Aandaakonan inaakonigewin: Considering an Anishinaabe meaning to the Canadian law on consultation and accommodation

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Abstract

Indigenous laws are resurging throughout Turtle Island and have vital roles to play in the creation and application of laws, governance structures, and decision-making. However, for this to happen, the understanding of the law which is predominant and dictates legal processes must change, specifically when such laws apply to Indigenous land and peoples. This will allow Indigenous legal orders – including Anishinaabe legal norms such as mutual aid, kinship, giftedness and doodem – to flourish. This thesis explores Anishinaabe law resurgence by asking: how can decision-making about land, natural resources, and Aboriginal rights through the duty to consult and accommodate be altered so to be understood and applied through Anishinaabe law? By exploring the legal principles and theories that form both the colonial and Anishinaabe legal orders, this thesis considers one way Anishinaabe legal orders could understand the duty to consult and accommodate.

Dedication & Acknowledgements

This thesis is dedicated to my great grandmother, Bernice, whose love of writing allowed her to persevere through a life filled with countless obstacles; you are the reason I write. Also, to my nephew Miles. May you grow up in a Canada that respects you and everything you will one day become. Walk through life knowing your ancestors are behind you.

* * *

I want to first thank my husband, Bilal, for pushing me to write this thesis. You've always supported my dreams, my thoughts, my passions. Without you, all this would still be in my head. Thank you for convincing me that there is no time to write like the present. I love you dearly.

Thank you also to my amazing supervisor, Karen Drake. Your support, knowledge and thoughtfulness are how these thoughts became words. *Chi-miigwetch*. To my committee member, Jeffery G. Hewitt, I say thank you for pushing me to be the best advocate I can be ever since my very first day of law school. You've supported me since day one, and I am so grateful you were able to be part of the thesis as well. Also, to Aaron Mills, for being an integral part to my thesis writing and defense process. Your work inspired this.

To my sisters, Vanessa and Victoria, thank you for being you. Without you, I wouldn't have been able to get to this point. Victoria, thank you for our countless phone calls, laughs and endless love. Vanessa, thank you for being my first teacher and first reader. Thank you, also, for making me an aunt and giving me the sweetest nephew to love. This thesis is for him.

To my parents, thank you for pushing me to pursue my love of storytelling. You always knew the stories I wrote as a young girl would one day turn into writing that could mean something. I hope this thesis has become just that.

I want to also thank Dayna N. Scott and Estair Van Wagner. You both supported me this past year of writing in so many ways. You saw something in me before I put pen to paper. Thank you for allowing me to work with you, talk things through with you, and turn to you.

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Preface

Before I begin my writing, I wanted to introduce myself to you. My name is Veronica, and I am a writer and a lawyer. I'm also a daughter, a sister, a wife, and an aunt. The most important parts of who I am are the pieces I just told you, especially because this thesis is dedicated in part to my nephew, Miles, who was born in November 2020.

Introducing myself to you is important to fully understand my work, and why I write what I do. I am of Indigenous ancestry on my mother's side. Her mother, my grandmother, is Anishinaabe and Iroquoian. I keep a photo of my great, great-grandmother on my bookshelf; she is dressed in all black, sitting on her land near Oka. Her photo sits next to the various Indigenous artist's work I have framed, my smudge shell, feather and medicines. I also have the autobiography of my great grandmother, Bernice, there. Her story, "Gifted with Strong Life", was handwritten and bound before she died. The title, which I hope you will come to learn, is important for my thesis and Indigenous cosmology. I am also Italian: my father's parents came to Northern Ontario with their children from Calabria, Italy after southern Italy was ravaged by WWII and the civil wars which followed thereafter. My grandparents only spoke Italian, making Italian my father's first language, though he never taught us it, partly because he felt it would do his three daughters no good. So, my sisters and I grew up trying to piece together the words we heard our dad speak to his family, wishing we could understand and be part of the conversation. My sisters and I also have thick, dark curls in our hair and dark almond eyes which very much resemble our Italian roots and are daily reminders of that part of our identities.

I identify first and foremost as a writer. Stories, therefore, are a huge part of my life. I love to read them, write them, and tell them. Stories are also a critical part of Anishinaabe law. I will tell you many types of stories in this thesis: personal stories, family stories, and parts of sacred stories, all for the purpose of conveying my argument that the law on the duty to consult and accommodate needs to be changed. Because of my love of stories, language has begun to play a big role in my life as well. I am currently learning both Italian and Anishinaabemowin, the languages of my ancestors. I like to think that language and storytelling is part of my blood, passed down to me by all my ancestors. And while my Italian grandparents never wrote their stories on paper like Bernice did, they very much lived them every day, such as why my Nonno never ate onions. After the war, he was dropped off in Naples and forced to walk the rest of the way home to Cosenza, Calabria, one of the most southern points in Italy. Today, that would be a 324 km drive along the Western coastline, and to walk, this would take approximately 70 hours. I can only imagine what that walk would mean post World War (if you are unfamiliar with what happened to the Italian landscape in the war, know it involved a lot of bombing, specifically in the south). Even though my Nonno had no food or water, he walked home, cutting through farms. And to survive, he ate onions. When he finally made it home, he never ate onions again.

This thesis, ultimately, comes down my questioning of *what really is law, and why?* I've set out to answer this question, and others, while exploring my role as a lawyer and storyteller, and have chosen to write from an Anishinaabe legal perspective, as much of the teachings I have come from Anishinaabe Elders. However, I want to make clear these legal perspectives, stories, language and laws are not mine, but the works of those who came before me. So, with that, I say:

Aanii boozhoo, Veronica *indizhinikaaz*. Turtle Island *indoonjbaa*. *Anamikaage nindinawemaaganagtok*.
Hello, my name is Veronica. I call Turtle Island my home. Welcome, all my relations.

Introduction

One of the Anishinaabemowin words for law is *inaakonigewin*. There are many other words for law, such as *debwe*, truth in so far as we can know it,[1] *minoniweindawewin*, living in harmony,[2] and *miinigowiziwin*, the gifts given by Creator.[3] My[4] favourite word for law is *inaakonigewin* as I believe it includes the different forms the law can take: decisions, judgements, truth, understandings, consideration, justice, constitutionalism, and law as a whole.[5] *Aandaakonan* is the word to describe changing the law and giving it a new meaning. In the following pages, I will explore what a changed meaning to the duty to consult and accommodate could be through my understanding of Anishinaabe legal orders. I will explore the foundational legal principles which make up Anishinaabe legal orders, how decision-making about land use could look through such legal principles, and how Anishinaabe law could re-write the duty to consult and accommodate. While the word *aandaakonan* can have the meaning "giving a *new* meaning to the law", the meaning I will be exploring in these next 100 pages or so is not new; it is old. Anishinaabe Nations and peoples know such a meaning. The changed meaning that will be explored in this thesis is built on Anishinaabe legal principles and norms that have operated within communities and peoples since time immemorial, and still do, to this day; principles such as kinship and mutual aid, giftedness and reciprocity, consensus and doodem. This meaning is only new in the sense that the current colonial state has not seen it.

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[1] Lindsay Keegitah Borrows, *Otter's Journey Through Indigenous Language and Law*, (UBC Press, 2018) at *xiii*.
[2] *Ibid* at *xvi*; You will note that throughout this thesis, most words that are not English have been italicized. I recognize that some Indigenous scholars have made the decision to not italicize their languages. For me, I chose to italicize as I believe it draws extra attention of the reader.
[3] Aaron Mills, "Miinigowiziwin: All That Has Been Given for Living Well Together: *One Vision of Anishinaabe Constitutionalism*" (2019) Aaron James Mills (Waabishki Ma'iingan), University of Victoria (Mills PhD) at 69.
[4] Throughout my thesis, I will be writing in the first person with my experiences and stories interwoven. To the non-Indigenous scholar, this may be an informal choice, however, many Indigenous writers choose to write this way as it is a way of situating oneself in their work, such as Aaron Mills and Sarah Morales. As Sarah Morales wrote in her PhD Dissertation, "The notion of relationality requires that you know about me before you can begin to understand my work. As Indigenous scholars, we write about ourselves and position ourselves at the outset of our work because the only thing we can write about with authority is our own experiences" (Sarah Noël Morales, SNUW'UYULH: Fostering an Understanding of the Hul'qumi'num Legal Tradition (Sarah Noël Morales, 2014, University of Victoria) at 1).
[5] See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 861 and 866 for his discussion on why he chooses *inaakonigewin* as his word choice for law, as well as footnote 47 on page 866 for various Anishinaabe scholars' understanding of what *inaakonigewin* means.

I therefore call my work "*Aandaakonan inaakonigewin*:[6] Considering an Anishinaabe meaning to the Canadian law on consultation and accommodation". My hope is that this Anishinaabe meaning can be operationalized in real-life, as well as be adapted to fit within the different Indigenous legal orders and decision-making processes across Turtle Island.[7] In such a changed meaning, the legal orders of the affected Indigenous Nation will be considered law in the same sense the Canadian legal order is considered law, and therefore inform the consultation process fully. I want to make clear, though, that this meaning I set out to explore is only one way the law on the duty to consult could be understood through Anishinaabe legal orders. It is, by no means, the only way Anishinaabe law could understand the duty, nor is it necessarily the 'best' meaning. It is one understanding, one vision: my understanding, my vision.

Before I can attempt to propose a changed meaning, an understanding of what the law looks like from both the Canadian and Anishinaabe legal orders is needed. I will start by laying out the perspectives and legal principles which surround both legal orders; the building blocks of Canadian and Anishinaabe law. By critically examining both, a picture can start to be painted of how the differing legal orders cannot 'come together'[8] to create a collaborative meaning for consultation due to their incommensurability,[9] and therefore, a changed meaning is required. I will then explore the building blocks of Anishinaabe legal orders in detail throughout the following chapters by looking closer at how language and stories influence laws and processes; the principles of kinship, giftedness, and mutual aid; and how governance and decision-making work. I will also be exploring the colonial system and the laws of the Canadian legal order throughout, which includes an exploration of the legal theories which form the foundation of Canadian law and the duty to consult and accommodate. In the final chapter, I will culminate all

[6] The spelling and definition of these words come from the 2018 reprinting of *A Concise Dictionary of Minnesota Ojibwe* by John D. Nichols and Earl Nyholm, originally printed in 1995 by the Regents of the University of Minnesota. Anishinaabemowin, like many languages, differs in spelling and definition based on the dialect and geography. The word for "thank you" has, for example, at least four different spellings that I know of: *miigwetch, meegwetch, miigwech, meegwech*. I have always been taught the spelling of *miigwetch*, and have chosen to continue with that spelling, despite this specific dictionary spelling it differently. For consistency, and because I am not fluent in Anishinaabemowin, I have chosen to use the spelling and definitions found in this dictionary by Nichols and Nyholm for any words I do not hold spelling and definitions for myself.
[7] Many Indigenous peoples and Nations call the land Turtle Island in reference to their Creation Stories, many of which have a narrative that the land grew from the back of a turtle. Throughout this thesis, I use Turtle Island in reference to the land mass now known as Canada.
[8] Having different legal orders 'come together' and operate within the colonial system has been gaining traction over recent years, most notably by non-Indigenous peoples.
[9] Aaron Mills, an Anishinaabe legal scholar, uses this term in his PhD Dissertation, *supra* note 3 to explain the vast differences of the two legal orders and how they cannot be judged by the same standards or understandings.

these building blocks to propose one way the law on the duty to consult could be re-written through Anishinaabe legal orders.

Chapter One begins the exploration of both legal systems, starting with the foundational legal theories which form the Canadian understanding of the duty to consult and accommodate: Lockean theories on property and the theory of legal positivism. Juxtaposed to these foundational theories are Anishinaabe legal principles of giftedness, kinship, and mutual aid. These are pivotal building blocks to Anishinaabe law and lifeways, and therefore, foundational principles of what the duty to consult could look like. Language is critically important in building an understanding of both legal systems, and this means the language spoken both in and out of law, in stories, and in every day speaking. As will be explored in Chapter Two, understanding the multiple layers of language is needed in order to understand the language that is law. By building such an understanding of language, I can engage with Anishinaabe legal orders, stories, and individual laws without misconstruing or misunderstanding them.

Chapter Three builds on the importance of foundational theories and language from Chapter's One and Two by exploring in detail the Anishinaabe legal orders' foundational theories of kinship, giftedness, and mutual aid, and how all relate to governance and decision-making via doodem – the clan system. Decision-making is a critical piece to the duty to consult and accommodate; therefore, to understand the process through an Anishinaabe legal order, I will explore what Anishinaabe legal orders say about decision-making and governance. In this chapter, doodem is explored both historically and presently to demonstrate its ongoing integral role in many Anishinaabe communities' culture, identity, laws, and policies, and how doodem can be implemented in a changed understanding of the duty to consult. Chapter Four is when the duty to consult, as it is currently understood in Canadian jurisprudence, is explored in expanded detail. At the beginning of Chapter One, the duty is discussed very briefly, and there are a few reasons why I leave the full details of the current duty to Chapter Four. In part because it is important for me to scale back to the grounding roots of Canadian and Anishinaabe legal orders before exploring the duty as it currently stands, and a possible Anishinaabe understanding of it. Another reason is because I see the duty as a Pandora's Box:[10] something filled with unexpected

[10] The Greek mythology story of Pandora and her jar of unexpected troubles can be found in Hesiod's *Theogony, Works and Days*, "Why Life is Hard", composed originally in Greek in the 8th or 7th century, B.C. The version I rely on was translated to English by S. Lombardo in *Anthology of Classic Myth*, Second Edition.

troubles. Opening the lid to this jar[11] before acknowledging the incommensurability of the two legal orders can lead to an expectation of positive outcomes. By understanding that the jar is not what is expected, I can open the lid, braced for the truth of its contents. Upon exploring this Pandora's Box[12], and having explored the foundational roots of both legal orders, I can finally put the pieces together in one version of an Anishinaabe understanding of the duty. Putting the pieces together happens in Chapter Five where I propose a changed meaning to the duty to consult by culminating the theories, language and legal orders explored in the first four chapters. Chapter Five does this by telling two short stories: the first is a story of how the current duty to consult works; the second is a story of how the duty to consult could work through an Anishinaabe meaning.

As I embark on exploring a changed meaning to the duty to consult, consider perhaps this thesis as a story, with shorter stories interwoven. It is a story of colonial law and of Anishinaabe law; a story of owning the land and respecting the land; and a story about language and kinship, governance and relationality. I offer these stories as an invitation to engage with them, beginning with the story behind the Canadian law. The story of the Canadian law can be a challenging one; it can be a story of settler supremacy,[13] violence, assimilation, coercion, and the erasure of Indigeneity, language, and Indigenous legal orders. Perhaps, one day, it can be a story of *once upon a time*. For now, though, it is a story of the current reality of the Canadian legal order.

[11] While the saying is 'Pandora's Box', the actual 'box' Pandora opens in the myth is a jar. In Hesoid's telling of the misery of man in "Why Life is Hard", Pandora opens a big jar, not a box.

[12] For reference, in Hesiod's *Theogony*, "Pandora", lines 573-620, Pandora is created by the gods as the first mortal woman, and is described as a lovely evil. She is resistibly beautiful, but filled only with evil so to punish the men of the earth for at this time in creation, the Fates – the three women who weave every human's life line – had created no evils for men to combat. Alternatively, Hesiod explains Pandora somewhat differently in "Why Life is Hard", lines 58-128, saying that all gods gave Pandora something when they collectively created her. She was given a voice, named Pandora because *pan* meant "all" and *dora* meant "gifts", and described as a "pain for human beings". In this telling, Pandora took the lid of a large jar that was filled with all "miseries that spell sorrow for men" and unleashed it unto the human world.

[13] Settler supremacy is a term used by Aaron Mills in his PhD Dissertation, *supra* note 3. I borrow this term throughout this thesis, which Mills defines as being the relationship of colonialism, defined by the notion of the settler being supreme to Indigenous peoples, and mandated by the interests of settler persons.

One: *Inendaagwad* – it is thought of a certain way

The understanding of Canadian law which is accepted as legitimate law is both historically and currently dictated by a colonial system and the theories which shape it, most notably that of European philosophers and theories. As will be argued in this chapter, European philosophers and theories were instrumental to the erasure of Indigenous legal orders as holding the status of law. Specifically, this chapter explores how the theories of the natural world as argued by John Locke, and the theory of legal positivism which categorized Indigenous law as not law, were foundational to forming the Canadian legal order's understanding of the duty to consult and accommodate. Furthermore, this chapter explores how these foundational theories are incommensurable to Anishinaabe foundational theories, and therefore, should not be writing the law on the duty to consult. Instead, it should be the laws of the affected Nation.

Understanding (and Misunderstanding) the Law

Cree legal scholar Tracey Lindberg explains that 'law', as a word, "has its origin in non-indigenous etymology", and that while some Indigenous languages have "comparable and translatable terminology and concepts, it is many Indigenous peoples' shared experience that 'law' does not translate".[14] As will be explored throughout this thesis, the words we use to create and define law are the building blocks to legal orders and governance structures. In Canada, this is a colonial system with colonial building blocks, both of which thrive on what Anishinaabe legal scholar Aaron Mills calls the principle of settler supremacy.[15] If the colonizer was not of the opinion that he was superior to the colonized, this thesis would never have needed to be written. Alas, a colonized state is fueled by the principle and belief that the colonizer and his legal orders and beliefs are supreme. This has extended itself into all aspects of modern life, from socio-economic standards to consumerism to education to language. It extends, also, to the law.

Over time, settler supremacy and the colonial system have created a divide between what is considered law, and what is merely considered a worldview. In this reality, Indigenous legal orders do not fit into the category of law and are instead shoved into the category of a

[14] Robert J. Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg, "The Doctrine of Discovery in Canada" as found in *Discovering Indigenous Lands* (2010) Oxford University Press at 92.
[15] Mills, *supra* note 3 at 4.

worldview. This categorization is accomplished through settler supremacy which has "[mandated] that the interests of settler persons and peoples are to be given priority over the interests of indigenous persons and peoples".[16] Settler supremacy has achieved this by tearing down the core of Indigenous legal orders through the destruction of the self, the Nation, the story, the language, and the land.[17] As Brenna Bhandar explains, even pre-existing economies, "such as that of the potlatch … were outlawed and criminalised by the colonial settler state".[18]

As language is a critical piece of this thesis and understanding legal orders, I want to address the language that I will be using. Throughout this thesis, I say Anishinaabe legal orders *plural* as every Anishinaabe Nation[19] – just like every Indigenous Nation – is unique and has their own interpretations and traditions within their individual legal order. An Anishinaabe legal order therefore could be an individual First Nation, a larger council of Anishinaabeg Nations, or that of individual persons. I am in no position to define who is or is not included within an Anishinaabe legal order, nor do I purport to. The understanding of Anishinaabe legal orders throughout this thesis, therefore, is only that of my own understanding; an understanding I have been learning throughout my life, and throughout this past year writing this thesis, and is not attached to any one Nation or peoples. This understanding is only one version – my interpretation – of what could be varying versions and interpretations of Anishinaabe laws and legal principles, lifeways, and governance structures. With language addressed, let me now move to exploring the legal principles which make up the Canadian legal order and the duty to consult.

The most important theories which make up the Canadian understanding of the duty to consult and accommodate, I argue, are Lockean notions of property and legal positivism.[20]

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[16] *Ibid* at 3.

[17] Settler supremacy and laws have forced many Indigenous laws and practices into corners through the domination of peoples via claimed Crown sovereignty and the outlawing of laws and practices, such as potlach. This forced many Indigenous peoples and Nations to stop practicing their laws, languages, ceremonies, and stories.

[18] Brenna Bhandar, "Status as Property: Identity, Land and the Dispossession of First Nations Women in Canada" 2016, Reflections on Dispossession: Critical Feminisms vol 14, 1-20 at page at 11.

[19] Anishinaabe Nation can mean a First Nation as recognized under Canadian law, but more importantly, it can mean a Nation through the laws of the individual Nation and collective of peoples. For example, The Anishinabek Nation is a legal entity which represents 39 Anishinaabe First Nations throughout Ontario. Anishinaabe Nations exist outside of Ontario as well. You can visit the Anishinabek Nation's website to see who they represent at: https://www.anishinabek.ca/ Grand Council Treaty #3 is a council of Anishinaabe Nations of Treaty #3 in Ontario and Manitoba. You can see who they represent here: http://gct3.ca/our-nation/

[20] John Austin, a British legal philosopher, theorized the "command theory of law", which we now know as "legal positivism". This theory, Michael Freeman and Patricia Mindus argue in their book, "The Legacy of John Austin's Jurisprudence", (2013) Springer Netherlands, at *v*, defined positive law "as the command of the sovereign, his peculiar idea of sovereignty, the sharp distinction between law and morality, the harsh criticism of the concept of natural law and rights, his particular conception of liberty, his strong commitment to the codification or rule of law,

Without the notion of property, which can be understood as the ownership of the natural world, or legal positivism, which denied Indigenous legal orders the status of law, a very different conversation about land and decision-making, not to mention law write-large, may be taking place. I acknowledge that focusing on Lockean theories may seem too narrow a focus on what property 'means' in Canada; however Locke is an important start, specifically when attempting to understand property as it relates to Indigenous peoples. The same can be said about the theory of legal positivism. European philosophers, their theories, and their understandings of the natural world and what is law have influenced the reality of law in Canada, and by extension, how natural resources and development should be legally categorized and managed. This shapes, of course, the Canadian understanding of the duty to consult and accommodate. To not lose sight of the duty, I will open this chapter with a very brief overview of what the duty to consult and accommodate is and how it is currently understood in Canadian law, expanding in further detail in Chapter Four. After the summary, I will explore the Lockean theories of property and ownership and how such theories became categorized as law through legal positivism, all framed by Aaron Mills' notion of settler supremacy.

<u>How the Duty to Consult and Accommodate is Understood – A Brief Summary</u>

In Canadian doctrinal law, the duty to consult and accommodate is a legal and constitutional duty which both the federal and provincial/territorial Crowns hold.[21] There is a duty to consult, and where appropriate, accommodate Indigenous peoples when the Crown contemplates conduct that may adversely impact potential or established Aboriginal or treaty rights.[22] This constitutional duty arises from the principle of the honour of the Crown, which requires the Crown to avoid any sharp dealings with Indigenous peoples.[23] The legal duty is grounded in the Crown's assumption of sovereignty over the land and resources of Canada.[24] The duty is recognized and affirmed by s 35 of the *Constitution Act, 1982*; however, along with other s 35 rights, the content of these rights are not actually written in the text of the Constitution. This leaves the duties and their

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and the various classifications of the law, most notably, the distinction between the law of things and the law of persons, and primary and secondary rights and duties".

[21] See *R v Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6.

[22] See *Haida Nation v British Columbia (Minster of Forests)* [2004] 3 SCR 511 (*Haida Nation*) at para. 31.

[23] See *Haida Nation* at para. 19 citing *R v Badger*, [1996] 1 SCR 771 (*Badger*) at para. 41.

[24] See *Haida Nation* at para. 53.

definitions open to negotiations and something for the judiciary to decide upon.[25] The legal understanding of the duty has been growing, changing and expanding over the last two decades, and the duty has gone from a simple notion[26] to being something that can be delegated to proponents.[27] Canadian courts view the duties as "a means to further reconcile the relationships between the Crown and Aboriginal peoples"[28] and are meant to require Crown actors to "create opportunities for participation and input from Aboriginal peoples impacted by proposed conduct"[29] as the duties themselves have origins in reconciliation. By localizing this understanding, the judiciary, most notably the Supreme Court of Canada, interprets the duties purposively, aiming them at "promoting reconciliation".[30] In contrast, the duty in practice is different as it "carries out significant economic regulation in the context of natural resource developments,"[31] making the duties much less about reconciliation and more about the development of resources.

When the words of the judiciary are compared to the specifics of the duty to consult, the economic regulation of natural resources is front and centre. Take *Haida* for example, which is often championed as the leading case which defined the duty in Canadian law. In *Haida*, forestry was the issue. The British Columbia government was issuing logging licenses to forestry companies on lands and resources subject to Haida Nation's Aboriginal title claim.[32] Haida Nation was not consulted on the logging licenses, and even though their Aboriginal title to the land was unproven in the Canadian court system, the British Columbia Crown should have been aware of this claim,[33] and therefore consulted with Haida Nation. The court went further, explaining that there is a "spectrum" of how much consultation and accommodation is required by the Crown which is based on "an assessment of the strength of the claim to the asserted right and the potential for harm from the proposed Crown conduct".[34]

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[25] Dwight Newman, *Revisiting the duty to consult Aboriginal peoples* (2014: Purich Publishing Limited) at page 23.
[26] See *R v Sparrow*, [1990] 1 SCR 1075
[27] See *Clyde River v Petroleum Geo-Services Inc.* [2017] 1 SCR 1069 and *Chippewas of the Thames v Enbridge Pipelines Inc.*, [2017] 1 SCR 1099.
[28] Loraine Land and Matt McPherson, *Aboriginal Law Handbook*, 5th Ed., (2018: Thomson Reuters Canada Lmtd., Olthius Kleer Townshend LLP) at page 157.
[29] *Ibid* at 157.
[30] *Ibid* at 16.
[31] *Ibid* at 16.
[32] *Ibid* at 159.
[33] *Ibid*.
[34] *Ibid*.

Let's dissect this: Haida Nation, a First Nation who has lived within its traditional territory from time immemorial, was not properly consulted by the colonial provincial Crown before that Crown issued logging licences to forestry companies on traditional Haida lands. In order to have Aboriginal title to this land, as recognized by Canadian law, Haida Nation needs to have their claim, and the rights within the claim, proven in Canadian courts by Canadian terms. The provincial Crown should have been aware of Haida Nation's claim, whether the right was proven yet by the courts. Moreover, whether Haida Nation will be given "deep consultation" is going to be decided by the same Crown who is issuing the licences to Haida Nation land, based solely on a spectrum designed by the colonial government's judicial system. At the end of the processes, the logging licenses to Haida Nation land may still be issued because Haida Nation was "properly consulted", therefore allowing for the economic development of Haida Nation land by non-Haida Nation logging companies, and, because Haida Nation was consulted, the process will be considered by the judiciary as "reconciliatory".

How Settler Supremacy Shapes Understandings of Law

To begin my argument of Lockean theories and legal positivism being foundational to the duty to consult, as well as incommensurable to Anishinaabe legal orders, I will start by exploring settler supremacy in detail. As will be addressed in the section, both theories are rooted in settler supremacy, and this is a key distinguishing factor in the two legal orders being incommensurable. I want to focus this chapter also on the development of the natural world, as it is a driving factor in the duty to consult as well as the incommensurability between Lockean and positivistic theories, and Anishinaabe legal orders.

Two questions I often ask myself are: *how can land be developed when it is attached to Indigenous peoples*; and *why do the laws of development stem from the Canadian state and not the Indigenous peoples?* Anishinaabe legal scholar Aaron Mills argues settler supremacy is the answer to these questions, and similar ones. What settler supremacy means as it relates to the categorization of laws and legal norms relates not only to colonization, but also to the Eurocentric view of laws and societies as reflected onto Indigenous peoples, seen most often reflected in concepts around the natural world. Of course, those two things go hand in hand as colonization is the forcing of European laws and societal structures onto a collective of peoples through the claim that the laws of the colony are supreme. Indigenous peoples and their legal

orders were specifically singled out by European theorists as being a reason why certain European legal theories should have standing on Turtle Island, such as Lockean theories on property and legal positivism's categorization of Indigenous legal orders not having the status of law.

Perhaps the most dangerous part of settler supremacy via Canadian law and policy is that it operates both unseen and unheard[35] and is a principle which is inferred from its consequences and patterns in legal positions, as well as in legal reasoning.[36] Mills argues that settler supremacy comes in three forms of violence: the first is settler violence *against* Indigenous peoples.[37] This violence targets the bodies, minds, hearts and spirits of the individual person and is the most visible and understood version of settler supremacy.[38] This is the way colonial laws cause harm to the individual Indigenous person, whether it be through *Indian Act* amendments or criminal law policies. The second form of violence is settler violence *to* Indigenous peoples.[39] The violence *to* Indigenous peoples is "group-centred" and attacks the "languages, ceremonies, economies, oral traditions, child-rearing practices, medicinal practices, the patterned mobility of our communities, and of course our earth interactivity".[40] Essentially, violence to Indigenous peoples is violence to how an individual identifies as belonging to a people, seeking to "destroy the group in which individuals seek belonging".[41] This form of violence seeks to harm the collective body of Indigenous peoples, Nations, laws, stories, and connections. Settler supremacy can hack away at an individual's body and spirit, but if their collective Indigently is whole, the person can persevere. However, when settler supremacy destroys everything it means to be an Indigenous person and/or Nation, the harm affects more peoples, identities, and generations.

