, for it isn't clear that something needs even to be *balanced* in order to be *honourable*.

The critical point behind this gradual shift is that the reconciliation doctrine articulated in *Van der Peet* has meant that Canadian law not only permits, but requires that non-aboriginal interests be considered even in how *aboriginal* rights are construed. This remains the case even though the Supreme Court of Canada has stated that:

> Taking into account the aboriginal perspective on the occupation of land means that physical occupation as understood by the modern common law is not the governing criterion. The group's relationship with the land is paramount. To

180 *Supra* note 168 at 62.
181 *Supra* note 167 at 137 (emphasis added).
182 *Ibid*. at 308.
183 *Supra* note 168 at 67.
184 *Ibid*. at 75 (emphasis added).
185 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388.
186 *Supra* note 167 at 24.

> impose rigid concepts and criteria is to ignore aboriginal social and cultural practices that may reflect the significance of the land to the group seeking title.[187]

Given that Canadian law of the rights of aboriginal peoples ultimately isn't about scoping accurate boundaries of the legal interests of aboriginal peoples, but rather about striking a compromise between those interests and the interests of Canadians generally—who have a very different way of relating to land than do the Anishinaabek—it seems that from an Anishinaabe perspective, Canadian law can't provide anything remotely resembling justice for Anishinaabe interests in land. The conflict, on one type of fact pattern at least, boils down to Canada permitting—in the name of aboriginal rights—the destruction of topsoil ecosystems, systematized drilling into the Earth and the mass removal/dislocation of, from an Anishinaabe perspective, persons. And this is permitted for purposes such as forestry, mining, hydroelectric power, general economic development, regional fairness and even historical reliance—the mere fact that people have done it in the past. There are many circumstances under which simply by virtue of allowing these activities, even without consideration to their decidedly anthropocentric ends, an Anishinaabe community would be in direct violation of its traditional law. This is the case of KI.

V *Giiwedinong* (North): Kitchenuhmaykoosib Inninuwug—Creator and Canada, Justice and Jail

> This case highlights the clash of two very different perspectives and cultures in a struggle over one of Canada's last remaining frontiers. On the one hand, there is the desire for the economic development of the rich resources located on a vast tract of pristine land in a remote portion of Northwestern Ontario. Resisting this development is an Aboriginal community fighting to safeguard and preserve its traditional land, culture, way of life and core beliefs.[188]

The convoluted legal proceedings of KI, Platinex, and the Crown in right of Ontario illustrate the conflicting views of land and law that we've been exploring. KI is a First Nation roughly 377 miles North of Thunder Bay, and a party to Treaty 9. Platinex Inc. is a junior exploration company which had 221 unpatented mining claims and 81 mining leases on traditional KI territory. Although initially interested in pursuing development opportunities on its territory—with the caveat that any and all development occur in a way it found agreeable—KI eventually changed its mind and by June 2000 had issued a moratorium on development projects in its ancestral territory, unequivocally terminating its support for Platinex. Ultimately, six members of KI, Donnie

187 *R. v. Marshall; R. v. Bernard*, 2005 S.C.C. 43, at 137.
188 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] O.J. No. 3140 (QL) at 1.

Morris (Chief), Jack Mckay (Deputy Chief), Samuel Mckay, Cecilia Begg, Darryl Sainnawap (Councillors) and Bruce Sakakeep ("the KI-6") were sentenced to six months imprisonment for contempt of court. Direct action initiatives they engaged in denied Platinex access to lands necessary to pursue its claims and as such were in violation of the terms of an interim injunction the company had obtained against KI. A very important fact is that none of the KI-6 defended against the charge.[189]

Driving KI in this struggle to safeguard and preserve its traditional land, culture, way of life and core beliefs was its sacred law, *Kanawayandan D'aaki*, a local name for the stewardship obligation discussed above. Community member John Cutfeet explains:

> Kanawayandan D'aaki means "look after my land," but most importantly, it means "keep my land." Kanawayandan D'aaki not only means you have a responsibility to look after the land but that you also have a sacred duty from our Creator "God Almighty" to fulfill this sacred responsibility ... Our primary responsibilities as keepers of the land revolve around our spiritual mandate to preserve and protect it.[190]

This perspective has been presented in court filings as well. In KI's factum on a motion seeking to enjoin Platinex from pursuing its drilling agenda, KI stated:

