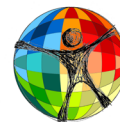


# Indigenous Rights, Collective Responsibilities, And Relationship To Land In Haudenosaunee And Anishinaabe “Dish With One Spoon” Territory

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# ABSTRACT

This article explores how Indigenous conceptions of responsibilities towards (and kinship with) Creation contrast with Western liberal conceptions of individual human rights and dominion over nature. It examines the concept of relationality—how relationship creates obligation and a responsibility to respect and assist others—in the context of Haudenosaunee and Anishinaabe internal affairs, relationships with other First Nations, and relationships with the Crown in Canada. Indigenous logic systems (e.g. mutual aid and cyclical reciprocity) and the “Dish with One Spoon” covenant are examined to illustrate how relationships and responsibilities, as opposed to individual rights, are constitutionalized for the purpose of maintaining harmony between people and the natural world. Indigenous models of relational accountability and self-determination are contrasted with the Crown’s contemporary approach to environmental management, human rights, and Indigenous self-governance. By exploring these differences, this article aims to advance dialogue between Indigenous and Western liberal constitutional orders for improved environmental stewardship.

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## Foreword

I completed my 2018 McGill International Human Rights Internship Program placement at the Akwesasne Justice Department, Mohawk Nation at Akwesasne. My main project was contributing to work on a draft Akwesasne Conservation Law, which sought to regulate hunting, fishing, and trapping in a manner that honours Haudenosaunee relationships to the land. I became involved in researching how Akwesasne community laws might interact (or conflict) with the federal *Indian Act* and the environmental laws of neighbouring settler jurisdictions. I also learned about the internal community tension between traditional governance models and elected band council governance under the *Indian Act*—a liberal imposition. Our work had to navigate these internal and external tensions to maintain community support and advance community interests. We aimed to produce laws that reflect traditional laws, customs, and practices while also building upon the best practices of neighbouring jurisdictions. This required a commitment to relationship-building with settler governments, community members, and the land. During my internship, we met with government officials and community stakeholders to discuss the draft law and other matters of importance to Akwesasne. Some of these discussions were held outdoors—on the land or on the St. Lawrence River—to remind ourselves of our relationship to and responsibility towards the natural world. The rights and responsibilities of Indigenous peoples with respect to environmental stewardship—and their interactions with Western approaches to environmental management—were of central importance. I am extremely grateful to have had the opportunity to work for Akwesasne and to learn from community elders, knowledge-keepers, and the dedicated Justice Department team. This article is my attempt to further explore environmental stewardship ideas that I encountered during my time in Akwesasne and my studies at McGill University.

## Introduction

*The premise of Earth asking something of me makes my heart swell. I celebrate the implicit recognition of the animacy of the Earth: that the living planet has the capacity to ask something of us, and that we have the capacity to respond. Can it be that an entity as vast, as whole and generous, as the Earth has need of me? Me? Could it be that we are more than passive recipients of her gifts, but participants in her well-being? We are honored by the request. It lets us know that we belong.*

Dr. Robin Wall Kimmerer, Potawatomi (Neshnabé)<sup>1</sup>

The Haudenosaunee and Anishinaabe peoples of eastern North America have maintained respectful relationships with the Earth and other non-human beings since time immemorial. Their oral traditions share similar Creation stories that link humanity to nature and the spirit world.<sup>2</sup> When the Earth was new, the first woman, Skywoman, fell from the sky onto a great turtle's back. With the aid of the water animals, she spread soil from the seabed across the turtle's shell, causing it to grow into Turtle Island, or what we commonly call North America. This land became home for all of Creation, including the Haudenosaunee and Anishinaabe peoples. It provides food, clothing, and shelter—everything the people need to live well. And in return for the generosity of the land, animals, and plants, the people treat Creation and the spirits with compassion, understanding, and respect.<sup>3</sup> Life and traditional law center around the maintenance of respectful social relations between human and non-human beings.

Although the Haudenosaunee-Anishinaabe relationship has at times been strained by war, since 1700 the two peoples have maintained respectful relations based on the sharing of land

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<sup>1</sup> Robin Kimmerer, "Returning the Gift" (2014) 7:2 Minding Nature 18 at 18.

<sup>2</sup> See Osenonction and Skonaganleh:rá, "Our World" (1989) 10:2-3 Canadian Woman Studies 7 at 8 (for a Mohawk perspective); Kimmerer, *ibid* at 18–19 (for an Anishinaabe perspective).

<sup>3</sup> See Basil H Johnston, "Thou Shalt Honour Earth Mother" in *Honour Earth Mother / Mino-audjauh Mizzu-kummik-quae* (Cape Croker Reserve: Kegedonce Press, 2003) 145 at 147–148 [Johnston, Earth Mother].

and resources.<sup>4</sup> They formally entered the "Dish with One Spoon" covenant, enshrined in wampum belt treaty, at the 1701 Great Peace of Montreal; this covenant has been renewed at conferences between the two peoples ever since.<sup>5</sup> In his review of the covenant relationship, Victor Lytwyn describes how, "[t]he dish symbolizes a common hunting ground, while the spoon denotes that people are free to hunt within it and to eat the game and fish together."<sup>6</sup> The Haudenosaunee and Anishinaabe peoples agreed to share the land at the peripheries of their core traditional territories. This relationship reflects a mutually held appreciation for the gift of Creation, the interconnectedness of all things, and humanity's role in environmental stewardship.<sup>7</sup>

Although the Haudenosaunee and Anishinaabe peoples continue to honour the covenant, the new settler governments of Canada and Ontario situate themselves outside of it, even though their borders encompass "Dish with One Spoon" territory. Canada and Ontario have not seriously engaged in the Haudenosaunee-Anishinaabe relationship of respect and reciprocity towards the land. They placed Indigenous peoples on reserves and sought to govern Indigenous traditional territories from a position of sovereignty or dominion. By virtue of the *Constitution Act, 1867*, legislative powers were distributed between the federal and provincial governments, with "Indians and lands reserved for Indians" falling under federal jurisdiction.<sup>8</sup> Indigenous peoples and their legal institutions were left outside of the Canadian constitutional framework. Their cultures, worldviews, and logic systems were diminished by colonization and the imposition of a Western liberal democratic system. Their ability to work together and with Canada on common issues, like environmental stewardship, was greatly diminished as a result.

Western and Indigenous constitutional orders are supported by different logic systems, which produce different

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<sup>4</sup> Victor P Lytwyn, "A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St. Lawrence Valley Region" (1997) 28 *Papers of the Twenty-Eighth Algonquian Conference* 210 at 217.

<sup>5</sup> *Ibid* at 217, 219, 221.

<sup>6</sup> *Ibid* at 210.

<sup>7</sup> Kimmerer, *supra* note 1 at 20.

<sup>8</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.



understandings of social relations, including our relations with non-human beings and the natural world. The liberal logic of Western constitutional orders supports a notion of political community based on radical individual autonomy, where individuals are free to act in their own self-interest, within limitations set by the State.<sup>9</sup> Human rights, for instance, operate to limit the extent to which individuals (and the State) can impose themselves on the freedom and autonomy of others. The mutual aid or cyclical reciprocity logic of rooted Indigenous constitutional orders, in contrast, supports a holistic view of community—beyond political community—that emphasizes collective responsibilities among a broad array of community actors, both human and non-human.<sup>10</sup> Individuals are expected to support the community by sharing their gifts through mutual aid or cyclical reciprocity. Individual autonomy, in this sense, is maximized by freely contributing to community wellbeing.