Settler supremacy in Canada is so strong and prevalent in part because Canadian law has been built upon the theories of majority white-male theorists and philosophers from Europe. Take, for example, property law and the Doctrine of Discovery[42]: it was theorized that 'savage

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[35] Mills, *supra* note 3 at 4.
[36] *Ibid* at 4.
[37] *Ibid*.
[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid*.
[41] *Ibid*.
[42]*The Doctrine of Discovery* emanated from a series of Papal Bulls from the 1400s. The "discovery of the New World" by European explorers was used as the legal justification for colonial dispossession of Indigenous lands, peoples and legal orders. Canadian jurisprudence, such as *St Catharines Milling and Lumber Company v The Queen*, was based on the Doctrine of Discovery. In 2014, the Supreme Court of Canada was called upon by interveners in

Indians' could not possibly own property, therefore, laws were established upon such an idea.[43] The Doctrine of Discovery was used by Europeans "to justify [their] alleged right to the lands of Indigenous peoples. This was the principle called *terra nullius* (a land or earth that is null or void), or *vacuum domicilium* (an empty, vacant, or unoccupied house of domicile)".[44] The Doctrine of Discovery and its principles asserted that lands unoccupied by persons or nations, or occupied by persons or nations but not being used "in a manner that European legal systems approved" were "available for Discovery claims".[45] Settler supremacy, with its roots in the Doctrine of Discovery and the theories built upon its notions, is founded on the assumption of European/Christian asserted superiority over Indigenous peoples, governance structures, and legal orders. They are "built upon this largely racialized philosophy: those who were superior had superior rights to those who were inferior".[46] As Tracey Lindberg explains, this notion of 'infidel inferiority' was predicated on the "notions of correspondence with the imperialist defined notions of humanity" via religious theology.[47] European/Christian beliefs existed by virtue of their theology defining Europeans "as possessing direct relationships to the Supreme Power through His representatives on earth".[48] Therefore, any peoples who were "unrelated to the representatives" were therefore "opposed to and conflicting with the authority. They were also understood to possess lesser humanity".[49] This related directly to Indigenous peoples within the 'New World'.[50]

Further entrenched in the Doctrine of Discovery and the understandings which stem from it was the belief that Indigenous peoples were also inferior in regard to their relationship to land and the natural world. As Lindberg argues,

> Conceptions of the 'New World' and Indigenous peoples were based upon imaginary, misconstrued, or fear-based constructions of peoples whose individual traits, philosophies and values, and systems (government, land holding, laws, etc) differed from their own.

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the *Tsilhqotin'in Nation* decision to repudiate the Doctrine. The unanimous SCC ruling did not name the Doctrine directly, the Court did say the related doctrine of *terra nullius* "never applied in Canada". For more, see the very helpful document published by the Assembly of First Nations, "Dismantling the Doctrine of Discovery" (January 2018); see also Lindberg, *supra* note 14.

[43] See for example John Locke, *Second Treatise of Government*; see also Lindberg, *supra* note 14 at 92 where she writes that the Doctrine of Discovery amounted to "savages requiring civilization".

[44] Lindberg et al *supra* note 14 at 21.

[45] *Ibid* at 21.

[46] *Ibid* at 94.

[47] *Ibid*.

[48] *Ibid*.

[49] *Ibid*.

[50] *Ibid*.

> Casting imperial law as normative and Indigenous law as non-existent or abnormal played a distinct role in the implantation of beliefs about the rightfulness of European property laws.[51]

All these notions are deeply rooted in Christian-colonial and racist legal architects, and yet, the property law taught and practiced in Canada is built upon it, nonetheless. The Canadian public does not question that owning property in Canada comes from settler supremacy frameworks. Instead, Canadians set out to own property as a means of success. The fact the 'savage Indians' could not possibly own property as an underlying basis to Canadian property law does not get categorized as an outdated, colonial, or a racist worldview: it simply remains law. If you were to ask an Anishinaabe person what their Anishinaabe legal orders say about owning property, the reasoning will not be, "because we savages simply cannot own property". Instead, the answer will likely lean us towards what their legal principles say about the relationship between humans and the Earth, likely rooting itself in the legal obligations a human has to their non-human kin.

Take for example Basil Johnston's version of the Anishinaabe Creation Story,[52] centred on Father Sun and Mother Earth, and how The Great Laws of Nature came to be.[53] In this story, Johnston explains that Nanabush and his father, Epingishmook, had just smoked from the Pipe of Peace together and Epingishmook begins to tell his son of the special relationship and dependence Anishinaabe peoples have to the sun, earth, moon, and stars. Epingishmook explains that in creation, there are four orders: first is the physical world; second, the plant world; third, the animal; and last, the human world.[54] All four orders are so intertwined that they make up life and one whole existence. Epingishmook continues, explaining that no one order is self-sufficient or complete alone because each order gets its meaning from creation. "From last to first," he explains, "each order must abide by the laws that govern the universe and the world. Man is constrained by this law to live by and learn from the animals and the plants, and the animals are dependent upon plants which draw their sustenance and existence from the earth and the sun. All of them depend ultimately on the physical world. The place, sphere, and existence of each order

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[51] *Ibid* at 94 and 95.
[52] It is important to note that Creation Stories vary between different Indigenous Nations. This version of an Anishinaabe Creation Story is told by Anishinaabe writer Basil Johnston. There are many other versions of Anishinaabe Creation Stories, some of which will be explored later on in Chapter Three.
[53] See the story of "Father Sun and Mother Earth" in Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976) [Johnston, Ojibway Heritage] at 21-31.
[54] *Ibid*.

is predetermined by great physical laws for harmony."[55] These laws are known as The Great Laws of Nature, and as Johnston shows in his story, they provide for the well-being of all of creation.[56] The Great Laws govern the sun, moon, earth and stars; the wind, water, fire and rock; the rhythm of life, birth, growth, and even death.[57] This story showcases the Anishinaabe legal principles of kinship and mutual aid (which will be explored in detail in Chapters Two and Three). These legal principles are not seen as 'law', however, from a colonial perspective, and are instead seen as an Anishinaabe worldview or story that do not garner the status of law in the eyes of the colonial state.

Why is this? Aside from settler supremacy overriding the original laws of Turtle Island, what has caused such a modern-day recoil to the notion that Indigenous laws are, and should be, considered law? Why are they put into the same box where folklore lives? Anishinaabe-kwe Lindsay Keegitah Borrows explores these types of questions, writing that when it comes to Indigenous peoples and their stories and laws, there is a common response of "Wow, I can't imagine that".[58] This "wow" is rarely followed up by asking to learn more about the story and the laws within, and rather is followed up by nothing: the listeners choose to "ignore, reject, silence, or manipulate Indigenous stories".[59] This unwillingness to learn, as Borrows explains, results not only in the disconnection and misunderstanding of Indigenous stories and laws, but also results in governments making decisions about Indigenous peoples, rights and land without the proper, adequate knowledge of the stories and laws, which leads to people suffering.[60] I would take Borrows' categorization of misunderstanding further, and categorize this "wow" and what follows, or lack thereof, as a product of Lockean theories and legal positivism.[61] As John Borrows explains, the reason Indigenous laws having the uncertain status they do in Canada's legal order stems from the "debate about what constitutes 'law' and whether Indigenous peoples

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[55] *Ibid* at 21-31.
[56] *Ibid.*
[57] *Ibid.*
[58] Borrows, *supra* note 1 at *x*.
[59] *Ibid* at *x*.
[60] *Ibid.*
[61] The definition of legal positivism I base this argument on comes from John Austin's command theory of law, which defined positive law as being that of the command of a sovereign, sovereign meaning a European king, or the likes thereof. As will be explored later in this chapter, Austin's legal positivism, or command theory of law, was later developed by HLA Hart. For more on legal positivism, its history and advancement by various theorists, see Michael Freeman and Patricia Mindus, *The Legacy of John Austin's Jurisprudence*, (2013) Springer Netherlands, specifically Chapter 1, Brain H. Bix, "John Austin and Constructing Theories of Law" at 1-13, and Chapter 14, Frederick Schauer, "Positivism Before Hart" at 271-290.

in Canada practiced law prior to European arrival".[62] Borrows goes on to explain that those who take this stance, both historically and contemporarily, believe that societies only have laws if they "are declared by some recognized power that is capable of enforcing such a proclamation", and if they do not have this proclamation, then the Indigenous legal tradition is seen only as customary, and therefore, "not clothed with legality".[63] Legal positivism describes customary laws as being: "...a conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior".[64] Legal positivism as a theory states that custom is only "transmuted into positive law" when the custom is adopted by the "courts of justice, and when judicial decisions fashioned upon it are enforced by the power of the state".[65] Legal positivists who agree with this definition of law then see Indigenous laws as purely customary, worldviews, as they have not been converted into positive law. As Borrows argues, this is problematic because while some Indigenous laws may be customary, other laws may be "positivistic, deliberative, or based on theories of divine and natural law".[66] Borrows goes further, arguing that even if the laws are customary, customary laws have more than just moral force, and to believe otherwise is misleading and harmful.[67]

What legal positivism and its categorization of Indigenous laws has done is successfully create the view that Indigenous legal orders are not law.[68] This can be seen as Aaron Mills' third form of settler supremacy, which is violence inflicted against and to Indigenous peoples. This third form is a violence which seeks to "accomplish Indigenous erasure".[69] Mills describes this violence as only recognizing Indigenous peoples as a unique peoples, "but in a sense not our own", meaning Indigenous peoples may retain the "substantive trappings of peoplehood" while losing "something much more profound".[70] Settler supremacy does this by maintaining "a singular social order by means of force and law [by] supressing the diversity of human

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[62] John Borrows, *Canada's Indigenous Constitution*, University of Toronto Press (2010) at page 12.
[63] *Ibid* at 12.
[64] John Austin as cited by John Borrows, *Canada's Indigenous Constitution*, University of Toronto Press (2010) at page 12.
[65] *Ibid* at 12.
[66] *Ibid* at 12.
[67] *Ibid*.
[68] See Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (2019) University of Toronto at chapter 6 for more on a naturalist's analysis of legal positivism and how it has informed the Canadian law, specifically in relation to Aboriginal rights.
[69] Mills, *supra* note 3 at 5.
[70] *Ibid* at 5.

worldviews".[71] Mills argues that the third form of violence is unlike the first two forms because the third is not substantive.[72] The third form does not target "particular indigenous practices, doctrines, or embodiments" and instead, targets Indigenous peoples and their "capacity to understand the world on [their] own terms and to organize [themselves] accordingly."[73] This third form, therefore, is much more abstract, making it difficult to identify.[74] However, what can be identified from this third form is that the violence denies Indigenous peoples the ability to speak their languages[75] and laws, live their truths[76], and even "to imagine [their] lives constituted within [their] own understandings of persons, freedom and community."[77] This third violence also encompasses the first two by enforcing a law and social order that is not the law of the peoples, ultimately inflicting violence to and against Indigenous peoples as well as their identities, laws, stories, ways of being, and most damaging of all, their land. This third form of violence can be linked not only to legal positivism, but also to Locke's theories of property, the natural world, and ownership in law.

How Lockean Theories Understand Property Law

John Locke wrote that "The earth, and all that is therein, is given to men for the support and comfort of their being".[78] To him, every piece of creation was "made to become property – things owned by individual men, to be used for human ends".[79] Locke's ideology or creation story is starkly different than Basil Johnston's Creation Story as explored above. And while creation stories differ depending on the Indigenous persons and Nations,[80] just as they differ

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[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] John Locke, *Second Treatise of Government* (Indianapolis, IN: Hackett, 1980), 18 as cited in Marc Kruse, et al., "Educating in the Seventh Fire: Debwewin, Mino-Bimaadiziwin, and Ecological Justice" (2019) Educational Theory, volume 69 number 5. 587-601 at page 591.
[79] Marc Kruse, et al., "Educating in the Seventh Fire: Debwewin, Mino-Bimaadiziwin, and Ecological Justice" (2019) Educational Theory, volume 69 number 5. 587-601 at page 591.
[80] Again, there are many versions of creation stories across Indigenous peoples in Canada alone. Even amongst Anishinaabeg peoples and communities, Creation Stories differ. For example, Basil Johnston's version of an Anishinaabe Creation Story found in his 1976 "Ojibway Heritage" is slightly different than Lindsay Keegitah Borrow's version of an Anishinaabe Creation Story in her 2018 "Otter's Journey Through Indigenous Language and Law". Both authors are members of Neyaashiinigmiing, Chippewas of Nawash Unceded First Nation, yet their renditions of the creation story are slightly different.

between many human societies and religions, at the root of many Indigenous stories is a cosmology of giftedness.[81] As Mills explains, many present the belief that all of creation "holds a gift worthy of our respect" and in "need of our gratitude".[82] The notion of gifts is extremely important in Anishinaabe cosmology,[83] and one of the Anishinaabemowin words which encompasses giftedness in cosmology is *miinigowiziwin*: "a spiritual gift from Creator".[84] Robin Wall Kimmerer explains the importance of gifts in Anishinaabe lifeways, writing that "when people's lives [are] so directly tied to the land, it [is] easy to know the world as a gift".[85]

In a different Basil Johnston version of the Anishinaabe Creation Story, which is also the version I have been taught, gifts are explored when the Great Spirit, Kitchie Manitou sets out to create a world of life and beauty after waking from the most marvelous of dreams.[86] When creating this world, Kitchie Manitou first created rock, water, fire and wind.[87] Then came the sun, moon, earth and stars.[88] Kitchie Manitou then gave the sun, earth, moon and stars their own powers. Grass, flowers, trees and vegetation came next[89] followed by animals of every kind.[90] It wasn't until Kitchie Manitou thought back to the initial dream where the world was created that he made humans.[91] Humans had the ability to dream, just like Kitchie Manitou did. While human was "last in the order of creation, least in the order of dependence, and the weakest in bodily powers,"[92] humans had the power to dream. This, Kitche Manitou thought, was the greatest gift of all.[93] In this version of the Anishinaabe Creation Story, Johnston writes that the earth was not created to benefit the existence of humans, and in fact, 'human' was the last being Kitche Manitou created. The earth, and all the creation within it, was gifted to all creation, including

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[81] Mills, *supra* note 3 at 68.
[82] *Ibid* at 68.
[83] For more on gifts in Anishinaabe law, language and culture, see Ignatia Broker, *Night Flying Woman: An Ojibway Narrative* (St. Paul: Borealis Books, 1983) [Broker, Night Flying Woman] at 54 as cited in Aaron Mills PhD at 68; Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976) [Johnston, Ojibway Heritage] at page 11-12; Robin Wall Kimmerer, *Braiding Sweetgrass* (Minneapolis: Minnesota, Milkweed Editions, 2013) at page 30.
[84] See Mills, *supra* note 3 at 68, specifically at footnote 309, where Mills credits the Elders Council of Weechi-it-te-win Family Services for giving *miinigoziwin* its meaning.
[85] Robin Wall Kimmerer, *Braiding Sweetgrass* (Minneapolis: Minnesota, Milkweed Editions, 2013) at page 30.
[86] See Basil Johnston, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976) [Johnston, Ojibway Heritage] at page 12.
[87] *Ibid* at 12.
[88] *Ibid*.
[89] *Ibid*.
[90] *Ibid* at 13.
[91] *Ibid*.
[92] *Ibid*.
[93] *Ibid*.

humans, as was the gift of dreaming.[94] Johnston goes on in his re-telling, explaining that once humans were created, The Great Laws of Nature were formed.[95] The Great Laws of Nature were made for "the well being and harmony of all things and all creatures."[96] These Great Laws "governed the place and movement of the sun, moon, earth and stars; governed the powers of wind, water, fire, and rock; governed the rhythm and continuity of life, birth, growth, and decay."[97] Most importantly, all of creation "lived and worked by these laws".[98]

This story shows once again the differences between Anishinaabe and Christian beliefs. Locke wrote that, based on his Christian ideologies, there must be a means to appropriate all of creation before creation can "be of any use, or at all beneficial",[99] which contrasts with the Anishinaabe principle that the natural world is a gift. Locke wrote that in the beginning of time, the God of Christianity gave all of nature to mankind in common: this meant that all men had "an equal right to gather natural resources for their own use".[100] Once you appropriated the natural resource, the item belonged to whomever made the effort to gather the item while the nature the item came from remains common property.[101] Locke's notions of property were very much centred on the individual: ownership was conferred only through effort that was expended to make the item, such as an apple, available for one's personal use. Locke's theory, when applied to land, held that while originally, all land was owned in common, anyone could acquire a property claim to land and resources simply by labouring on the land to make it productive.[102] As John Bishop explains, this meant if you could "clear the forest, plough the soil, and cultivate crops"[103] you would be effectively appropriating the woods for your own ownership, entitling you to own not only the crop from the woods, but also the land which you cleared.[104]

Locke's beliefs and theories contrast further with Anishinaabe legal orders rooted in cosmology and giftedness. He argued that Indigenous peoples were "ignorant of the moral

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[94] *Ibid*.
[95] *Ibid*.
[96] *Ibid*.
[97] *Ibid*.
[98] *Ibid*.
[99] Kruse, *supra* note 79 at 591.
[100] John Douglas Bishop, "Locke's Theory of Original Appropriation and the Right of Settlement in Iroquois Territory" (1997: Cambridge University Press) Canadian Journal of Philosophy, Vol. 27, No. 3, 311-337 at 314.
[101] *Ibid* at 314.
[102] *Ibid* at 315.
[103] *Ibid*.
[104] *Ibid*.

necessity of appropriating the life of the world for private purposes," writing that the "fruit, or venison, which nourishes the wild Indian, who knows no inclosure and is still a tenant in common, must be his and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life".[105] Locke's articulation has carried itself deep into the colonial history and present of Canada, embedding itself in much more than our understanding of property law. This belief, at its core, has shaped the understanding of property and natural resources in Canada, influencing the laws, policies and practices of development, including the duty to consult. Property in Canada has different meanings and therefore different laws which govern how it operates. Even so, it is generally accepted in Canadian law that property is a means of managing resources.[106] Further, property as a right is actually rights *plural*: a bundle of rights.[107]

Locke further wrote that once you passed laboured land onto another, that person would not have to labour the land to have rights and ownership to it, because that first person did the labour necessary.[108] This imposed a duty to "undertake actions which tend to preserve the human species,"[109] and because original appropriation of property expends the necessary labour, "original appropriation of private property becomes a right".[110] Original appropriation was applied to the arrival of Europeans to Turtle Island as a right of settlement.[111] Locke's theory was interpreted to mean that a European could acquire ownership of property on Turtle Island if they invested their labour in "making the land more productive", and if the land was common property prior to their arrival either "because there were no indigenous people in the area or because the indigenous people had never transferred the land from common ownership to private ownership by original appropriation".[112]

[105] Kruse, *supra* note 79 at 591.
[106] Sarah E. Hamill, *Common Law Property Theory and Jurisprudence in Canada* (2015) Osgoode Legal Studies Research Paper No. 28 Vol. 11/ Issue. 06/ (2015) Queen's Law Journal, Vol. 40(2), 679-704 at page 682.
[107] *Ibid* at 682. The bundle of rights theory argues that there are several 'rights' a person can have in relation to a singular piece of property. Multiple people can also possess rights to the same piece of property, implying the rights are severable. Within this bundle are the right to possess; right to use; right to manage; right to the income from; right to alienate; right to security or immunity from expropriation; and the "incident of transmissibility". Whether or not there is a bundle of rights outside of theory, the core of property comes down to property meaning ownership which brings us ultimately back to Locke.
[108] *Ibid*.
[109] *Ibid* at 316.
[110] *Ibid*.
[111] *Ibid* at 317.
[112] *Ibid*.

To further understand the importance of Locke in Turtle Island's colonial history, it is important to note who Locke was in relation to European colonization. As James Tully notes,

> Locke had extensive knowledge of and interest in European contact with aboriginal peoples. A large number of books in his library are accounts of European exploration, colonization and of aboriginal peoples … [and] Locke was one of the six or eight men who closely invigilated and helped to shape the old colonial system.[113]

Locke's theories on the natural state of the Turtle Island reflect notions of settler supremacy and what later becomes known as legal positivism. He described Turtle Island as an example of "the state of nature", classifying the land and its peoples as "the earliest age in a worldwide historical development".[114] This 'state of nature' brings us back to legal positivism and the Eurocentric view that when there is no hierarchical government – therefore no 'state' – you cannot transmute customs to laws. Locke's writings described in detail the life of Indigenous peoples living on Turtle Island, stating that the way of life of Indigenous peoples supported his theory of popular sovereignty. As Tully explains, because Indigenous peoples exercised what Locke later came to call "individual popular sovereignty" or "individual self-government", Indigenous peoples were not afforded the ability to "know and to interpret standards of right (natural laws), to judge controversies concerning oneself and others in accordance with these laws, and to execute such judgements by punishments proportionate to the transgression and appropriate for purposes of restraint and reparation".[115] This, along with Indigenous people appropriating the earth's bounty "without consent"[116] of a governing authority meant that Europeans had "a right to wage war 'against the Indians, [and] to seek Reparation upon any injury received from them'".[117] This instilled the belief that Indigenous peoples did not understand property and that Indigenous peoples had no governing state or recognized legal order, and therefore, did not have any property laws of their own.[118]

I acknowledge that there are many contemporary critiques of Locke; however, one cannot deny the influence his writings had in early colonization. While it may be easy to think of Locke as purely historical and dismissing parts of his theories as something of the past, doing so would

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[113] James Tully, "Rediscovering America: the Two treatises and aboriginal rights", chapter 5 in *An Approach to Political Philosophy*, 1993: Cambridge University Press, 137-176 at page 140.
[114] *Ibid* at 141.
[115] *Ibid.*
[116] *Ibid* at 142.
[117] *Ibid.*
[118] *Ibid.*

further perpetuate the violence of colonial laws. As Breanna Bhandar argues, "Locke fashioned a theory of self-consciousness that justified and fit with a non-absolutist form of government. Colonial governance, and juridical representations of subjects of governance frame the constitution of categories of Indian and settler and indeed the *Indian Act* regime". [119] Moreover, the Doctrine of Discovery and Locke's categorization of Indigenous peoples as savages without a past memory further justified the European's ability to appropriate and own Indigenous land.[120] As Bhandar argues, the European settler who pre-empted land "fits into the Enlightenment historicism that equated cultivation with a narrative of civilizational progress", leading to "The property logic of Indian identity [being] entirely different from that of the self-possessed, proprietorial subject".[121] Further, the *Indian Act*, both historical and current, along with the imposition of private property were "premised on the denial of First Nations' memory of their relationships to land and place" as theorized and justified by Locke.[122] The colonial state, Bhandar argues, has refused to credit the colonized peoples with "a memory of place before settlement, before 'civilisation'".[123] The subject of the *Indian Act* is therefore not an individual who is afforded the ability to engage freely in commerce, nor can they be a private property owner of *fee simple* land.[124] The *Indian Act* was able to create a separate judicial space[125] where the state that once did not exist could now "regulate nearly all aspects of labour, the use of natural resources, and exchange" on land reserved for Indian subjects.[126]

Locke misconstrued Indigenous legal orders to justify his theories; as Tully argues, he was well aware that Indigenous peoples were politically organized Nations who were not "wholly individual and independent" as he said in his descriptions of the state of nature.[127] Locke therefore described Indigenous Nations in such a way that they could not be understood as "political societies" with governance and law,[128] fitting the definition of law via legal positivism. Indigenous peoples failed to meet the Christian-European criteria of a distinct political society which garnered political recognition: having an institutionalized legal system, judiciary,

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[119] Bhandar, *supra* note 18 at 8.
[120] *Ibid* at 9.
[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid* at 9.
[126] *Ibid.*
[127] Tully, *supra* note 113 at 151.
[128] *Ibid* at 151.

legislature and executive, and the “sovereign right to declare war and peace”.[129] These theories became the reality of thinking of early colonizers and have stuck with the Canadian state through the imposition of colonialism.[130] The world being of no value until developed is perhaps the most prevalent theory we see in the duty to consult, as natural resource extraction and development is the largest moving factor triggering consultation, showing how a Lockean belief that a tree is not of benefit until it is developed into pulp and paper continues to be a legal principle.

James Sakej Youngblood Henderson of the Bear Clan writes that “To speak of modern legal notions of ‘ownership’ and ‘property’ rights in the context of Aboriginal languages or worldview is very difficult, if not impossible”.[131] Indigenous concepts and visions of properties, Henderson argues, have to do with “ecological space that creates our consciousness, not an ideological construct or a fungible resource”.[132] Furthermore, legal positivism’s categorization of the laws and societal structures of Indigenous peoples, most notably their behaviours and lack of property ownerships, as ‘primitive’ and therefore not legal in status also influences how the colonial legal system views Indigenous laws and the natural world socially and legally, and builds, arguably, on Locke’s writings. In this next section, I will use natural resources as a focus in discussing how legal positivism, as influenced by Lockean theories, further misunderstands Indigenous laws and legal orders, and as a building block to the duty to consult, makes the legal order incommensurable to that of the Anishinaabe.

