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An Anishinaabe Constitutional Order

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An Anishinaabe Constitutional Order

by Aaron Mills, Karen Drake, and Tanya Muthusamipillai

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1. Introduction

This chapter provides a brief introduction to the constitutional order that underlies Anishinaabe law.¹ The focus is not on Anishinaabe law itself; an undistorted understanding of Anishinaabe law is impossible without first understanding the underlying constitutional order that gives rise to Anishinaabe law. By “constitutional order”, we do not mean a combination of founding documents and conventions; those refer to only one particular type of constitutional order.² Instead, we mean a framework for how a people constitutes itself as a political community.³ All legal systems, including Canadian law, are grounded in a particular constitutional order. Constitutional orders, in turn, are grounded in a people’s fundamental beliefs about the nature of reality, including their ontology, cosmology, and epistemology.⁴ An

¹ The Anishinaabe nation is located “around the upper Great Lakes and on the prairies to the north-east of the lakes”: John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 77.

² Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847 at 855, note 14 [Mills, “Lifeworlds”].

³ *Ibid.*

⁴ *Ibid.*

attempt to engage with a foreign legal system—including an Indigenous legal system such as Anishinaabe law—without first comprehending that law’s underlying constitutional order will result in misunderstandings and a distorted conception of the law. For those of us enculturated within a western liberal democratic worldview, to avoid inadvertently imposing our own particular ontological, cosmological, and epistemological—and eventually constitutional—assumptions onto Anishinaabe law, we must first learn to step outside of our own constitutional order and begin to operate from within an Anishinaabe constitutional order.

The account of an Anishinaabe constitutional order presented here draws from Aaron Mills’ research for his doctoral dissertation, and in particular from his article entitled “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today”.⁵ Consistent with the discussion of Anishinaabe epistemology below, Mills asserts that his primary teacher of Anishinaabe law is his grandmother, Bessie Mainville of Couchiching First Nation, but that he learns much also from community members and elders from Couchiching and other nearby Anishinaabe communities, and from the land.

Section 2 below begins with a brief sketch of an Anishinaabe epistemology (way of knowing and learning). A comprehensive account of Anishinaabe ontology, cosmology, and epistemology is beyond the scope of this chapter. The focus is on epistemology because insofar as this chapter aims to teach readers about an Anishinaabe constitutional order, it incorporates some aspects of an Anishinaabe epistemology. Section 3 discusses three *aadizookaanan*,⁶ or stories, which reflect an Anishinaabe constitutional order. Section 4 explains Mills’s tree model of legality and compares an Anishinaabe constitutional order to a liberal constitutional order. Section 5 provides a fact scenario depicting various legal issues affecting a hypothetical Anishinaabe community, the Animikii-wiikwedong First Nation. Finally, section 6 applies the constitutional order outlined in sections 3 and 4 to the hypothetical fact scenario. This is not a comprehensive legal analysis of the fact scenario, as this chapter does not purport to detail Anishinaabe law. Rather, section 6 answers the question: How does an Anishinaabe constitutional order inform the Animikii-wiikwedong First Nation decision-making process regarding the mining company’s proposal?

2. Anishinaabe Epistemology

To appreciate the distinctive features of an Anishinaabe epistemology, it is helpful to contrast it with a western epistemology, including a western conception of knowledge and truth.⁷

⁵ *Ibid.* Mills wishes to note his sincere appreciation for the hard work of Drake and Muthusamipillai. While the framework is Mills’s creation, the majority of the work of explaining and applying it in this chapter was undertaken by Drake and Muthusamipillai.

⁶ *Aadizookaanan* (pl); *aadizookaan* (sg); pronounced ah-di-zoh-kah-nun, *aadizookaanan* are Anishinaabe sacred stories and/or legends from time immemorial. Often, the term *aadizookaanan* is used interchangeably with stories and legends. In this analysis, we will use the term interchangeably with stories. Please understand therefore that when we write “stories”, we mean to exclude *dibaajimowinan*, which are personal, family, and community narratives from time memorial.

⁷ This section is reproduced with minor adaptations from Karen Drake, “Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom” (2017) 95:1 Can Bar Rev (forthcoming), copyright © 2017 by Karen Drake.

Despite philosophical debates, the standard western conception of truth, the one accepted for practical purposes, is that truth is objective and absolute. True facts exist in the world independently of knowers. The scientific method is premised on this conception; by repeatedly refining our theories, we will get ever closer to *the* truth. The corresponding pedagogy has been described by Paulo Freire as the banking system of education.⁸ Students, who lack knowledge, are empty vessels that can be filled with knowledge by passively receiving deposits of true facts from a teacher.⁹ According to this epistemology, teachers are authorities who bestow knowledge by transferring true facts.¹⁰ Standard western teaching methods, such as the lecture, reflect these assumptions. A lecturer is an authority, occupying a privileged place in the room, usually at the front and elevated by standing while students sit; the lecturer states true facts which students receive. Once students are able to accurately repeat, or perhaps apply, the true facts, then they too have knowledge.

This picture is complicated somewhat by the use of the Socratic method within some courses at some law schools in Canada. The Socratic method eschews the passivity of the banking system of education, but it still assumes the objectivity of truth. Although law students must engage actively in response to Socratic questioning, the answers they give are still objectively correct or incorrect; their answers either accurately reflect the facts, issues, holding, and *ratio* of the case in question, or they do not.