These different constitutional logics produce different conceptions of law. For liberal actors of the Western order, law is most easily understood as a set of rules to control behaviour. The power to create, interpret, and enforce law is reserved to a State-sanctioned class of legal elites: police, lawyers, judges, and elected officials. For community actors of a rooted Indigenous order, however, law is more like a process: it is a way of being in the world.<sup>11</sup> All community actors are constantly involved in law creation, interpretation, and enforcement in their social interactions. Everyone is expected to know and live in accordance with community-accepted rules, customs, and principles. This conception of law places the burden of legal work on each community member, instead of outsourcing it to legal elites.<sup>12</sup> It

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<sup>9</sup> See Michael J Sandel, "The Procedural Republic and the Unencumbered Self" (1984) 12:1 *Political Theory* 81 at 81–87; John Christman, *Social and Political Philosophy: A Contemporary Introduction* (London: Routledge, 2002) at 6–8, 26–28, 94–103 (for an introduction to liberalism as a philosophy).

<sup>10</sup> Stan McKay, "Calling Creation into Our Family" in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Don Mills, Ont: House of Anansi Press, 1992) 28.

<sup>11</sup> Christine Zuni Cruz, "Law of the Land: Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing Ltd, 2009) 315.

<sup>12</sup> *Ibid.*

also means that law is never static or universal. It constantly evolves through social practice.

The liberal logic system is embedded within Canadian constitutionalism, leaving little space for Indigenous logic systems in State institutions responsible for environmental law and policymaking. Canadian law, including laws relating to Indigenous peoples and land management, is coloured by its liberal foundations. Indeed, in the context of interpreting Aboriginal harvesting rights, the Supreme Court of Canada has stated its goal as "reconciliation of [A]boriginal societies with the larger [liberal] Canadian society of which they are a part."<sup>13</sup> Similarly, in deciding whether development projects or Aboriginal rights infringements are justified, the "public interest" is essentially equated with the interests of the non-Indigenous majority.<sup>14</sup> In a liberal society like Canada, human rights and contractarianism trump Indigenous notions of collective responsibilities. The non-human world, including land itself, is left without rights, allowing it to be freely monetized for economic exchange. This poses a problem for environmental stewardship. Liberalism—and the global capitalism that it enables—has led to a breakdown in humanity's relationship to the natural world, as global crises like climate change and biodiversity loss attest.<sup>15</sup> Western discourse on sustainable development or green growth try to square the circle, but the ideas of growth and development—usually at the expense of nature—are rarely questioned.<sup>16</sup> The growth model prevails. By sidelining traditional Indigenous logics like mutual aid and cyclical reciprocity, Canada and other liberal democracies constrain visions for human progress to those that maintain liberal dominance and the human-nature dichotomy.

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<sup>13</sup> *R v Gladstone* [1996] 2 SCR 723 at para 74.

<sup>14</sup> See e.g. *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* [2017] SCC 41 at para 59 (on Indigenous opposition to a pipeline project, approved by the Canadian government, that impacts Indigenous traditional territory).

<sup>15</sup> See Stephen Clarkson, "Globalization's Perilous Imbalance: Constraints for Canada's Governments, Opportunities for Canadian Citizens" (2010) 60 *University of New Brunswick LJ* 251.

<sup>16</sup> But see e.g. Annie Rochette, "Stop the Rape of the World: An Ecofeminist Critique of Sustainable Development" (2002) 51 *University of New Brunswick LJ* 145.

This paper examines whether the Canadian constitutional order can accommodate or adopt Indigenous legal traditions to advance a holistic vision of human progress beyond the dominant liberal paradigm. The urgency of contemporary environmental problems, and the apparent inability of liberalism and global capitalism to solve them, suggest that a radical rethink of the human-nature relationship is needed. Rooted Indigenous logic systems and the Haudenosaunee-Anishinaabe “Dish with One Spoon” covenant may offer guidance on how to restructure this human-nature relationship. But how might rooted Indigenous logic systems be brought into dialogue with liberalism and the Canadian constitutional order? Can they be leveraged to inform Canadian law and policy without being jeopardized or subsumed into the dominant liberal paradigm? Is it even possible to accommodate differences across logic systems and constitutional orders? These questions will be explored after identifying the key tenets of Haudenosaunee and Anishinaabe worldviews and the major differences between liberalism and the Indigenous logic of rooted relational accountability. In attempting to reconcile Canadian and Indigenous constitutional orders, this paper will examine options to promote respect and relationality in Canadian and provincial interactions with First Nations and the natural world. It will discuss three potential areas for “constitutionalizing” respect and relationality: 1) the extension of human rights to non-human beings; 2) the strengthening of local governance through persuasive authority mechanisms; and 3) the adaptation of federal structures for Indigenous and environmental decision-making. It will explore the feasibility of hybridizing or partnering liberal and Indigenous logics for the advancement of environmental stewardship in “Dish with One Spoon” territory and the Canadian environmental policy arena.

## Rights and Responsibilities in Haudenosaunee and Anishinaabe Worldviews

*In our ways, there are no “rights,” only responsibilities: to observe the clans, to bring honour, trust, friendship and respect; to be kind; honest; share and have strength; to maintain a relationship with all of the natural world.*

Skonaganleh:rá, Kanien’kehá:ka (Mohawk),  
Haudenosaunee Confederacy<sup>17</sup>

Respect and relationality, and the responsibilities arising from them, are fundamental to Haudenosaunee and Anishinaabe worldviews. Since humans first appeared on Turtle Island, they have been dependent on other beings—the animals and plants—for their survival. Indigenous communities hunted, fished, farmed, and gathered food on the land. They depended on the land and each other to complete the many tasks required for survival. This interconnectedness continues to engender a deep respect for the natural world, including both its animate and inanimate elements.<sup>18</sup> It also engenders a deep respect for individual autonomy and a sense of responsibility to the community. According to Mohawk scholar Taiaiake Alfred, “respect must be shown to the need for individuals to find their way according to their own vision.”<sup>19</sup> Individuals understand that the wellbeing of their community, and their place in it, depend on their ability to contribute. Indeed, Inupiat/Inuvialuit scholar Gordon Christie asserts that “[r]esponsibilities act to define a core of the identity of the individual” in Indigenous societies.<sup>20</sup> Individual identity is linked to responsibilities to the community. According to Anishinaabe scholar John Borrows, “Anishinabek peoples have obligations (daebizitawaugawin) to their families and community: to support them, to help them prosper, and to exercise

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<sup>17</sup> Osennontion and Skonaganleh:rá, *supra* note 2 at 11.

<sup>18</sup> Kirsten Manley-Casimir, “Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law” (2016) 61 McGill LJ 939 at 7; see also McKay, *supra* note 10.

<sup>19</sup> Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005) at 39 [Alfred, *Action and Freedom*].