How Legal Positivism Misunderstands Indigenous Law

The Black’s Law Dictionary defines natural resource as an “asset or material contributing to the nation’s natural capital. To extract, process, or refine natural resources requires capital and human resources, as mental and physical labour. By these means, the nation obtains its true economic value”.[133] Natural resources as a definition and means of extraction, as can be seen from this definition, can arguably be tied back to Locke, and how his theories developed over

[129] *Ibid* at 152.
[130] The *Indian Act*, as the example given by Bhandar, still inflicts violence to Indigenous peoples, land and bodies. As an example, Bhandar explains in her article, *supra* note 17 at page 11, that in the 1970s, First Nation women were bringing forth legal challenges to the *Indian Act* for discrimination on the basis of sex.
[131] James [Sákéj] Youngblood Henderson, “Míkmaw Tenure in Atlantic Canada” (1995) Dalhousie Law Journal, 18, 1, 196-294 at 217.
[132] *Ibid* at 217.
[133] Accessed at: https://thelawdictionary.org/natural-resource/.

time to reflect the notion that the potential gain from allocating resources and property allows for sophisticated systems of property rights.[134] This can also be seen in how Canada's resource development is traced historically. The history of natural resource development as it is traced by economic historians starts not with Indigenous peoples and governance structures, but with European settlement.[135]

Economic historians such as Harold Innis state that as European settlers began increasing their dependencies on resources, such as fish, timber, and water, the need to parcel land for living and farming started to increase.[136] Slowly over time, the need to expand where one could parcel out land also grew, leading to the 'frontier' – or the 'unappropriated'[137] part of Canada – receding, development proceeding, and natural resources needing allocation amongst competing users and uses.[138] As a British colony, this meant property in land could only be acquired from the English common law,[139] and therefore, acquiring land from Indigenous peoples happened by the Crown through treaty or surrender before title to the same land could be granted to the settlers.[140] These early Crown grants were the easiest and cheapest way to acquire land, and the grants tended to carry a full range of freehold rights.[141] Crown grants to European settlers also became one of the earliest recognized legal ways of acquiring and managing natural resources until 1867, where responsibility for granting rights fell to provincial governments as outlined in the *Constitution Act*.[142] Around the turn of the century, federal and provincial governments stopped granting complete or outright title to land and resources, except when the land was for agricultural or urban purposes, and started to grant permits and licenses to resources such as

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[134] Peter H. Pearse, "Property Rights and the Development of Natural Resource Policies in Canada" (1988) Canadian Public Policy / Analyse de Politiques, Sep., 1988, Vol. 14, No. 3, pp. 307-320 at 308.
[135] *Ibid* at 308.
[136] *Ibid*.
[137] Unappropriated means lands settlers had yet to "settle". Unappropriated also means Treaty vs non-Treaty lands. There are plenty of sources for the history of Treaty making in Canada. For some, see Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (2014) University of Toronto Press; see also Marie Battist, *Living Treaties: Narrating Mi'kmaw Treaty Relations* (2016) Cape Breton University Press; Brian Egan, "Sharing the colonial burden; Treaty-making and Reconciliation in Hul'qumi'num Territory" (2012) The Canadian Geographer Vol. 56(4); and Sheldon Krasowski and Winona Wheeler, *No Surrender: The Lands Remains Indigenous* (2019) University of Regina Press, to name a very few.
[138] Pearse, *supra* note 134 at 308.
[139] *Ibid* at 308.
[140] *Ibid*; see also *Royal Proclamation of 1763*, RSC 1970, Appendix II, No 1.
[141] *Ibid* at 309.
[142] In 1867, the Constitution gave authority over property and most natural resources to the provincial governments which existed at the time.

timber, minerals and water.[143] These licenses and permits were issued to private parties to give access to the resources, while keeping the title to the land and resource with the Crown.[144] By keeping title, the Crown kept property over the resource until the resource was "recovered and (usually) paid for" by the permit holder.[145] While economic historians do not fully understand why the Canadian system turned away from English private ownership to public ownership of land and resources, some historians believe it may be tied to the "growing populist sentiment, especially in regions opening up for settlement".[146] Regardless, the development of property rights in Canada as attached to the natural world has created a spectrum of rights which ranges in duration, exclusiveness and transferability,[147] translating to what we know as the 'bundle of rights' understanding of property, as explored above. This historical pattern of natural resources understood as property reflects two major influences: "the historical pattern of settlement and the historical pattern of interest in resources".[148] These influences have resulted in the exploitation of natural resources by the private sector, and this reliance on the private sector is "as entrenched as our commitment to public ownership of [resources]".[149]

One of the clear issues with this historical dating of natural resources in Canada is the starting of the dating at European settlement. I argue that this start date is rooted in legal positivism categorizing Indigenous peoples as being lawless. The concept of natural resources as we understand in Canada requires that we expand on this exploration of legal positivism, as it influences what is considered Canadian law, and what is not. As Sundhya Pahuja, an Associate Professor of Law at the University of Melbourne in Australia argues:

> The ideal(ised) version of law in the development story is the law of the legal positivist. Legal positivism as a jurisprudential endeavour is another narrative, about a certain body of rules made in a particular way. According to this story, these particular rules are the only rules which may rightly bear the name of 'law'. And this 'law' is the language in which legitimate authority is brokered in modern society.[150]

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[143] Pearse, *supra* note 134 at 309.
[144] *Ibid* at 309.
[145] *Ibid*.
[146] *Ibid* at 310.
[147] *Ibid* at 309.
[148] *Ibid*.
[149] *Ibid* at 310.
[150] Pahuja, S, 'Beheading the Hydra: Legal Positivism and Development', 2007 (1) Law, Social Justice & Global Development Journal (LGD) at 3.

Under legal positivism, the laws which governed Turtle Island prior to European settlement did not rightly bear the name of 'law' as they were not part of the body of rules which made up the law that *did* rightfully bear the name of law under European legal orders. Legal positivism's defining of what did or did not bear the name of law gets to what Gordon Christie argues is a concept that, when one speaks of the law, they "talk of *x* being law or an element of the law, of a case standing for a legal proposition, and so on".[151] This concept, Christie explains,

> …suggests that behind legislative and judicial practice there is *meaning*, that jurists intend to project meaning through such statements. That is, much of the language of everyday discourse in legal communities (and broader society) rests on the notion there is such a thing as 'law'. A concept we hold that captures what it is for a particular rule to be law, a particular action of a legislative body, and so forth.

Trying to describe the nature of the thing called law, Christie explains that it "seems to require initial theoretical or conceptual presumptions. This thing we might all feel we can identify – the law – is incapable of self-definition and does not simply rise up before us to declare what it is like". Saying what does and does not fit into the law "is to do nothing but pick out features of our collective social existence we seem licensed to say go into our conception [of law] for no discernable reasons other than we intuit or feel this is so". Christie explains that this, in turn, "implies our concept of law might be socioculturally fixed – that there may be no such thing as *the* concept of law".[152]

This concept of law being 'socioculturally fixed' is an interesting analysis of legal positivism as it defines what bears the name of law based not only on European standards of legal orders, but also socio-cultural standards. Examples of this are the concepts of nation and development.[153] Nation and development are a network of terms defined by referencing the other through legal positivistic views, essentially enabling a narrow version and vision of society, political organization, economics,[154] as well as law. A nation that is worthy of a legal positivistic definition of law is one that is developed through legal positivistic means, such as developing the natural world through European means of ownership and labour, and through the socio-cultural standards of living. This definition of nation and development furthers Eurocentric supremacy as

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[151] Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis*, (2019) University of Toronto Press at 215.
[152] *Ibid* at 215.
[153] Pahuja, *supra* note 150 at 3.
[154] *Ibid* at 3.

it "erases the inevitable violence" that comes with 'developing' a nation that is not yours;[155] you erase the legal order and socio-cultural standards of a people when you develop them as your own nation, on your own terms, and within your own laws.

Both Pahuja and Christie cite H.L.A Hart in their discussions on legal positivism, a European philosopher who advanced legal positivism as a theory. Hart's conception of law "gained jurisprudential favour as the new positivist conception… as an explication of how positive law could command the right to be called 'law'".[156] Hart's theory was that a legal system could claim the right to be law when it demonstrated two minimum conditions that he deemed were "necessary and sufficient for the existence of a legal system". [157] These two conditions were: "rules of behaviour which are valid according to the system's ultimate criteria of validity" and, "rules of recognition specifying the criteria of legal validity and its rules of change and adjudication [which] must be effectively accepted as common public standards of official behaviour by its officials". [158]

Hart's concept of law, coincidently, "just happens to lie so close overtop the legal system with which he is intimately familiar":[159] European definitions of rules and law. As Christie explains, the concept of law being that of what European philosophers were familiar with is "knocking at the door leading to questions about the place of culture and perspective in thinking about 'the law'".[160] Legal positivism, then, sees legal orders as 'legal' if they are "built according to essentially structural requirements, with the structure containing elements that are themselves *reason-giving*",[161] the reasons being that of which is familiar to the theorist themselves, and not that of something 'foreign'. Foreign reasons and legal orders were that of Indigenous legal orders. Not only were they groups of people from a far away land, but their foundational legal principles did not coincide with the legal principles of Europe. Therefore, legal positivism did not just dismiss Indigenous legal orders as being non-law because they did

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[155] *Ibid*.
[156] *Ibid* at 7 and 8; see also Freemand & Mundis, *supra* note 18 for multiple articles on how Hart – and others before him – advanced legal positivism.
[157] *Ibid* at 8 citing Hart, H, 1994, p 116.
[158] *Ibid* at 116.
[159] Christie *supra* note 151 at p 220.
[160] *Ibid* at 221.
[161] *Ibid* at 222.

not ‘fit’ into its rules, categories, or sociocultural standards of law, but it also dismissed them as they had foundational principles which were incommensurable to their own.

To continue with the natural resource and development example from this section, I want to focus on Hart’s positivistic writing on resources. Hart argued that in a “crowded world of scarce resources [men] must adopt some form of social organization”.[162] Within this social organization, there once again must be rules, one of which must restrict the use of violence by establishing “set, stable patterns of ownership or use of resources”.[163] As Daniel Gormley points out, while this notion of survival is important, Hart does not do an adequate job explaining how the desire to survive is the sole source of moral obligation.[164] What Hart does explain is that a “stable institution of property is necessary within a community”.[165] What this translates to is Indigenous societies not having institutions due to their lack of property ownership; because the legal orders are incommensurable in their legal understandings of ownership and property, one is accepted as law while the other is dismissed. Gormley argues that what Hart established through these arguments is that “some form of property regime among communities is morally required insofar as it enhances the stability which permits human development”.[166] Without such a regime, the legal order is dismissed as primitive and non-legal.[167]

Legal positivism marked “the step from the pre-legal into the legal world” by converting “the regime of primary rules into what is indisputably a legal system”.[168] Because Indigenous societies did not meet either of the minimum conditions which afforded legal orders the status of law under legal positivism, nor did they have commensurable notions of property, Indigenous peoples did not have law. This connects once again to the violence that settler supremacy inflicts onto Indigenous peoples, bodies, laws, and land, as argued by Aaron Mills. As Mills explains,

> the principle of settler supremacy obviously doesn’t operate transparently. One won’t find a Canadian court, legislature, or minister appealing to it as justification for state action. It operates unseen and unheard. *It’s a principle which must be inferred from consequences and patterns in legal positions and in legal reasoning*.[169]

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[162] Daniel J. Gormley, “Aboriginal Rights as Natural Rights” (1984) The Canadian Journal of Native Studies, IV, 1, 29-49 at 31-32.
[163] *Ibid* at 32.
[164] *Ibid*.
[165] *Ibid* at 34.
[166] *Ibid* at 36.
[167] Pahuja, *supra* note 150 at 8, citing Harris, J, 1997, p 121.
[168] Pahuja, *supra* note 150 at 8, citing Fitzpatrick, P, 2001, p 98, quoting Hart, H, 1994, p 41.
[169] Mills, *supra* note 3 at 4, emphasis added.

Legal positivism's labeling of Indigenous societies as primitive, as well as its notions of property and wealth, are examples of how settler supremacy can be inferred from consequences and patterns in legal positions and reasonings. This, I argue, is perhaps a reason why economic historians do not link the beginning of natural resources in Canada to Indigenous peoples. Whether we are taught legal positivism or not, the Eurocentric vision of what Canada was, is, and will be, is based on positivistic theories and its creation of a hierarchy of legal orders, influencing the patterns of legal reasoning and positions we see, and accept, as law.[170]

However, Indigenous legal orders were, and are, legitimate legal orders with laws and rules. For example, environmental law or responsibilities in John Borrows' understanding of an Anishinaabe legal order are defined by Elders in "reference to the way natural resources are used, the manner in which they are monitored, and the relationships among different users in their allocation".[171] These laws are attached to established rules and the "literal connection and interaction between those things in the environment that act to use their surroundings, and those that are acted upon".[172] These laws could be categorized as being either positivistic, deliberative, and/or based on theories of natural, customary and divine laws.[173] What is important, however, is that Indigenous legal orders are considered as having the status of law by their own means and definitions, and never that of non-Indigenous legal orders. Only allowing the recognition of Indigenous legal orders as law *because* of European theories and doctrines is a continuation of colonization and settler supremacy, specifically the third form. This supremacy is extended into how one attempts to understand Indigenous legal orders through language. As will be argued in this next chapter, one needs to learn, or re-learn, language before attempting to learn Indigenous legal orders. Language, in this sense, is threefold: the language of the Nation; the language of stories; and the language of law. By taking you on my journey of learning language, and therefore the language of stories and of law, I will argue that the order of learning law is important for any legal order, including that of Anishinaabe legal orders. Without understanding language in all three forms, I am ill-equipped to understand the depth of meaning words hold,

[170] Borrows, *supra* note 62 at 13.
[171] John Borrows, "Recovering Canada: The Resurgence of Indigenous Law" (2002) University of Toronto Press at 47.
[172] *Ibid* at 47.
[173] Borrows, *supra* note 62 at 12.

and therefore if I attempt to learn the language of law out of order, the meanings of words will be, literally, lost in translation.

Two: *Bimaadiziimagad* – it is alive and living

Language is important for understanding any social structure, government system, culture, literature, and legal system, and not just in the sense of speaking or reading language. The dialect is important, as is the grammar, the rules and exceptions, and how it translates. On top of the formality of the written and spoken language, the principles that underly the language and the peoples who speak it are equally important, especially when speaking about Indigenous languages. In this chapter, I will explore language and how it relates, in all its meanings, to Anishinaabe legal orders. Specifically, I will explore what I call the three forms of language: the language of Anishinaabemowin, the language of stories, and the language of law. By layering my understanding of the languages found in Anishinaabe legal orders, and by a bracketing of my understandings of the languages of the Canadian legal order, I can build my understanding of Anishinaabe legal orders without misunderstanding or furthering settler supremacy in my analysis of Anishinaabe laws, principles, and languages. I want to note at the outset of this chapter that I am very much still a student of language. Therefore, everything in this chapter is my understanding, as it currently stands in my level of learning, of Anishinaabemowin and its related grammar and syntax.

The Grammar of Strawberries and Cats

I am currently learning Anishinaabemowin and Italian as they are the languages of my ancestors. To learn both means learning the formality of the language, such as formal grammar, as well as the principles behind the language, which can also be classified as a form of grammar. I call this the *grammar of principles*, inspired by the works of Robin Wall Kimmerer.[174] In my journey to understand my identity, I have found the reclamation of language as my method of choice. When

[174] See Robin Wall Kimmerer, "Braiding Sweetgrass" *supra* note 85 where she similarly explores what she calls 'the grammar of animacy'. Kimmerer's grammar of animacy focuses on the animate beings that the grammar is speaking to: the bay, as a noun, is living, therefore it is animate. My grammar of principles is inspired and informed by Kimmerer's grammar of animacy, taking it a step further to include more than just animacy as a grammatical principle in Anishinaabemowin. Principles, for me, go beyond the strict formal grammar of a language, such as a bay is animate, and expands it to include when a noun is animate whether the formal grammar categorizes it in such a way or not, based on how the peoples who speak the language categorize the noun in their lifeways.

I started to learn Anishinaabemowin a few years ago, so much of what I had been coming to understand not only in myself but in my work started to make sense. For Italian, the years sitting in my Nonna's house trying to piece together the fast, thick Calabrese[175] being spoken by everyone in the room except me and my sisters makes me feel like I deserved to be part of those conversations. Until I started this journey, I was quick to dismiss one of the two forms of grammar. For Italian, I was quick to dismiss the grammar of principles and purely focus on the formal grammar. Is the word masculine or feminine, and how do I conjugate it? For Anishinaabemowin, it was the opposite: I focused only on the grammar of principles while dismissing the formal grammar of the language. Blueberries are part of creation, therefore animate.[176] But as I have come to learn, without both grammars, language is simply just squiggled lines on a page or sounds on the tongue we cannot decipher, and this is true also of law. Even though learning a language can make you feel as though you are caught up in one form of grammar or the other, I am learning just how important it is to ground myself in the notion that both grammars exist at the same time, whether one form of grammar makes it seem that way or not, and that contradictions in the formal grammar need not detract from the grammar of principles, and vise versa.

When it comes to formal grammar, which we understand to be the structure of the language such as syntax, punctuation and infliction, the two languages I am learning are very different from each other, as well as from English. Having studied French for many years, the formal grammar of Latin languages was already seared into my memory, making learning Italian much easier than Anishinaabemowin. That, and the fact I have heard my dad speak Italian my entire life. Yet, I still cannot help but get frustrated when I come across the simple word *cat* and am affronted with the fact that it has a masculine and feminine spelling (which also affects its plural): Cat (m): *gatto*, Cat (f): *gatta,* Cat (pl)(m): *gatti*, Cat (pl)(f): *gate*. When I asked my dad about the gender of the word cat, he said, "cat is *gat*". His dialect, which is Calabrese, may have resulted in him shortening the word and making it genderless. If I were to ask another Calabrese

[175] As I explore later in this chapter, Calabrese is a dialect of Italy, and is the dialect my dad's entire family has always spoken. Currently, I am learning what many call 'Italian proper', i.e., the dialect spoken for business, such as in Rome and Milan. When I talk to my dad in Italian, a majority of the words we speak are the same, if not extremely similar, despite being different dialects. However, they are not identical languages, hence they are categorized as dialects. For example, the Italian word I know for *bowl* is *ciotola*. My dad's word for *bowl* is *scodella*.

[176] The Anishinaabemowin word for blueberry that I have been taught, *miin*, is an inanimate noun in the dialect's formal grammar.

person the same question, they may not say *gat*, or perhaps they will. Either way, what I know to be important is that whichever word one gives *cat*, whether it be *gatto, gatta* or *gat*, the meaning is still that of a furry four-legged cat. However, the dialects of Italy's Provinces and regions do differentiate how words are pronounced, spelled, and even at times what their meaning or definition is. What I am starting to understand from my daily Italian lessons is that whether *cat* is masculine or feminine has to do with the gender of the cat being spoken about, the default being masculine. While nouns are gendered in Italian, that does not necessarily mean the feminine strawberry, *la fragola*, is alive. It is like how in English nouns can be a person, place or thing. However, in either English or Italian, if I were to say the strawberry has personhood, I would have some explaining to do, as that is not part of either language's grammar of principles. That being said, the grammar of principles as it pertains to the fruit would differ to some degree between them as the cultural grammar around food is very different in Italy, making conversations about *la fragola* grammatically different than English on both fronts.

Understanding the basics of this grammar is key to me learning Italian and hopefully becoming fluent. I have to throw the English language out the window when doing my daily lessons, which can be hard when it's the language I have done everything in for almost 30 years. But, if I want to learn my father's language, as well as understand the culture better, social constructs, and even laws one day, it all starts with whether cat is masculine or feminine. The same goes for learning Anishinaabemowin. If I want to understand the Anishinaabe culture, social and government structures, stories and laws, I also have to throw away the rules of English and start with the grammar of cat. My cat Inde, who actually has an Anishinaabemowin name, would not be masculine or feminine in Anishinaabemowin the same way she is in Italian. *Cat* is *gaazhagens* and is an animate noun. *Inde'* means *my heart* and is a dependent inanimate noun. Even though the word *Inde'* is inanimate, I decided to give it to my animate cat, which is animate in two senses, both in formal grammar and grammar of principles. I believe we can all agree, whether we speak a language that gives animacy or genders to words or not, that a cat is alive in the sense that it is a breathing being. Not all languages, however, would be as quick to agree that a strawberry is, which is why understanding language and grammar is so critical.

Words as static letters have multiple meanings, and once multiple words are strung together in a sentence, their meanings can change and evolve even more, eventually becoming, in some form or another, what we call law. However, law at the end of the day, boils down to

words, either static or strung together; written or spoken. Law, and therefore its words, are interpretive, and to interpret them correctly, we must understand the meanings of each individual word in the sentence called a law. Without an understanding of each word, and each words individual meaning, we have no means of understanding the words together as a sentence and law, nor the meanings the words have when strategically placed together. If we expect these layers of understanding for the Canadian legal order, why then do we not hold ourselves to the same expectation with other legal orders? To understand Anishinaabe legal orders, I argue, the same layered understanding is called for as just like in English – or Italian – words have meanings that change when other words are strung before and after them. This chapter will explore these layers through the three forms of language, exploring each form on its own, but also layered with the others, as a vital step in exploring what an Anishinaabe legal order may say about the duty to consult.

The First Form of Language: The Language of Anishinaabemowin

The first form of language, the language of Anishinaabemowin, requires learning both forms of grammar of the language which houses the legal orders I am setting out to learn. For Anishinaabe legal orders, that means Anishinaabemowin. As a learner of Anishinaabemowin, I have to learn the grammars in the language I currently understand, which is English. The key, therefore, is bracketing my English grammars when learning those of Anishinaabemowin. Building on the examples from above, that means the grammars of nouns. The Ojibwe People's Dictionary explains that nouns in Anishinaabemowin "are inflected; that is, they take on affixes – prefixes and/or suffixes – that give grammatical information about them. For example, affixes can indicate whether a noun is animate or inanimate (gender)".[177] Animate nouns can reflect that the noun is alive. However, not everything that is animate necessarily adds up in the two forms of grammar. Another online Anishinaabemowin resource I use is Anishinaabemodaa.[178] Here, they explain similarly that,

> In Ojibwe, all nouns belong to one of two classes of gender – animate and inanimate. Nouns referring to people, animals, trees, and spirits belong to the animate class of nouns. Some non-living things are also included in the animate class … For example … it is

[177] The Ojibwe People's Dictionary is an online resource that was developed and is maintained by Nora Livesay and John D. Nichols with support from the University of Minnesota. You can see the "Key to Ojibwe parts of speech" at: https://ojibwe.lib.umn.edu/help/ojibwe-parts-of-speech
[178] You can access this web resource at: http://anishinaabemodaa.com/

> difficult to understand why star, mitten, and net are animate, and earth, shoe, water, and boat are inanimate.[179]

Even within the categorization of animate and inanimate, these 'genders' are not how we currently understand gender in English as they are not a sexual identity; instead, they "identify different ways of existing in the world".[180] Perhaps the most puzzling thing for me in learning Anishinaabemowin is not *cat* like in Italian, but why earth, *aki*, is an inanimate noun, just like Anishinaabemodaa explains. Part of this is because I am learning the language out of order: I am learning the grammar of Anishinaabemowin after already learning many of the stories and laws. Having teachings such as the earth is alive is counterintuitive to learning that the word for earth, *aki*, is inanimate,[181] supporting the argument that order is important.

Basil Johnston writes about language and its order, arguing that one cannot be expected to understand anything about a culture or a people "Without the benefit of knowing the language of the Indian nation" and that "unless scholars and writers know the literature of the peoples that they are studying or writing about, they cannot provide what their students and readers are seeking and deserving of."[182] Language, for Johnston, is inseparable from literature[183] in the same way I argue it is inseparable from law. He explains that words in Anishinaabemowin have three levels of meaning: the first is the surface meaning that you understand instantly at hearing or reading it; then, beneath this meaning, is the fundamental meaning of the word, derived from prefixes and combinations with other words or terms; and the third level underlies both of these first two, and is the philosophical meaning.[184] Taking this, we can extend Johnston's language

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[179] *Ibid*.
[180] Aaron Mills, *Aki, Anishinaabek, Kaye Tahsh* Crown, Indigenous Law Journal, Volume 9 Issue 1, 2010 at 116.
[181] It is important to note that in Anishinaabemowin, verbs play a very large role. For the purpose of this argument, I have focused on nouns merely as a relational tool to Italian and English. Verbs in Anishinaabemowin refer to states of being or to actions and are inflicted, like nouns, taking on affixes that convey the grammatical information. This information can include the relationship the verb has to other parts of the sentence, making verbs the main feature of most Anishinaabemowin sentences. Furthermore, the subject of the verb is the main person or thing involved in the action being described, which often times translates to gender (ie animacy). Like any language, learning the language means far more than just nouns, especially in Anishinaabemowin. However, this thesis is arguing that understanding the grammar of principle does not necessarily mean understanding the intricacies of proper grammar to such an in-depth level; it merely argues that understanding the basics of grammar, such that animacy exists and has exceptions and rules, is a starting point to being able to engage with the language and stories in English.
[182] Basil H. Johnston, "Is that all there is? Tribal Literature" in *Centering Anishinaabeg Studies: Understanding the World through Stories* (2013) edited by Jill Doerfler, Niigaanwewidamm James Sinclair and Heidi Kiiwetinepinesiik Stark, Michigan State University at page 5.
[183] *Ibid* at 6.
[184] *Ibid*.

and literature to language, literature *and* law: language, stories, law. Within each, the meanings of the words use form the basis of what we then understand as a language, a story and a law.

In many Anishinaabemowin dialects, both forms of grammar affirm the notion that the natural world is animate.[185] In the grammar of principles (or what Robin Wall Kimmerer calls "the grammar of animacy"[186]), animacy can go beyond formal grammar and extend to the personhood of the noun. By learning this first form of language, stories and literature can be read in Anishinaabemowin or English, as the grammar of the words being read will not be lost in translation. Without this first form however, the stories and literature, as Johnston explained, cannot be understood fully as the meanings of the words will be misunderstood on both a fundamental and philosophical level.[187] Without these levels of understanding, the laws cannot be drawn from the stories let alone understood. It is important to note that this form of language does not require that everyone become fluent in Anishinaabemowin, or only read stories in Anishinaabemowin. In fact, many Anishinaabe stories have been shared in different forms through the English language without losing their meaning. For example, I can read an Anishinaabe story in English and the law embedded within the story won't be lost on me so long as I understand the meanings of the words in each sentence through the lens of Anishinaabemowin and an Anishinaabe legal order. What this means is that regardless of the language I am speaking or reading, I understand the story because I understand the two grammars of the story's language.

Both Aaron Mills and Gordon Christie also connect understanding language to understanding law. Mills argues that there is a "violence of translation across legalities" when one attempts to understand law without language, and he calls this "constitutional capture".[188] Gordon Christie calls this same notion the "liberal snare".[189] What both scholars point to is that understanding different legal orders accounts for the person understanding the culture attached to them through language.[190] Is the cat alive? Does the strawberry have personhood? As Mills explains, "We *must* specify that legal processes are empowered and constrained by the

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[185] See Mills, *supra* note 177 at 115; see also Kimmerer, *supra* note 85 at 58.
[186] See Kimmerer, *supra* note 85 at 30. The grammar of animacy will be explored throughout this chapter, both through the views of Kimmerer and other Anishinaabe scholars.
[187] Johnston, *supra* note 179 at 5.
[188] Mills, *supra* note 3 at 35.
[189] *Ibid* at 36 citing Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 Indigenous LJ 13 at 14-18.
[190] Mills, *supra* note 3 at 37.

constitutional orders (again: logic and structure) which generate and authorize them".[191] Logic and structure can relate to language, and legal orders are seen "as existing in outer layers of spheres and beliefs, constantly challenged, constantly being revised and rejected … their very meaning is dependent on who has influence over the task of providing a platform for communication between language users".[192] Furthermore, the language spoken in a liberal legal discourse, inclusive of the concepts of rights, freedoms, and even autonomy, is "so all-pervasive it can be said that the political morality of liberalism supplies the language of everyday legal discourse".[193] This constitutional capture, or liberal snare, blocks differences in legalities, and when this is done in a colonial state with the violence of settler supremacy inflicted against Indigenous peoples, Indigenous lifeways are also affected.[194]

The effect of settler supremacy's violence to legal discourse is that Indigenous legal orders are not seen as law. When speaking just about language, the English language prohibits us the ability to use Indigenous languages because of the perception that English language rules can be applied universally to Indigenous language rules. This limits one from being able to truly speak, write and use Indigenous language. To do so, you have to remove the rules of the English language and learn the rules of the Indigenous language. This extends to law. As Christie argued, the English language when it comes to legal discourse is heavily influenced by political morality, therefore shaping the words we use to describe laws and legal processes. And while this legal language can be translated to a different spoken or written language, the legal language is harder to translate. It is when a legal language is translated to another legal language that has a different political morality[195] and lifeways[196] that the translation inflicts violence. In Canada, this happens when one attempts to translate Indigenous legal languages into their colonial legal language without accounting for differences in grammars; the political morality of liberalism and the lifeways so heavily attached to the self and not the community[197] result in forcing of one language's rules onto another. What often follows is only speaking about Indigenous laws and

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[191] *Ibid* at 38.
[192] Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 107.
[193] *Ibid* at 72.
[194] Mills, supra note 3 at 38.
[195] Christie, *supra* note 189 at 72.
[196] Mills, *supra* note 3 at 38.
[197] Christie, *supra* note 189 at 72.

legal languages in vague terms, such as a 'legal tradition' or 'legal culture'.[198] Law is not called what it is: law. What the legal language is, is quite literally, lost in translation.

Similar to the different dialects of Italy, there are dialects of Anishinaabemowin that depend greatly on the geography and history of the location the dialect derives from. If I were to call my dad's Calabrese Italian a *dialect of Italian*, and not an *Italian dialect* would cause some Calabrian's to have an uproar. The distinction, as I understand from my aunt who was born and raised in Italy is that Calabrese is a direct descendent of Latin and has massive Greek influence due to Calabria being a Greek settlement for much of human history (and still has this influence to this day in parts of the province). To say Calabrese is a *dialect of Italian* and not an *Italian dialect* therefore means that Italian, not Latin, is the parent language, which according to my aunt and linguists, is not the case.[199] Even formal Italian is a descendant of Latin, which means formal Italian is merely a sibling to Calabrese. To take this even further, within the Calabrian Province different Calabrese dialects are spoken. The same is true of Indigenous languages. There may be different spelling, pronunciation and even meanings of Anishinaabemowin words depending on the Nation. While much of the language will be the same, like in Italian, to say they are all the *exact* same would simply be wrong. Whether we formally call these dialects or not, the principle remains: depending on where you are, the influences of peoples, geography and history have a lot to do with the spoken and written language. It will also have a lot to do with the language of stories and literature, and of course, the language of law. Therefore, the translation system in place must account for these differences.