We can contrast this with an Anishinaabe conception of knowledge and truth. Lana Ray and Paul Nicholas Cormier describe an Anishinaabe epistemology with the story, “Nanaboozhoo and the Maple Trees”:

A long time ago when the world was new, Gitche Manitou made things so that life was very easy for the people. There were plenty of animals, good weather, and the maple trees were filled with thick, sweet syrup; they just had to break off a twig and collect it as it dropped off. Nanaboozhoo went to go see his friends the Anishinaabe, but when he arrived there was no one around – they were not fishing, working in the fields, or gathering berries. Nanaboozhoo finally found them in a grove of maple trees, lying on their backs with their mouths open, letting the maple syrup drip into their mouths.

Upon seeing this, Nanaboozhoo said, “This will not do.” He went down to the river and took a big basket made of birch bark, bringing back many buckets of water. He went to the top of the maple trees and poured the water in so that it thinned out, making the syrup thin and watery and just barely sweet to the taste. “This is how it will be from now on”, he said. “No longer will syrup drip from the maple trees. Now there will be only watery sap. When people want to make maple syrup they will have to

⁸ Paulo Freire, *Pedagogy of the Oppressed* (New York: Bloomsbury Academic, 2013) at 72.

⁹ Freire, *ibid* at 72; see also Marie Battiste, *Decolonizing Education: Nourishing the Learning Spirit* (Saskatoon: Purich Publishing Ltd, 2013) at 106.

¹⁰ Freire, *supra* note 8 at 72.

gather many buckets full of the sap in the birch bark baskets like mine. They will have to gather wood and make fires to heat the stones to drop into the baskets. They will have to boil the water with the heated stones for a long time to make even a little maple syrup.”¹¹

Ray and Cormier explain that the thick maple syrup is akin to knowledge,¹² and that western teaching and learning methods, such as being spoon fed facts from a PowerPoint slide or from a book, are akin to lying on the ground and letting maple syrup drip into one’s mouth.¹³ The process of turning the sap into syrup represents Anishinaabe knowledge.¹⁴ Just as it takes many people actively working together to gather bucket after bucket of sap, collect wood, make a fire, and boil the sap for hours just to make a small amount of syrup, so too does learning require both sustained personal engagement—or in other words, the active exercise of individual agency¹⁵—as well as working together as part of a coordinated community.¹⁶ Moreover, no two communities produce syrup that is identical in all respects. The flavor, consistency, texture, and so on, of different batches of syrup will depend on the weather, geography, boiling time, and so on, of different communities and their sugar bushes.

This Anishinaabe epistemology corresponds to an Anishinaabe conception of truth. Basil Johnston explains that the Anishinaabemowin phrase, “*w’daeb’awae*” means “he or she is telling the truth, is correct, is right.”¹⁷ But the truth referred to in this phrase is not absolute; it is a qualified truth, one that is circumscribed by the speaker’s experience, perception, and command of language at that time.¹⁸ What one knows is a result of one’s own lived experience and active personal engagement, and so is always bounded by the limits of that experience. This conception helps to explain why an elder will so often say that she or he does not know much at all.¹⁹ Such statements are incongruous from within a western epistemology, according to which Anishinaabe elders are authorities on Anishinaabe traditions. But as Leanne Simpson explains, “you’ll always hear from our Elders what appears to be them ‘qualifying’ their teachings with statements that position them as learners, that position their ideas as their own understandings, and place their teachings within the context of their own lived experience.”²⁰ Anishinaabe elders do not claim to

¹¹ Lana Ray & Paul Nicholas Cormier, “Killing the Weendigo with Maple Syrup: Anishinaabe Pedagogy and Post-Secondary Research” (2012) 35:1 *Can J of Native Education* 163 at 165, citing MJ Caduto & J Bruchac, *Keepers of the Earth, Native Stories and Environmental Activities for Children* (Saskatoon: Fifth House Publishers, 1989) at 145.

¹² Ray & Cormier, *supra* note 11 at 165.

¹³ *Ibid* at 166-7.

¹⁴ See Margaret Noori, “Beshaabiiag G’gikenmaaigowag: Comets of Knowledge” in Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinepinesiik Stark, eds, *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing: Michigan State University Press, 2013) 35 at 35 (explaining that “there is no noun for ‘knowledge’ in the verb-based Anishinaabe language. In place of a single target word or definition, there are instead verbs bound with prefixes and suffixes indicating what is known and who is knowing.”).

¹⁵ Ray & Cormier, *supra* note 11 at 165.

¹⁶ *Ibid* at 170.

¹⁷ Basil Johnston, “Is That All There Is? Tribal Literature” (Spring 1991) *Can Literature* 54 at 57.

¹⁸ *Ibid*.

¹⁹ Hadley Louise Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] at 20.

²⁰ Leanne Simpson, “Land as pedagogy: Nishnaabeg intelligence and rebellious transformation” (2014) 3:3 *Decolonization: Indigeneity, Education & Society* 1 at 11.

have tasted the syrup of every Anishinaabe community, and they do not purport to fill us, like empty vessels, with absolute truth, or in other words, to pour thick maple syrup directly into our mouths.