<sup>20</sup> Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2 Indigenous LJ 67 at 111.

their rights to live and work.”<sup>21</sup> In this sense, responsibilities link back to individual rights, akin to the notion of rights and corresponding duties in Western legal traditions. However, because everyone and everything is interrelated, actions are understood to have repercussions beyond the immediate parties to an exchange. Being respectful, in this context, means acting kindly or generously. Traditional laws, customs, and principles promote respect and generosity in community by advancing relational logic systems, like mutual aid or cyclical reciprocity, that emphasize collective responsibilities over individual rights.

## 2.1 Relationality and Giftedness

In both Haudenosaunee and Anishinaabe worldviews, individuals are expected to share the gifts they have been given by the Creator with their community. From the Haudenosaunee perspective, Taiaiake Alfred notes a responsibility to pursue self-betterment and to use your talents or abilities to solve problems for the collective.<sup>22</sup> This view is echoed by Anishinaabe scholar Basil Johnston, who states that “if today’s youth is to emulate their ancestors in the exercise of selflessness in the discharge of their duties toward ... their community, then youth ought to seek that training that best prepares them to serve their peoples.”<sup>23</sup> Johnston describes this pursuit of self-betterment as part of a process of living and acting in accordance with traditional principles.<sup>24</sup> And in order to truly appreciate and understand these principles, you must engage with them through community relations. Johnston puts it as follows:

The ideas must be sought, and the understandings must be fulfilled. Only then will “Think Indian,” combined with

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<sup>21</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 79 [Borrows, Constitution].

<sup>22</sup> Alfred, *Action and Freedom*, *supra* note 19 at 111.

<sup>23</sup> Basil Johnston, “Think Indian” in *Think Indian: Languages Are Beyond Price* (Cape Croker Reserve: Kegdonce Press, 2011) 177 at 189 [Johnston, Think Indian].

<sup>24</sup> This reflects a different notion of freedom than that of liberalism; see Basil Johnston, “The Four Hills of Life” in *Ojibway Heritage* (Toronto: McClelland and Stewart Limited, 1976) 109 at 115 (“freedom and independence must be consistent with his communities’ laws and codes and with the great laws that govern the world”) [Johnston, Four Hills].

fulfillment, have meaning. Through accomplishment, the plea or advocacy "Think Indian" will transform into "Be Indian."<sup>25</sup>

To "Think Indian", in other words, is to think relationally. You must understand and fulfill your responsibility to share gifts with the community. Relationality and giftedness require an attentiveness to the needs of others, a readiness to meet those needs, and an openness to express your own needs and receive gifts.

Relationality and giftedness are also manifested in traditional laws, customs, and principles that regulate human interactions with the natural world. All of Creation and life itself are understood to be gifts from the Creator. In recounting a story, Johnston states that "[f]or men and women to live out life in all its stages is to receive and possess nature's greatest gift."<sup>26</sup> To engage in the giving and receiving of gifts is to live in the Creator's way. This idea is further elucidated in an Anishinaabe story set at the dawn of time, called "Seagull".<sup>27</sup> An attempt will be made to summarize it here:

Before the Earth had light, the animals crowded together in darkness. Each of them possessed a gift, but they were reluctant to open them, until Bear took the initiative. His gift was a bowl of berries. He shared the berries with the other animals and he found that if he shared, the bowl never emptied. Seagull, however, was unwilling to share. He was eventually cajoled into dropping his gift, releasing the Sun and providing light to the world.

According to this story, everyone had a responsibility to share their gifts to bring the world into being.

In another story, Nanabush (a prominent trickster figure with creation power) asks a group of animals how they will help the first Anishinaabe upon their arrival on Turtle Island.<sup>28</sup> The

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<sup>25</sup> Johnston, *Think Indian*, *supra* note 23 at 187.

<sup>26</sup> Johnston, *Four Hills*, *supra* note 24.

<sup>27</sup> Basil Johnston, "Seagull" in *The Gift of the Stars / Anangoog Meegiwaewinan* (Cape Croker First Nation: Kegeedonce Press, 2010) 37.

<sup>28</sup> Ogimaagwanebiik (Nancy Jones), "Animals" in H James St Arnold & Wesley Ballinger, eds, *Dibaaajimowinan: Anishinaabe Stories of Culture and*

animals are eager to help, with many volunteering to gift themselves as food when the humans are hungry. In one telling, Moose says: *"If they show respect to my meat. If they show respect of my gift. When they offer tobacco, that is what I like when they show me respect with tobacco."*<sup>29</sup> Plants and animals willingly gift themselves to humans, but they expect respect and gratitude in return.

Finally, in *"The Year the Roses Died"*,<sup>30</sup> we learn that the gift of Creation requires careful stewardship. Rabbit is blamed by a council of animals for eating all the roses. A Manidoo (spirit) appears and tells the council:

Killing the Waabooz [rabbit] will not bring back the roses. You all noticed that the roses were in trouble, and you all decided to take your own shares even if it meant killing the roses forever. There is no honor in this. This is not keeping creation in balance as you were told to do in the Beginning Time.<sup>31</sup>

The animals failed in their responsibility to attend to the needs of others in their community. From this story and others, Haudenosaunee and Anishinaabe internalize the importance of relationality and giftedness for environmental stewardship.

## *2.2 Rooted Constitutionalism: The Logic of Mutual Aid and Cyclical Reciprocity*

Haudenosaunee and Anishinaabe worldviews include ways of thinking, or logic systems, that center around the importance of kindness and sharing for community wellbeing. These logic systems can be classified as mutual aid or cyclical reciprocity. In a retelling of events at an Anishinaabe council meeting, an orator states that "[Nanabush] taught the art of

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Respect (Odanah, WI: Great Lakes Indian Fish & Wildlife Commission, 2013) 92.

<sup>29</sup> *Ibid* at 92.

<sup>30</sup> Mary Siisip Geniusz, "The Year the Roses Died" in Wendy Makoons Geniusz, ed, *Plants Have So Much to Give Us, All We Have To Do is Ask: Anishinaabe Botanical Teachings* (Minneapolis: University of Minnesota Press, 2015) 13.

<sup>31</sup> *Ibid* at 14.

healing and the manner of knowledge and the greatest of human virtues: kindness."<sup>32</sup> He describes how kindness begets kindness, and how community members share a responsibility to be generous with their gifts. This is evident in how hunters behave: Anishinaabe community member Jemima Morris suggests that "[hunters] believed that if they showed their kindness [by sharing meat] they would be blessed by the Creator for all the things that are on the land."<sup>33</sup> A hunter will display respect and gratitude for a harvested animal by leaving a gift (typically tobacco),<sup>34</sup> by sharing the food generously, and by harvesting only in accordance with the needs of their community.<sup>35</sup>

Community members share what they have, not because of an expectancy of return, but because gifts to the community are repaid through enhanced community wellbeing. By helping others or doing good, individuals contribute to the maintenance and growth of their community support networks. Individuals also maintain good relations with their broader community—the natural world—by being respectful towards it. Displays of respect are considered a necessary reciprocation of the gifts that nature provides. According to Anishinaabe scholar Aaron Mills:

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.<sup>36</sup>

The logics of mutual aid or cyclical reciprocity apply in relations between human actors and non-human actors alike, because everyone and everything is understood to have a place in the community of Creation.

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<sup>32</sup> Basil Johnston, "The Council / Zuguswediwin" in *Ojibway Ceremonies* (Toronto: McClelland and Stewart, 1987 [1982]) 155 at 165 [Johnston, The Council].