<u>The Second form of Language: The Language of Stories</u>

The second form of language is the language of stories. For Italian, that means learning the stories of the Peninsula, and even the stories of my ancestors, such as my Nonno's onion story I told you in my Preface. For Anishinaabe legal orders, many of the laws are derived from *aadizookaanag*: sacred stories.[200] Sacred stories are traditionally told orally, and have only

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[198] Mills, *supra* note 3 at 38.

[199] If you are interested in more about the linguistics of the sunny Italian Peninsula, I suggest reading *The Dialects of Italy* as edited by Martin Maiden and Mair Parry, or Paolo Coluzzi's article, "Endangered Minority and Regional Languages ('dialects') in Italy" (2007) Modern Italy Vol. 14, Issue 1.

[200] Heidi Bohaker, *Doodem and Council Fire: Anishinaabe Governance through Alliance* (2020) University of Toronto Press at xv; I also want to note that for some Anishinaabeg, there are rules about sacred stories. See, for example, Leanne Betasamosake Simpson, *Dancing on Our Turtle's Back: Stories of Nishinaabeg Re-Creation,*

recently been written down through publicly available texts. Within these stories, laws, morals, values and life lessons are often told. There are other forms of stories too: as Anishinaabe politician Jerry Fontaine explains, "our truth, gah-wi-zi-mah-ji-say-muh-guk" are stories of origin, while the "ah-di-so-kahn-i-ni-ni-wahg/kwe-wahg" are sacred storytellers who share "the ah-di-so-kah-nahg (sacred stories) and their di-bah-ji-mo-wi-nan (stories of personal experience)".[201] Through all types of stories, Anishinaabe identity is grounded, as is ones "intimate relationship with the land".[202] Information is passed down from one generation to another, ensuring a cultural and legal continuity.[203] Stories and storytelling also help the Anishinaabeg to "make sense and meaning of how we came to be and our existence".[204] As Fontaine writes, "Storytelling provides us with some context for [our existence] and the beginning of our own narrative".[205] All these stories "tell the world that we are human, not blood-thirsty savages and inhuman. [Stories] are also complex and, in many ways, different from academic historiography because Ojibwaymowin and our other languages are interwoven with our relationship to the world around us and to the land".[206]

Canadian law, which may also be categorized as a form of story, is distinguishable from Indigenous law stories, most notably because Canadian law is not passed down from generation to generation through storytelling in the same way *per se*.[207] Typically, to gain an in-depth understanding of Canadian law that goes beyond 'stealing is illegal', one would have to obtain a legal education. While stories may be told from parent to child about the dangers of breaking a law, the history, reasoning and meaning of these laws are traditionally saved for the elite of society who study, advocate and make law. Even with modern technology allowing one to look up the human trends and legal principles of different times, there remains a difference. A story

Resurgence and a New Emergence (2011) ARP Books at 56 where she explains that for her First Nation, one does not tell sacred stories in the spring, summer and fall.

201 Jerry Fontaine, *Our Hearts Are as One Fire: an Ojibway-Anishinabe vision for the future* (2020) UBC Press at xv and 3.

202 *Ibid* at 3.

203 Georgina Barton and Robert Barton, "The importance of storytelling as a pedagogical tool for indigenous children" at page 45, as found in *Narrative in Early Childhood Education: Communication, Sense Making and Lived Experiences* (2017) edited by Susanne Garvis and Niklas Pramling, Routledge Publishing.

204 Fontaine, *supra* note 198 at 167.

205 *Ibid* at 167.

206 *Ibid*.

207 See Jon Borrows, *Heroes, Tricksters, Monsters, and Caretakers: Indigenous law and Legal Education* (2016) McGill Law Journal vol. 61 issue 4; and Hadley Friedland and Val Napoleon, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) McGill Law Journal 61:4, 725-754 for more on the differences between Indigenous stories and common law case law.

which encompasses the founding laws of creation is not synonymous to a story of how Johnny got caught stealing candy from the General Store, or Johnny's case against the General Store from any time period. This difference does not necessarily relate to the cultural significance of stories and storytelling. In fact, storytelling is one of the most basic ways that humans, from all cultural backgrounds and parts of the world, have been relating human experience throughout our shared history.[208] Much of what humans do and experience as a species revolves in one way or another around stories.[209] Take, for example once again, the story of my Nonno walking home after the war and eating onions. This story relates his experience, as well as explains why he never ate *cipolla* again. You could even argue that there is a life lesson in his story about perseverance. The concept of story for all humans has always been to relate human existence and experiences, whether it be through song, dance, ritual or art,[210] and there is science to explain this. Storytelling has roots in the physiology and contextualizing processes of the human brain, getting to the heart of the human psyche, reflecting the ways the human brain organizes and stores information.[211] However, stories that hold law are not synonymous with my Nonno eating onions, or even what we call case law.

Granted, case law is in a sense the story of people and their circumstances. Johnny stole candy from the General Store.[212] *Johnny v The General Store*. Evidence; fact; finding; a story of law and how it came to apply to Johnny. Johnny's story, and how the law came to apply to Johnny, is transmitted to others via a story. However, the similarity in the definition of story across legal traditions should not be taken to show that Indigenous laws and the common law are one in the same as attempting to categorize Indigenous law in common law concepts only furthers settler supremacy. As Borrows says, "the categorization of Indigenous law into common law or civil law categories may be problematic … [this] risks the crass manipulation of Indigenous legal worldviews to fit Euro-Canadian legal boxes".[213] Perhaps a defining difference

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[208] Gregory A. Cajete, "Children, myth and storytelling: An Indigenous perspective" (2017) Global Studies of Childhood, Vol 7(2) 113-130 at 115.
[209] *Ibid* at 115.
[210] *Ibid*.
[211] *Ibid*.
[212] Johnny stealing candy from the general store is not taken from a real case. I used the name Johnny because my great-uncle is named Johnny, and for whatever reason, he was in my mind when I wrote this. He is the younger brother of my mom's dad. Fun fact: this great-uncle Johnny used to play guitar in Johnny Cash's band. Yes, *the* Johnny Cash.
[213] John Borrows, *Heroes, Tricksters, Monsters, and Caretakers: Indigenous law and Legal Education* (2016) McGill Law Journal vol. 61 issue 4 at page 812.

in stories in Indigenous laws and common law traditions is that Indigenous stories, whether the *aadizookaanag* of the Anishinaabeg or the *pūrākau*[214] of the Māori, have the ability and purpose of relating the unique human experiences of their peoples and ancestors in a way that is not only a narrative, "but an echo of a truth lived and remembered".[215] These stories have the ability and purpose of teaching the laws and cultural traditions of a peoples through language, as language embodies the law.[216] These stories therefore are different than my Nonno's onion story or case law, as they have a normative force that goes beyond "my grandfather walked the length of southern Italy and ate onions",[217] or the facts and application of law against Johnny.

Many Anishinaabe stories are embedded in relationships and relationship-making processes,[218] and as Anishinaabe scholar Heidi Kiiwetinepinesiik Stark explains, *aadizookaanag* are seen by many Anishinaabeg as living strands that "constitute the relationships Anishinaabeg hold between themselves and with all of Creation".[219] Many *aadizookaanag* focus on values, such as respect and responsibilities, and "embody interest in forging healthy communities to benefit Anishinaabeg and the world around them".[220] This illustrates the difference with case law and *aadizookaanag* even further. As Borrows explains, it is easy for us to not see a difference between such stories and case law as they both

> ... attempt to provide reasons for, and reinforce consensus about, broad principles and to justify or criticize certain deviations from generally accepted standards. Common law cases and Aboriginal stories are also similar because both record fact patterns of past disputes and their related solutions. Furthermore, both ... are interpreted by knowledgeable keepers of wisdom and presented in a manner suitable to a particular

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[214] I understand that Pūrākau is a Māori word which encompasses the legends, stories and mythology and the Māori peoples.
[215] Cajete, *supra* note 205 at 115.
[216] See Borrows, *supra* note 1 where she explores this idea of language being law, and law being language, through the Indigenous laws and languages of the Anishinaabe, Inuit, Māori and Coast Salish.
[217] Leanne Betasamosake Simpson and Edna Manitowabi, in "Theorizing Resurgence from within Nishnaabeg Thought" in *Centering Anishinaabeg Studies: Understanding the World through Stories* (2013) edited by Jill Doerfler, Niigaanwewidamm James Sinclair and Heidi Kiiwetinepinesiik Stark, Michigan State University at 287 explains that every Anishinaabe person has their own personal stories and narratives which can be used to communicate their "personal truths, learning, histories, and insights". This could mean that my Nonno's onion story *could* equate to dibaajimowin. However, this grandfather is not Indigenous – he was born and raised in Southern Italy. His story very well demonstrates his resilience in walking home after the war and eating onions to survive, however, there is no normative force to this story in the same way Anishinaabe sacred or personal stories do.
[218] See *Centering Anishinaabeg Studies: Understanding the World through Stories* (2013) edited by Jill Doerfler, Niigaanwewidamm James Sinclair and Heidi Kiiwetinepinesiik Stark, Michigan State University at 59.
[219] *Ibid* at 59.
[220] *Ibid*.

> dilemma. Finally, both … are regarded as authoritative by their listeners, and there are natural, moral, and cultural sanctions for the violation of their instructions.[221]

Furthermore, Borrows explains that Indigenous stories are distinguishable from common law precedent due to the way Indigenous stories are recorded and applied.[222] The oral tradition of Indigenous societies is one of the main pillars of this difference.[223] Oral tradition was and is still used to chronicle important information as well as store and share the information through "a literacy that treasures memory and the spoken word".[224] This oral tradition allows for what Borrows calls "a constant reaction of First Nations systems of laws".[225] Furthermore, Borrows explains that the changes to stories does not equate to the story's truths being lost; instead, modifications recognize "that context is always changing, requiring a constant reinterpretation of many of the account's elements".[226] The fluidity of Indigenous legal stories allows for contextual meaning to be conveyed to the listener.[227]

Each Indigenous Nation has their own languages, stories, laws and governance structures, which will be reflected in their own oral traditions and traditions around stories,[228] therefore each demand the listener to understand the foundational principles they are built on, starting with language.[229] Understanding the first form of language then allows me to understand the second form: stories can be law in the same way law can be stories. Johnny stole from the General Store: stealing is illegal. Trees are alive: living creation has personhood. However, the critical distinction remains that I must look to Indigenous legal orders, and therefore the laws and stories, on their own terms, resisting the urge to compare them to Euro-Canadian systems for validation,[230] or the terms of other Indigenous legal orders. Furthermore, as can be pulled from Larry Chartrand's writing, without understanding the language of stories, there is an inability to identify *who* can interpret and apply laws. Chartrand explains that,

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[221] John Borrows, "With or Without You: First Nations Law (In Canada)", (1996) 41 McGill Law Journal 629 at 647.
[222] *Ibid* at 648.
[223] *Ibid.*
[224] *Ibid.*
[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid.*
[228] Hadley Friedland and Val Napoleon, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) McGill Law Journal 61:4, 725-754 at 739.
[229] *Ibid* at 735.
[230] See Larry Chartrand, "Eagle Soaring on the Emergent Winds of Indigenous Legal Authority" (2013) Review of Constitutional Studies, vol. 18, no. 1 at 85.

> Both Indigenous legal traditions based on customary law (articulated in oral legends and stories passed down from generation to generation) and the common law have similar roots in local laws as understood by the local community. The primary difference, however, is that in the common law, a specialist enforcer or decision-maker such as a judge interprets and applies the law. In Indigenous systems, the community as a whole fulfills this role, in the sense that each member has the responsibility and authority (usually in consultation with Elders) to apply the law as understood communally.[231]

Chartrand also explains that Indigenous stories are not authoritative in the same way common law cases are. As he explains, while there may be symmetry between a sacred story and *Johnny v The General Store*; "the stories and legends" Chartrand writes, "'reflect' the law, but they are not the law unlike judicial common law opinions and legislations … the source of law is found in the actions taken collectively by the community members as they live and interact with one another grounded in a particular culture".[232] Moreover, Indigenous stories may not exhibit the same "conceptual understandings of law" that common law does, as Indigenous law is "inherently fluid" and not necessarily confined to constructed authorities as in the common law.[233] Therefore, to engage with Indigenous laws and their sources properly, they cannot be engaged with through a common law understanding.[234]

The language of stories gets further at the incommensurability between Indigenous law and the Canadian common law, even on the seemingly simple basis of where the law is. At the core roots of what creates law, Indigenous laws and the common law are so vastly different that they cannot be expected to 'go together'. Not only are the values and theories incommensurable, but so too are what the laws are, where they come from, and who has the authority to apply them. Therefore, to understand these legal orders and engage with them meaningfully, the colonial understanding and operations of law cannot interfere. In Chartrand's own words, "We can teach Indigenous law, but if it is not recognized as 'law' by lawyers and judges because of continued colonial intransigence and the denial of legal authority (apart from specific legislative recognition), what is the point?"[235] For me, it is worth inquiring whether European philosophers would have understood these two forms of language of any one of the hundreds of Indigenous

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[231] *Ibid* at 69.
[232] Larry Chartrand, "Indigenizing the Legal Academy from a Decolonizing Perspective" (2015) Ottawa Faculty of Law Working Paper Series No. 2015-22 at 23.
[233] *Ibid* at 23.
[234] *Ibid* at 23 and 24.
[235] *Ibid* at 24.

societies on Turtle Island and beyond if they had taken the time to do so, and if so, whether they would have still categorized and dismissed Indigenous societies and their laws as being primitive and of no standing. Further, if they had taken time to understand Indigenous law and where it comes from, had understood the meanings of language, the differences of grammar, and the legality of sacred stories, would they have still considered Indigenous law as non-legal? Perhaps if they had stopped to understand the complex and developed legal orders of Indigenous Nations, they would have a legal view of the world that has a moral responsibility to water and trees, and a legal system that recognizes the personhood and standing of other species.[236] While Kimmerer described this as being "all in the pronouns",[237] I would define it as also being all in the principles. I would also stretch it further to say it is also all in the stories because, as Kimmerer herself writes, "our relationship with land cannot heal until we hear its stories".[238]

Now that the first two forms of language have laid the foundation of understanding, I can continue to the third form of language, which is the language of law. Up to now, I have argued that the theories of the common law, such as Lockean theories of property, legal positivism, and settler supremacy are all reasons why Canadian law is incommensurable with Anishinaabe legal orders, and because of this, I am setting out to understand a changed meaning for the duty to consult and accommodate through Anishinaabe legal orders. Of course, to do this, I need to have an understanding of some of the Anishinaabe laws which could play a role in this changed meaning. This brings me now to the final form of language: the language of law.

The Third form of Language: The Language of Law

The third form of language is the language of law. As I already explained, at the very root, laws are simply words strung together. To understand or interpret the law, you need to have an understanding of the words and their meanings that you are reading. Lindsay Keegitah Borrows argues that for Anishinaabe laws to be expressed, the laws must live within the peoples as well as the language in order to be authoritative. [239] She argues that law cannot simply be written on paper to be 'law'; it must also be written "on people's hearts", bringing it to the core of the person and the "core of their being" for proper revitalization to occur.[240] Sākihitowin Awāsis

[236] Kimmerer, *supra* note 85 at 57 and 58.
[237] *Ibid* at 58.
[238] *Ibid* at 9.
[239] Borrows, *supra* note 1 at *xi*.
[240] *Ibid* at *xi*.

argues that because the English language can implicitly permit for nature to be disrespected through the denial of being regarded as persons,[241] language assimilation poses a threat to Indigenous knowledge systems[242] and laws. But what does the language of law mean? Mills argues that what ultimately counts as law and as "legitimate processes of its generation, adjustment, and destruction" are created, constrained and empowered by the constitutional orders "from which [the laws] derive life".[243] These constitutional frameworks that create, contain and empower laws reflect the unique understandings about *what* law is.[244] The Anishinaabe constitutional principles that encourages us "to know and to use the sacred gifts one has been given" is different than a liberal understanding of law, which considers "the sacred and natural sense" of Anishinaabe law as being "improper because it's too vague to proscribe behaviour".[245] Anishinaabe legalities give emphasis to an "earth-centric 'rooted' form of constitutionalism" which is "characterized by mutual aid and its correlate structure, kinship".[246]

To scale Mills' categorization of Anishinaabe constitutional principles back, we must understand what he calls "cosmological giftedness".[247] Cosmological giftedness comes from Creation Stories, according to which "creation holds a gift worthy of our respect, in need of our gratitude".[248] Gifts for the Anishinaabeg can be conveyed in the Anishinaabemowin word *miinigowiziwin*.[249] Mills shares in his dissertation how different elders in his life have defined *miinigowiziwin*, all of which defined it on similar lines of cosmology giving creation all the gifts needed for life.[250] Kimmerer also speaks about giftedness grounding Anishinaabe law. Gifts, she explains, whether from the earth or from another being, "establish a particular relationship, an obligation of sorts to give, to receive, and to reciprocate".[251] This relates itself back to

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[241] Sākihitowin Awāsis, Gwaabaw: Applying Anishinaabe harvesting protocols to energy governance (2020) The Canadian Geographer / Le Géographe canadien 2021, 65(1): 8–23 at 10.
[242] *Ibid* at 10.
[243] Mills, *supra* note 5 at 847.
[244] *Ibid* at 847.
[245] Mills, *supra* note 3 at 71.
[246] *Ibid* at iii.
[247] *Ibid* at 68.
[248] *Ibid*.
[249] *Ibid*. Mills attributes this word for giftedness to the elders Council of Weechi-it-te-win Family Services, who he cites as giving the word "Miinigoziiwin" (the same word in another dialect) the definition of "a spiritual gift from Creator". For more one this, see Mills *supra* note 3 at page 68, footnote 309.
[250] See Mills, *supra* note 3 at 68 and 69 where he cites Elder Dave Courchene of Sagkeeng First Nation, Grandmother Sherry Copenace of the Ojibways of Onigaming, an Elder from Mitaanjigamiing, Elder Harry Bone, as well as Mills' own Nokomis.
[251] Kimmerer, *supra* note 85 at 25.

Henderson's writing on consciousness to space in Indigenous languages. Gratitude and reciprocity, along with a consciousness in language, are directly connected to gifts and therefore giftedness. This correlation is what Mills calls the positive analytic of mutual aid: gift → gratitude → reciprocity.[252] In this part of Mills' dissertation, he recounts a story by Basil Johnston, which I believe merits retelling here:

> Bear gave one berry to each of his neighbours that stood near him. So many berries did the bear give out to everyone that called out, 'Give me one' that his container should have become empty. But it didn't. It remained always full. Bear gave and gave until every insect, bird, animal and fish had received a berry. Still, his container was as full as it was before.[253]

The generosity of Bear is what claims the reader's attention. Bear offers her gifts of berries to the other beings of creation,[254] yet her bowl never seems to empty. As Mills explains, to the reader this seems illogical: how could Bear give away all these berries yet still have a full bowl?[255] Is the bowl magical? Is Bear magical? Perhaps. However, to get the real answer is to remove the liberal narrative in which these questions of logic appear.[256] As Mills argues, this logic "belongs to another kind of story. In a liberal narrative, it's a zero-sum truth that the more an autonomous person gives, the less he necessarily has".[257] Here, in the kinship relationship of the animate characters, the more they give to each other the more they have, as the beings they give to will give back to them because of the principle of mutual aid, which Mills explains, governs their kinship relationship. I will explore the legal principle of kinship further in Chapter Three; however, for now, the explanation Mills gives, I argue, is consistent with the three forms of language. If I did not know that the characters of this story are animate and have a kinship relationship with each other, both in the story and in reality, and that stories tell us laws and reasonings, I could easily dismiss this story as being illogical, not realizing that the law of this story is, in fact, giftedness and reciprocity. Or, as Mills says, mutual aid.

Kimmerer gives her own explanation of the liberal misunderstanding of the legal concept of giftedness in her chapter "The Gift of Strawberries". Here Kimmerer argues that,

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[252] Mills, *supra* note 3 at 100.
[253] *Ibid* at 100 and 101, citing Basil H Johnston, "Plants" in *Honour Earth Mother / Mino-audjaudauh Mizzu-kummik-quae* (Cape Croker Reserve: Kegedonce Press, 2003) 37 at 45-47.
[254] Mills, *supra* note 3 at 101.
[255] *Ibid* at 101.
[256] *Ibid.*
[257] *Ibid.*

> From the viewpoint of a private property economy, the 'gift' is deemed to be 'free' because we obtain it free of charge, at no cost. But in the gift economy, gifts are not free. The essence of the gift is that it creates a set of relationships. The currency of a gift economy is, at its root, reciprocity. In Western thinking, private land is understood to be a 'bundle of rights,' whereas in a gift economy property has a 'bundle of responsibilities' attached.[258]

Unlike in liberal legal orders, in Anishinaabe legal orders, the value of the gift is based on reciprocity.[259] Reciprocity means reciprocating giftedness to others in our life: one gives their gift to the next person knowing that through mutual aid, the gift will return,[260] just like it did to Bear in Johnston's story. This is the fundamental nature of giftedness: gifts move, and as they move, their value increases.[261] In explaining giftedness, Kimmerer also uses berries, writing about removing liberal logic from one's mind when exploring another's language of law:

> The fields made a gift of berries to us and we make a gift to [others]. The more something is shared, the greater its value becomes. This is hard to grasp for societies steeped in notions of private property, where others are, by definition, excluded from sharing. Practices such as posting land against trespass, for example, are expected and accepted in a property economy but are unacceptable in an economy where land is seen as a gift to all.[262]

Strawberries, as part of creation, are a gift that creates an economy of reciprocity and gratitude, and also of sharing and caring for our kin. It is this human perception of the world, the consciousness, which makes creation – the world or the berries – a gift.[263] To bring this all back to Bear's bowl of berries, in a mutual aid society, Bear's bowl remains full "for the reason that gifts begets gratitude, which begets thanksgiving and reciprocation: return gift".[264] The word thanksgiving is not to be confused with the Canadian holiday. To put all three forms of language together, thanksgiving as the first form of language is to be understood as the Anishinaabemowin word *miigwetch*, which "is *literally* an acknowledgement of a gift, linguistically situating one within the analytic".[265] Thanksgiving, as the second form of language, may be a story told by an

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[258] Kimmerer, *supra* note 85 at 28.
[259] *Ibid* at 28.
[260] *Ibid*.
[261] *Ibid* at 27.
[262] *Ibid*.
[263] *Ibid* at 30.
[264] Mills, *supra* note 3 at 102.
[265] *Ibid* at 102.

Elder about *why* thanksgiving occurs, such as the story of bear. Thanksgiving, as the third form of language, may be the law of giftedness.

Bear Speaks all Three Languages

I want to take the analysis of the three forms to a deeper level than I did for the word *thanksgiving* by revisiting once more the story of Bear and her berries[266] (before I do this, however, I remind you that I am still a student of Anishinaabemowin, and therefore, this is an engagement with my learning of language and grammar, stories, and laws). My understanding of language and grammars allows me to understand and accept why Bear is animate, allowing me to see that "Bear gave one berry to each of *his* neighbours" and not question it in a liberal logic way. I am also able to deduce that "every insect, bird, animal and fish" are also creatures of animacy and beings with personhood without the storyteller having to stop and explain this to me. Understanding what stories in Anishinaabe legal orders mean, I can see this story of Bear and know it is not folklore or mythology. I can understand that within this story, laws may be present and therefore are actively being shared with me, such as giftedness. I also know I cannot compare this story to, or attempt to understand it through, Canadian law or the English language, no matter the symmetry that may be present. Because of the first two forms, I am able to engage with the principles in this story as well through the third form. As Mills explained, the Anishinaabe constitutional principles of this story relates to giftedness and mutual aid. I can apply this principle to my everyday life, as well as apply it to a legal problem that warrants giftedness and mutual aid as legal principles.

These three forms of language are essential for outlining my understandings and abilities to engage with Anishinaabe legal orders, but also for understanding the incommensurability of Anishinaabe and colonial law. In all three forms of language, I can see just how different the language of law is: trees have personhood vs natural resources are objects; stories convey legal principles vs the evidence against Johnny; giftedness vs property. These three forms of language may not translate to different Indigenous languages, just as Italian does not translate to Anishinaabemowin or English.

[266] If you have been wondering why I refer to Bear as *she/her* and not *he/him* like Basil Johnston does in his telling of the story, see Leanne Betasamosake Simpson and Edna Manitowabi, "Theorizing Resurgence from within Nishnaabeg Thought" in *Centering Anishinaabeg Studies: Understanding the World through Stories* (2013) edited by Jill Doerfler, Niigaanwewidamm James Sinclair and Heidi Kiiwetinepinesiik Stark, Michigan State University at 287 where Leanne explains that, as a woman, she identifies herself in stories through she/her pronouns.

Three: *Indinawemaaganidog* – all my relations

Brothers and Sisters Everywhere

In this chapter, I will further explore the Anishinaabe principles of kinship and mutual aid, along with how such principles relate to governance structures and decision-making. My focus on kinship is two-fold: first, it is a foundational principle in Anishinaabe legal orders and lifeways and therefore warrants detailed discussion. Second, kinship is one of the teachings I hold close to my heart and was taught at every stage of my life. Growing up with mixed ancestry meant learning values and morals from a mix of Italian and Indigenous teachings. As a product of colonization, my mother was not able to raise me and my sisters with many teachings and stories of her ancestors. However, the few she did have ended up having the most influence over us; especially kinship. The way she taught us kinship and the responsibilities attached was through being a good sister. No matter what we did growing up, the teaching was always the same: treat your sister with respect and love. Being a good sister did not just stop at my blood siblings: it extended to family and friends, our pets, the plants growing in our garden, and the trees in our backyard. *You have sisters everywhere*, she would say.

Sakej Henderson writes that "the Aboriginal order of kinship implies a distinct form of responsibilities. Everyone has the responsibility to give and receive according to his or her choices and gifts".[267] For my mother, this was instilling in us that we each had our own gifts that allowed us to help, teach and support the other, and with our gifts come responsibilities. Kinship, therefore, is an integral part of Anishinaabe lifeways and legal orders, meaning it is also an integral part of Anishinaabe governance structures and decision-making. Kinship relationships and responsibilities can be found in *doodem*,[268] the clan system, which has been used by many Anishinaabe Nations for centuries and continues to be an integral part of Anishinaabe governance. The multilayered importance of doodem and kinship in Anishinaabe legal orders and lifeways, both historically and currently, as will be explored in this chapter affords it an important role in changing the understanding on the law of consultation as the duty to consult

[267] James (Sákéj) Youngblood Henderson, "Sui Generis and Treaty Citizenship" (2002) 4:6 Citizenship Studies, 415 at 425.

[268] At the very outset of this thesis, I had a note about non-English words being italicized. Going forward, *doodem* and its plural, *doodemag*, will be non-italicized. This is because I am actively choosing to use the Anishinaabemowin word for clan throughout.

and accommodate deals specifically with development of land, and through consultation, decisions are made about the project. Without doodem, an exploration of how many Anishinaabe Nations make decisions would be incomplete as many communities have, and still do, use doodem. Moreover, without doodem influencing development decision-making processes, the process of consultation will continue to be that of colonial understandings.

Furthermore, doodem and its ties to kinship is an integral part of understanding Anishinaabe identity broadly. Doodem, as will be argued, links kinship to mutual aid and giftedness, as well as to how one may identify with the world and the laws which govern it. Doodem can therefore shape life in all aspects, from language to stories, creation to being, and governance to law. In principle, doodem kinship influences how one lives within creation, inclusive of language and actions. Doodem is a reminder that we have brothers and sisters everywhere, that they are all our relations, and that we have the responsibility to share our gifts with other beings. As Aaron Mills explains, our gifts take the form of "general responsibilit[ies] for how to be-with the land while using it", and that these responsibilities are "internal to a particular set of relationships".[269] This chapter will explore doodem in a few ways: doodem as identity; how doodem has foundations in kinship; and how doodem is a foundation of governance and decision-making, all to demonstrate the integral importance of doodem in and its principles and how they can be integrated into Anishinaabe understandings of the duty.