3. *Aadizookaanan* and an Anishinaabe Constitutional Order

The following three *aadizookaanan*, or stories, reflect an Anishinaabe constitutional order, which in turn give rise to Anishinaabe legal processes, which in turn give rise to Anishinaabe law. Our analyses of the first two stories highlight the tripartite framework of an Anishinaabe constitutional order. Our analysis of the third story identifies a key principle of Anishinaabe constitutionalism: the democratic principle. Insofar as Anishinaabe *aadizookaanan* reflect constitutional and legal principles, it may be tempting to treat them as analogous to Canadian judicial decisions. However, Anishinaabe *aadizookaanan* differ from judicial decisions in at least the following four ways. First, although *aadizookaanan* reflect constitutional and legal principles, they are not authorities for law in the way that judicial decisions are authorities for common law principles.²¹ That is, *aadizookaanan* are not the source of the law. Rather, the source may be some interaction within the natural world or the actions of community members which give rise to a consensus regarding the principle at issue.²²

Second, judicial decisions are meant to be fully comprehensible on a first reading, at least to those with the requisite training. Stories, in contrast, are often understood in a layered way. The different layers of meaning within a story can provide guidance that varies from person to person or even within the life of one and the same person, depending on his or her life experiences each time the story is heard. In other words, stories do not embody an objective, absolute truth; they require a listener or reader to be actively engaged in meaning-making. Our analysis of the following three stories reflects our understandings, based on our own experiences to date. In other words, by giving you our analysis of the following three stories, we are not purporting to pour thick maple syrup directly into your mouth.

Third and most important, case law abstracts law from facts, intending that law should apply across all contexts. That is to say, case law—like all other sources of law in the common law tradition—presents law as *rules*: rights and reciprocal obligations standardized within a common citizenship. *Aadizookaanan*, on the contrary, present law as *responsibilities*: gifts and reciprocal needs that vary across distinct kinds of relationships. The law that lives in an Anishinaabe story is specific to its relational context; it cannot be disembedded, generalized, and transplanted elsewhere.

Finally (and directly connected to the third point), judicial decisions require a narrow kind of reason which reflects a liberal conception of rationality: we are—at law at least—primarily, *thinking* agents. Working effectively with case law requires finely honed critical and analytical thinking skills. Reasoning in the context of Anishinaabe law frequently makes

²¹ See Larry Chartrand, “Indigenizing the Legal Academy from a Decolonizing Perspective” (July 2015) *Working Paper Series* [unpublished] at 23.

²² *Ibid.*

demands upon one's whole self: body, mind, spirit, and heart. "Reasoning" has less to do with an anthropocentric form of rationality, and more to do with the provision of reasons.

a) The Vision of Kitche Manitou²³

The following account is drawn from Basil Johnston's version of "The Vision of Kitche Manitou".²⁴ It begins with a poem in which people ask elders: Who gave each creature his or her gift? For example, who gave the rose the gift of beauty? Who gave the bear the gift of a sense of timing? Who gave me my vision?²⁵ Finally, the narrator asks:

Who gave to us
The gifts we do not own
But borrow and pass on?²⁶

Johnston then provides a prose account of the earth's creation. Kitche Manitou, the Great Spirit, had a vision of all things. Kitche Manitou dreamt of a sky, sun, and moon, of mountains and forests, of flowers and vegetables, of crawling, flying, and swimming beings. Kitche Manitou also saw the birth and end of things, feeling wind and rain, and experiencing sadness and love. In these experiences Kitche Manitou realized that these experiences had to be brought into being. One by one, being by being, Kitche Manitou brought the world into existence. Out of nothing Kitche Manitou made rock, water, fire, and wind and gave each a unique power that became its soul-spirit.²⁷ From these four substances, Kitche Manitou created the sun, stars, moon, and earth. From water, to wind, to air, from mountains, valleys, islands, and rivers, from plant beings to animal beings, Kitche Manitou gave each a unique power and nature. Last of all, Kitche Manitou created humankind.²⁸ Humans were the least in the order of dependence, and weakest in bodily powers, but humanity had the greatest gift: the power to dream.²⁹ Then, Kitche Manitou "made The Great Laws of Nature for the well being and harmony of all things and all creatures."³⁰ The Great Laws of Nature governed all of the activity of the natural world, including "the place and movement of sun, moon, earth and stars;...the powers of wind, water, fire, and rock;...the rhythm and continuity of lift, birth, growth, and decay."³¹ Kitche Manitou's vision was brought into existence.³²

This story reflects the tripartite structure of Anishinaabe constitutionalism. The first constitutional feature revealed is the ontological condition of interdependence (as opposed to

²³ Kitche Manitou means "Great Spirit". For the Anishinaabe, Kitche Manitou is the Creator of all things and the Giver of Life.

²⁴ Basil Johnston, "The Vision of Kitche Manitou" in Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976) 11.

²⁵ *Ibid* at 11-12.

²⁶ *Ibid* at 12.

²⁷ *Ibid*.

²⁸ *Ibid* at 13.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ *Ibid*.

³² *Ibid*.

individual autonomy in the liberal tradition). Humans are not dominant over the natural world. Humans are “last in the order of creation, least in the order of dependence, and weakest in bodily powers”.³³ If all animals and plants ceased to exist, humans could not survive. Of all parts of the natural world, we are the most dependent. But our relationship with the rest of the natural world is more accurately described not merely as one of dependence, but of interdependence. We need each other, and this is why we were given gifts to pass on.