<sup>33</sup> Wapshkaa Ma'iingan (Aaron Mills), "Case Comment: Aki, Anishinaabek, Kaye Tahsh Crown" (2010) 9 *Indigenous LJ* 107.

<sup>34</sup> Johnston, *Earth Mother*, *supra* note 3 at 149.

<sup>35</sup> Kimmerer, *supra* note 1 at 19–20.

<sup>36</sup> Mills, *supra* note 33 at 10.



These logic systems play a fundamental role in Haudenosaunee and Anishinaabe social ordering processes. Community members familiarize themselves with these logic systems by engaging with different Indigenous sources of law, like stories and ceremony, by learning from elders and their peers, and by learning from the land. The logic systems can be described as part of a rooted constitutional order—rooted in place through connection to the land and rooted in community through social practice, i.e. through the exercise of respect and relational modes of thinking, like mutual aid or cyclical reciprocity.<sup>37</sup> Many stories describe the importance of mutual aid or cyclical reciprocity to community cohesion and wellbeing.

In the following Anishinaabe examples, gifting sustains community, and the failure to share or respect the gift results in the breakdown of community relations. In “The Mink and the Marten”,<sup>38</sup> Mink and Marten maintained good relations, but when one refused to gift food to the other, they go their separate ways. In “The Man, Snake, and Fox”,<sup>39</sup> a man was rescued from a snake by a fox, who asked the man to help him if he ever needed food. Years later, the man killed a fox that he found eating food in his camp. The dying fox said: “Don’t you remember?” Finally, as a poignant example of community breakdown, “Aitkin and the Ojibwa” describes the murder of a Euro-Canadian fur trader after he fails to provide an Anishinaabe man with supplies for the winter.<sup>40</sup> The trader refused to sell the provisions, and unbeknownst to him, this was considered the ultimate betrayal of his responsibility to the community. The logic of mutual aid or cyclical reciprocity extended to him through his relations with the Anishinaabe. Displays of respect and gift-giving are invitations to enter a community’s circular reciprocity framework.

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<sup>37</sup> See e.g. Mills, *ibid.*

<sup>38</sup> Kāgigē Pinasi (John Pinesi [also Penessi, Penassie]), “The Mink and the Marten” in Truman Michelson, ed, *Ojibwa Texts Collected by William Jones*, vol 7, part 2 (New York: Arbor Press, 1919) 127.

<sup>39</sup> Story of the Man, Snake and Fox in Basil H Johnston, “Is That All There Is?: Tribal Literature” (1991) 128 *Can Literature* 54 at 59–60.

<sup>40</sup> Jacques LePique, “Aitkin and the Ojibwa” in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–1895* (Detroit: Wayne State University Press, 1994) 131.

### 2.3 *Boundaries of Community and Responsibility: Kinship*

For the Haudenosaunee and Anishinaabe or other rooted Indigenous societies, community can be understood as the group of human and non-human beings with which you maintain relations. These can be considered "kinship" relations because community members, even those outside the family or clan group, are traditionally referred to with kin names or honorifics.<sup>41</sup> Historically, Euro-Canadian traders may have been referred to as Brothers and the Crown may have been referred to as Mother or Father, depending on the strength of their relationship with an Indigenous group. Non-human entities like Mother Earth and Grandfather Sun also fit into this broad notion of community. Indeed, according to Aaron Mills, "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 [emphasis added]." <sup>42</sup> The use of the word "peoples" is instructive. Irving Hallowell notes that "social relations" between human and non-human persons are of "cardinal significance" to the Anishinaabe.<sup>43</sup> A similar statement could be made for the Haudenosaunee and other rooted Indigenous societies.

Both human and non-human entities assume responsibilities in keeping with their place in the community. In Haudenosaunee and Anishinaabe kinship structures, your responsibilities are defined by your relationship towards others, with closer relations entailing a stronger sense of responsibility.<sup>44</sup> The boundaries of community are fluid, unlike conventional ideas of ethnicity or nationality, because they can grow or contract to encompass everyone involved in a community's circle of reciprocity. This fluidity requires that community members remain engaged in the processes of mutual aid and cyclical reciprocity. Community, in this sense, is not characterized by determinant factors—like

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<sup>41</sup> Laura Peers & Jennifer SH Brown, "'There Is No End to Relationship among the Indians': Ojibwa Families and Kinship in Historical Perspective" (1999) 4:4 *The History of the Family* 529.

<sup>42</sup> Mills, *supra* note 33 at 15.

<sup>43</sup> A Irving Hallowell, "Ojibwa Ontology, Behaviour, and World View" in Jennifer SH Brown & Susan Elaine Gray, eds, *Contributions to Ojibwe Studies: Essays, 1934–1972* (Lincoln: University of Nebraska Press, 2010) 535 at 538.

<sup>44</sup> Peers & Brown, *supra* note 41.

language or blood—but rather by adherence to a shared logic system.

### Colonialism, the Canadian State, and the Advent of Indigenous Rights

The worldviews described in the previous section remain largely intact among many Indigenous elders and knowledge-keepers in Canada, but a large proportion of the Indigenous population—especially Indigenous youth—are increasingly influenced by the liberal individualist worldview of the dominant non-Indigenous Western culture. The promotion of assimilation through cultural genocide<sup>45</sup> has been a central component of Canadian law and policy regarding Indigenous peoples since confederation, with confinement in reserves, the residential school system,<sup>46</sup> and the “Sixties Scoop”<sup>47</sup> being among the more nefarious examples. The *Indian Act*, adopted in 1876, remains the legal cornerstone of Canada’s assimilationist approach.<sup>48</sup> It continues to limit Indigenous autonomy by imposing a liberal democratic governance model on First Nation reserves and restricting Indigenous influence over land management and band membership. These laws and policies have had enduring impacts on Indigenous people by limiting their economic opportunities, eroding their languages and cultures, and generally contributing to a reduced sense of pride and place.<sup>49</sup>

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<sup>45</sup> David MacDonald, “Five reasons the TRC chose ‘cultural genocide’”, *The Globe and Mail* (20 December 2017), online: <<https://www.theglobeandmail.com/opinion/five-reasons-the-trc-chose-cultural-genocide/article25311423/>>.

<sup>46</sup> See Daniel Schwartz, “Truth and Reconciliation Commission: By the numbers”, *CBC News* (2 June 2015), online: <<http://www.cbc.ca/news/indigenous/truth-and-reconciliation-commission-by-the-numbers-1.3096185>>.

<sup>47</sup> See Andrew Russell, “What was the ‘60s Scoop’? Aboriginal children taken from homes a dark chapter in Canada’s history”, *Global News* (23 August 2016), online: <<https://globalnews.ca/news/2898190/what-was-the-60s-scoop-aboriginal-children-taken-from-homes-a-dark-chapter-in-canadas-history/>>.

<sup>48</sup> *Indian Act*, RSC 1985, c I-5.

<sup>49</sup> See e.g. Truth and Reconciliation Commission, “Honouring the Truth, Reconciling for the Future” (2015) at 135, online: <[http://www.trc.ca/websites/trcinstitution/File/2015/Honouring\\_the\\_Truth\\_Re](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Re)

The persistence of Indigenous worldviews, despite these ongoing pressures, demonstrates the incredible resilience of Indigenous peoples. As Indigenous nations work to reclaim and reinvigorate their laws, customs, and responsibilities towards Creation, Canada is beginning to reconcile itself with Indigenous peoples and their rights, as recognized within its liberal constitutional framework.