Doodem as it Shapes Anishinaabe Identity

Doodem is rooted in many aspects of Anishinaabe legal orders and lifeways, including that of identity. Lindsay Keegitah Borrows writes that "One's dodem, usually an animal, is a nurturer with life-giving properties".[270] She explains that the *de* in doodem "shows how our relations can centre our hearts while the *do* nourishes us. Humans and nonhumans are part of the same community and, as such, we have mutual obligations to sustain one another".[271] The connection between animals and humans is one of inter-dependence "where humans are dependent upon animals and other ensouled life".[272] Jerry Fontaine talks about the origin of the word doodem,

[269] Mills, *supra* note 3 at 154.
[270] Borrows, *supra* note 1 at 5; note that Lindsay spells doodem *dodem*. This is just one more example of the differences of language.
[271] *Ibid* at 5.
[272] Bohaker, *supra* note 197 at 66; see also Darlene Johnston, "Litigating Identity: The Challenge of Aboriginality" (Masters of Law thesis) 2003 at 78.

explaining that the word derives “from the root ‘de,’ meaning ‘heart’ or ‘centre’”, and that, “Simply stated, [doodem is] about our connectedness … The clan is therefore accepted as the centre of identity/responsibility and the drum is the heartbeat and/or the centre of the nation”.[273] Doodem, therefore, defined “Every social, political, economic, military and spiritual element of Anishinaabe life” including values, beliefs, and worldviews.[274] Doodem is viewed as “the Creator’s gift [to the Anishinaabe] and that creation gave each of us certain responsibilities”.[275]

Understanding the natural world as kin, as brothers and sisters, was such a critical piece to Anishinaabe law and cultural identity historically that the Anishinaabeg included them in almost all of their stories.[276] Within *aadizookaanag* the origins of doodem and the kinship relationship between humans and non-humans can be found. As Darlene Johnston explains, the soul of one’s Nation is the soul of their doodem.[277] For the Anishinaabeg, living beings have souls,[278] and therefore, have personhood. That is why many Anishinaabeg represent themselves as their individual doodem. For Johnston’s great-great-grandfather, this meant representing himself as an Otter.[279] The Anishinaabe kinship relationship to non-humans also attaches itself to the land. As Johnston explains, for the Anishinaabeg of the Great Lakes, “the Great Lakes region is more than geography. It is a spiritual landscape formed by and embedded with the regenerative potential of the First Ones who gave it form”.[280] The ‘First Ones’ are the original doodem animals from *aadizookaanag*, and such stories importantly create a sense of belonging to kin and landscape, while emphasizing the “fundamental importance of gift exchange and reciprocity”.[281]

Doodem is part of Lindsay Keegitah Borrows’ version of the Anishinaabe Creation Story that she tells in “*Otter’s Journey Through Indigenous Language and Law*”. In her telling, there was a great flood that resulted in the land, animals and humans being submerged in water.[282] The animals who could swim or fly were all that survived, and they had grown tired and were starting to long for Mother Earth.[283] The animals all gathered in a council to discuss how to bring back

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[273] Fontaine, *supra* note 198 at 30 and 31.
[274] *Ibid* at 183.
[275] *Ibid*.
[276] *Ibid* at 55 and 56.
[277] Johnston, *supra* note 269 at 78.
[278] *Ibid* at 78.
[279] *Ibid*.
[280] *Ibid* at 74.
[281] Fontaine, *supra* note 198 at 76.
[282] Borrows, *supra* note 1 at 5.
[283] *Ibid* at 5.

the land.[284] Some volunteered to swim down to the bottom of the water to bring back soil, but they all failed, that is, until the little muskrat, *wazhashk*, tried.[285] While the little muskrat was under the water, all the animals worried and waited; it took a long time, but finally she floated up to the surface, clenching life-saving soil in her little paw.[286] Borrows' retelling of the creation story goes on to tell how humans, and therefore doodem, came to be:

> A great mountain had grown where Wazhashk was buried. There were large hunting grounds and beautiful waters, plentiful with food. But despite the animals' general well-being, they felt that something was missing – what, they did not know ... Kichi Waaboz, who was in charge of propagating the creations of the earth, went around the Great Lakes to ensure the animals' needs were fulfilled … He took the *asemaa* (tobacco) for an offering and pushed through the pine curtains. Beyond this green veil was the woods, the place to ask Gizhe-Manido what was needed ... At the edge of the forest, he found singular corpses of the *owaazisii* (bullhead), *ajijaak* (crane), *an'aawenh* (pintail duck), *makwa* (bear), and *mooz* (moose). Kichi Waaboz summoned the powers of the *manidowag* (spirits). From these corpses arose the first humans. We come from the animals, and we share our sounds, our hearts. Dodem.[287]

While there are many other Anishinaabe scholars who have recounted *aadizookaanag* on doodem,[288] much of the earliest historical documentation come from early European writers, such as William Warren. Warren wrote that "the doodem tradition is itself a gift to the Anishinabek and, as a gift, it creates an obligation between humans and other-than-human beings of the same doodem to share resources and to assist one another as kin should do".[289] Doodem promoted the cooperation of different Anishinaabe societies as well as their integrative organization, allowing not only for a personal identity and gifts, but also created a responsibility to aid other doodemag. Again, we see giftedness, an integral piece of Anishinaabe legal orders and lifeways, being rooted in doodem.

Nicolas Perrot is another European who documented doodem. Perrot's account of doodem is important to analyze as it brings up two crucial points: "first, that the Anishinabek constituted their governments as doodemag beings who met in council, and second, that specific

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[284] *Ibid.*
[285] *Ibid* at 6.
[286] *Ibid* at 6 and 7.
[287] *Ibid* at 6 and 7.
[288] See for example Lindsay Keegitah Borrows above, *supra* note 1. See also John Borrows, "Indigenous Legal Traditions in Canada" (2005) Washington University Journal of Law & Policy for a retelling of the creation story at 193-195; and Darlene Johnston, *supra* note 269 "Litigating Identity: The Challenge of Aboriginality" (Masters of Law thesis) 2003 at 62 to 74 where she retells a historical account of the creation story and relates it to her grandfather's Otter clan.
[289] Bohaker, *supra* note 197 at 76 and 77 citing William Warren, *History* at 44.

doodem beings took on responsibility for particular places in the Great Lakes region".[290] Perrot's writing of doodem comes from an Anishinaabe *re*-creation story that, similar to Borrows' from above, followed a flood.[291] In Perrot's account, "The animals were gathered on a great wooden raft as it floated on a vast body of water, with no land in sight".[292] Nanabozhoo, a prominent character in many Anishinaabe stories, is the Great Hare, and is "described as the leader of the animals".[293] Great Hare proceeds to ask the animals to dive off the raft and swim to the bottom of the sea to retrieve a grain of sand.[294] Alike to the version Borrows tell, it was the muskrat who succeeded.[295] Perrot writes that Nanabozhoo took the sand from the muskrat and,

> Let it fall upon the raft, when it began to increase; then he took a part of it, and scattered this about which caused the mass of soil to grow larger and larger … As soon as he thought it was large enough, he ordered the fox to go to inspect his work, with power to enlarge it still more; and the [fox] obeyed … After the creation of the earth, all the other animals withdrew into the places which each kind found most suitable for obtaining therein their pasture or their prey.[296]

Perrot recognized that while the first beings of creation were not human, they were still considered persons, and wrote that these First Ones had laws, governments, and a decision-making structure.[297] Great Hare was a leader, and as a leader, "he called a council of all beings to discuss what course of action should be taken to provide land for them and who should take on the responsibility of trying to acquire the sand".[298] Perrot recognized that these animal beings had souls which could be passed to subsequent generations of related beings,[299] writing that "When the first ones died, the Great Hare caused the birth of men from their corpses … [the Anishinaabe] derive their origin from a bear, others from a moose, and others similarly from various kinds of animals".[300] In Darlene Johnston's examination of Perrot's account of doodem[301] she explains the focus on Great Hare gives the reader a lot of information about

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[290] *Ibid* at 65 citing Nicolas Perrot, "Memoire," as translated by Emma Blair in *Indian Tribes*, 1:31-7.
[291] *Ibid*.
[292] *Ibid*.
[293] *Ibid*.
[294] *Ibid*.
[295] *Ibid*.
[296] *Ibid* at 65 citing Nicolas Perrot, "Memoire," as translated by Emma Blair in *Indian Tribes*, 1:31-7.
[297] *Ibid* at 65.
[298] *Ibid* at 66.
[299] *Ibid*.
[300] *Ibid* at 66 citing Nicolas Perrot, "Memoire," as translated by Emma Blair in *Indian Tribes*, 1:31-6 and 8.
[301] See Johnston, *supra* note 269 for Darlene Johnston's analysis in her thesis, pages 69 to 77.

Anishinaabe notions of leadership, decision-making, and land.[302] Great Hare, as a chief of the animals, does not embody the leadership traits that we see in historic European leaders; "he is not despotic. His authority depends upon persuasion, not coercion".[303] Instead, Great Hare demonstrated cooperation and bravery, and the decision to create land was for mutual sustenance, not Hare's personal gain.[304] Perrot's account of doodem demonstrates that the first non-animal human beings understood that they were descendants from the animals who were the First One,[305] and that the actions of Great Hare and the other animals were critical not only to their creation, but their survival. Perrot's writings also connect each different doodem to a distinct territory, as each animal ancestor "withdrew into the places which each kind found most suitable".[306] This has translated to a responsibility to and for the land where the doodem was born,[307] and the early Europeans understood this connection to land so well that they even compared it to their own familial traditions of Coat of Arms.[308]

Jerry Fontaine explains that doodem was created to "respect the order of creation, including those that flew and swam and those that crawled and walked".[309] The order of creation from Basil Johnston's version of the Anishinaabe Creation Story places humans "last in the order of creation, least in the order of dependence, and the weakest in bodily powers".[310] In Perrot's account, humans came from the bodies of the animals, relating to animal's place in order of creation. As Fontaine writes, because of the order of creation, "a world without animals would have been unimaginable. There wouldn't be order as we know it and the world wouldn't have made any sense".[311] Historically and presently, the way in which the Anishinaabe govern themselves reflects this order of creation and dependence on their animal older brothers,[312] even if the stories doodem comes from differ. In his book, "Our Hearts Are as One Fire", Fontaine shares his story of how doodem began:

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[302] *Ibid* at 71.
[303] *Ibid*.
[304] *Ibid* at 71 and 72.
[305] *Ibid* at 72.
[306] *Ibid* at 66 citing 1:31-7.
[307] Bohaker, *supra* note 197 at 67.
[308] *Ibid* at 77.
[309] Fontaine, *supra* note 198 at page 148.
[310] See Basil Johnston *supra* note 86, *Ojibway Heritage: The Ceremonies, Rituals, Songs, Dances, Prayers and Legends of the Ojibway* (Toronto: McClelland and Stewart, 1976) [Johnston, Ojibway Heritage] at page 13.
[311] Fontaine, *supra* note 198 at 148.
[312] *Ibid* at 148.

> At our beginning, the animals helped by nourishing newborn infants with fruits, vegetable, berries and drink, while the birds and butterflies brought joy. The bear who loves the newborn beings offered his flesh so that Anishinaabeg would survive. Following the example of the bear, the deer, moose, porcupine, beaver, groundhog, grouse and goose and almost every other animal offered himself/herself for the well-being of their human brothers and sisters.[313]

The animals both possessed and reflected characters which were respected, therefore becoming the animals of the clan system.[314] The crane was the leader; the loon represented fidelity; the bear, strength and courage; the marten, guardianship; the fish had a gift for teaching; the birds were spiritual leaders; and the deer the grace of poets and artists.[315] These animals, their characteristics, and the doodem they represented get at what Fontaine calls "humanity's five basic individual and social needs": leadership, protection, sustenance, learning, and physical well-being.[316] Further, doodem was an "incredible system of social order and structure [that] was one of the original laws of creation, which came to represent life itself".[317]

With governance comes decision-making processes of any society or civilization, and this is no different for the Anishinaabeg. As stated above, doodem was such a critical piece of Anishinaabe life prior to colonization that early Europeans knew it was necessary to work with the doodem because of its "political, economic, social and military influence", as well as the fact that Anishinaabe "society was governed by specific protocols and responsibilities" which the doodem encompassed.[318] As Heidi Bohaker explains, when Anishinaabe leaders met to make decisions "they brought the specific knowledge and attributes of their doodem beings with them".[319] Doodem "informed both governance practices and decision-making"[320] as well as leadership and councils, which all relate to Anishinaabe legal orders.[321] The specific knowledge, attributes, and relationality doodem creates through kinship are key to understanding how doodem operates within governance. Therefore, I will now expand on mutual aid and kinship.

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[313] *Ibid*.
[314] *Ibid* at 149.
[315] *Ibid*.
[316] *Ibid*.
[317] *Ibid*.
[318] *Ibid* at 164-165.
[319] Bohaker, *supra* note 197 at 168.
[320] *Ibid* at 168.
[321] *Ibid* at 168 and 169.

Doodem has Foundations in Kinship

In Chapter Two, I explored Mills' discussion on mutual aid and kinship, most notably in the story about Bear's bowl of berries. In this part of Mills' dissertation, *what* kinship and mutual aid are, and *how* they relate not only to each other, but Anishinaabe constitutionalism and life – specifically as it translates in community – is explored in depth. The driving themes regarding kinship which can be pulled from Mills' argument are dependence, responsibility and connectedness. As Mills explains, these themes can also be called mutual aid, reciprocity and giftedness. Mills explains that mutual aid "is structured into the lives of community members through kinship",[322] which he explored in Basil Johnston's story about Bear and her bowl of berries: "Thus the bowl, in a mutual aid society, remains full for the reason that gifts beget gratitude, which begets thanksgiving and reciprocation: return gift".[323]

Mills' exploration of the positive analytic of mutual aid, reciprocity and giftedness in community as well as with the natural world is an important piece to understanding kinship and how it relates in different aspects of Anishinaabe legal orders, lifeways and governance, but so is his other form of mutual aid. This other form is the negative analytic. Instead of gift → gratitude → reciprocity[324], which we explored in Chapter Two, Mills' negative analytic formulation of mutual aid is need → responsibility → reciprocity.[325] As he explains, in the negative formulation, a need "is met with a sense of responsibility to the needs-bearer, which in turn gives way to beneficent action".[326] Mills uses another one of Basil Johnston's Anishinaabe stories to demonstrate this: in this story, a young boy yearns for a gift and "struggled to recognize when his gift (a water lily) came, and how to act responsibly in respect of it".[327] The young boy finally does recognize the water lily as a gift, then, "[he] takes it, uses it, and heals his grandmother's illness" with the water lily.[328] Months later, the young boy says to his grandmother:

> 'No'okomiss, the flower gift that I received; it was really meant for you, wasn't it?'
> 'In a way it is. But it was meant for everybody. But that's the way all human gifts are'.[329]

[322] Mills, *supra* note 3 at 98.
[323] *Ibid* at 102.
[324] *Ibid* at 100 to 103.
[325] *Ibid* at 103.
[326] *Ibid.*
[327] *Ibid* at 105.
[328] *Ibid.*
[329] *Ibid* at 105 citing Basil Johnston, "The Gift of the Stars" at 21.

This notion of responsibility takes a new meaning in the negative formulation of mutual aid, meaning benefiting others with your gift, not just yourself.[330] The possession of gifts becomes coupled with a responsibility to use the gift "for the benefit of all".[331] What this translates to is instead of beings coming to Bear asking for berries, the boy goes to his grandmother with his gift of the lily. In both forms, however, there is a responsibility to share the gift. Whatever the gift may be, how one distributes the gift is articulated through their kinship relationships: "claims within indigenous legal systems are to be construed as responsibilities, which are necessarily embedded within kinship".[332] The structure of relationality which forms mutual aid "is *kinship*, which places familial assignations upon, and thus relations between, radically interdependent persons".[333] The organization of kinship implies specific responsibilities attached to the relationships: relationships are formed through kinship ties; responsibilities are dependent on the gifts and choices we make as well as the relationship we have with other beings.[334] Therefore, kinship is both the formal and substantive system of categorization in which one's relationships and responsibilities are distributed.[335]

Mills categorizes kinship as a constitutional structure within the Anishinaabe legal system, while mutual aid is a constitutional logic,[336] meaning mutual aid is achieved through kinship.[337] Kinship then, as the structure of mutual aid, "sets out the relationships through which community members present and receive their gifts and needs", much of which happens through kinship roles, such as older and younger sister.[338] Mills explains that each kinship role or relationship "specifies the mutual aid analytic in a particular way" as the different kinship role is shaped by gratitude and reciprocity, and how "responsibility shape[s] reciprocity may vary considerably" between kinship roles.[339] Mills uses the example of brother/sister kinship relationship in explaining how the relationship changes responsibility. He explains that the

[330] *Ibid* at 106.
[331] *Ibid* at 106 citing Robin Wall Kimmerer, "Returning the Gift" at 23.
[332] *Ibid* at 154 citing James (Sákéj) Youngblood Henderson, "Sui Generis and Treaty Citizenship" (2002) 4:6 Citizensh Stud 415 at 425.
[333] Mills, *supra* note 3 at 114.
[334] *Ibid* at 154 citing James (Sákéj) Youngblood Henderson, "Sui Generis and Treaty Citizenship" (2002) 4:6 Citizensh Stud 415 at 425.
[335] Mills, *supra* note 3 at 155.
[336] *Ibid* at 114.
[337] *Ibid.*
[338] *Ibid* at 115.
[339] *Ibid.*

brother/sister relationships serve "as a kinship ideal, establishing a close connection, allowing for significant flexibility in the scale and the flow of give and take".[340] This differs, he writes, from the father kinship relationship as "fathers bear responsibility for meeting the needs of their children and partners".[341] The sibling kinship relationship, which is the relationship I know best, is rooted in looking to the other for aid,[342] and because the sibling relationship can transcend beyond blood siblings to a number of different contexts, such as members of the same clan, "almost anywhere she travels, an Anishinaabekwe can find the level of support she'd receive from a sibling; she need only find someone who shares her clan".[343]

In the positive analytic, because my older sister has different gifts than I do, I seek her out when the aid I need falls within her giftedness. As my older sister, she has the responsibility to share that gift with me. If we take this example to the negative analytic, I know that when I have the gift which would benefit my sister, I go to her with my gift in the same way the boy did with his lily. Mills speaks to brother/sister relationships transcending blood relations: you have sisters everywhere. The clan relationships and identities he speaks of, which are found in doodem, establish a brother/sister relationship even across differences in regions and "even amongst persons from distinct ethnonational groups",[344] which was present in Warren's writing that kinship created an obligation between doodemag to share resources and aid one another "as kin should do".[345] The kinship relationship of doodem comes down to an Anishinaabemowin word: *indinawemaaganidog*, meaning 'all my relations'.[346] *Indinawemaaganidog* "refers to everyone, not just to humans. I'm to consider animals and spirits, too, as my relatives".[347] The word comes from the root animate noun *inawemaagan*, a relative, a kinsman. Kinship is described, then, as meaning a relationship which extends "to the air, the animals and the water".[348] This notion of kinship extending to non-human beings of creation can be found within other Indigenous Nations. As Stan McKay, a Fish River Cree writes,

> Indigenous Spirituality from around the world is centred on the notion of our relationship to the whole creation. We call the earth "our mother." The animals are "our brothers and

[340] *Ibid*.
[341] *Ibid*.
[342] *Ibid* at 115 and 116 citing Ruth Lands, "Ojibwa Sociology" at 14.
[343] Mills, *supra* note 3 at 116. Anishinaabekwe means Anishinaabe woman.
[344] *Ibid* at 116.
[345] Bohaker, *supra* note 197 at 76 and 77 citing William Warren, *History* at 44.
[346] Mills, *supra* note 3 at 117.
[347] *Ibid* at 117.
[348] *Ibid* at 118 citing *Migisi Sahgaigan Maa 'a Chi Totaa-Aki Declaration* at 1.

> sisters." Even what biologists describe as inanimate, we call our relatives. This calling of creation into our family is a metaphorical construction that describes the relationship of love and faithfulness between human persons and creation. Our identity as creatures in the creation cannot be expressed without talking about the rest of creation.[349]

Through an Anishinaabe-specific understanding of kinship, I can explain why "we receive *gifts* through our relationships with non-humans, rather than *resources* by extracting from things",[350] which we see in the colonial worldview. This distinction is key: it demonstrates the incommensurability between the world as a gift and the world as a resource: giftedness vs Lockean theories on property; mutual aid vs legal positivism.

The kinship relationship between humans and animals stems from the human dependence on animal beings as our kin or elder brothers,[351] extending the kinship relationship of brother/sister to another level of transcendence: no longer is it just your blood sibling and the sibling of another doodemag, but also the original First Ones we are connected to. This relationship can be categorized in three fundamental ways: physically as food; as providers of tools and clothing; and as giving "knowledge of the world, life and himself".[352] The third fundamental way – giving knowledge – comes from animals having "a unique capacity to sense the changes of the world, the alternations of the seasons, and the coming state of things. Man does not have the preknowledge possessed by bluebirds or trout, or squirrel. For man to prepare, he looked to his elder brothers".[353] Johnston gives the example of eagles, geese and robins: these birds know "of the advent of autumn" and therefore go south for the winter.[354] Humans do not have the sense to know when autumn is coming in the same way these birds do, therefore humans look to their brother and sister eagles, geese and robins to know when to prepare for autumn. The same way we look to our human kin for advice, we also look to our nonhuman kin. Each have gifts that are shared for the benefit of the other.

Basil Johnston's three fundamental categorizations of relationship to non-human beings brings doodem kinship out of *aadizookaanag* and into everyday life. With the passing of each season, the gifts and responsibilities of different beings are needed, and therefore, are given,

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[349] See Mills, *supra* note 3 at 118 citing Stan McKay, "Calling Creation into Our Family" at 29.
[350] Mills, *supra* note 3 at 118.
[351] Johnston, *supra* note 86 at 52.
[352] *Ibid* at 52.
[353] *Ibid.*
[354] *Ibid.*

whether through the positive or negative formulation of mutual aid; we either seek out the being and ask for their gift or are given the gift by the being. For example, in the summer, we may seek out the strawberry plant and ask for her gift of the heart berry, while in the fall, the geese tell us of their gift. The gift can have different forms. For the geese, it can be the preknowledge of the autumn, but it can also be their bodies for food and materials. The same is true of doodem: the gift of a being can take different forms. Fish, for example, are a doodem but also a staple traditional food.[355] In Mississauga territory, the people of the fish doodem are considered the intellectuals of the Nations. The fish doodem of the different Nations meet twice a year to "tend to their treaty relationships, and renew life just as the Gizhe-mnido had instructed them".[356] Simpson explains that these gatherings held at Mnjikaning – the small narrows between Lake Couchiching and Lake Simcoe – were extremely important because "the fish nations sustained the Nishnaabeg Nation during times when other sources of food were scare … Our relationship with the fish nations meant that we had to be accountable for how we used this 'resource'".[357]

This example of fish doodem meeting at the small narrow between the two lakes reflects much of what I have been speaking about thus far. First, it is an example of the attributes and gifts a fish doodem has. It also demonstrates how different peoples of the same doodem have a responsibility to other doodemag inside and outside their own Nation. It shows the gifts the fish gives its human relations, while also showing how doodem relates to location and landscape. The fish doodem meeting at a spot between two Lakes is not inconsequential: fish, as beings of water, correspond to the human fish doodem which have responsibility over the waters of their doodem. As a meeting place for different fish doodem, the narrows of two Lakes which sustain the Anishinaabeg of the region is quite telling. You have doodem of different Nations meeting together as one doodem at a location of significance to their individual Nations, but also of significance to their Nations as a part of broader Anishinaabe society. It is also a place where the fish move between the two lakes. Doodem, therefore, as a structure of kinship allows for identity, security, decision-making, leadership, and a keeping of peoples on a personal and community level. It reinforces the Great Laws of Nature from the creation stories, and the

[355] Leanne Simpson, "Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships" (2008) Wicazo Sa Review, vol 23 no. 2, 29-54 at 33.
[356] *Ibid* at 33.
[357] *Ibid* at 33 and 34.

importance of respecting the nature and beings which came before us, all of which are rooted in the principles of mutual aid, kinship, and giftedness.

As Mills argues, through both the positive and negative formulations of mutual aid, kinship "sets up rooted community as an open and contingent circle of relationships, placing extraordinary emphasis on individual agency … [consisting] in ongoing, dynamic practices of relationality".[358] This all naturally extends to governance, not only of a community or Nation, but of the self. One's doodem, such as fish, give them an identity that relates to their gifts and attributes that they can then find in other Nations and communities. It also gives one an identity within their own community, such as being an intellectual. As we will see in this next section, the identity of doodem in relation to governance was and remains almost inseparable from the personal identity of doodem for many Anishinaabe Nations.

I recognize that coming from Canada's governance tradition, having an identity in law and governance in such a way may seem foreign. You may not have been raised with the notion that your personal gifts have any relation to governance and decision-making unless you chose to pursue positions of government. This is because government in the liberal worldview does not start with the self: it starts with the institution and the notions of positions of power and influence; positions that are incommensurable to Anishinaabe governances. And because power and influence inform decision-making in these governance structures, the notion that decision-making is the work of the community, and not that of the upper positions of governance, may also seem foreign. However, as I have explored in the chapters thus far, the colonial understandings of law and governance are foreign in relation to Indigenous understandings because, on the most basic of levels, they are formulated with opposing beliefs. Therefore, to understand doodem as governance and decision-making, I invite you to remove your colonial understandings once again of what makes up law, governance, and decision-making, so to understanding them through kinship, giftedness, and mutual aid.

Doodem/Kinship as a Foundation of Governance

In this section, I will explore how doodem, rooted in kinship, is specifically linked to the governance structures of many Anishinaabeg peoples and Nations. Leanne Simpson writes that for the Anishinaabeg,

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[358] Mills, *supra* note 3 at 121.

> There was a belief that good governance and political relationships begin with individuals and how they relate to each other in families …In a real sense for the Nishnaabeg, relating to one's immediate family, the land, the members of their clan, and their relations in the nonhuman world in a good way was the foundation of good governance in a collective sense.[359]

The result of what Simpson argues is that one is self-governing "if and only if I live responsibly as a son, brother, cousin, father, uncle, and so on: in relation with my community members".[360] Mills writes that he can achieve this state of relationality that Simpson writes about coming from kinship and mutual aid when he exercises a careful judgement that "accords with what my legal traditions have taught me, with how my lifeway informs them, with how my lifeworld has shaped it, and finally, with how that lifeworld is *grounded* in earth".[361] How this relationality to kinship and mutual aid, and therefore also doodem, connect to what Mills calls the earthway: "[it] is the deeper reason why, in a rooted legality, it's appropriate to speak of the legitimacy of governance in terms of the *grounding* of law".[362] Anishinaabe rooted legality is the process of careful decision-making demonstrated through "communal Anishinaabe self-governance context: *zagasawe'idiwin*, the council, convened for the most serious of matters".[363] Mills' exploration of *zagasawe'idiwin* is rooted in a legality and governance structure of doodem, and therefore kinship and mutual aid. While he only speaks to the clan system briefly, as we see from other Anishinaabe scholars, kinship can be doodem and vice versa.