The second constitutional feature pertains to our gifts: it is the relational logic of mutual aid (as opposed to contract and consent in the liberal tradition). Each being has its own gift. The gifts of the rose, the bear, humans, and others are described in the poem. Kitche Manitou conferred a special power and nature—or in other words, a gift—on each and every aspect of the natural world, including rocks, water, fire, and wind. There is a legal word for this sacred gifting in Anishinaabemowin: we say “*miinigowiziwin*.” It refers to the fact that Kitche Manitou has gifted all of creation with what we need to have a good life together. As such, these are gifts “we do not own / But borrow and pass on.” In other words, our gifts are not ours to profit from; we are not to use them to benefit only ourselves. We pass them on; that is, we must give our gifts away. In another of Basil Johnston’s stories, a boy named Southwind says to his grandmother, “No’okomiss, the flower gift that I received; it was really meant for you, wasn’t it?”³⁴ She replies: “In a way it is. But it was meant for everybody. But that’s the way all human gifts are.”³⁵ It is the connection developed from the constant flow of gifts meeting one another’s needs that coordinates interaction and sustains community cohesion, not the formal and detached bindingness of a social contract.

The third constitutional feature pertains to the ends towards which political community is oriented: harmony (as opposed to justice, in the liberal tradition). The natural world, in its natural state, is not chaotic and lawless. There is no state of nature in the sense of an original, disordered position from which we escape by entering into a social contract to create a civil society where we impose human-made laws on each other. On the contrary, all aspects of the natural world are already imbued with law—The Great Laws of Nature—and are ordered. These laws govern all aspects of the natural world, including human life. When these laws are followed, the result is harmony. Importantly—and this is a critical distinction—“harmony” does not mean “non-conflict”, but rather “non-disconnection”. It is a state of shared openness to the gifts and needs of self and of other.

b) The Great Law

The following account of “The Great Law” is drawn from the version orated by Randy Councillor and recorded and revised by Art Przybilla.³⁶ Rabbit usually ate a wide variety of plants and as a result did not overtax any one species of plant.³⁷ But one summer the roses were

³³ *Ibid.*

³⁴ Basil Johnston, “The Gift of the Stars / Anungoog Gauh Meenikooying” in *The Gift of the Stars / Anungoog Meegiwaewinan* (Cape Croker First Nation: Kegedonce Press, 2010) at 19.

³⁵ *Ibid.*

³⁶ Randy Councillor and Art Przybilla, “The Great Law” in *Ojibwe Tales: Stories of the Ojibwe People* (International Falls, MN: Lake States Interpretive Association, 2004) 27.

³⁷ *Ibid.*

especially delicious, and so Rabbit ate nothing but roses. Roses eventually became scarce and as a result Bee was unable to make as much honey as usual. Bee did not know the cause of the rose shortage, and frequently lamented the problem to all of the other animals. The other animals lost patience with Bee's complaints and ignored him.³⁸

Hummingbird, though, listened to Bee and to determine the extent of the issue, went on a search for roses. After searching widely but finding no roses, Hummingbird and Bee called a Great Council of all the animals.³⁹ Even at the Great Council, the other animals did not listen to Bee, until Bear realized and explained that the lack of roses meant that he would not have enough honey for winter, and would have to eat some of the other animals instead. The other animals then became concerned that they might be eaten by Bear or, like Fox, have to compete with Bear for food.⁴⁰

The birds then flew to the four directions of the earth in search of roses. All were unsuccessful except Hummingbird who returned with a single half-dead Rose. The animals used all of their combined knowledge to nurse Rose back to health. When she was strong enough to talk, the animals asked what had happened and Rose explained that Rabbit had eaten all of the roses except for her. Bear was so angry that he yanked Rabbit by the ears, which then became stretched. Bear eventually tossed Rabbit into the angry crowd and told them to kill Rabbit. But Rose told them to stop.⁴¹ Rose explained that all of the animals were at fault—even Bear—as they failed to listen to Bee when Bee first told them about the issue. In fact, the animals had broken the greatest of all the Great Laws, namely, the one that “tells us that all living things must watch over all other living things and Mother Earth.”⁴² And so Rabbit's ears remained stretched to remind all to listen, and roses received thorns to keep them safe from rabbits.⁴³

This story again illustrates the tripartite structure of Anishinaabe constitutionalism. However unlike the last story, this one identifies the three core constitutional features through the stacking errors of the animals in the story. It requires the reader to engage with it in a slightly different way, and to reason for oneself. It also introduces several Anishinaabe constitutional principles (which, recall, are not about rules, but rather how to orient oneself in relationship); we address only one of these here: the democratic principle.

With respect to the first structural feature of Anishinaabe constitutionalism—interdependence—each of the animals lost sight of the fact that it is in a relationship of interdependence with the others. Rabbit failed to appreciate how his eating all of the roses would affect Bee's ability to make honey, which would affect Bear's diet, which in turn would affect other animals who might then be eaten by Bear or have to compete with Bear for food. The other animals also failed to appreciate this interdependence when they ignored Bee's initial complaints.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid* at 28.

⁴¹ *Ibid* at 29

⁴² *Ibid.*

⁴³ *Ibid* at 30.

With respect to the second structural feature of Anishinaabe constitutionalism—mutual aid—the majority of animals declined to render aid, opting out of the mutual aid framework which involves a cycle of (i) gifting, which generates (ii) gratitude, which in turn generates (iii) reciprocity, which then generates further (i) gifting, and so on. When the animals initially ignored Bee, they withheld their gifts—such as the birds’ ability to search for roses—which would have helped to meet the needs of all other animals.

With respect to the third structural feature of Anishinaabe constitutionalism—harmony—when the animals opt out of the mutual aid framework, closing themselves off from one another, the result is a sequence of calamity culminating in Rabbit’s ears getting stretched and Rabbit almost being killed. Harmony is finally restored when the animals are reminded of their responsibility to “watch over” each other, which they can fulfill by rendering mutual aid. Rabbit’s stretched ears serve as an ongoing reminder of this responsibility. In this way, the Anishinaabe constitutional order—including interdependence, mutual aid, and harmony—is encoded on the physiognomy of rabbits.