In 2016, the Canadian government expressed its unconditional support<sup>50</sup> for the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).<sup>51</sup> It also committed to implementing UNDRIP by reviewing all federal laws and policies in accordance with its "Principles Reflecting the Government of Canada's Relationship with Indigenous Peoples."<sup>52</sup> However, the federal *Indian Act* surely runs afoul of UNDRIP articles 3 and 4<sup>53</sup> on Indigenous peoples rights to self-determination and self-government. And despite the recent change in rhetoric, we

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conciling\_for\_the\_Future\_July\_23\_2015.pdf> (for a discussion about the legacy of residential schools).

<sup>50</sup> James Wilt, "Implementing UNDRIP is a Big Deal for Canada. Here's What You Need to Know.", *The Narwhal* (12 December 2017), online: <<https://thenarwhal.ca/implementing-undrip-big-deal-canada-here-s-what-you-need-know/>>.

<sup>51</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*, online: <<http://www.refworld.org/docid/471355a82.html>> [UNDRIP].

<sup>52</sup> Canada, Department of Justice, "Principles Reflecting the Government of Canada's Relationship with Indigenous Peoples" (Ottawa: 19 July 2017), online: <<https://www.justice.gc.ca/eng/csjsjc/principles-principes.html>>.

<sup>53</sup> UNDRIP, *supra* note 51: (article 3 reads: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development; article 4 reads: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions).

continue to see State efforts to control and limit Aboriginal rights, as protected in Section 35 of the *Constitution Act, 1982*.<sup>54</sup>

The legal cases defining Aboriginal rights, most notably *R v. Sparrow* (1990)<sup>55</sup> and *R v. Van der Peet* (1996),<sup>56</sup> have been criticized as restricting the contemporary evolution of Indigenous rights. John Borrows describes them as “freezing” Indigenous rights in a narrow interpretation of pre-contact Indigenous cultural practice.<sup>57</sup> For example, rights to trade natural resources will not necessarily translate into the modern-scale commercial rights needed to develop resource economies. Likewise, hunting and fishing rights are seemingly stuck in a romantic vision of pre-contact practice, limiting the role of Indigenous people in contemporary environmental stewardship. These early post-1982 court decisions<sup>58</sup> were also unwilling to acknowledge a broad, general Aboriginal right to self-government, but some First Nations have since won self-government powers through political negotiations.

Although Canadian courts have recognized a duty for the Crown to consult Indigenous communities about development projects on their territories,<sup>59</sup> they have not recognized an Indigenous right “to determine and develop priorities and strategies for the development or use of their lands,” as set out in UNDRIP article 32.<sup>60</sup> This article states that countries shall work “to obtain [the] free and informed consent [of Indigenous peoples] prior to the approval of any project.” UNDRIP thus arguably gives Indigenous nations a veto power over development on their territories, but the Canadian government—and the courts—have rejected its applicability to Canadian law. The recent *Clyde River* (2017)<sup>61</sup> and *Chippewas of the Thames*

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<sup>54</sup> *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11: “35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

<sup>55</sup> *R v Sparrow* [1990] 1 SCR 1075.

<sup>56</sup> *R v Van der Peet* [1996] 2 SCR 507.

<sup>57</sup> John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1998) 22:1 *American Indian L Rev* 37.

<sup>58</sup> See also *R v Pamajewon* [1996] 2 SCR 821.

<sup>59</sup> See *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73.

<sup>60</sup> UNDRIP, *supra* note 51.

<sup>61</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc* [2017] SCC 40.

(2017)<sup>62</sup> decisions make no mention of UNDRIP and dismiss a veto power as being contrary to the balance and compromise required of the consultation process in a liberal society.<sup>63</sup>

The liberal rights-based approach has not always advanced Indigenous interests, but Canada’s recent commitment to UNDRIP implementation offers some hope for the future. Can Indigenous rights, as defined in a liberal constitutional framework, protect Indigenous cultures and worldviews from settler State domination? Or are Indigenous and liberal logic systems too fundamentally different to allow for respectful dialogue and coexistence? The following section explores the apparent conflict between these logic systems in greater detail.

### **A Clash of Constitutional Orders: Liberalism vs. Rooted Relational Accountability**

Western and rooted Indigenous constitutional orders arise from different worldviews with different logic systems, which can—at times—bring the two orders into conflict. Haudenosaunee and Anishinaabe logic systems, described earlier as mutual aid or cyclical reciprocity, are more relational and community-oriented than the individual-oriented liberalism that underlies Western constitutional thought.<sup>64</sup> In Canadian law, for instance, we see the individual-oriented approach in the *Canadian Charter of Rights and Freedoms*;<sup>65</sup> the judiciary protects the rights of individuals from interference by other individuals or State actors.<sup>66</sup> In Haudenosaunee and Anishinaabe law, collective responsibilities are emphasized over individual rights; community members are

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<sup>62</sup> *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* [2017] SCC 41.

<sup>63</sup> *Ibid* at paras 59, 60.

<sup>64</sup> Mills, *supra* note 33 at 21.

<sup>65</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>66</sup> See Rachel Ariss with John Cutfeet, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Winnipeg: Fernwood Publishing, 2012) at 41–42; Aki-Kwe (Mary Ellen Turpel), “Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges” (1989) 10:2&3 *Canadian Woman Studies* 149.

expected to use their gifts for the benefit of the community.<sup>67</sup> This difference in the weight given to rights and responsibilities reflects different conceptions of personhood, freedom, community, authority, and knowledge, which together pose an obstacle to effective dialogue between Western and rooted Indigenous constitutional orders.<sup>68</sup>

In order to overcome this obstacle, we need to examine the privileged position of liberalism and accept that different logic systems can also support viable constitutional orders. Liberalism is so engrained in Western thought, and so dominant globally, that it can be mistaken for a universal thing. If we examine it critically as a narrative, however, we can identify its influence on our thinking and more effectively engage with rooted relational accountability in Indigenous societies.

Liberalism presupposes several dichotomies that are absent from rooted Indigenous logic systems. It places humanity apart from nature and it emphasizes the importance of individual autonomy, separating life into private and public spheres. Individuals agree to recognize a public sovereign, the State, to govern their affairs and protect individual rights to things like liberty and equality.<sup>69</sup> Individuals are primarily connected by political affiliation and State citizenship, instead of membership in community or broad kinship structures. In liberal democratic states, individuals exercise their consent to be governed by State authority by participating in the democratic process. They offload legal work to State institutions and legal elites, instead of engaging in more local or community-based governance and law-making. They agree to create a private-public dichotomy, with public interactions governed by formal procedure.<sup>70</sup> The focus on procedure, instead of substance, allows the diverse civic body to achieve consensus at a broad national level. In this way, the legitimacy of State institutions—including law—depends on impartiality. An aversion to the messiness of substantive debate and contextual factors leads to a focus on universal and impersonal law, including things like human rights.<sup>71</sup> The liberal

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<sup>67</sup> Mills, *supra* note 33.

<sup>68</sup> See e.g. Cruz, *supra* note 11.

<sup>69</sup> Ariss and Cutfeet, *supra* note 66 at 41–42.