Darlene Johnston writes about the symbolism of representing one's doodem, and that for her great-great-grandfather, that was drawing his Otter doodem.[364] This drawing would have represented his identity as an Otter doodem, encompassing "his chiefly capacity, his tribal identity, [and] simply his personal signature".[365] In her book "Doodem and Council Fire" Heidi Bohaker explains that doodem images were used as signatures by Anishinaabe leaders, such as Johnston's ancestor, on treaties, petitions and letters in the eighteenth and nineteenth centuries.[366] To a non-Indigenous – or even non-Anishinaabe – person, these images may read nothing more than the image of a plant, an animal, or a mythical creature; however, these images

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[359] *Ibid* at 159 citing Leanne Simpson, *supra* note 352 "Looking after Gdoo-naaganinaa" at 32.
[360] Mills, *supra* note 3 at 159.
[361] *Ibid* at 159.
[362] *Ibid*.
[363] *Ibid*.
[364] Johnston, *supra* note 269 at 64.
[365] *Ibid* at 63.
[366] Bohaker, *supra* note 197 at *xiv*.

were so much more, written by leaders on documents "pertaining to their lands, at councils held on those lands, reflecting the decisions of those councils". [367] These images were expressions of Anishinaabe law that represented kinship[368] and date back far longer than their use on treaties.[369] The symbolism of doodem drawing on political documentation is telling of how closely tied one was to their doodem identity in governance, but it is important to remember that the drawing of doodem, and therefore its symbolism, did not start and end with political documentation: visual doodem pictographs date back far longer than European-Anishinaabe treaty making. Louise Erdrich writes about doodem pictographs and rock paintings, explaining that rock paintings in the Lake of the Woods area of northern Ontario cannot be accurately dated;[370] that is how old the tradition of doodem is. As she explains, some rock paintings in this area of Ontario are hundreds of years old while others are thousands.[371] Regardless of their age, Erdrich says that the paintings are alive.[372] Bohaker supports this understanding, explaining that for the Anishinaabe, the land and waters are "simultaneously spiritual and physical spaces".[373] In the Lake of the Woods, these rock paintings are not just historical or "pointer signs. They hold far more significance. They refer to a spiritual geography and are meant to provide teaching[s]".[374]

The significance of doodem as rock paintings and signatures both point to the importance of doodem in Anishinaabe life and governance, supporting Fontaine's argument that nothing in Anishinaabe life or law and governance operated without it. By consciously representing oneself as one's doodem in a myriad of mediums, Anishinaabeg are "clearly articulating the centrality of doodem to their system of government and were tying that identity to the lands".[375] This relates also to the doodem choices for leadership; the Anishinaabe drew metaphors for leaders from their doodems "of all sizes and shapes".[376] While strength and size of the being, such as the bear, makes it an obvious choice for leadership, smaller animals, such as the northern clear water

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[367] *Ibid*.
[368] *Ibid*.
[369] *Ibid*.
[370] Louise Erdrich, *Books and Islands in Ojibwe Country: Traveling Through the Land of my Ancestors* (2014) Harper Perennial at 39.
[371] *Ibid* at 39.
[372] *Ibid* at 40.
[373] Bohaker, *supra* note 197 at *xv*.
[374] Erdrich, *supra* note 367 at 39.
[375] Bohaker, *supra* note 197 at xv.
[376] *Ibid* at 77.

crayfish, are also choices for leadership as it "is an assertive defender of its territory".[377] Edward Benton-Banai explains that each doodem "was given a function to serve for the people",[378] meaning each doodem allowed for connection to identity, character, life choices, and how one identifies with place and political roles.[379] For some Anishinaabe communities,[380] this could mean that the Bear doodem are protectors who are likely to take up occupations centered on protection,[381] while Cranes and Loons may take up roles of leadership and politics.[382] Doodem leaders were expected to lead discussions and debates related to their giftedness in the community where elders, women, men, and youth would all have an opportunity to participate in the discussions and decision-making process.[383] This focus on consensus and a decentralized political power ensured there was equality within the doodem/clan, community, and broader Anishinaabe nation.[384] The concept of alliance between different doodemag is a grounding foundation of Anishinaabe governance and a "lived expression of the interdependence of all life".[385] The alliance of doodemag is an important part of doodem as it shows the reliance not only on your own community's doodem representatives but also those of other communities. The Anishinaabe Council Fires, a "specific and long-standing deliberative bodies that were constituted and recognized through and by other Anishinaabe councils to have responsibility for the lands, waters, and peoples of a particular territory"[386] along with councils of women and councils of young men are just two examples of the kinship ties doodem created and sustained.[387]

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[377] *Ibid.*
[378] Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (1979) at 74.
[379] Bohaker, *supra* note 197 at 78.
[380] Doodem and clan identities vary based on community, so note that the doodem identities listed here are not necessarily that of all Anishinaabe communities. Doodem and clan vary historically and currently throughout communities. Many scholars and writers, such as Edward Benton-Banai and Basil Johnston, have laid out doodemag by social and governance functions, and even these vary slightly from the other. These examples are purely examples and are by no means to say every community followed or follows these breakdowns of clan. Furthermore, as will be explored later in this chapter, how doodemag were used historically can vary exponentially in modern day communities, or may not. Depending on the Nation, their history and their laws, clan and doodem can vary from something done in the past to something still strictly followed in all aspects of life and governance.
[381] Bohaker, *supra* note 197 at 79.
[382] *Ibid* at 79.
[383] Fontaine, *supra* note 198 at 138.
[384] *Ibid* at 138.
[385] Bohaker, *supra* note 197 at *xv*.
[386] *Ibid* at *xvi*.
[387] *Ibid.*

I alluded to the incommensurability of governance structures and positions of power between Anishinaabe and colonial systems earlier in this chapter. A key incommensurability between the two is the Anishinaabe having multiple leaders. You may be thinking, but we have multiple leaders in Canadian governance structures, each one representing different geographical locations; how, then, is that an incommensurability? Perhaps the biggest difference is that within one community there was no one leader; instead, there were different leaders from different doodem. Again, you may be thinking about the breakdown of governance in Canada through different ministries and their ministers, which is ideally broken down by people who have expertise in certain areas. However, as I have stated throughout this thesis, the comparison between colonial systems of governance and Indigenous structures is a continuation of settler supremacy and violence, and this structure of governance is hierarchal in nature and construction. Furthermore, as just explored, consensus and community-wide participation in decision-making is a core foundation of governance, something not seen in Canada's current system. Moreover, as will now be explored, leadership in Anishinaabe legal orders has a very different definition and description than in the colonial system.

Simpson explains that the division of responsibilities and expertise between different doodemag "necessitated different leaders – as did the plurality of issues a family group, clan or community might face".[388] The expertise one has through their gifts comes from a "combination of authentic power, knowledge, experience and personal gifts or attributes as recognized by the collective".[389] Therefore, it is common for an Anishinaabe community to have more than one leader.[390] Anishinaabe leaders exercise authority *with* his or her community members, not *over* them.[391] This understanding of authority is vastly different than the Euro-centric understanding of authority, as Anishinaabe governance authority is not that of accepting the concept of a majority having the right to enforce a way of life.[392] Instead, it is based on consensus, decision-making for the greater good of community, and what Mills calls persuasive authority.[393]

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[388] Leanne Betasamosake Simpson, *Dancing on Our Turtle's Back: Stories of Nishinaabeg Re-Creation, Resurgence and a New Emergence* (2011) ARP Books at 119 and 120.
[389] *Ibid* a 120.
[390] *Ibid.*
[391] Mills, *supra* note 3 at 162.
[392] *Ibid* at 162.
[393] *Ibid.*

Near the beginning of this chapter, I cited Darlene Johnston's analysis of an early European writer, Perrot, where she looks at the governance authority of Great Hare, arguing that his authority was dependent on persuasion.[394] Persuasive authority is the opposite of the European coercive authority, where one leader or branch of government has power over the people and imposes this power through coercion. Coercive authority does not leave room for consensus decision-making, while persuasive authority relies on it. Both Mills and Bohaker cite an Anishinaabe writer from the 1800s, Peter Jones, in their description of Anishinaabe governance structures, persuasion and consensus. An excerpt of Jones' writings in his book, *History of the Ojebway Indians* is worth noting. Jones writes:

> The chiefs are the heads or fathers of their respective tribes; but their authority extends no further than to their own body, while their influence depends much on their wisdom, bravery, and hospitality. When they lack any of these qualities they fall proportionably [sic] in the estimation of their people. It is, therefore, of importance that they should excel in everything pertaining to the dignity of a chieftain, since they govern more by persuasion than by coercion … They have scarcely any executive power, and can do but little without the concurrence of the subordinate chiefs and principal men … they are taught by their chiefs and wise men to observe a certain line of conduct, such as to be kind and hospitable.[395]

Persuasive authority, at its core, works without resorting to coercion[396] and is done without compulsion, allowing people to "follow freely and [be] at liberty to withdraw".[397] Simpson writes similarly about persuasive authority, explaining that *eniigaanzid*, which is the Anishinaabemowin word for 'the one to go first', is a leadership style that is not authoritarian or based on unilateral decision making, but instead based "on humility, emergence, collectivity in decision making, sharing in the work and in action, and listening".[398]

To return to Anishinaabe leadership being that of a plurality adds yet another layer of incommensurability, as not only did the Anishinaabeg not have an authoritative leader in the sense of European standards, they often had more than one leader, all of whom had their own expertise and gifts.[399] In a liberal logic, a plurality of leaders may not make sense. However, as Simpson argues, when leadership is continuously defined in terms of liberal and international

[394] Johnston, *supra* note 269 at 71.
[395] See Mills, *supra* note 3 at 162 citing Peter Jones, "History of the Ojebwa Indians" at 108-109.
[396] Mills, *supra* note 3 at 163.
[397] Johnston, *supra* note 86 at 61 as cited in Mills, *supra* note 3 at 163.
[398] Simpson, *supra* note 385 at 121.
[399] *Ibid* at 120.

politics, or as a simple statesman with coercive power, European understandings of leader are privileged over those of the Anishinaabe.[400] This makes one question leadership in plurality due to defining leadership through liberal and positivistic senses. This continuation of legal positivism's categories of legitimate law and governance, including Mills' settler supremacy, is damaging to Indigenous peoples, governance structures and ways of life, including how one raises their children. Simpson explains that colonizers have always mistakenly interpreted Anishinaabe parenting philosophies as "a 'lack of parenting' because of the absence of punishment, coercion, manipulation, criticism, authoritarian power, and hierarchy".[401] The list of absences in parenting are the same absences in Anishinaabe governance. Therefore, the mistaking of a lack of parenting also extends to mistakenly interpreting Anishinaabe governance as being a 'lack of governance': there is a lack of coercion, singular authority and hierarchy. As Simpson argues, Euro-centric views on governance and family structures were incommensurable with Anishinaabe structures, as in Anishinaabeg societies, the parenting environment was one that "created highly autonomous individuals that were also community-minded".[402] Anishinaabe child rearing therefore led to:

> leaders that were able to build consensus by listening to people, leaders who were full of humility, responsibility and respect, leaders who were willing to sacrifice on a personal level for the betterment of the nation … leadership based on shared, not absolute power, grounded in an authentic power rather than an authoritarian one; and it created communities that were profoundly *less* authoritarian, less coercive and less hierarchal.[403]

I find this line of argument extremely telling of the European views of Indigeneity in all forms, as well as how these views have impacted traditional governance structures today. The Euro-centric view that Indigenous lifeways were invalid did not just stop at laws and governance structures; it extended the same supremacy and violence to all aspects of life. If you are raised knowing you have brothers and sisters everywhere, you may very well become an adult and leader who instills this belief in your positions of responsibility, as well as how you raise your

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[400] *Ibid* at 120.
[401] *Ibid* at 123.
[402] *Ibid.*
[403] *Ibid.*

own children. To destroy one's legal and governance structures, you have to start at the root: the child. And as we know, that is what the colonial government did.[404]

In Mills' dissertation, he cites a real-life example of this incommensurability from a 1695 congress with the Governor General of New France, where an Anishinaabe leader named Chingouabé attempted to explain his community's governance in contrast to the French systems. Chingouabé says to the Governor General: "Father: It is not the same with us as with you. When you command, all the French obey you and go to war. But I shall not be heeded and obeyed by my nation in like manner. Therefore I cannot answer except for myself and those immediately allied or related to me".[405] As a leader, Chingouabé could not command his peoples to obey him and follow him to war; his leadership role was far more complex than that, and to be expected to do such a thing is to be subject to European understandings of governance. As a leader, he had a responsibility to his people, one that may have very well been influenced by his doodem, and perhaps influenced further if his community had multiple leaders. Furthermore, Chingouabé states that he can only answer for himself and those immediately allied or related, suggesting that at most, he could only answer for his doodem members.

These differences in governance further enforced the European view that Indigenous societies had no laws, governance structures, or parenting skills. The belief Indigenous societies lacked governance was used by legal positivism to categorize Indigenous societies as primitive and lawless. Even Perrot, whose writing on doodem origins was cited above in this chapter, is an example of a European view on Anishinaabe governance. In his piece, "Savages of North America", Perrot wrote that "The savage does not know what it is to obey … The father does not venture to exercise authority over his son, nor does the chief dare to give commands to his soldier".[406] Even with Perrot's in-depth understanding of doodem, his worldview hindered him from understanding that governance can occur without coercion. The same happens each time one attempts to use liberal logic to categorize Indigenous legal orders in Euro-centric ways. By doing so, the liberal logic forces society to honour the Euro-centric ways over the Indigenous, all while continuing to inflict violence on Indigenous peoples.

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[404] This can of course be seen in the creation and institution of the residential school systems, which sought to assimilate Indigenous children to a Euro-Christian life. The school system attacked identity, language, spirituality, governance, and of course, how a child was raised. This is merely one example.
[405] Mills, *supra* note 3 at 165.
[406] *Ibid* at 163 citing Perrot, *Savages of North America* at 136.

The Nibi Declaration – An Example of Anishinaabe Law and Governance

In this final section, I explore the Nibi Declaration of Treaty #3 as an example of Anishinaabe legal orders creating ratified law. Aimée Craft and Lucas King write about the 2019 Nibi Declaration of Treaty #3, explaining that the Nibi Declaration "voices the [Anishinaabeg] relationship with water (Nibi) and jurisdictional responsibility that all Anishinaabe citizens have within the Treaty #3 territory", affirming the "responsibilities and relationships that others living within the territory should have with the water and ensures that the spirit of Nibi is central to decision-making and water governance".[407] This modern-day use of Anishinaabe legal orders is an example of how legal principles, such as mutual aid and kinship relationships, drives many Anishinaabe legal orders and lifeways, as well as the ties of natural resource extraction to Indigenous territory.[408] In 1997, Treaty #3 Anishinaabe ratified the first written law of the Anishinaabe Nation, Mother Earth Law. This legislation outlines the legal principles which guide all decision-making and consultation in the territory that refers to natural resource development.[409] In 2019, the Nibi Declaration was ratified, and as Craft and King explain, the Nibi Declaration is an "affirmation of jurisdiction, based on Anishinaabe laws. Its purpose is to give effect to the *Manito Aki Inakonigaawin* (MAI or Mother Earth Law) and to help advance the watershed management planning in the Treaty #3 territory".[410] The Nibi Declaration provides a "foundation for the development of a Watershed Management Plan" for the territory.[411] This Plan is "rooted in Anishinaabe Law of *Manito Aki Inakonigaawin* … [and] is an exercise of nationhood [ensuring] … the inclusion of Anishinaabe laws through the four-direction (North, East, South, West) governance model of the Nation".[412]

Furthermore, the Nibi Declaration as a whole is an assertion of *Nibi inaakonigewin* – water laws – and the "responsibilities for ongoing water management and governance … connected to the MAI, which is the overarching legislation that guides the relationship with Mother Earth for The Nation and for those who are proposing to impact the lands and waters

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[407] Aimée Craft and Lucas King, "Building the Treaty #3 Nibi Declaration Using Anishinaabe Methodology of Ceremony, Language and Engagement" *Water* 2021, 13, 532 at 1.
[408] *Ibid* at 2; For context, Treaty #3 territory is rich in "timber, minerals and other natural bounties, natural resource extraction in Treaty #3 Territory began before the Treaty relationship with the Crown was confirmed in 1873
[409] *Ibid*.
[410] *Ibid* at 1; Treaty #3 territory spans 55,000 square miles between Northwestern Ontario and Eastern Manitoba. It is home to 28 Anishinaabe First Nations.
[411] *Ibid* at 3.
[412] *Ibid*.

within the territory”.[413] *Nibi inaakonigewin* of the Treaty #3 Anishinaabe “is generated from different sources” and each level of the law “is part of a set of concentric circles sourced in spiritual law in the natural environment, as applied by other beings in Creation”.[414] *Nibi inaakonigewin* “involved accepting responsibility in relation to our relatives”,[415] forming responsibilities to “themselves, others, the land, and all beings on the land”.[416] *Nibi inaakonigewin* is structured on kinship relationality and relationships “as opposed to rights and obligations” and is a system of “reciprocity, where beings have a responsibility to one another based on a variety of relationships that are intrinsically connected, reflecting kinship structures”.[417] Furthermore, *Nibi inaakonigewin* instructs us that water is life – *Nibi onje biimaadiiziiwin*: “Water gives and takes life; we are born of water and are primarily composed of it. Our relationship with water is the most central and constant relationship in our human lifetime. Water is also a living being, which relies on a web of relationships to be well and to bring wellness to others”.[418] Nibi, therefore, is “treated as an actor in a relationship” where “Women have a special and distinct relationship to water” as well as a sacred responsibility to Nibi, equating to women being included “in all decision-making relating to Nibi”.[419]

Along with Anishinaabe law and relationality, the Nibi Declaration emphasises language. As argued in Chapter Two, language is critical to understanding any legal order, and the Nibi Declaration is a ratified example of this. As Craft and King write,

> The consistent emphasis on language throughout the life of the project, its central importance in the ceremonial aspects of the development of The Declaration, the equally authoritative interpretation of the text in Anishinaabemowin and the ongoing discussions on the transmission of knowledge and future educational curricula exemplifies the important role that language has in both conceptualizing responsibility and articulating concepts through an Anishinaabe lens.[420]

Governance, of which is based on consensus building, often involves the meeting of difference councils, as seen earlier in this chapter. The Nibi Declaration is no different: The Women’s Council of Treaty #3 developed a purpose statement for the Declaration project titled, *Aaniin*

[413] *Ibid*.
[414] *Ibid* at 4.
[415] *Ibid*.
[416] *Ibid* at 5.
[417] *Ibid*.
[418] *Ibid*.
[419] *Ibid* at 5 and 6.
[420] *Ibid* at 2.

Wengi iji chi ge'wiin – Why are we doing this – which outlined that the Nibi Declaration was to be about "respect, love, and our sacred relationship with Nibi and the life that it brings".[421] This sacred relationship with Nibi in Treaty #3 territory has been maintained since time immemorial "through the exercise of sacred relationships and responsibilities, the Anishinaabe of the region has worked to protect and respect the water throughout the territory [because] Water is life, and it is the lifeblood of all Creation".[422] The use of Anishinaabe laws and governance for all decision about Nibi and other parts of creation in the territory has always been a priority of Treaty #3 Anishinaabeg. Craft and King explain that while the discourse in Canada has lately progressed "to include references to various forms of traditional knowledge (TK) or Indigenous knowledge (IK) and the protection of Aboriginal rights with respect to environmental decision-making and impacts on the exercise of constitutionally protected rights", in practice, such an implementation "has yet to be achieved in a meaningful way".[423] As the pair argues,

> Governments and industries struggle with the application of Indigenous knowledge and values to decision-making. Existing colonial and hierarchical structures based on capitalist values continue to dominate over Indigenous-led decision-making … Decision-making authority has been stripped from Anishinaabe, and decisions are made to capture a wide variety of interests, often privileging industry, tourism and recreational cottage use of the lands and waters over the interests and authority of the Indigenous peoples. The balancing of multiple (and at times conflicting) interests has resulted in the exclusion of the values and jurisdiction inherently held by The Anishinaabe Nation of Treaty #3.[424]

Moreover, Craft and King argue that Indigenous participation in decision-making through the current consultation model "is not sufficient".[425] Indigenous jurisdiction and decision-making authority is needed as it "recognizes Indigenous self-determination and environmental management".[426] The Nibi Declaration is an example of Anishinaabeg Nations jurisdictionally asserting their legal orders while also stating an affirmation of "Indigenous jurisdiction over water governance and management".[427] Through the Nibi Declaration, the Anishinaabeg of Treaty #3 are demonstrating that they are "not waiting for external validation or recognition" of their laws and governance structures.[428] The Nibi Declaration is the "vision for Grand Council

[421] *Ibid*.
[422] *Ibid*.
[423] *Ibid* at 3.
[424] *Ibid*.
[425] *Ibid* at 4.
[426] *Ibid*.
[427] *Ibid*.
[428] *Ibid*.

Treaty #3 to develop watershed management planning based on [their] inherent jurisdiction and in order to reaffirm and assert Anishinaabe responsibilities as they relate to Nibi"[429] and it brings "forth the voice of The Anishinaabe Nation in relation to Nibi and the responsibilities and values that will guide the protection and respect of Nibi for the future".[430]

I see the Nibi Declaration as an example of how the current consultation process is not suited to making decisions about Nibi, and how Treaty #3 Anishinaabeg Nations have come together to use their own laws and governance structures. Language is important for understanding the Nibi Declaration, as well as the Anishinaabe lifeways of Treaty #3 Anishinaabeg. The Nibi Declaration also demonstrates how foundational kinship is to Anishinaabe legal orders and governance structures in modern day. The Nibi Declaration is rooted in kinship, as are the laws integrated, such as *Nibi inaakonigewin*, and is therefore an example of an Anishinaabe legal order guided and defining a process, and something I will be drawing from for my proposed understanding of an Anishinaabe consultation process.

As this thesis is about the duty to consult and accommodate, I must, at some point, talk about it. At the outset of this thesis, I touched on the duty very briefly. Even in such a brief introduction of the duty, one can see the laws and principles informing the process are purely colonial ones. The current system takes the same legal principles and values which deny Indigenous societies of having legal orders, and expects these legal principles to somehow have a different outcome. Without an understanding of Indigenous legal orders through their own meanings and laws, it is easy to continue to expect positive outcomes of the Canadian process, which is why I have left this next chapter until now. I needed to explore not only the underlying incommensurability of the systems, but I also needed to speak to my understanding of Anishinaabe legal orders, principles, and languages on their own, as best I could. As explored in this chapter, the foundation of kinship and mutual aid have remained within Anishinaabe legal orders to this day, both in how one identifies with their community as well as how Anishinaabe governances are structured. This can be seen on the most cursory level of symbolism, and on the most intricate level of living with Anishinaabe laws. Yet even so, when implementing Anishinaabe legal orders into a changed understanding of the duty to consult and accommodate,

[429] *Ibid.*
[430] *Ibid.*

community specific systems will vary. Understanding that differences in Anishinaabe communities exist is also why I left the duty to consult for so long.

Four: *Aazhawaashi* – it sails across by the winds

In this chapter I will be using Homer's *The Odyssey* as a metaphor for the Canadian jurisprudence on the duty to consult. As a natural storyteller, telling you the duty to consult juxtaposed to one of the greatest stories ever told makes sense to me, as my writing of choice is Greek Classics. I also see this storytelling as keeping true to my identity, which goes beyond identifying, first and foremost, as a writer. As I shared with you, I have Italian heritage through my father, and this is specifically of Calabria, the most southern Province of Italy (along with the island of Sicily) which was once part of Greece Major prior to the Roman Empire.[431] While I could draw on Roman mythology (which would make sense as my father is Italian and not Greek), I offer Greek mythology in this chapter, specifically through the Greek poet, Homer, as geographically, Calabria houses some of the Greek mythological sites mentioned in Homer's *The Odyssey*.[432] Also, as explored in Chapter Two, stories are an integral part of Anishinaabe legal orders and lifeways, and are how I link myself to Bernice, my great-grandmother, who herself was a writer. Storytelling is my gift, and as explored in Chapter Three, I therefore have a gift that can be shared with you, my reader. The storytelling I am about to do in this chapter, then, is a culmination of my identities and the legal orders which govern me: writer, Italian, Anishinaabe, Anishinaabe legal orders, the Canadian legal order.

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[431] For more on the history of Italy, see the works of Neapolitan historian, Tommaso Astarita, *Between Salt Water and Holy Water: A History of Southern Italy*, (2006) W.W. Norton & Company, New York. Calabria's history is fascinating to say the least. It has roots in the languages, cultures and 'conquest' of Latin, Greek, Byzantine, Ottoman, Spanish, French and Napoleon, Norman, Roman Empire and Holy Roman Empire forces. The name 'Calabria' has language ties to Latin, Greek, Byzantine and even Hebrew languages. To keep things as simple as possible, I say 'Greece Major' and refer only to the Roman Empire's rule of Calabria here.

[432] The version of Homer's *The Odyssey* that I rely on is the Penguin Classics version as translated by E.V. Rieu and D.C.H. Rieu, originally published in 1946, and published with revised translations in 1991 and 2003.

Opening Pandora’s Box

I have come to refer to the duty to consult and accommodate as my Pandora’s Box:[433] a source of great and unexpected troubles; something that I opened without knowing exactly what I was getting myself into.[434] I first started working with the duty during my 1L summer job at Rama First Nation. At this point, the duty still looked shiny, glittery, and full of positive potential. Ever since 1L summer, I have been all-consumed by the duty to consult, the difference now is that the duty is no longer shiny and positive; it is a Pandora’s Box: a deceiving jar[435] filled with unexpected troubles. The more I studied and worked with the duty over time, the more engulfed in unexpected troubles I found myself. At the beginning, the idea of what the duty could hold was positive, like a shimmering gold. Over the years, I would unlock the jar and attempt to fully understand the duty, but stop and swiftly lock it back up. Over time, just like Pandora, I could not hold back any longer and I leapt headfirst, opening the jar, and unleashing everything inside. What hit me first were the troubles that the duty holds: the injustices of the process, the countless court challenges by Indigenous communities, and the lack of Indigenous laws within the process. The more I studied and worked, the more pain the jar unleashed on me. Eventually, overcome by the contents, I slammed the lid shut. I had found only troubles in my jar and I was ready to walk away for good. But then, my jar beckoned me to *please, please, open just once more*. There was one last thing left inside both mine and Pandora’s jars: Hope. My once more was applying to write this thesis. This thesis, then, is my Hope:

> But the woman took the lid off the big jar with her hands
> And scattered all the miseries that spell sorrow for men.
> Only Hope was left there in the unbreakable container,
> Stuck under the lip of the jar, and couldn’t fly out.[436]

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[433] For the myth of Pandora’s Box, see Hesiod, *supra* note 9, *Theogony, Works and Days*, “Why Life is Hard”, the Myth of Pandora, composed originally in Greek in the 8th or 7th Century, B.C., as translated by S. Lombardo, in *Anthology of Classic Myth* second edition, starting at page 164.

[434] In Hesiod’s myth, Pandora is the first mortal woman, created to bring misery upon men, which occurs when she opens, unbeknownst to her, a jar filled with diseases and despair. The Collins Dictionary defines the saying “open Pandora’s box” as “If someone or something opens Pandora’s box or opens a Pandora’s box, they do something that causes a lot of problems to appear that did not exist or were not known about before”. Accessed: https://www.collinsdictionary.com/dictionary/english/open-pandoras-box.

[435] While the saying is ‘Pandora’s Box’, the actual ‘box’ Pandora opens is a jar. In Hesoid’s telling of the misery of man in “Why Life is Hard”, Pandora opens a big jar, not a box. Where ‘jar’ got turned into ‘box’, I’m not sure.

[436] An excerpt from Hesiod, *supra* note 10, *Theogony, Works and Days*, “Why Life is Hard”, the Myth of Pandora, composed originally in Greek in the 8th or 7th Century, B.C., as translated by S. Lombardo, in *Anthology of Classic Myth* second edition, page 164, lines 115 to 118.

As I mentioned at the end of Chapter Three, this chapter will look at the Canadian understanding of the duty to consult and accommodate. It will explore, in expanded detail, what the duty is in Canadian jurisprudence, painting a picture of what the duty looks like. I have looked to the incommensurability of the underlying principles of both legal orders and languages and started to explore the laws and decision-making processes of my understanding of Anishinaabe legal orders. Now, I will directly address the duty to consult. I will open Pandora's Box once more and tell you the tale of the duty to consult, for only once the jar is emptied can Hope escape: a changed understanding of the duty informed fully by Anishinaabe legal orders.