This story also illustrates the democratic principle. Although we use the term ‘democratic principle’, we mean something closer to participatory democracy, as opposed to representational democracy. Once Bee and Hummingbird realized the extent of the problem, rather than try to address it by themselves, they called a Great Council of all the animals. Each animal used its unique gifts to contribute toward the solution. The birds flew in all directions to find signs of roses and when Rose was found half-dead, they all used their gifts to nurse Rose back to health. No animal was left out of the decision-making process.

c) Beaver Gives a Feast

The following account of “Beaver Gives a Feast” draws from the version recorded in F.G. Speck’s collection.⁴⁴ Beaver was the Chief of the animals. From time to time, Beaver decided to give a feast to which he invited all of the other animals.⁴⁵ Each time Beaver passed the food to his guests, he also passed wind. This sent silly Otter into hysterics. Other guests cautioned Otter: “You mustn’t laugh when Beaver does that; he is our chief.”⁴⁶ But every time Beaver passed wind at one of his feasts, Otter would laugh. Finally, the animals told Otter that he must not attend the next feast. “You must not come; you never keep your mouth shut; you always laugh”,⁴⁷ they explained. While Otter obliged, he told the others to ask Beaver to send him his share of the food in the size of Otter’s forearm. Otter has a very small forearm. The others agreed and attended the feast. Beaver noticed that Otter was not among his guests and asked, “Where, indeed, is Otter? I like him because he is so funny.” The people told Beaver that Otter did not come but asked Beaver to send him his share of food. Beaver cut a piece the size of Otter’s forearm and sent it back to Otter.⁴⁸

⁴⁴ FG Speck, “Beaver Gives a Feast” in FG Speck ed, *Myths and Folk-lore of the Timiskaming Algonquin and Timagami Ojibwa* (Ottawa: Government Printing Bureau, 1915) at 53.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at 54.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

This story further illustrates the democratic principle, mentioned above, which is one principle that flows from the tripartite structure of an Anishinaabe constitutional order. Here, we see how authority works within Anishinaabe political community, namely, through persuasive compliance (as opposed to coercive authority, in the liberal tradition). Beaver is the leader, but he does not exercise coercive authority or use force in a top-down way, as a western sovereign does in the form of the executive branch of government. Instead, authority rests with the community members; it was the community members who told Otter to stay home and the evidence that they truly possess power is that even though Otter enjoyed the feasts, he complied with the direction from the community. The community members have not delegated their authority upward to Beaver, but rather retain it themselves. Power is diffuse, spread throughout the community, not concentrated in the position of the leader, whose role is rather that of facilitator and coordinator. Although Beaver enjoys Otter's company, Beaver respects the community's decision that Otter is not to attend the feasts. Beaver does not order Otter to attend or overrule the direction of the community. Instead, Beaver exercises persuasive leadership. He organizes and facilitates community gatherings, but does not impose his own will over them. It is Beaver's ability to effectively coordinate interaction within the community—in part via the provision of gifts in the form of holding feasts, and in part because of his demeanour, as evidenced by his attitude to Otter, who laughs at him—that persuades others to heed his judgment. Despite being prohibited from attending the feasts, Otter's need is not overlooked; the community brings him his share of food. Otter only asks for a small portion of food, presumably because that is all he needs. He does not take more than he needs.

4. An Anishinaabe Constitutional Order

To understand the significance of a constitutional order (whether Anishinaabe or otherwise), it is helpful to understand the relationship between a constitutional order and a society's related institutions. Aaron Mills explains this relationship—in the context of both Indigenous and non-Indigenous societies—using a tree model. The following account of Mills's tree model of legality is reproduced with minor adaptations from his article entitled “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today”.⁴⁹

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

⁴⁹ Mills, *supra* note 2 at 862-63.

subject to the trunk, which is subject to what the roots will bear. All are intimately connected but never so tightly as to eliminate difference.

No two trees are the same even if they're both white birch, the same age, and growing right next to one another. Similarly, while two Anishinaabe communities may have nearly identical constitutional structures, they will have laws that differ. Each level of legality within the lifeworld-law relationship is both empowered and constrained by the levels below. Every people is a tree. We tell different stories of creation (even those of us who don't acknowledge doing so or who explicitly disclaim a view of creation) and the story we tell powerfully conditions the constitutional order we bring into being. For all societies, that constitutional order will shape legal processes and institutions, and thus ultimately what we count as law.⁵⁰

This isn't quite the full image, however. Unlike Canada's constitutional image of a "living tree",⁵¹ no tree is actually freestanding. The roots are buried in and wrapped tightly against earth. The tree is grounded in something beyond itself. A "rooted" lifeworld doesn't reflect the spontaneous ideas of those standing within it. Indigenous societies are all different and have unique creation stories. But all are of something common: the earth beneath and all around us. What varies is how we understand it.

Our focus in this chapter is on the trunk, or in other words, the constitutional order. In a liberal democracy, the constitutional order is premised on the primacy of individual autonomy. Individuals exercise their autonomy when they enter into a contract (the social compact) in which they create rights and undertake obligations. The goal of entering into a political community is to achieve a state of justice, or in other words, a just state.