<sup>70</sup> See Sandel, *supra* note 9.

<sup>71</sup> Ariss and Cutfeet, *supra* note 66 at 41–42.

focus on individual rights over collective responsibilities also privileges economic development over environmental wellbeing. Individuals are free to pursue their own self-interest, so long as they respect the law of the State and the rights of other persons. The natural world and future generations, left without rights, must depend on the State to legislate for their protection. Liberalism assumes a natural condition of disorder, mirroring the wildness of undeveloped nature, that we escape by creating human-nature and public-private divides and imposing rules on ourselves.

Rooted relational accountability acknowledges the interconnectedness of all things, and so denies any formal dichotomy between humanity and nature or between private and public life. It presupposes a natural condition of harmony, instead of disorder, which requires the maintenance of respectful relations between humans and non-human beings. The logics of mutual aid or cyclical reciprocity operate to coordinate gifts and needs in the community. Freedom is equated with community wellbeing because it maximizes an individual's capacity to live well.<sup>72</sup> And as suggested by Basil Johnston, belonging is always about becoming.<sup>73</sup> Rooted relational accountability thus requires more from community members than passive civic engagement. Although some community members, like elders or chiefs, may hold more authority than others, there is no ultimate authority equivalent to the liberal State and its judiciary. Everyone shares the responsibility of maintaining respectful relations within the community kinship structure. In this sense, rooted relational accountability requires that community members constantly exercise legal reasoning and judgement, instead of outsourcing it to legal elites. When everything is interconnected, all questions become—in part—legal questions. And when law permeates all social interactions, it becomes exceedingly difficult to decontextualize or universalize it. Consideration must be given to how an action will impact the complex web of relations in the community. It becomes impossible to neglect the impacts of a

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<sup>72</sup> See Johnston, *Four Hills*, *supra* note 24 at 116 ("At times, laws, customs, and codes may appear to bridle and restrain the vision and bind the freedom of the individual. But the conflict is only apparent. General world laws and codes and customs are wide enough to allow a person sufficient scope for the exercise of his freedoms and for his growth").

<sup>73</sup> Johnston, *Think Indian*, *supra* note 23.



decision on the natural world and future generations.<sup>74</sup> In rooted Indigenous societies, law is a story for all of Creation; it is not seen as something that separates humanity from nature—civilized from uncivilized—unlike law in the liberal tradition.

The project of adopting elements of Indigenous legal traditions into Canadian environmental law and policy may be limited by the liberal boundaries of the Canadian constitutional order. We may find ourselves open to substantive difference—in terms of law and legal pluralism—but inflexible in terms of our underlying logic systems or worldviews. We also risk diminishing Indigenous law by forcing it into a liberal framework. It may be disingenuous—or even incoherent—to translate law across constitutional logics, since we give meaning to law through our logic systems.<sup>75</sup> They are the ways in which we make sense of law. They define the range of possibilities by empowering and constraining certain types of thinking, e.g. with respect to how we manage our relations with non-human beings and the natural world. The question, then, appears to be whether liberalism and rooted relational accountability are entirely incommensurable. They seem to offer competing paradigms for our relationship with nature: dominion vs. stewardship.<sup>76</sup> Can these two paradigms be brought closer together to better balance human development with the needs of the natural world?

### **Hybridity and Coexistence: Constitutionalizing Respect and Relationality for Environmental Stewardship**

Although major differences exist between Western liberal and rooted Indigenous constitutional orders, these differences do not necessarily mean that they are entirely incommensurable and incapable of learning from one another. Indeed, according to legal philosopher Patrick Glenn, the notion of incommensurability

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<sup>74</sup> See Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999) at xxii; Alfred asserts: “We have to refer to both the past and the future in our decision-making. This is where we get the concept of the ‘seven generations’: we’re supposed to be listening to our grandfathers, our ancestors, but we also need to listen to the grandfathers yet to come.”

<sup>75</sup> Mills, *supra* note 33.

<sup>76</sup> *Ibid* at 12.

is "incompatible with the fundamental nature of all [legal] traditions, which live as a flow of communicable and communicated information."<sup>77</sup> Western legal traditions can and should engage with Indigenous legal traditions. There are undoubtedly many obstacles to engagement, as canvassed earlier, but they are not insurmountable roadblocks. The work of overcoming them can shed light on the negative elements of the dominant liberal paradigm and potentially help to reshape our contemporary relationship to the natural world, i.e. by incorporating Indigenous notions of respect and relationality for environmental stewardship. However, meaningful dialogue across constitutional orders requires that we first recognize the biases inherent in our own traditions and accept that law can come from different places. If we recognize and accept difference, we can avoid the trap of static objectification and categorization and instead focus on how to change our behaviour. By keeping an open mind in this way, we can avoid a "clash of constitutional orders" and seriously explore possibilities for hybridization and coexistence.

### *5.1 Human Rights for Non-Human Persons?*

Perhaps the most obvious way to incorporate Indigenous notions of respect and relationality into the Canadian constitutional order is to constitutionalize rights for the natural world. By affording rights to non-human beings like animals and rivers, we can erode the classic human-nature divide of liberal thought and better balance the needs of humans and the natural world. This approach has seen some success in New Zealand, for instance, where the extension of rights to the Whanganui River has improved environmental wellbeing and Maori-settler relations.<sup>78</sup> However, this approach retains the liberal emphasis on rights over responsibilities, and so invites debate over competing rights. By situating the wellbeing of nature alongside other protected interests, like human rights, we are forced to

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<sup>77</sup> H Patrick Glenn, *Legal Traditions of the World*, Fifth Edition (Oxford: OUP, 2014) at 47.

<sup>78</sup> See e.g. Katie O'Bryan, "Giving a voice to the river and the role of indigenous people: The Whanganui River settlement and river management in Victoria" (2017) 20 Australian Indigenous L Rev 48; Liz Charpleix, "The Whanganui River as *te awa tūpua*: Place-based law in a legally pluralistic society" (2018) 184:1 The Geographical Journal 19.

balance the wellbeing of nature with those other interests. We therefore risk conflict between human and non-human interests.

A true relational model, on the other hand, would recognize these interests as being almost inseparable. From a Haudenosaunee perspective, Alfred argues for “the recognition and respect of sensitivity to one’s place in creation and awareness of one’s place in a circle of integrity.”<sup>79</sup> The logic of mutual aid or cyclical reciprocity extends to human relations with the natural world. And humans, as the most dependent of all Creation, have a special responsibility to act as environmental stewards.<sup>80</sup> This responsibility recognizes the agency of non-human “persons.” According to John Borrows, Anishinaabe “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.”<sup>81</sup> The extension of rights to non-human beings will require engagement with Indigenous notions of personhood. It will also need to grapple with how the rights of human and non-humans interact to create responsibilities. A rights-based approach that does not recognize respect and relationality—and associated responsibilities—risks short-circuiting the cyclical reciprocity that should guide environmental stewardship.

### *5.2 Persuasive Authority and Compliance in Community*

Indigenous notions of respect and relationality can also be advanced by creating constitutional space for community-based Indigenous environmental governance. In the current Canadian constitutional framework, environmental jurisdiction is not explicitly assigned, so it has come to be shared between the federal and provincial governments.<sup>82</sup> The federal government holds exclusive jurisdiction over “Indians and lands reserved for Indians,”<sup>83</sup> giving it the ability to delegate certain powers,

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<sup>79</sup> Alfred, *Action and Freedom*, *supra* note 19 at 39.