The Tale of the Duty to Consult and Accommodate

Over the last few decades, the Canadian courts have recognized that the Canadian government has a duty to consult and accommodate Indigenous peoples as a means of reconciling the relationship between the Crown and Indigenous peoples. Through multiple court decisions since the 1990s, the courts have begun outlining what the duty is, how it should look, and how it shouldn't look. But before any discussion can take place about the issues with the duty, I will discuss *what* the duty is, as defined by the judiciary. Simply put in a few short sentences, the duty to consult and accommodate is a legal and constitutional duty on the Crown to consult, and where appropriate, accommodate Aboriginal Nations[437] when the Crown contemplates conduct that may adversely impact potential or established Aboriginal or Treaty rights.[438] This duty arises out of the principle of the honour of the Crown, which requires the Crown to avoid any sharp dealings with Aboriginal peoples.[439] It is defined as both a constitutional and legal duty of the Crown,[440] and includes federal and provincial/territorial Crowns. The constitutional part of the

[437] A note on language: *Indigenous* is not a word recognized legally or constitutionally. *Aboriginal* and *Indian* are. Aboriginal is a pan-term, as defined in the Constitution, which includes Indian (First Nation), Inuit and Métis peoples. However, many Indigenous peoples find the word Aboriginal to be outdated, and therefore prefer Indigenous as a pan-term, or First Nation when speaking pan about Indians. As the legal world has not defined Indigenous, Aboriginal must be used in legal contexts. As a result, in this chapter I will use Aboriginal when appropriate contextually, but revert back to Indigenous when possible. Furthermore, much case law uses the wording "Aboriginal groups". I have opted to not use "groups" under the wise advice of my supervisor, Karen Drake, who has written about the connotation "group" takes when used by the Courts as opposed to words such as Nations or peoples. Therefore, I will be using Nations or peoples where the Courts use groups. For more on this, see her work: Karen Drake, "A Right Without a Rights-Holder is Hollow: Introduction to OHLJ's Special Issue on Identifying Rights-Bearing Aboriginal Peoples" (2020) Osgoode Hall Law Journal, Issue 1 Volume 57, Article 13.
[438] See *supra* note 22, *Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73.
[439] *Ibid* at para. 25.
[440] See *Haida, supra* note 22, *R v Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6; and *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, 2010 CarswellBC 2867 at para. 34.

duty is grounded in the notion of the honour of the Crown,[441] which in turn, is protected under s 35(1) of the *Constitution Act, 1982*. The legal part of the duty is based in the Crown's claim of sovereignty over the land and resources in Canada.[442] Furthermore, the duty to consult applies to modern treaties, not just historical or numbered treaties.[443]

Now, let me unpack all this: what the duty is; what the honour of the Crown is; what the rights are which result in the duty being triggered; how the duty is fulfilled; and who fulfills the duty. I will do this by looking at what the Canadian courts have said about all these pieces, and how these holdings are interpreted. As parts of the duty are still being defined in courts, I will also look at what is still outstanding in the duty to consult, such as free, prior and informed consent and the implementation of *The United Nations Declaration on the Rights of Indigenous Peoples*. The contents of my Pandora's Box have a story of their own, so I will continue with the Greek mythology metaphor and compare this to Homer's great epic *The Odyssey*. Like Homer's Odyssey, which is the story of a man named Odysseus attempting to return home after the Trojan War,[444] the tale of the duty to consult is years in the making.[445] Many stops have been made which defined, in one way or another, what the duty is or is not, developing it over years of court challenges. There are more challenges coming its way, so, like Odyssey's wife Penelope[446] waiting years for the return of her husband, we still wait for the full picture of the duty to consult, making the duty a process both judicially defined yet shifting with each decision. As an Odyssey still unfinished, this is an unpacking of the duty to consult as is *currently* understood.

On the Sandy Shores of a Troy called Sparrow

We cannot talk about the duty to consult or *The Odyssey* without first looking to where much of what we know about both all began. For *The Odyssey*, that is the sandy beaches of Troy as told

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[441] *Ibid R v Kapp* at para. 6.
[442] *Ibid* at para. 53.
[443] See *Little Salmon/Carmacks First Nation v Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53.
[444] The Trojan War is told in Homer's *The Iliad*, which is the prelude to *The Odyssey*, depicting the Trojan War, the famed fighter Achilles, and the story of the most beautiful woman in Greece, Helene of Sparta, who launched a thousand ships.
[445] Between *The Iliad* and *The Odyssey*, Odysseus is away from his island home of Ithaca for twenty years. See *The Odyssey* Book XIX where "twenty years" away from home is referenced multiple times.
[446] *The Odyssey* opens on Penelope, the wife of Odysseus, who has been waiting for her husband's return from the war. In the Penguin Classic's version of *The Odyssey*, the introduction has a very helpful subsection which speaks to each main character briefly. Penelope's can be found in this version at page xxiii.

in *The Iliad*;[447] for the duty to consult, it is where Aboriginal rights began: *R v Sparrow*. In 1990, the Supreme Court outlined the general principles that the Crown must comply with when an Aboriginal right is to be infringed.[448] The court held that the *Constitution* by virtue of s 35 enshrined Aboriginal rights, and therefore, interferences with the exercise of Aboriginal rights must be justified.[449] The court developed a test for the infringement and justification: first, the test seeks to define whether the Aboriginal right has been infringed or not; second, the test seeks to determine if the government activity which infringed the right is justified or not.[450] The duty to consult emerges in the justification test which requires that the Crown consult and inform the affected Indigenous Nation of the activity that is to infringe their right.

Sparrow starts an important conversation about assumed Crown sovereignty, and therefore, settler supremacy. In *Sparrow*, the court was "faced with the task of making sense of Aboriginal rights in light of their entrenchment in the Constitution under section 35".[451] The court, while acknowledging Aboriginal rights, held that such rights are not absolute as they operate "to temper the authority of 'unquestioned sovereignty' of the Crown".[452] The court came to this decision by qualifying sovereignty through Constitutional rights:[453] "while British policy towards the native population was based on respect for their right to occupy their traditional

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[447] The version of *The Iliad* I rely on is the Signet Classic's version as translated by W.H.D Rouse, published originally in 1996, and republished in 2015. For reference, Troy was a kingdom that had the same gods as the Greeks (most notably Apollo) but was not part of Greece proper. Paris of Troy was tricked by the gods and fell in love with Helene of Sparta, who was married to the 'King' or 'Chieftain' of Sparta. Paris took Helene back to Troy with him, which resulted in all of the Greeks coming to her rescue (thanks to an oath Odysseus had all the princes of Greece swear years before). When the King of Troy, Priam, refused to let Helene go, the Greeks waged war against the Trojans, hence the famous Trojan War. While Homer wrote of the Trojan War in relation to great heroes and gods, there is archeological evidence that a Trojan War possibly occurred. Troy is believed to be located in modern-day Turkey.

[448] See *supra* note 26, *R v Sparrow*, [1990] 1 SCR 1075.

[449] These 'Aboriginal rights' are rights held by Aboriginal peoples as defined by s 35 of the *Constitution*: "In this Act, aboriginal peoples of Canada include the Indian, Inuit and Métis peoples of Canada". Aboriginal rights are seen as a spectrum of rights that include practices, traditions and customs which are "integral to the distinctive culture of aboriginal peoples", such as hunting and fishing, many of which take place on the land.[449] Aboriginal rights are considered *sui generis*, which means unique, not fitting into the categories of English or French laws.

[450] The test is as follows: The government activity might be infringing an Aboriginal right if: The activity imposes an undue hardship on the Indigenous Nation; The activity is considered unreasonable by the court; and the activity prevents the right-holding from exercising the right. The activity will be justified if: The infringement serves a valid legislative objective; There has been as little infringement on the right as possible; Fair compensation has been provided for the infringement; and the Nation was consulted/informed. A valid objective may be the conservation of a natural resource, for example.

[451] Gordon Christie, "A colonial reading of recent jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) The Windsor Yearbook of Access to Justice, vol 23(1) at 38.

[452] *Ibid* at 38

[453] Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow", 1991 29-2 *Alberta Law Review* 498, 1991 CanLIIDocs 248 at 499.

lands … *there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown*".[454]Asch and Macklem's argument in their 1991 article explores this assumed sovereignty in detail. The pair argue that the 1867 *Constitution Act* did not "actually state that the Canadian state enjoys sovereignty over its indigenous population".[455] The assumption that the Canadian state enjoys sovereignty over Indigenous peoples and lands is justified through an interpretation of s 91(24) which states the federal government is responsible *for* Indians and lands reserved for Indians, which in the minds of the court equates to sovereignty *over* Indians and their land. However, as they argue, s 91(24) does not actually justify this sovereignty: "interpreting s 91(24) as authorizing Parliament to pass laws governing its indigenous population absent consent of that population" does not equal sovereignty *over* those peoples.[456] If you remove the underlying assumption of sovereignty *over* Indigenous peoples and lands from the interpretive picture, "s 91(24) could just as easily be read as not authorizing Parliament to pass laws in relation to native people absent their consent".[457] Therefore, absent wording in the Constitution to state Canada has sovereignty over Indigenous peoples, the judicial interpretation of sovereignty is simply that: an interpretation.[458]

The Supreme Court would later qualify sovereignty stating that s 35's purpose is to reconcile prior occupation with "*de facto* Crown sovereignty".[459] However, as Ryan Beaton writes, the court "is clear that this conception of Aboriginal rights relies … on some attenuated doctrine of a hierarchy of civilizations, or at least a hierarchy of legal systems".[460] How else, Beaton asks, could the Crown "acquire sovereignty over, and underlying title to, Indigenous territories through mere assertion, in the face of 'pre-existing systems of aboriginal law' that did not recognize the Crown's acquisition of sovereignty and underlying title?".[461] This hierarchy of legal systems is legal positivism as discussed in Chapter One. Asch and Macklem argue this as well, stating that the assertion of sovereignty over Indigenous peoples and lands "ultimately rest[s] on unacceptable notions about the inherent superiority of European nations".[462] Beaton's

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[454] See *Sparrow*, *supra* note 26 at 1103 [emphasis added].
[455] Asch and Macklem, *supra* note 450 at 510.
[456] *Ibid* at 510.
[457] *Ibid*.
[458] *Ibid*.
[459] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director*, [2004] 3 SCR 550 at para. 42.
[460] Ryan Beaton, "*De facto* and *de jure* Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2019) Constitutional Forum, 27(1): 25 at 27.
[461] *Ibid* at 27.
[462] Asch and Macklem, *supra* note 450 at 510.

question along with Asch and Macklem's argument are important when dissecting the jurisprudence that defines the systems which make decisions about Indigenous lands and rights. Even as the jurisprudence gets further away from the sandy shores of Troy that is *Sparrow*, the words, and interpretations of the first challenges will forever impact the outcome.

For example, while the courts have come out against "civilization hierarchy",[463] the Supreme Court's qualification of sovereignty in *Sparrow* and later decisions still upholds the Crown's legal power to exercise sovereignty over Indigenous peoples and lands. The courts do so by explicitly rejecting the Doctrine of Discovery – or *terra nullius* – the same doctrine they "traditionally relied upon to justify the Crown's acquisition of sovereignty through assertion".[464] What this means is that the doctrine which allowed the Crown and courts to assume sovereignty in the first place, meaning the only basis to originally assert sovereignty, is later rejected by those same courts.[465] What, then, is the basis for this assertion of sovereignty if we reject the original basis? To follow what Macklem, Asch and Beaton write, then that basis is a misinterpretation of s 91(24). Take the *Sparrow* decision, with its test of infringement justification: this test "establishes a form of judicially mediated Crown sovereignty" where the courts are "weeding out illegitimate exercises of Crown sovereignty, while allowing legitimate ones".[466] The legitimate ones, of course, are legitimate by means of European-derived laws, not Indigenous law. The belief in the superiority of Euro-centric laws "ultimately supports the unquestioned acceptance of Canadian sovereignty… in s 35(1) of the *Constitution Act, 1982* by the Court in *Sparrow*".[467]

The supporting and qualifying of Crown sovereignty on the part of the courts throughout Aboriginal law jurisprudence makes s 35 contexts unique: "the Court has framed the overarching purpose of section 35 not simply in terms of protecting constitutional rights, but rather … in terms of reconciling 'the pre-existence of aboriginal societies with the sovereignty of the

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[463] See Beaton, *supra* note 457 where he cites at page 27 the Supreme Court decision *Simon v The Queen* where the court rejected the view that Indigenous peoples lacked the capacity to enter binding treaties.
[464] Beaton, *supra* note 457 at 27.
[465] See *Tsilhqot'in Nation* at para. 69 where the court states: "At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown."
[466] *Ibid* at 28.
[467] Asch and Mackle, *supra* note 450 at 512.

Crown'".[468] This makes the overarching goal of reconciliation, and by extension the duty to consult, to be that of the "legitimation of Crown sovereignty through negotiated settlement of outstanding claims".[469] This is seen clearly in *Sparrow*'s legal test: the courts are "spelling out how Crown authority is tempered", illustrating the extent to which a "colonial mentality infects contemporary jurisprudence, and how the duty to consult emerges from an essentially colonial agenda".[470] Behind the *Sparrow* test for right infringement justification, "there lies a clear colonial vision of the interrelationship between the prior land interests of Aboriginal nations on the one hand and the Crown on the other. Aboriginal sovereignty is, once again, substantially ignored".[471] The courts crafted a test that, ultimately, justifies assumed sovereignty and the defining of Indigenous interests in land through colonial means, themes that will be seen throughout the remainder of this Odyssey.

Sparrow, therefore, is an example of a Pandora's Box of its own. At face value, it is a case that defines rights and seeks to protect them. This, of course, is appealing and draws people, rightfully so, to the jar, making them want to open it up and see the beautiful gold that it promises to hold. However, once the jar is opened, so too are its unexpected troubles: a case grounded in assumed sovereignty; the categorization of Aboriginal rights through colonial context and tools; the dismissal of legal orders and governance structures for Euro-centric ones. However, every Pandora's Box has Hope, and as Gordon Christie explains:

> The only glimmer of hope emerging from *Sparrow* came from the failure of the Court to directly eliminate the possibility that Aboriginal rights might be understood not as grounded in analogous interests held by non-Aboriginal people (protected under such legal instruments as 'property rights'), but rather rooted in Aboriginal conceptions of their own interests in maintaining relationships with their traditional territories.[472]

Deglamuukw is another early Aboriginal law case, and similar to *Sparrow*, at face value it is a decision that elevates Aboriginal interests in land and expands the possibility of rights to that of title. However, like *Sparrow*, the glitter of this case merely attracts one to the jar with the hopes of positive outcomes, yet once it is opened, you see it for what it truly is:

> In *Delgamuukw*, the Supreme Court of Canada found that *some* Aboriginal land interests could constitute right *to* land, insofar as the interests were grounded in exclusive use and

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[468] Beaton, *supra* note 457 at 28.
[469] *Ibid* at 28.
[470] Christie, *supra* note 448 at 38.
[471] *Ibid* at 38.
[472] *Ibid*.

> occupation of the lands in question at the point in time that Crown sovereignty was asserted over these lands … The elevation of certain Aboriginal land interests to the status of property rights within the common law was in no manner a step away from the Court's deep commitment to the colonial framework under which it had worked for so long … all Aboriginal rights – which must include property rights – are not only subject to Crown regulation, but exist separate from Aboriginal sovereignty.[473]

The Supreme Court's colonial commitment, as Christie calls it, can be found in the duty to consult beyond the case law which defines it. The duty to consult, and the rights it addresses, are understood in colonial ways, meaning that Crown consultation is that of Canada's understanding of the Indigenous Nation's identity in relation to land; Canada's understanding of how the Nation will interact with the land; and Canada's vision of how the land will be used.[474] Even the mere definition of Aboriginal 'rights and title' are "constructs which reflect nothing other than the exercise of non-Aboriginal notions about identity, and about how such non-Aboriginal notions lead into visions of land use".[475]

Delgamuukw, however critical in the Aboriginal law jurisprudence, is fairly old in this Odyssey, just like *Sparrow*. And while the courts have expanded what rights and title mean in more recent years, *Sparrow* and *Delgamuukw* remain foundational. Looking to Odysseus, even the earliest challenges he faced, such as smarting his way out of the cave of the great Cyclops Polyphemus forever impacted who he was and the rest of his journey.[476] Upon deceiving and blinding Polyphemus, Odysseus is excited to continue his journey, thinking he was mere days from returning home. No one could have expected all the troubles coming his way. Furthermore, his actions on Polyphemus' Island followed him for the rest of his Odyssey, forever marking the next steps on his journey.[477] Early cases such as *Sparrow* and *Delgamuukw* are no different: their marks are still seen today. Tests are derived from them that courts still use to this day, furthering

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[473] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para. 39.
[474] *Ibid* at 41 and 42.
[475] *Ibid* at 41.
[476] The story of Odysseus and the Cyclops Polyphemus can be found in *The Odyssey supra* note 429 Book 9 at 110-124, as well as in Books 1 and 2 in which a short summary of the Polyphemus Cyclops can be found. Essentially, Polyphemus, the one-eyed son of the Olympian god of the sea Poseidon, is hostile towards Odysseus and his men when they are on his island. He ends up eating two of them, and locking the rest in his cave. Odysseus, being a quick-thinker, blinds Polyphemus and they all escape by hiding under the sheep Polyphemus also has in his cave. Blinded, Polyphemus feels the sheep to make sure they are not the men, but of course, being under the sheep meant the men could escape.
[477] The great bag of winds Odysseus receives to send him home were interfered with by the God Poseidon as revenge for his harming of Polyphemus.

the assertion and justification of assumed Crown sovereignty and the forcing of Indigenous interests into colonial boxes of rights and title.

And so, with *Sparrow* and *Delgamuukw* truly begins our Odyssey of the duty to consult. The sandy shores of Troy are behind us and we have sailed off head first into the open sea that is Canadian jurisprudence. With each case, we can see why Pandora's Box is so appealing: each case is new and exciting, adding a new detail to what the duty is, evolving it into a practical process we all can use. However, what lies under the glittering gold is often not what is expected, and the glitter that shrouds the case law is often simply that: a cloak hiding the stark, dark reality that lies beneath. The optimism of returning home to Ithaca and seeing an end to the journey gets chipped away with each passing challenge. While the battle may be against a new creature each time, whether it has one eye or the name of a different Ministry does not matter, for the truth of who you face is the same: a far more powerful entity who has the power to make rules unfairly stacked against you. So, we sail across the sea of jurisprudence by the winds that are settler supremacy; the winds which can be traced back to the earliest of challenges.

The Sirens' Songs in the Year of Definitions

The year 2004 was a vital year for the duty to consult, mainly due to the key decision *Haida Nation v British Columbia*. This was the first decision where the Supreme Court set out the substance of the duty, and to present day, it remains foundational. In Chapter One, I outlined the facts in *Haida*. Essentially, this decision was about the provincial British Columbia government issuing logging licenses to land and resources that were subject to Haida Nation's Aboriginal title and right claim. One of the most important results of this decision is that the Court held that a duty to consult arose, even though the Aboriginal title claim had yet to be proven in a Canadian court. The Court also held that the duty is triggered when the Crown is, or should be, aware of proven or asserted Aboriginal or treaty rights that may be affected by the proposed Crown conduct.[478] Therefore, rights or title do not have to be proven in a Canadian court, or admitted to by the Crown, in order to trigger the duty. So long as the Crown is aware of the asserted rights, or ought to be, and the rights may be impacted by the proposed conduct, then the duty is triggered.

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[478] See *Haida*, *supra* note 22 at para. 35.

In terms of Greek mythology, I see the decision of *Haida* – and the year of 2004 more broadly – as the Sirens: creatures who sing beautiful songs that draw men, unbeknownst to them, to the rocky outposts of their isles.[479] Famously, Odysseus is instructed to have his men fill their ears with beeswax, so not to hear the Sirens' songs, and to tie him tightly to the boat's mast to stop him from forcing them to steer the boat to the intoxicating songs.[480] The jurisprudence that came from the year 2004 are like the Sirens' songs; they enchant the listener towards them, having the listener believe their songs are nothing but beautiful, blinding them from the sharp, rocky outposts within the jurisprudence. The other aspect of *Haida* that makes up the core of the duty, and the deceiving songs of the Sirens, is the notion of a 'spectrum'. This spectrum has to do with the degree of consultation, and if appropriate accommodation, that is required by the Crown, which is based on an assessment of the strength of the asserted rights claim, as well as the potential for harm.[481] At the high end of the spectrum, a 'deep consultation' will be required, while the low end may only require notice of the proposed conduct and hearing the affected community's concerns.[482] *Haida* also states that the consultation and accommodation of affected Indigenous Nations is "part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolutions".[483] This duty is founded in the honour of the Crown and arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it".[484] More recently, real or constructive knowledge was defined by the Supreme Court. Actual knowledge arises "when a claim has been filed in court or advanced in the context of negotiations, or when a treaty may be impacted".[485] Alternatively, constructive knowledge is "when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may be reasonably anticipated".[486]

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[479] The Sirens can be found in Homer, *supra* note 429 Book 12, pages 157 to 162. While Homer never describes what the Sirens look like, there have been ancient renditions of the creatures found in archeological finds, often depicting them as part woman, part bird.
[480] See Homer, *supra* note 429 Book 12 lines 47 to 54 at page 158. It is Circe, who will be addressed shortly in this chapter, who tells Odysseus about the Sirens and how to protect himself and his crew as they cross their path.
[481] *Ibid* at paras. 43-45.
[482] *Ibid*.
[483] Borrows, *supra* note 1 at para. 32.
[484] *Ibid* at para. 35.
[485] See *Rio Tinto*, *supra* note 437 at para. 40.
[486] *Ibid* at 40.

In the same year of the *Haida* decision, the Supreme Court released *Taku River Tlingit First Nation v British Columbia.* In *Taku River,* the Supreme Court elaborated on their findings in *Haida*, holding that Provinces also have the duty to consult, and that there are limits for consultation which arise out of decisions that may adversely affect unproven Aboriginal rights and title claims.[487] *Haida* and *Taku River* are also generally understood as defining the means by which an Indigenous Nation can protect their lands and resources when their rights have yet to be proven. However, as Christie argues, in truth the cases illustrate "the pressure the judiciary continues to exert on Aboriginal nations (pressure directed toward the generations-old policy of assimilation)".[488] While this pressure takes several forms, the most important for us to focus on is the form taken in the duty to consult:

> … the duty to consult does not operate to merge or reconcile self-understood Aboriginal visions of land use … Rather, the Crown is imagined as working within and through nothing but its vision, with the duty to consult operating to potentially modify the activities that fall under this vision. The consultation process may be directed toward substantially addressing the concerns of potentially affected Aboriginal nations, but the accommodation of Aboriginal interests must be understood within this larger context … In seeking to trigger the duty to consult, an Aboriginal nation is acknowledging its lack of alternative recourse, and seeking to bring to bear this inadequate, assimilative tool upon problems generated by the larger colonial context.[489]

The duty to consult effectively forces a second form of assimilative pressure onto Indigenous peoples via legal tests advanced in *Haida* and *Taku River*, backed by *Delgamuukw* and *Sparrow*'s justification of sovereignty. This demonstrates my argument about just how influential and foundational early cases are, even if their justifications are later qualified: these are the seemingly beautiful songs of the Sirens.

For me, I see the Sirens that are *Haida* and *Taku River* as deceiving pillars of optimism: they bring the jurisprudence one step closer to the end of the journey, as a win, just as *Haida* is often seen as a win for the Haida Nation. But, if you are not careful, you can get swept up in the seemingly beautiful music the Sirens sing, bending to their will, not understanding exactly what the song is saying or making us do:

> Your next encounter will be with the Sirens, who bewitch everybody who approaches them. There is no homecoming for the man who draws near them unawares and hears the Sirens' voices; no welcome from his wife, no little children brightening at their father's

[487] See *Taku* River, *supra* note 456 at paras 1-2.
[488] Christie, *supra* note 448 at 43.
[489] *Ibid* at 44.

> return. For with their high clear song the Sirens bewitch him, as they sit there in a meadow piled high with the mouldering skeletons of men, whose withered skin still hangs upon their bones.[490]

It can be easy to get caught up in the advancements of the courts in cases such as *Haida* and *Taku River*, not realizing exactly how the decisions shape the law. When you listen to the decisions without beeswax in your ears, you can easily become bewitched by their high, clear song: there is a duty even without proving rights in court; the Crown must act to reconcile past wrongs; consultation is a balancing of everyone's interests. This is seen as a beautiful song drawing you in, wanting you to believe every word. Consequently, you forget to look past the Sirens and see the meadow piled high with the injustices done to Indigenous peoples in the name of assumed sovereignty. As a result, in order to protect one's land and peoples, Indigenous Nations must conform to the colonial process, transforming their unsettled claims into the colonial understanding of rights and title. Only then will a Nation be in the all-too-rare position "wherein their consent might be required before the Crown can act,"[491] knowing all the while, as *Taku River* makes clear, any recourse via accommodation is not a duty to come to an agreement. Through this colonial systems, Indigenous Nations are forced to accept the Crown's vision of land use as the starting point.[492] To protect their lands, peoples and legal orders, they must take the wax from their ears, untie themselves from their boat's mast, and listen to the Sirens' song.

<u>*The Cloak of Honourability*</u>

Of the entirety of *The Odyssey*, there is one character who is shrouded in mystery more so than others, and that is the enchantress – often also referred to as a witch or witch-goddess[493] – Circe, daughter of the sun-god Helios. As classics scholar Judith Yarnall writes,

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[490] Homer, *supra* note 429 *The Odyssey*, Book 12, lines 38 to 47.
[491] Christie, *supra* note 448 at 44.
[492] *Ibid* at 46.
[493] There is debate amongst classics, and lovers of Greek mythology alike, as to whether Circe's lineage within the Greek gods family tree affords her the title of 'goddess' or not. Odysseus describes Circe to the Phaiacians as "dread goddess of human voice", and in such writing, Homer "never questions Circe's authenticity as a goddess or her right to live like one" (see Judith Yarnall, *Transformations of Circe: The History of an Enchantress*, (1994) University of Illinois Press, Urbana and Chicago at 10 and 11) and as the daughter of Helios the sun-god by the ocean nymph Perse. Also, throughout *The Odyssey*, Odysseus refers to her as 'goddess' or 'the beautiful goddess'. She is, as agreed by all, not a human, however, as Judith Yarnall writes, "the descriptive phrase [of Odysseus] implies that Circe occupies an unusual ontological niche. Although a divinity, of another order of being and power that that of mortals and therefore a presence to be feared, she is nevertheless accessible for she speaks our tongue" (see her book, *Transformations of Circe* at page 10.

> Circe is far more than just another member of this [Book's] exotic cast; she becomes … Odysseus's mystagogue, instructing him in the details of his way. She does not appear until [Odysseus] is thoroughly lost, and she does not disappear until he has regained some sense of his bearings and the dangers to come.[494]

Circe is an enchantress who uses pharmacy – herbs as medicine – to transform people and beings.[495] She masks her island, Aeaea, and her powers as seemingly simple things, cloaking everything about her in mystery.[496] This cloak of mystery can be seen as a metaphor for the honour of the Crown. The duty to consult is grounded in this notion of honourability, cloaking the foundational intentions of actions as being 'honourable', and hiding the powers of the Crown behind honourability.