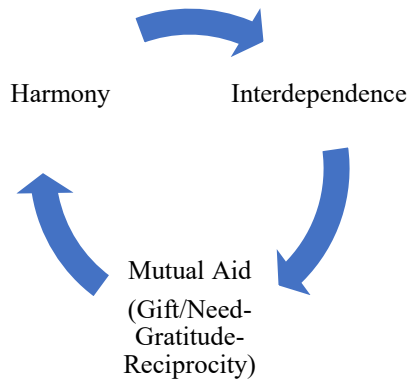
In contrast, the ontological starting point of an Anishinaabe constitutional order is not individual autonomy, but interdependence. All members of the political community—which includes humans, animals, plants, earth and all other aspects of the natural world—are interdependent. Because of this interdependence, the political community sustains itself not through contract, but through mutual aid. Each member of the political community has a responsibility to coordinate the sharing of gifts with the needs of others within the political community. As we have said, the goal of political community is not justice, but harmony. If all members of the political community use their gifts to meet the needs of all others, then harmony

⁵⁰ As Mills indicates in "Lifeworlds", *supra* note 2 at 863, n 40, most law professors in Canada (and indeed entire legal movements: law and society, legal pluralism, comparative law, transsystemic law, and critical legal studies, amongst others) are committed to the general view that context is vital to legal analysis and to legal education, and in particular (1) that it's critical for students to understand law as a function of legal process and of ideology, and (2) that power operates in various ways in the legitimation of one process (whether formal or informal) over another. That is, most of us understand that legal education must include the branches beneath the leaves. However, as Mills explains in "Lifeworlds", the same cannot generally be said of the trunk and roots and I see this as a serious failing of Canadian legal education.

⁵¹ See *Edwards v Canada (Attorney General)*, [1930] AC 124 at 136, 1929 UKPC 86.

can be achieved. Harmony does not refer to an absence of conflict; it refers to a web of relationships (interdependence) in which each member communicates gifts and needs.

An Anishinaabe constitutional order can be illustrated as follows:



5. Fact Scenario

As you read the following fact scenario, consider how the Anishinaabe constitutional order discussed thus far would structure the response of the First Nation in the scenario. We thought an example would be important, because unless the judicial branch of government is able to begin to understand and to identify Indigenous constitutionalism at work, it will continue to (mis)read Indigenous patterns of reason, argumentation, and action (i.e. law) from a Canadian constitutional standpoint, and thus as confused, civilly disobedient, or illegal. In the era of reconciliation, continuing in this way seems difficult to justify.⁵²

Animikii-wiikwedong First Nation is an Anishinaabe community located in Northwestern Ontario and a signatory to the Robinson Superior Treaty. Like many other First Nations across Canada, the members of Animikii-wiikwedong First Nation did not speak or read English in 1850 when they signed the Robinson Superior Treaty.

A substantial deposit of chromite has been discovered within Animikii-wiikwedong First Nation's traditional territory, but outside of its reserve. A mining company called Rocky Bay Mining Inc. (Rocky Bay) has staked a number of claims in this area, and now it wants to start the extraction process.

⁵² Having offered this challenge, we acknowledge just how complicated taking it up is. One of the most challenging realities here is that often Indigenous communities don't act in strict compliance with their own constitutional orders; by 2017, results are not so neat and tidy. Frequently Indigenous individuals and communities bring elements of their own constitutional order into an argument or action which endeavours to be attentive also to Canadian law and constitutional assumptions. And this is exactly what *should* be expected: Indigenous peoples have been living under the imposition of Canadian constitutionalism for generations now and, as best they are able, have developed survival strategies. But in the final analysis, this complexity should not be a barrier to learning as best one can. The alternative is the continued tacit acceptance of colonialism's greatest imposition: the overwriting of existing Indigenous constitutionalisms by Canada's.

According to the case law on section 35(1) of the *Constitution Act, 1982*, the Crown has a duty to consult with Aboriginal peoples whenever it contemplates action that will have an adverse impact on Aboriginal or treaty rights, and also provide accommodation in some circumstances. The case law also establishes that Indigenous laws should inform the interpretation of section 35(1). Ontario tells Rocky Bay that Rocky Bay must fulfill the duty to consult before Ontario will grant it an extraction permit.

Rocky Bay held a consultation session at Animikii-wiikwedong First Nation's community centre on August 9, 2016. The Rocky Bay representatives gave a PowerPoint presentation outlining their proposed extraction plan, including the effects it would have on the land. They explained that Rocky Bay plans to use an open pit mining system that will cover an area of approximately three square kilometers. Using the open pit system means that everything in those three square kilometers, including animals, trees, shrubs, rocks, earth and of course chromite, will be removed. The mine is expected to operate for eighty years, after which Rocky Bay will remediate the site. Rocky Bay also proposes to build a road to access the open pit.

After the presentation, Rocky Bay asked Animikii-wiikwedong First Nation for feedback by September 20, 2016 so that it could address any concerns and get government approval by the end of the year. Rocky Bay needs to start construction on the mine by February 2017 in order to make the operation economically viable.

The next month, Animikii-wiikwedong First Nation sent a letter to Rocky Bay in response to its presentation. About the access road, Animikii-wiikwedong First Nation explained that the proposed route goes directly through a grove of maple trees, but that if the road were moved about 200 metres so that it avoids the maple trees, it would be fine. About the mine itself, representatives of Animikii-wiikwedong First Nation stated that they have a number of concerns. To name just one, they noted that the location of the proposed pit would be directly within the feeding ground for deer. They asked whether the pit could be reduced to 1/5 of the proposed size, so as to preserve the feeding ground. Animikii-wiikwedong First Nation also explained that they need more time before they can articulate their full response. Many members of the Animikii-wiikwedong First Nation live off of the reserve, in various towns and cities throughout Canada. Most, though, return to the reserve during the summer, and so Animikii-wiikwedong First Nation proposes that it can respond to Rocky Bay's proposals by the end of the summer of 2017.