> KI is embedded with the land, through a spiritual stewardship relationship, understood by KI as the Law of the Creator. KI was given its traditional lands by the Creator to protect for this and future generations. All of these are viewed by KI as core elements of its identity and culture. These deeply-held spiritual beliefs were an important motivating factor in KI's protest actions against Platinex.[191]

Cutfeet explains the jurisdiction dilemma into which KI was thrust regarding Platinex's right to drill on ancestral KI territory, as legislatively empowered and judicially enforced under Canadian law:

> When the exploration company [i.e., Platinex Inc.] came onto our land without permission from Kitchenuhmaykoosib Inninuwug, it directly challenged our culture, our spirituality, and the sacred mandate that had been entrusted to us by the Creator to protect the land in which we were placed.[192]

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189 They did successfully appeal the sentence, serving just under 10 weeks of its term.

190 John Cutfeet, "Kitchenuhmaykoosib Inninuwug: Our Home and Native Land" (speech presented to the roundtable entitled *The Duty to Consult Aboriginal Peoples and Ontario's Mining Act* at the Canadian Law and Society Association meetings at the Congress of the Canadian Federation for the Humanities and Social Sciences, University of Saskatchewan, Saskatoon, 2 June 2007), online: Mining Watch Canada <http://www.miningwatch.ca/en/kitchenuhmaykoosib-inninuwug-our-home-and-native-land>.

191 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, Factum of the Moving Party, Kitchenuhmaykoosib Inninuwug, et al. on Motion for Injunction (19 June 2006), Thunder Bay 06-0271 (Ont. S.C.J.) at 18.

192 *Supra* note 190.

This claim, too, is held closely enough by KI that they have put it forward in the legal proceedings:

> From KI's perspective, its moratorium is a manifestation of KI's own law, deriving from the Law of the Creator, which includes making decisions that ensure protection of KI's traditional territory for this and future generations. KI cannot make such decisions without meaningful consultation, including at the strategic planning level. To defy the moratorium through permitting Platinex activities to proceed in this context, is, to KI, to defy the Law of the Creator. This is irreparable harm.[193]

A direct action response to what was from KI's perspective a territorial invasion wasn't simply about posturing for a better deal. It was about fulfilling a sacred obligation under KI's own law. A recent community assessment paper states that *Kanawayandan D'aaki* is, despite its age, forward-looking—and not only for KI's own benefit:

> We know the resources will need to be preserved and used wisely for the sake of our children and for the children from the four colours of the world.[194] As we head into a challenging future, our connection to the land and its peoples continues to be strengthened and we pray for respect, honesty and wisdom to be our guides.[195]

This result in this case was particularly sad because unlike most Justices, Smith J. actually understood KI's perspective within the conflict of laws mess he was handed, yet imprisoned the KI-6 regardless, taking the view that:

> If two systems of law are allowed to exist—one for the aboriginals and one for the non-aboriginals, the rule of law will disappear and be replaced by chaos. The public will lose respect for, and confidence in, our courts and judicial system[196]

However this appears to be in direct conflict with Lamer C.J.C.'s pronouncement in *Delgamuukw* that:

> The aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples ... As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which

193 *Supra* note 191 at 68. See also paragraph 38.

194 This is a reference to the Medicine Wheel, but I leave interested readers to learn about it elsewhere.

195 *Kitchenuhmaykoosib Inninuwug First Nation: Searching Together Report 2009*. Mamow Shawaygikaywin; North South Partnership for Children. Design by Roxann Shapwaykeesic/ Wawatay Print Services and Linda Nothing-Chaplin, online: <http://www.northsouthpartnership .com/pdfs/ca-KI%20Assessment%20Report%2009 .pdf> at 1.

196 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 WL 726951 (Ont. S.C.J.) at 44.