<sup>80</sup> See Mills, *supra* note 33 at 12: “As the least capable and most dependent, Anishinaabe was instructed to be steward for the rest of Creation; Anishinaabe was tasked with the difficult but honest job of taking care of everyone else.”

<sup>81</sup> See Borrows, *Constitution* at 242; See also Mills, *supra* note 33 at 22: “The land is not only alive, but is fully a person, as are all of the beings it hosts.”

<sup>82</sup> *Constitution Act, 1867*, *supra* note 8, s 91, 92.

<sup>83</sup> *Ibid*, s 91.

including environmental by-law powers, to Indigenous governments. Section 35 of the *Constitution Act, 1982*, can also be read—at its most generous—as protecting an inherent Aboriginal right to self-government, including environmental governance on Indigenous lands.<sup>84</sup> The issue then becomes one of jurisdictional overlap, since Indigenous lands could be argued to encompass all of Turtle Island. How can federal and provincial jurisdiction be reconciled with Indigenous jurisdiction, given the apparently conflicting nature of Western and Indigenous constitutional orders?

Indigenous governance traditionally relies on persuasive authority in tight-knit community groups, making it quite different from democratic governance at the State level. According to Basil Johnston, "[l]eadership was predicated upon persuasion; its exercise upon circumstances and need."<sup>85</sup> He analogizes leadership in Anishinaabe communities to leadership among migratory birds; "safety and autonomy of the species is best served by following diverse paths in small units."<sup>86</sup> Governance is most effective in small band units, where leaders can maintain a closer bond to their community and the land. This idea is analogous to the subsidiarity principle in Western thought, which suggests that governance should be exercised at the lowest competent level.<sup>87</sup>

Indigenous governance also traditionally requires consensus-building. Johnston states that the leader is "expected to seek and rely upon the guidance of a council."<sup>88</sup> There was no debate *per se*, only respectful deliberation and mutual inquiry.<sup>89</sup> Because community members were not compelled to follow any one leader, disagreement could lead to the fracturing of a community into separate groups. Consensus-based decision-

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<sup>84</sup> *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>85</sup> Basil Johnston, "Leadership" in *Ojibway Heritage* (Toronto: McClelland and Stewart Limited, 1976) 61 at 61 [Johnston, Leadership].

<sup>86</sup> *Ibid* at 62.

<sup>87</sup> See e.g. Eugénie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 52 *The Supreme Court L Rev: Osgoode's Annual Constitutional Cases Conference* 601.

<sup>88</sup> Johnston, Leadership, *supra* note 85 at 63.

<sup>89</sup> Johnston, The Council, *supra* note 32 at 171.

making helped to maintain community cohesion. This consensus approach sits uneasily with contemporary partisan politics and the zero-sum game of environmental exploitation in liberal capitalist societies.

By emulating persuasive authority, we can improve Indigenous-settler relations and human-nature relations in Canada and other settler States. The local and consensus-based nature of persuasive authority ensures that community decisions are made in a way that maintain respectful relations between humans and the natural world. Enhanced local and consensus-based decision-making can potentially strengthen Canadian environmental law and policy by prioritizing local environmental considerations.

Existing Canadian constitutional protections for Aboriginal rights already recognize a duty to consult Indigenous peoples on projects that affect their land and their rights, but the duty maintains an unequal relationship between the Crown and Indigenous peoples. It requires the reasonable accommodation of Indigenous interests, but ultimately the Crown is free to move forward on projects without the consent of affected Indigenous communities.<sup>90</sup> This interpretation of Aboriginal rights and Crown-Indigenous relations does not honour Indigenous conceptions of respect and relationality. We can move closer to local consensus-building by reinterpreting the duty to include deep cooperation in areas like land use planning, wildlife and resource co-management, and environmental assessment. Indeed, as argued by former Anishinaabe chief Gary Potts, we need to accept that “the land is boss” in our development decision-making.<sup>91</sup> Potts describes how local “stewardship councils” could make decisions based on the land’s ability to provide. This stewardship focus would value Indigenous knowledge and protocol, alongside Western science, and thus help to strengthen relational obligations between Indigenous communities, settler State actors,

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<sup>90</sup> See e.g. *Clyde River (Hamlet) v Petroleum Geo-Services Inc* [2017] SCC 40; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* [2017] SCC 41.

<sup>91</sup> Gary Potts, “The Land Is the Boss: How Stewardship Can Bring Us Together” in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Don Mills, Ont: House of Anansi Press, 1992) 35 at 37.

and the land.<sup>92</sup> We can also consider an Indigenous veto power for projects that would significantly affect Indigenous lands.<sup>93</sup> This idea has gained traction since Canada committed itself to UNDRIP, which calls on national governments "to obtain [the] free and informed consent [of Indigenous peoples] prior to the approval of any project."<sup>94</sup> A commitment to enhanced local consensus-building, akin to traditional persuasive authority models, will strengthen Indigenous-settler relations and enable a more respectful form of environmental stewardship.

### *5.3 Legal Pluralism, Self-Determination, and the Federal Arrangement*

Apart from human rights for non-human persons and local consensus-building in environmental decision-making, we can also explore more fundamental changes to the constitutional relationship between Canada, the provinces, and Indigenous peoples. An earlier attempt at constitutional amendment in Canada, the Charlottetown Accord, sought to explicitly recognize Aboriginal self-government in the Canadian constitutional order.<sup>95</sup> Although the accord failed at referendum, its ideas remain attractive to many Canadian legal scholars.<sup>96</sup> However, this approach requires that we situate Indigenous law and governance powers within the liberal framework, which risks detaching them from the rooted logic systems—like mutual aid or cyclical reciprocity—that animate them. We encounter the problem

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<sup>92</sup> Mills, *supra* note 33 at 10 (on Anishinaabe expansion of community relations and desire to share knowledge in environmental and land use planning); Manley-Casimir, *supra* note 18 at 15: "Higher amounts of personal interaction between non-Indigenous and Indigenous peoples may therefore increase the amount of respect between cultures."

<sup>93</sup> See e.g. Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 University of New Brunswick LJ 235.

<sup>94</sup> UNDRIP, *supra* note 51.

<sup>95</sup> See Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown" (2012) 57 McGill LJ 955.

<sup>96</sup> See e.g. Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) at 394–96.

of legal pluralism across constitutional logics, discussed in Section 4.

The liberal boundaries of Canadian constitutionalism may not be flexible enough to accommodate Indigenous legal traditions.<sup>97</sup> The idea of Aboriginal self-government, for example, is about governance *within* the Canadian constitutional order, complete with its *Charter of Rights and Freedoms*, which could impose upon Indigenous notions of collective responsibilities. It envisions Indigenous governments as municipal governments, with some distinguishing Indigenous characteristics, under the federal Crown.<sup>98</sup> It is therefore quite different from a notion of Indigenous self-determination, like that supported by UNDRIP articles 3 and 4.<sup>99</sup> True self-determination will empower Indigenous peoples to play a more important role in Canadian environmental stewardship efforts.