Animikii-wiikwedong First Nation received the following response from Rocky Bay:

Rocky Bay Mining Inc.
124 Main Street
Thunder Bay, ON P8W 0K3

October 1, 2016

Animikii-wiikwedong First Nation
P.O. Box 132
P3E 6A5

Dear Chief and Council,

We thank you for your correspondence dated September 20, 2016. We believe that we can fully accommodate all of your concerns.

First, we understand your concerns about the destruction of the maple trees. Unfortunately, though, it will not be practical to re-route the access road. Our feasibility study showed that the most cost-efficient route for the access road is the one proposed and outlined during our presentation. Moving the route, even by 200 metres, would mean having to blast through the Canadian shield, which would add several hundreds of thousands of dollars to the cost of our project. However, we are very pleased to offer you another solution: we will ship 50 litres of maple syrup from the Metro grocery store in Thunder Bay to your community each year during the eighty year life of the mine. This solution has the benefit of both ensuring an adequate supply of maple syrup and also being cost efficient.

Second, we would like to address your concerns about the size of the pit. This size was chosen because a pit of this size will provide the maximum profits in the light of the expenses required to operate the pit. This was our criterion when determining the size of the pit because we are obligated to uphold our duty to our shareholders to maximize profits. To compensate for the loss of deer as a result of the pit, we would like to negotiate a monetary payment to be provided to you, as well as a to-be-agreed upon number of jobs at the mine to be reserved for members of your community.

Third, we appreciate your desire to consult with your off-reserve members, but we regret that it would not be feasible for us to wait until the end of next summer for a full response from you. We would lose tens of thousands of dollars for each day that this project is delayed beyond February 2017. Fortunately, we have a solution: we have been advised that this type of decision is within the jurisdiction of Chief and Council under the *Indian Act*. It is not necessary to put this to a vote of the entire community; Chief and Council have the authority to enter into a Memorandum of Understanding with us on this issue.

We hope that we have satisfactorily addressed your concerns and that we can now move on to negotiating the terms of a Memorandum of Understanding (MoU). Attached is a draft MoU setting out the terms proposed above (50 litres of maple syrup per year, monetary payment, guaranteed jobs). We look forward to hearing from you at your earliest convenience.

Yours truly,
Rocky Bay Mining Inc.

6. Analysis: How does an Anishinaabe constitutional order inform Animikii-wiikwedong First Nation’s decision-making process about the mining company’s proposal?

6.1 Considering the Structure of Anishinaabe Constitutionalism

a) Interdependence

All three stories discussed above illustrate the principle of interdependence. In “The Great Law”, all beings are dependent upon one another for their survival. The nature of the connection of the members of the community is need. The decision of Rabbit to eat all the roses, and the decision by the animals to ignore Bee’s concerns, led to the needs of all animals not being met. Bee could not make honey, Bear could not rely on Bee’s honey, Fox would now have to compete with Bear for smaller animals, and smaller animals were in danger of being eaten by Bear. Similarly, in “Beaver Gives a Feast”, everyone recognizes that although Otter is excluded from the feast, he still has a need for food. Finally, the “Vision of Kitche Manitou” reveals that humans were created last and are dependent on the natural world to survive.

Similarly, the members of Animikii-wiikwedong First Nation are in a relationship of interdependence with the maple trees and the deer. The maple trees and the deer are neither chattels nor fixtures on the land; they are not property of any kind. As such, they are not resources or objects. Instead, the maple trees and the deer are members of a political community that has a relationship with Animikii-wiikwedong First Nation. The maple trees, the deer, and members of Animikii-wiikwedong First Nation each have gifts that can meet the needs of the others. Financial compensation not only fails to meet the broader needs at issue; it is destructive of the existing mutual aid relationships. Some of Animikii-wiikwedong First Nation’s gifts include the ability to protect the maple trees and the deer from being destroyed by those who have no relationship with them and who would reduce them to externalities that can be replaced with commodified versions of their gifts.

There is an additional way in which members of Animikii-wiikwedong First Nation are dependent on the maple trees and the deer, as well as on the animals, trees, shrubs, earth, and rocks that would be removed in order to dig the pit. Recall that in “The Vision of Kitche Manitou”, Kitche Manitou imbued all aspects of the natural world with law—namely, with The Great Laws of Nature. As a result, the natural world is a source of Anishinaabe law. Similarly, in “The Great Law”, an Anishinaabe constitutional order is embedded within rabbit’s physiognomy. If the maple grove, the deer, the rocks and so on are destroyed, so too will be important aspects of the legal archive of Animikii-wiikwedong First Nation. They will lose the source of some of their law, and in time they will also lose the law itself.

b) Mutual Aid (Needs & Gifts)

Mutual aid is the means by which a political community is organized and constituted in accordance with an Anishinaabe constitutional order. This is accomplished through identifying and coordinating the gifts of some with the needs of others. When one receives a gift, one feels gratitude for having his or her needs taken care of, and this gratitude moves us to reciprocity. As we have seen, though, reciprocity will just as often mean paying the gift forward. In “The Great Law”, Bee had the gift to make honey and Bear had the need for honey in order to survive. The animals were told to use their gifts to look after one another, and the decision of one community member affected all other community members. In “Beaver Gives a Feast”, Otter has a need for food met by the gift that Beaver has to provide the food, and for a sense of belonging: Otter’s mandated absence from the feast had to be managed so as not to appear as a removal from the governance function of the community.