> are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system *or laws governing land use*.[197]

The difference here appears to be recognition in principle versus actual recognition of indigenous law. The tragedy is that Smith J. genuinely understood the significance of KI law and the world view informing it. At different points in the various proceedings associated with this matter, he stated:

> Whether any proposal for development will be accepted depends on the merits of each proposal, and whether the development respects KI's special connection to the land and its duty, *under its own law*, *to protect the land*;[198]
>
> Irreparable harm may be caused to KI not only because it may lose a valuable tract of land in the resolution of its TLE Claim, but also, and more importantly, because it may lose land that is important from a cultural and spiritual perspective. No award of damages could possibly compensate KI for this loss;[199]
>
> Although interested in the possible commercial and economic opportunities, KI views the issues of sovereignty, and cultural and spiritual concerns, as being paramount;[200]
>
> Viewed from an historical perspective this case is yet another battle in a larger ongoing conflict between two very different cultures. On one side of the battlefield is the non-aboriginal desire to develop the rich resources of the land. *On the other side is the Aboriginal perspective that views the land as a sacred legacy given to them by the Creator to manage and protect*.[201]

Most important of all, Smith J. observed that:

> It is critical to consider the nature of the potential loss from an Aboriginal perspective. From that perspective, *the relationship that Aboriginal peoples have with the land cannot be understated*. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. *Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land*. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.[202]

So difficult in fact, that when push came to shove, legally none of it mattered; the indigenous perspective that was said to be so important could be dismissed with a judicial flick of the wrist.

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197 *Supra* note 169 at 148 (emphasis added).
198 *Supra* note 188 at 19 (emphasis added).
199 *Ibid*. at 79.
200 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 29 C.E.L.R. (3d) 191, [2007] 3 C.N.L.R. 221 at 11. Recall that for KI, "spiritual concerns" are not divorced from legal obligations.
201 *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation & A.G. Ontario*, 2007 CanLII 16637 (ON S.C.) at 4 (emphasis added).
202 *Ibid*. at 80 (emphasis added).

Physically, push never did come to shove—OPP or Anishinabek Police officers were present at flashpoint confrontations—of which there have been several in the KI-Platinex relationship, and have never testified as to a physical confrontation.[203] Bodies have remained intact. Ideologically, however, the violence is immense. So long as the judicial pronouncement remains that at the end of the day, indigenous law doesn't matter,[204] whenever such situations arise, Anishinaabe people will persist in the same way and if necessary will continue to be incarcerated. If indeed the goal of Canadian aboriginal law, pursuant to the *Van der Peet* test, is reconciliation of prior indigenous occupation with the assertion of Crown sovereignty, we're failing miserably, for Crown sovereignty dominates the law, and when a judge feels the law is threatened by an aboriginal right, strangely there's no reconciliatory compromise.

I stood outside the Ontario Court of Appeal on May 28, 2008, when the KI-6 were released. I struggled intensely with their decision to endure their charge uncontested. As I began to learn more about Anishinaabe law, and then finally when I sat with a KI group over dinner one evening—three members of the KI-6, two other councillors and I—I suddenly understood. The KI-6 couldn't legitimize Canadian law in the face of how it had treated their traditional law, even at the cost of their individual liberty. It was a perfect jurisdictional conflict; the KI-6 were thrust into a position from which there was no legal exit but jail. That's the depth of the conviction many Anishinaabek have to their legal order.

That's a critical point here: the resistance sometimes presented to natural resource development by Anishinaabe communities is about conviction and legal obligation, not categorical anti-development. All cultures change; if they don't, they die. We, the Anishinaabek, are no different. We get it. According to KI Chief Donnie Morris:

> Kitchenuhmaykoosib Inninuwug is not against development within and around identified land mass. I support economic development, but it must be done in a manner where our natural environment is not destroyed, and mitigation measures which are consistent with our beliefs and practices must be in place. I would like to see our people benefit from our natural resources here so that families can start business and participate in tourism, eco-tourism, fisheries, logging and

203 With respect to perhaps the most factually contested flashpoint encounter, which involved the tearing up of the airplane runway (except in Winter when lakes have frozen over, KI is a fly-in only community), Justice Smith said, "[t]here was however, no independent evidence provided to this court of wrongdoing or criminal behaviour by KI or members of the community, despite the fact that the OPP were present for the duration of the confrontation" (*supra* note 188 at 129).

204 Smith J. stated: "While I understand the principles and beliefs that the Respondents hold, the sanctity of the system of justice and of the rule of law are paramount and must be protected at all costs. Simply put, there is a clear line in the sand that no segment of society can be allowed to cross" (*supra* note 196 at 53).

> other natural resources development activities where they will prosper and build a better future for their children and grandchildren.[205]

Once more, KI evidenced this conviction by presenting it as part of a legal argument against Platinex:

> KI is not opposed to all economic development within its territory. Whether any proposal for development would be accepted depends on the merits of each proposal, and whether the development respects KI's special connection to the land and its duty, under its own law, to protect the land.[206]

For the majority of Anishinaabe communities, most of the time the central issue for consideration isn't about a yes or no response to development, but rather about process and relationships. Economic efficiency (both in process and in ultimate resource yield) is an important consideration, but only one important consideration amongst numerous others.