This section will explore two ways to expand constitutional space for Indigenous self-determination: 1) a “three-cornered federalism” arrangement<sup>100</sup> with Indigenous heads of power (alongside federal and provincial heads of power) in the Canadian constitution; and 2) a “treaty federalism” arrangement<sup>101</sup> that recognizes separate but related Indigenous and Canadian constitutional orders. These options for systemic change can be pursued alongside the incremental adaptations described in the previous two subsections.

The three-cornered federalism arrangement would be an exercise in hybridization, since Indigenous law and governance powers would sit alongside federal and provincial powers under a single Canadian constitutional order.<sup>102</sup> This approach would seem more palatable to the Crown than treaty federalism because it would maintain Crown sovereignty in a single federal structure,

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<sup>97</sup> See e.g. Cruz, *supra* note 11.

<sup>98</sup> See Frances Abele & Michael J Prince, “Four Pathways to Aboriginal Self-Government in Canada” (2006) 36:4 *American Rev Can Studies* 568 at 572 (on the ‘mini-municipalities’ model).

<sup>99</sup> UNDRIP, *supra* note 51.

<sup>100</sup> Abele and Prince, *supra* note 98.

<sup>101</sup> See e.g. James Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 *Sask L Rev* 241.

<sup>102</sup> Abele and Prince, *supra* note 98.

instead of having “a federation of federations” based on treaty relationships. Indigenous governments would be given authority in areas of core Indigenous jurisdiction, potentially including things like wildlife and resource management. Shared jurisdiction over environmental matters in traditional Indigenous territories would require cooperation between all three orders of government: Indigenous, federal, and provincial. In areas of overlap or conflict, settler law and policy preferences would need to be reconciled with those of Indigenous governments. Dispute resolution and administrative bodies would need competence in both Western and Indigenous legal traditions. We can envision the establishment of special courts and development boards for environmental stewardship questions. Relationship-building could be pursued on the basis of respect and reciprocity, in keeping with Indigenous traditions.<sup>103</sup> This approach could therefore help to broaden the Indigenous rights discourse by incorporating elements of responsibility into the Canadian federal community.

The treaty federalism arrangement would be an exercise in coexistence, since it would recognize separate but equal Indigenous and Canadian constitutional orders. This approach would be a more radical departure from the *status quo* than three-cornered federalism, but it is arguably better suited to advancing Indigenous self-determination. It would recognize the sovereignty of Indigenous nations, and so require that Canada engage with them on an international basis through treaty.<sup>104</sup> This was the way in which Indigenous peoples historically engaged with settler authorities in Canada, and in many respects, it is the way that they continue to engage, since most treaties remain valid today. The Royal Proclamation (1763) and the Treaty of Niagara (1764) are prominent examples. They established relationships based on mutual respect and partnership.<sup>105</sup> This was also true of wampum belt covenants, like the “Two Row Wampum” and “Covenant Chain” agreements between the Haudenosaunee and British

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<sup>103</sup> See Heidi Kiiwetinepinesiik Stark, “Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada” (2010) 34:2 *Am Indian Culture & Research J* 145.

<sup>104</sup> Henderson, *supra* note 101.

<sup>105</sup> See Stark, *supra* note 103.



Crown.<sup>106</sup> The spirit of these agreements has not been honoured by Canada. The “Dish with One Spoon” covenant, though originally established between the Haudenosaunee and Anishinaabe, is also understood to encompass Indigenous-settler relations. It was meant to maintain harmonious relations between its parties and the natural world in areas of overlapping territorial interests. The assertion of Canadian sovereignty and the liberal dominion paradigm represent a drastic shift away from these treaties, as understood by their Indigenous signatories.<sup>107</sup> Osenntonion, a Mohawk knowledge-keeper, states:

[W]e were given our own ways to life, we were never given a government for any others but ourselves, and to this day, we maintain our end of the original agreement to co-exist, not to impose our ways on others.<sup>108</sup>

Treaty federalism calls for Canada to respect its treaty obligations and the sovereignty of Indigenous nations. It would involve recasting the sovereign-subject relationship as one of friendship and partnership. By reimagining the relationship in this way, we can strengthen the relational obligations between Indigenous nations, Canada, and the land that they coinhabit.

Three-cornered federalism and treaty federalism represent two possibilities for a new federal arrangement, but less systematic changes could be equally valuable in advancing respect and relationality for environmental stewardship. According to Kirsten Manley-Casimir, Indigenous conceptions of respect “place a high value on negotiating mutually agreeable terms to manage intersocietal relationships.”<sup>109</sup> The relationship between Canadians, Indigenous peoples, and the natural world

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<sup>106</sup> See John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government” in Michael Asche, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997).

<sup>107</sup> See Joshua Nichols, “Sui Generis Sovereignities: The Relationship between Treaty Interpretation and Canadian Sovereignty” (2018) Centre for International Governance Innovation, Canada in International Law at 150 and Beyond, Working Paper No 1, online: <[www.cigionline.org/publications/sui-generis-sovereignities-relationship-between-treaty-interpretation-and-canadian](http://www.cigionline.org/publications/sui-generis-sovereignities-relationship-between-treaty-interpretation-and-canadian)>.

<sup>108</sup> Osenntonion and Skonaganleh:rá, *supra* note 2 at 8–9.

<sup>109</sup> Manley-Casimir, *supra* note 18 at 8.

can be improved by entering into dialogue and acknowledging our interconnectedness. By choosing to live in accordance with the logics of mutual aid or cyclical reciprocity, Indigenous peoples (and non-Indigenous Canadians) can reject the more nefarious elements of liberal capitalism and the dominion paradigm.

Indigenous law is not a body of rules, like law in the Western tradition, but rather a lived process that must be practiced. The “revitalization” of Indigenous law therefore requires that more people learn and apply Indigenous logic systems. Indigenous self-determination, in this sense, becomes less about governance than the ability to grow a way of living and acting that places collective responsibilities ahead of individual rights.

## Conclusion

This paper sought to illustrate how rooted relational accountability in Indigenous constitutional orders supports a more sustainable vision of human-nature relationships than the liberal logic of Western constitutional orders. For the Haudenosaunee and Anishinaabe, respect and relationality form the basis of humanity’s responsibility towards nature, i.e. its responsibility to exercise environmental stewardship. This responsibility is manifested in the “Dish with One Spoon” covenant, which promotes sustainable land use for the wellbeing of all of Creation. The covenant relationship was contrasted with contemporary Indigenous-settler and human-nature relationships in the Canadian State, where the liberal dominion paradigm dominates.

After exploring the shortcomings of the human rights discourse and the conflicting natures of liberal and rooted Indigenous logic systems, this paper identified opportunities for hybridity and coexistence between Canadian and rooted Indigenous constitutional orders. By advocating for enhanced dialogue across constitutional logics, this paper rejected the idea of incommensurability in favour of a pragmatic approach to Indigenous-settler cooperation and relationship-building. Although important differences exist between liberal and Indigenous constitutional orders, these differences are not so large as to prevent productive exchange; principles of respect and relationality, for instance, can be adopted into Western law and policy for enhanced environmental stewardship. And the present

dominance of liberalism should not prevent us from supporting other ways of living and acting, like those embedded in rooted Indigenous constitutional orders. The application of Indigenous law and the reinvigoration of Indigenous logic systems can help the Western world heal its relationship with Indigenous peoples and the natural world.

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