If Rocky Bay wants to operate with the consent of Animikii-wiikwedong First Nation in its traditional territory, it will need to find a way to enter into political community with Animikii-wiikwedong First Nation. It can do this by identifying the needs of Animikii-wiikwedong First Nation and then offering the gifts it has to share that would meet those needs. At this point, Rocky Bay has identified some gifts that it can offer—maple syrup, jobs, and a monetary payment—but it is not clear that each of those gifts accurately corresponds to a need of Animikii-wiikwedong First Nation. More complicated still is how Rocky Bay’s offer impacts other members of the community: because maple trees are members of the political community and not property or a mere resource for making syrup, the offered gift of maple syrup does not adequately meet Animikii-wiikwedong First Nation’s need to fulfill its responsibility to meet the needs of the maple trees as members of its political community. Rocky Bay has demonstrated no understanding of Anishinaabe constitutional order. It has appealed to Animikii-wiikwedong First Nation’s self-interest, short-circuiting the logic of mutual aid, which is the very heart of Animikii-wiikwedong First Nation’s political community.

c) Harmony

To achieve harmony, each member of the political community must engage in the practices of mutual aid previously described. Disharmony results from the closing off of someone taking more than he or she needs. In “The Great Law”, harmony is impeded when Rabbit is unable to curb his appetite for Roses and thus takes more than he needs. In “Beaver Gives a Feast”, Otter only asks for a small amount of food because that is all he needs.

With respect to the size of the mine, the Animikii-wiikwedong First Nation is concerned with taking only what is needed. After considering the needs of the maple trees and the feeding ground for the deer, the Animikii-wiikwedong First Nation concludes that the mine should be reduced to 1/5 of the proposed size. In contrast, Rocky Bay’s determinant for an appropriate sized mine was maximizing shareholder profits. These two determinants not only fail to align, but pull against one another.

6.2 Applying Anishinaabe Constitutional Principles

As discussed above in section 4, a constitutional order (which corresponds to the trunk in the tree model of legality) establishes conditions of legitimacy for a political community's legal institutions and processes (which correspond to the branches), without dictating the exact form those legal institutions and processes must take. The stories discussed above illustrate not only principles pertaining to an Anishinaabe constitutional order but also principles pertaining to Anishinaabe legal institutions and processes, which are applied to the fact scenario in the section below.

a) Democratic Principle

According to the democratic principle, all members of a political community participate in community governance. The "Vision of Kitche Manitou" illustrates that all aspects of the natural world have a soul-spirit, and thus have agency. As such, all aspects of the natural world are members of our political community who should have a voice in decisions which impact them. In "Beaver Gives a Feast", authority was vested in and exercised by the people, not Beaver. Beaver respected the authority of the people and did not question why Otter was excluded from the feast. In "The Great Law", when Bee and Hummingbird recognized the extent of the problem, they called a Great Council which was a meeting of all the animals. Bee and Hummingbird did not make unilateral decisions without input from the other animals. The animals collectively took responsibility for determining why the roses had disappeared. Each animal exercised authority regarding community governance equally. This story illustrates the negative consequences of ignoring the voice and authority of other members of the political community. When Bee began complaining about the roses disappearing, no one listened to his concerns. By ignoring Bee's voice, the others exacerbated the problem of the disappearing roses.

Animikii-wiikwedong First Nation has a responsibility to consult with all community members affected by the proposed action, including the maple trees and the deer, as well as all of the animals, trees, shrubs, earth, and rocks that will be removed in order to dig the open pit of the mine. Animikii-wiikwedong First Nation also needs more time to consult with their off reserve members. However, Rocky Bay wants Animikii-wiikwedong First Nation's Chief and Council to make a unilateral decision, based on the authority granted to Chief and Council under the *Indian Act*. This request by Rocky Bay directly contravenes the principle that authority rests in the community who is responsible for decision-making that affects community governance. Decisions are not to be made by leaders, as in a representational democracy where those who are elected have authority to make decisions within specified areas of jurisdiction without holding a referendum about each decision.

7. Conclusion

This chapter does not document Anishinaabe law, which corresponds to the leaves and needles within the tree model of legality. To offer a conclusion about what the result of the

dialogue between Animikii-wiikwedong First Nation and Rocky Bay might be, we would have to engage in a detailed legal analysis. Instead, our focus has been on the roots (epistemology), the trunk (constitutional order), and to a lesser extent, the branches (legal institutions and processes). Just as the roots, trunk, and branches condition a tree's leaves and needles, so too does a political community's epistemology and ontology, constitutional order, and legal institutions and processes condition its laws. Thus, to understand Anishinaabe law, one must first understand Anishinaabe epistemology and ontology, constitutional order, and legal tradition (institutions and processes). This is a tall order—and one which Indigenous peoples are not asked but expected to meet every time they engage one of Canada's legal or administrative processes. For this reason, our analysis of the fact scenario did not purport to determine the specific outcome of whether the mine would proceed. Instead, we illustrated the differences in the approach an Anishinaabe community might take in generating such a position. Animikii-wiikwedong First Nation's approach was based on the view that they are part of an interdependent web of relationships in which all members of the community use their gifts to contribute toward meeting the needs of other community members. If each member fulfills this responsibility, the result is harmony.