VI Conclusion: Final Thoughts on the Path Ahead

In this paper I've briefly canvassed elements of Anishinaabe thought and law relevant to land and its natural resources. My view in so doing has been that if Crown and third-party proponents of development projects begin to understand the law of the Anishinaabe communities and individuals affected by their proposed projects, all parties might be better able to move forward in their relationships with one another. After all, as evidenced in both traditional and positivist Anishinaabe law, for the Anishinaabek, good relationships are what it's all about. It's difficult to fathom how the Anishinaabek and others might live in relation to one another in a good way, without an understanding of one another's interests. It isn't good enough to simply expect the Anishinaabek or other indigenous peoples to "look forward" and forget past injustices in the name of peace or prosperity. We *want* to be able to look forward! We're not "backwards"; nor are we blindly anti-development. We are, however, absolutely, uncompromisingly, insistent on having our law legitimized and we'll endure broken bodies for it, if forced. Minnawaanagogiizhigook has summed up the legal relational history:

> Indigenous legal orders have at different times been understood from within Canadian law as having never existed at all, as having been wholly displaced by Canadian law, or as existing only within and according to the terms set by Canadian law. Canadian law's tendency to deny the existence and significance of indigenous legal orders demonstrates disrespect for these legal orders.[207]

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205 *Supra* note 14 [KI, *One with Land*] at 166.

206 *Supra* note 191 at 39.

207 Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: UNB Press, 2007) 78 (citations omitted).

So long as the Crown-Anishinaabek relationship remains founded on disrespect, physical confrontations will continue. Moving *forward* requires an end to oppressive relationships rooted in colonialism and an effort to understand our world view and ourlaw. To move without that is for us not a forward motion at all. Many Anishinaabek have a detailed understanding of Canadian interests. The failure of reciprocal understanding is heavily weighted in one direction.

> Chief Donny Morris, Jack McKay, Bruce Sakakeep, Darryl Sainnawap, Cecilia Begg, Samuel McKay, Enus McKay and Evelyn Quequish you are hereby each sentenced to 6 months in jail.[208]

This isn't a happy ending.

> Should these Respondents decided [sic] to purge their contempt by undertaking on a permanent basis to comply with the order of this Court, I may be spoken to by way of a motion to vary or discharge the custodial order.[209]

If one understands the Anishinaabe law driving the participants of direct action initiatives, one understands that orders such as Justice Smith's will be neither varied nor discharged. For the present, KI is secure from natural resources development on its traditional territory that conflicts with KI law. However this isn't because the KI gave in to the assumed jurisdictional monopoly of Canadian law; it's because they refused to.

On my understanding of Anishinaabe law and of the facts of the Platinex situation, the KI-6 were legally justified in protecting their ancestral territory from gross harm, even in the face of the injunction. In such a situation, a contempt order serves to reify not respect for the rule of law, but rather animosity towards the colonial core of Canadian law as it regards indigenous peoples, their laws and their world views. However, I want to ensure I communicate also that Anishinaabe protest doesn't *always* need to be so adversarial. Sometimes meaningful and effective confrontation can occur in other ways. The epigraph I began this work with suggests that the best direct action initiatives are informed by the "intrinsic goodness" of indigenous ways of knowing. I carry Bob Lovelace's words in my heart and I've had the great pleasure of knowing them. Recently, I finished law school at the University of Toronto. I spent my final semester at the University of British Columbia (Faculty of Law), in order to further my focus on law and indigenous peoples. I was truly blessed in that I began every morning by standing in awe of a brilliant piece of Anishinaabe law both contemporary and traditional. A stunning, massive (14 feet by nearly 6 feet) quilt entitled "Healthy Land, Healthy People" hangs in Sty-Wet-Tan, the Great Hall of the First Nations House of Learning. It was

208 The words of Smith J. rendering sentence to the KI-6 and two others, in *supra* note 196 at 54.
209 *Ibid*. at 57.

created by Alice Williams, Anishinaabe-Kwe from Curve Lake First Nation, to represent (in particular, women's) indigenous voices at the First Ministers Meeting on aboriginal issues of November 24 and 25, 2005, in Kelowna, British Columbia. The quilt was a collective enterprise with over 40 indigenous people contributing blocks to it. Alice Williams has explained about this quilt that:

> The blocks speak about how we, as the Indigenous Peoples of this great and sacred Turtle Island, have a special relationship to and connection with the Land and all of Creation. We know that we should care for, look after, and nurture the Land and all of Creation. We are terribly concerned about the total destruction, disregard, and pollution of the Life-Givers, The Great Mother, and all the Beings of Creation.[210]

Don't be fooled by the peacefulness embroidered in the quilt. With words and intentions like that, despite its beauty this quilt is protest. It draws on the goodness of Anishinaabe traditions to voice Anishinaabe rejection of Canada's improper treatment of the land and all those whom it hosts.

On May 27, 2008—a day before the KI-6 were released—I was among several hundred people gathered at Queen's Park, Toronto, in support of the Mother Earth Protectors' ceremonies and political demonstration for the communities of KI, Ardoch Algonquin First Nation, and Asubpeeschoseewagong Netum Anishinabek (Grassy Narrows First Nation) and for Bob Lovelace and the KI-6, imprisoned for following Anishinaabe law in the face of a Canadian court order. It was a four-day event. On the first night, I heard Thom King speak and Rosina Kazi, the vocalist of Lal, performed an astounding a capella version of "Brown Eyed Warrior," my favourite protest song. On the 27th, I was supporting the initiative through the Law Union, speaking with community members and handing out a one-pager informing them of their obligations in the event of arrest. On the outside, it was easy. All were calm and respectful, and but for a small, potential sense of security I may have added, there was no need for me. On the inside, it was chaos.

The drums pounded through my ears, blood, bones and I wanted to rip my armband off, annihilate my pretence of uninvolved distance and stand with my relations as Anishinaabe. I felt this even though some of the young, angry men to my immediate right whispered "kill whitey" over and again, just loud enough so I could hear, because my skin is light and they were hurt. I felt this because I'm Bear Clan and my relations were under attack and trying to find strength together. And I felt this because insufficiently grounded in my own traditions, standing was all I knew how to do in this complex situation. Outside was peaceful Anishinaabe resistance to colonial oppression; outside I was silent, stone-faced. Inside I bifurcated between shouting in triumph and

210 Alice Williams, "Healthy Land, Healthy People" (2006) 25 (3/4) Canadian Woman Studies 201.

shaking in tears that threatened never to stop if set free. As the drum beat on, slowly the desperate, unreal whine of Black Francis bled through my ears, louder and louder, overlaying the pound of drum and I could hear and feel every word and chord that wasn't playing as if my spine were his fretboard.

With your feet in the air and your head on the ground
Try this trick and spin it, yeah
Your head will collapse
If there's nothing in it
And you'll ask yourself
Where is my mind
Where is my mind
Where is my mind[211]

Two years have passed and I better understand the inherent goodness of my legal traditions. I draw strength from Alice Williams and so many others who live Anishinaabe law, despite shameful, ongoing Canadian colonialism, in their daily lives. I carry with me Robert Lovelace's message that protest at its best isn't merely angry. The truth is that no matter how we feel about someone or what they've done to us, in a conflict situation, someone worries about each of us. Today then, for me, a change of tune. I've traded the entropy of Black Francis for the concerned affection of Rosina Kazi, who was *actually* present the first time around, even though at the time I couldn't hear anything she was sharing beyond her immediate words.

You place the world on your shoulders
And you fight the good fight
Justice makes your heart pound
And your fist will always rise
Over and over arrest me
This is ain't all we got
But 'they' still cannot figure it out

Still I worry about you
I worry about you
I do[212]

211 *Supra* note 2.
212 Lal, "Brown Eyed Warrior," Record: *Warm Belly, High Power* (Toronto: Public Transit Recordings, 2005).

I end this discussion in a circle, returning to where we began. In the same essay in which Bob Lovelace spoke of the nature of protest, he wrote "[t]he Warriors' responsibility is to encourage and protect the healing process in their communities."[213]

I am Wapshkaa Ma'ingaan, Bear Clan Anishinaabe. This paper is my protest. Thank you for your patience, having sat with it through 60 pages. Are you finished now?

Miigwec, nindinawemaaganagtok.

213 *Supra* note 1 at xix.