The honour of the Crown states that Canada must act honourably in its dealings with Indigenous peoples because they were never conquered[497] and requires that any s 35 rights are "determined, recognized and respected"[498] as honour is always at stake.[499] Because the Crown plays the role of the party who makes decisions which could negatively impact Aboriginal interests and rights, as well as the role of the party charged with protecting those same rights under the Constitution, the Crown's honour is always at stake, but not always engaged.[500] The court held in *Manitoba Métis Federation Inc. v Canada* that the honour of the Crown "imposes a heavy obligation" on Crown conduct in its dealings with Indigenous peoples.[501] Part of this heavy obligation is ensuring the duty to consult is meaningfully fulfilled and the overarching notions of reconciliation and protecting s 35 rights.[502]

One can agree that based on the case law, the honour of the Crown seems promising. The Crown must conduct itself honourably with Indigenous peoples, including while implementing

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[494] Judith Yarnall, *Transformations of Circe: The History of an Enchantress*, (1994) University of Illinois Press, Urbana and Chicago at 9.
[495] An excellent fictional adaption of Circe's myth is a novel by classics scholar Madeline Miller, *Circe*, (2018) Little, Brown and Company.
[496] An example is how Circe used pharmacy to drug – for lack of a better word – wolves and mountain lions to act like house dogs, and turning men into pigs. See Homer, *supra* note 429 Book 10, lines 432-433. Also note that the island Aeaea is also spelled *Aiaia*. I chose the spelling used in the version of *The Odyssey* I rely on.
[497] *Haida*, *supra* note 22 at para. 16.
[498] *Ibid* at paras. 16, 17 and 25. See also *Mikisew Crew First Nation v Canada*, [2005] SCJ No. 71 at para. 1.
[499] *Haida*, *supra* note 22 at para. 16.
[500] See *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at paras. 68 to 72 discussing when the honour is and is not engaged.
[501] *Ibid.*
[502] *Haida*, *supra* note 22 at para. 14; see also *Clyde River*, *supra* note 27 at para. 24 where to court speaks to reconciliation rarely being achieved in courts and instead in adequate Crown consultation before project approvals.

the duty to consult. What could be wrong with that? But as you already know, the glitter that is the honour of the Crown is merely a cloak covering up injustices. When the façade of honourability is stripped back, the previous legs of this Odyssey which have shaped the honour of the Crown and what it means for Indigenous peoples come to light. To begin, even though the honour of the Crown is defined as being at stake in all dealings with Indigenous peoples, it is not always engaged. Also, the duty to consult does not translate to a constitutional right of consultation[503] and there is no constitutional duty to consult where no constitutional rights are being implicated: Aboriginal interests and/or concerns that do not flow from s 35 do not, and cannot, trigger the duty to consult.[504] This also means that Indigenous laws and legal orders do not necessarily trigger the duty as they are not necessarily protected by s 35. The notion of the honour of the Crown continues to extend assumed sovereignty as the Crown must act honourably due to their foundational assumption of sovereignty. The honour of the Crown, therefore, acts like a proxy[505] when Indigenous Nations have not assimilated their interests into the colonial box of rights or title. The duty, "tied to its honour, lies on a spectrum substantially lower than might befall the Crown when it contemplates infringing an established Aboriginal right".[506] When a right or title is proven, the honour of the Crown acts somewhat as a check to Crown sovereignty and authority; however this check is not a barrier, "but rather a speed bump"[507] for even though cloaked in honourability, the duty to consult is still a call on the Crown to balance Aboriginal and non-Aboriginal societal interests.[508]

The honour of the Crown, then, is like Circe the witch-goddess, who cloaks her abilities and intentions in a façade: a beautiful, peaceful island where you can seek refuge.[509] As John Borrows writes, powers such as Circe and the Crown are like tricksters: both helping and hindering Indigenous peoples.[510] However, like the honour of the Crown, Circe's cloak only

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[503] See *Little Salmon*, *supra* note 440 at paras. 42-43 and 71.
[504] *Ta'an Kwacha'an Council v Yukon,* 2008 YKSC 60 (Y.T. S.C.) at paras. 58-59.
[505] Christie, *supra* note 448 at 42.
[506] *Ibid* at 43.
[507] *Ibid* at 46.
[508] *Ibid.*
[509] Homer, *supra* note 429 Book 10 at page 128.
[510] While I quite enjoy the metaphor of trickster – a character prominent in many Anishinaabe stories – I do not have the space here to explore this. For more, see John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) The Canadian Historical Review, 98-1, University of Toronto Press at 126 and 127. In his paper, Borrows argues that "originalism" via assumed Crown sovereignty acts as a trickster to Indigenous peoples, helping and also hindering their lifeways.

covers so much: at the end of the day, she is still an enchantress and goddess, and Odysseus is just a man; Circe can harness magical powers and Odysseus cannot. The honour of the Crown is still a colonial tool and justification for sovereignty, and Indigenous interests in land and legal orders are at the mercy of non-Indigenous visions of land use through balancing. The Crown and courts have power which Indigenous Nations are not afforded under colonial law. However, so long as both act honourably – the definition of which is theirs and not yours – they will be able to go about their actions and intentions without intervention of the gods or colonial institutions.

The Holds of Calypso

Near the end of *The Odyssey*, Odysseus is held on the nymph Calypso's Island, Ogygia, for seven years.[511] Calypso was first introduced in Book 1 as a goddess living on a well-wooded island "far away in the middle of the seas" and as the child of the god Atlas,[512] and she kept Odysseus, "the unhappy man," on her island for seven years, where, "Day after day she does her best to banish Ithaca from his memory with soft, persuasive words; and Odysseus, who would give anything for the mere sight of the smoke rising up from his own land, can only yearn for death".[513] While there, Odysseus often asks Calypso to release him, but Calypso does not let him go, hoping to keep him forever as her mortal husband. Eventually, Calypso does let him go, but only after Odysseus tells the goddess Athena[514] of his misery.[515] Athena then demands that her father, Zeus, set Odysseus free.[516]

Of all the metaphors I can find in Homer's epic, the hold of Calypso is perhaps the most compelling for me: Calypso controls Odysseus for her own benefit; the Crown controls Indigenous interests in land through the duty to consult for its own benefit. It is not the longings of the Nation that drive the process or the control, but the longings of the Crown, and it is not the longings of Odysseus, but of the nymph Calypso, which are determinative. Odysseus appeals to the goddess Athena for help, and Indigenous peoples must appeal to the Canadian court system

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[511] See Homer, *supra* note 429 at Book 5 starting at page 63.

[512] *Ibid* at Book 1 lines 50-53 at 4; Atlas is the god who holds the world on his shoulders. He is where the English language gets the world 'atlas' used to describe globes.

[513]*Ibid* at lines 54-59 at 4.

[514] Athena is the Olympian daughter of Zeus, the head god of the Olympians. In *The Odyssey*, she is the protecting goddess of Odysseus.

[515] Homer, *supra* note 429 at line 4 to 6 at 63.

[516] *Ibid* lines 20 to 43 at 63-64 where Zeus sends his son, Hermes the messenger god, to tell Calypso to release Odysseus.

for help. Neither Athena or the courts are in a domain accessible to Odysseus or Indigenous peoples as there are power imbalances that do not favour Odysseus or Indigenous peoples, and each time one appeals to either, there are ramifications. For Odysseus, Zeus tells Calypso to free him, but clearly states that the final legs of his journey home will not be easy: "neither gods nor men [will] help him".[517] For Indigenous peoples, the courts force them to assimilate their interests and laws into colonial boxes of rights and title. Beings of power such as Calypso hold control over Indigenous peoples, and one of the means of control is *who* the duty to consult applies to. The duty, as it rests with the Crown, is not owed by third parties to affected Aboriginal peoples.[518] However, administrative bodies can fulfill the Crown's duty if it has been delegated to them.[519] Delegating to administrative bodies is not a full outright delegation of all aspects and responsibilities of the duty; the Crown still holds the responsibility of ensuring the duty was met.[520] Nevertheless, the Crown can rely on a regulatory process such as the National Energy Board (NEB) either in part or in full to meet the duty to consult, due to the powers bodies such as the NEB hold.[521] If there is a tribunal process that falls short of fulfilling the duty, the Crown has the responsibility to ensure additional consultation is done to meet the process.[522] Third parties, such as the proponent can be delegated procedural aspects of the duty.[523] When this is done, the Crown must maintain a supervisory role to ensure the delegated aspect of the duty is being fulfilled properly.[524]

Answering the *who* question involves consideration of the Indigenous peoples affected by the proposed conduct. In *Behn v Moulton Contracting Ltd.*, the Supreme Court held that the duty to consult is a collective right that can only be asserted by the community as a collective; therefore individual members of the community can act as representatives, but do not have

[517] Homer, *supra* note 429 at line 31.
[518] *Haida*, *supra* note 22 at paras. 52-56.
[519] See *Clyde River* and *Chippewas of the Thames*, *supra* note 25.
[520] *Ibid* (*Clyde River*) at para. 22.
[521] The NEB, through its enabling statute, has powers to hold hearings, order studies, fund Indigenous participation, and accommodate Indigenous concerns when approving projects. The court in *Clyde River* and *Chippewas* relied on these powers in concluding that the NEB can fulfill the duty to consult.
[522] *Ibid* (*Clyde River*) at para. 22; see also *Gitxaala Nation v Canada*, 2016 FCA 187.
[523] *Haida*, *supra* note 22 at para. 53.
[524] See *Wii'litswx v British Columbia*, 2008 BCSC 1139; *Brown v Sunshine Cost Forest District*, 2008 BCSC 164S; *Adams Lake Indian Band v British Columbia*, 2011 BCSC 266; several British Columbia courts have found that when this type of delegation occurs, the Crown maintains the obligation to assess the scope and extent of consultation needed to meet its duty, which must be done at the outset of the process.

standing to bring an individual action pursuant to a breach of the duty.[525] In the very recent Supreme Court decision *R v Desautel*, the court expanded the who of "Aboriginal groups", holding that the duty may apply to Indigenous peoples outside Canada as there "is no freestanding duty on the Crown to seek out Aboriginal groups, including those outside Canada, in the absence of actual or constructive knowledge of a potential impact on their rights".[526] In the absence of actual or constructive knowledge (as per *Haida*) the Crown is free to act.[527] However, if the Crown has knowledge or is "put on notice" of rights of Aboriginal peoples outside Canada,[528] the Crown must determine whether the duty arises or not, and if so, what the scope is.[529] This comes from the holding that, "Because groups outside Canada are not implicated in this process [of the duty to consult] to the same degree, the scope of the Crown's duty to consult with them, and the manner in which it is given effect, may differ".[530] Therefore, the Crown may need to involve Indigenous peoples outside of Canada into the duty to consult processes ongoing with Indigenous peoples "inside Canada".[531]

As a process, the duty is determined in scope and extent by the Crown and courts, giving little power to the affected Indigenous Nation in creating the process, scope, or outcome. This also applies to the issue of *how* the Crown goes about fulfilling the duty. The Environmental Assessment (EA) process, for example, is increasingly being used by the Crown and its delegates to fulfill the duty to consult.[532] This is in part due to the "pragmatic attractiveness" that the EA process has for the duty as the Crown conduct is the subject of the EA.[533] EAs inform decision-makers on the potential environmental consequences of the project. Through their processes, they "inform and consult other government agencies and the public" and have legislation which "prescribes a set of procedural requirements that determine the level of scrutiny to which a project will be subject, the scope and content of the assessment itself, and the degree of public

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[525] See *Behn v Moulton Contracting Ltd.* 2013 SCC 26 at para. 30.
[526] See *R v Desautel*, 2021 SCC 17 at paras. 73 and 75.
[527] *Ibid* at paras. 73 and 75.
[528] See *Desautel*, *supra* note 519 at para. 75 citing *Native Council of Nova Scotia v Canada (Attorney General),* 2008 FCA 113 and *Mississaugas of Scucog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444*, 2007 ONCA 814.
[529] *Desautel*, *supra* note 523 at para. 76.
[530] *Ibid* at para. 76.
[531] *Ibid*.
[532] Like many other parts of the duty and this thesis, the EA process could be a whole thesis of its own. Due to time and scope, I leave the EA process in detail to future works.
[533] Alastair Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016). *Osgoode Legal Studies Research Paper Series* at 122.

engagement".[534] The procedural requirement of the EA varies based on the project's potential level of environmental harm, and the outcome can range from reports to hearings before tribunals.[535] Much of the information about the project and its environmental effects is required "to assess the impacts of the same activity on Aboriginal rights and interests".[536] Furthermore, EA consultations may impact the scope of the project; "for example, consultations within the EA may result in project modifications that would have implications for the duty to consult Aboriginal people – the processes of consultation under the duty to consult and in EA are to some degree inseparable".[537]

A main concern with fulfilling the duty through the EA process is obvious: one has to do with environmental impacts while the other involves the protection of constitutional rights. These two things are not one-in-the-same, no matter how much the two processes may overlap. Environmental interests as they relate to EAs are the interests of all citizens, not just affected Indigenous peoples.[538] Even though environmental protections may be a central interest of the affected Nation, they are being consulted because of their rights or title to the land, not their attachment to the environment. Unlike environmental interests, Aboriginal rights are "defined oppositionally to the 'broader community as a whole'. Whereas environmental interest can be entirely subordinated to other public interests".[539] The purpose of EAs is "the generation of harmony between the natural environment and development activities; a process that requires balancing of competing social goals and contested values".[540] This, of course, is not the same as the duty to consult. As Neil Craik explains,

> EA obligations and the duty to consult go beyond process. Neither is ambivalent about the outcomes its produces. The substantive aspect of EA is captured by the commitment to avoid "significant adverse environmental effects" caused by projects and activities subject to EA and to promote sustainable development. The substantive aspect of Aboriginal consultation is expressed through the duty to accommodate.…the structure of EA is such that the government may ultimately decide that the benefits of a project outweigh its environmental risks.[541]

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[534] *Ibid* at 134.
[535] *Ibid* at 135.
[536] *Ibid* at 122.
[537] *Ibid*.
[538] *Ibid* at 144.
[539] *Ibid* at 146.
[540] *Ibid* at 123.
[541] *Ibid* at 125.

Regardless of the clear differences between environmental impacts and rights, governments and proponents keep turning to EAs to fulfill the duty to consult,[542] and courts vary on whether EAs can adequately fulfill the duty. Of course, this has to do with the uniqueness of each project and affected Nation, as well as whether the EA process was supplemented in a way to satisfy the duty fully.[543] The required scope of consultation can depend also on the applicable treaty,[544] and when it comes to modern treaties, the role the treaty plays may vary further with circumstances.[545] However, the principle remains the same for all modern treaty consultations: there is a "need to respect the intention underlying the treaty itself with respect to consultation".[546]

I argue that so long as the who, when and how much of the duty to consult is dictated by the Crown and judiciary, whose foundations are in assumed sovereignty, Indigenous legal orders are unlikely to be a subject of the duty. The Crown is exclusively responsible for deciding how land is thought of and used.[547] With Crown sovereignty's monopoly on the duty, Indigenous peoples are constantly faced with "the prospect of never-ending Crown interference with their interests",[548] lands and rights. Defining the intricacies of the who, when and how much of the duty to consult through colonial understandings, Aboriginal rights and the processes which follow are seen as being "embedded within the state".[549] These rights and processes exist solely

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[542] The Federal guideline on consultation (*Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*) states that the federal government will rely on the EA process to fulfill the duty when possible: "The Government of Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise, such as environmental assessment and regulatory approval processes in which Aboriginal consultation will be integrated, to coordinate decision making and will assess if additional consultation activities may be necessary" at page 14.

[543] See *Ka'A'Gee Tu First Nation v Canada (Attorney General)*, 2012 FC 297 where the First Nation contested the EA process and the FC confirmed that the EA process could satisfy the duty to consult, but in order to do so, the process needed to provide meaningful consultation through the EA approval process. See also *Beckman v Little Salmon/Carmacks First Nation*, [2010] 2 SCR 640 at para. 39 where the court held that EAs may satisfy the duty so long as "in substance an appropriate level of consultation is provided".

[544] The discussion of treaty and consultation goes beyond this. For example, the duty may not apply when the modern treaty explicitly excludes consultation in certain circumstances. In such treaties, the courts will uphold the treaty provision so long as the provision is consistent with the honour of the Crown. The duty may be affected by the treaty's terms and underlying intention of the treaty's signatories. In *Beckman v Little Salmon/Carmacks*, the Supreme Court held the scope of the duty to consult was lower than it would have been in the absence of the modern treaty as the signatories decided not to include consultation provisions in the treaty. Additionally, in this decision, the Crown was proposing to grant lands that the First Nation had expressly surrendered in the modern treaty. The court in *Little Salmon* suggests that if a modern treaty expressly provides for consultation, such treaty provisions will be considered as a starting point for the Crown's obligation.

[545] See *Little Salmon*, *supra* note 440 at paras. 54 and 67.

[546] See, Jack Woodward, "Native Law" at 5§1300.

[547] Christie, *supra* note 448 at 45.

[548] *Ibid* at 46.

[549] *Ibid*.

as “creatures of domestic law, firmly under the control of the state”.[550] To exist otherwise would require the courts to understand rights outside colonial frameworks, which are tied to Indigenous sovereignty.[551] As Gordon Christie explains, the focus on balancing Indigenous interests and rights with that of societal interests is another signifier from the courts that the process has “eliminated Aboriginal sovereignty”.[552] For me, this is why the metaphor of Calypso is so compelling: the intricacies of the duty to consult are further colonial controls over Indigenous peoples and land, just as Calypso exercised control over Odysseus.[553] The affected Indigenous Nation’s laws, decision-making structures, and interests are rarely included, and if they are, they are subject to societal balancing and the overarching land-use visions of the Crown. What Odysseus does is subject to the control of Calypso as she holds all the power, and leaving his captor required appealing to the gods as he was left with little tools of his own to escape.

Accommodation: the footnote to the Odyssey

I have left out a significant part of this Odyssey: the duty to accommodate. I touched on accommodation briefly throughout this chapter, but I have not tackled it on its own. I see accommodation as being similar to what happens after Odysseus does finally return home to Ithaca: something left out of the narrative.[554] Details on the duty to accommodate are often lacking in the jurisprudence. There is little known, other than Odysseus returns to Ithaca, although his beloved home is nothing like how he remembered; the project may go ahead, even with modifications, but it will leave the land and peoples changed. Impacts to the land will be

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[550] *Ibid.*
[551] *Ibid.*
[552] *Ibid.*
[553] For a very good read, and a different take on who Calypso was – as well as who Odysseus really was – see Margaret Atwood’s novel *The Penelopiad*, (2005) Faber & Faber. Here, *The Odyssey* is told through Penelope’s, Odysseus’ wife, perspective. Instead of him being a great hero who battles monsters, he is just a man avoiding going home, lying to all he meets about who he is and where he has been. Calypso is maybe not a nymph, but perhaps a tavern somewhere on a faraway – or maybe not so far away? – island, ‘holding’ Odysseus.
[554] To briefly summarize, when Odysseus does finally return home to Ithaca, he is the only survivor from the journey. All his ship’s crew has perished over the years at sea battling creatures. Odysseus meets his son, Telemachus, for the first time, disguising himself as an old beggar in his old friend – and sheep herdsman’s – home, where Telemachus also happens to be. The next day, he goes with Telemachus to his old home where Penelope is being – at this point – relentlessly chased by suitors (for more on these suitors, see Books 16 onwards). Taking the “big bow” that still hangs on the palace’s wall, Odysseus kills the suitors and reveals himself to Penelope (see Books 21 and 22). After this, very little is said about Odysseus, Penelope, and Ithaca. We are left unsure of how the two rekindle after twenty years apart, or how Odysseus copes with being home after so long.

made, often irreversible ones, and they will forever change the landscape and peoples, influenced by all the events of the Odyssey thus far, yet rarely written.

What is known about the duty to accommodate is that accommodation involves a balancing of interests, and that even when the impact on rights is considered minor, the Crown still must be willing to address concerns and mitigate impacts.[555] It is also known that accommodation is by no means a duty to agree. At a minimum, accommodation must allow the affected Indigenous Nation to meaningfully exercise their rights.[556] However, accommodation should not come at a cost of "undue hardship for the non-Aboriginal population".[557] The courts are also quite clear that accommodation "provides no veto to Aboriginal communities"[558] and is not a means for the Crown to say they mitigated any Indigenous concerns so that the proposed project can go on as originally planned.[559] Ariss et al. argue that when courts articulate accommodation in terms of balancing interests, they not only detract from the procedural duty, but also undermine the constitutional rights which give rise to the duty:

> Aboriginal and treaty rights are a constitutive element of Canada, and economic or other interests do not amount to rights. To make Aboriginal and treaty rights commensurable with 'interests' misunderstands their purpose and standings. Any balancing in accommodation must stem from section 35 and not reduce [rights] to interests.[560]

Christie similarly argues that the courts viewing Aboriginal interests, settled or not, as needing to be balanced by the Crown against societal interests is damaging as s 35 should not be the mechanism Indigenous interests and rights are syphoned through; it should be Indigenous sovereignty.[561] Furthermore, Aaron Mills clearly argues that the colonial system is incommensurable with Indigenous legal orders, specifically Anishinaabe legal orders. To make Indigenous interests commensurable with colonial categorizations is furthering violence and supremacy. The rights and title the duty deals with should be understood through Indigenous sovereignty, and therefore, rights and title through colonial means is not what we should be asking for. The interests of the affected Indigenous peoples should be part of the process, and

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[555] See *Mikisew Cree*, *supra* note 495 at para. 64.
[556] *Ibid* at paras. 45-48.
[557] See *Little Salmon*, *supra* note 440 at para. 81.
[558] Rachel Ariss, et al., "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" (2017) McGill Journal of Sustainable Development Law, Vol. 13 Issue 1 at 48.
[559] See *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, leave to appeal refused in 2012 CarswellBC 386 (SCC).
[560] *Ibid* at 50.
[561] Christie, *supra* note 448 at 46.

decision-making about their laws and interests in the land should be the subject of the process. The key is understanding interests and rights through Indigenous legal means, not colonial means. Indigenous sovereignty, not colonial sovereignty.

The consultation and accommodation process too often means that the project goes forward, rights have been infringed, and all the while, the affected community was not the decision maker. The story goes on, but not in the way of the rest of the Odyssey: how Odysseus copes with his new reality of a changed Ithaca – and him being a changed person – is of little concern to Homer. *The Odyssey* is finished; the case decided. What happens to the character afterwards does not get written, nor does what happens to the Indigenous Nation and their land after the damage of the development is done.

The Many Miscellaneous Heads of Scylla

On his dangerous trek home, Odysseus battles the six-headed sea monster, Scylla.[562] Like Scylla, the duty to consult has multiple heads, many of which have yet to be fully explored by courts. I want to address, albeit it briefly, three of these heads: guidelines, payments, and international doctrines. Each play an important role in the practicality of the duty to consult, and each have an uncertain future in its full tale, partly due to the overall 'newness' of their relative jurisprudence. However, they warrant discussion as current day consultations deal with each of these heads to differing degrees, which means they influence how the overall process operates.

Over recent years, both the federal government and provincial governments have created consultation and accommodation guidelines and/or protocols. The purposes of these are to give Crown actors guiding principles on how to approach consultation and accommodation. For example, the federal guideline has a step-by-step guide to fulfilling the duty.[563] The guidelines, however promising, do not provide Crown actors with guidance on developing consultation protocols with individual affected Nations, nor on how to use the Nation's existing protocols.[564]

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[562] Remember how I explained to you some of the histories of Calabria in Chapter Two, and how my dad's Italian is heavily influenced by the Greek history of the Southern Peninsula? Within the Province of Calabria is the famed mythological home of Scylla. At the Strait of Messina between Calabria and Sicily is the rocky outpost the sea monster was said to have lived. Scylla is found in Book 12, and briefly again in Book 23. In Madeline Miller's novel, the backstory of Scylla, along with her defeat, is beautifully told through the eyes of Circe.

[563] See *supra* note 539 the "Updated Guidelines for Federal Officials to Fulfill the Duty to Consult" March 2011 which can be access through the Government of Canada's Crown-Indigenous Relations and Northern Affairs Canada website.

[564] In the Federal Guidelines (at page 54) under Phase 3: Accommodation, Step 2: Identify possible accommodation measures and options, there is one bullet note that reads: "officials may take into account … whether there are

What is clear in the guidelines and case law is that the duty to consult is not a duty to agree: all that is required is the participation of both parties in good faith consultations and that the colonial laws are supreme.[565] As for who pays for the consultation, the Crown and proponent are typically the parties with funding. In order for the affected Nation to understand the proposed project and issues fully, time and resources are needed. Sometimes, even experts need to be hired to review and analyze the materials. The case law suggests that the Crown and/or proponent funding the consultation process is a "positive factor in determining that the Crown has fulfilled its duty to consult", though of course, it is not, nor should ever be, a determinative factor.[566]

While there are many international doctrines which address Indigenous peoples, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is the doctrine I'll be focusing on here.[567] Many Indigenous peoples around the world assert that their consent should be required whenever decisions impact their land or rights. For the duty to consult, this would mean that the duty is not fulfilled without the full consent of the affected Nations. While Indigenous peoples have been demanding full consent for a long time, UNDRIP and its provisions relating to Free, Prior and Informed Consent (FPIC) have amplified this demand in recent years.[568] As Anishinaabe lawyer Sara Mainville writes, "The relationship between the parties [of litigation] has been more than adversarial; in fact, it is an abusive and untrusting relationship with the Crown, a relationship in need of an urgent prescription to bring it back to balance. Will the *UNDRIP* make a difference here?".[569] Mainville's question – which is a

consultation protocols with Aboriginal groups that serve as a basis to discuss, and where appropriate, to implement accommodation measures". There is no equivalent under Phase 2: Crown Consultation Process. However, under Phase 1: Pre-consultation Analysis and Planning, Step 6: Design the form and content of the consultation process, *design effective consultation processes*, there is a bullet note to consider "involving Aboriginal groups in the design of effective consultation processes"; and, "Many First Nations, Métis or Inuit groups have developed consultation policies, guidelines and protocols and request that the Crown adhere to them. Officials must follow the Updated Guidelines and their departmental or agency approaches. However, understanding the policies, guidelines or protocols of the Aboriginal group may become the starting point for a discussion on an effective and meaningful consultation process".

[565] See *Haida*, *supra* note 22 at para. 42.

[566] Land and McPherson, *supra* note 28 at 173 citing *Taku River*; *Chippewas of the Thames*; *Hupacasath First Nation v British Columbia (Minister of Forests)*, 2008 BCSC 1505; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763; and *Wii'liitswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139.

[567] UNDRIP became binding Canadian law in the midst of writing this chapter. Because of the timeliness of the Bill being passed, the existing scholarship on UNDRIP in Canada speaks to UNDRIP possibly becoming domestic law in the future, or, UNDRIP being customary international law.

[568] 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.

[569] Sara Mainville, "Hunting Down a Lasting Relationship with Canada – Will *UNDRIP* Help?", (2020) 57 Osgoode Hall Law Journal at 102.

question many Indigenous and non-Indigenous peoples alike have been asking – may be closer to being answered. In 2020, the federal government introduced legislation[570] to implement UNDRIP as binding law,[571] and very recently, this legislation received Royal Assent.[572] However, it is important to note that the purpose of the legislation is to "provide a framework for the Government of Canada's implementation of the Declaration",[573] meaning the federal government will "prepare and implement an action plan to achieve the objectives" of UNDRIP through "consultations and cooperation with Indigenous peoples and … federal ministers".[574]

UNDRIP was adopted by the United Nation General Assembly in September 2007, and sets out individual and collective rights of Indigenous peoples, identifying a minimum standard of dignity and well-being of Indigenous peoples, while also recognizing the distinctiveness of Indigenous peoples by asserting that the recognition of the rights of Indigenous peoples will enhance harmonious and cooperative relations between the State and Indigenous peoples.[575] FPIC is recognized throughout UNDRIP's articles, including Article 32.[576] FPIC, as a standard, is "the right of Indigenous peoples to take part in decision-making processes that may impact their lands, rights, and interests".[577] In the 2017 decision *Clyde River*, the appellants argued that FPIC amounts to: the freedom from force, intimidation, manipulation, pressure and/or coercion; a mutual agreement on a process for consultation; engagement with community that is robust and satisfactory; proper resourcing; and most importantly, the "shared objective of obtaining the reasonable consent of the Aboriginal group".[578] However, with the receiving of Royal Assent being so recent, it is unclear how UNDRIP and its provisions of FPIC will be implemented in

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[570] An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples.
[571] Prior to Royal Assent, a debate as to whether UNDRIP was considered Customary International Law (CIL), and therefore through the adoption approach, would already be binding law in Canada. Whether or not UNDRIP has already had the status of CIL, and therefore already was binding law in Canada, is a topic that could be a thesis on its own. For more on this debate, see Sylvanus Gbengazhi Barnabas, "The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law" (2007) International Human Rights Law Review, vol 6, 242-261 who cites prominent scholars on CIL, such as SJ Anaya and IR Gunning. See also Brenda L. Gunn, "Overcoming Obstacles to Implementing the *UN Declaration on the Rights of Indigenous Peoples* in Canada" (2013) Windsor YB Access to Justice vol 31, who argues the adoption approach to CIL in Canada allows CIL to become binding law without legislation stating so.
[572] Statute of Canada, c. 14, Royal Assent received on June 21, 2021.
[573] An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples at s 4(b).
[574] *Ibid* at s 6(1).
[575] UN, *supra* note 565.
[576] *Ibid*, Article 32, pages 23 and 24.
[577] Land and McPherson, *supra* note 28 at 223; see also the United Nations Office of the High Commissioner for Human Rights, "Free, Prior and Informed Consent of Indigenous Peoples" (September 2013) [OHCHR] for more on defining FPIC.
[578] *Ibid* at 175.

Canadian law. Article 32 of UNDRIP states that consent is the minimum standard for decision-making about development projects on Indigenous lands, but how this will translate in Canadian consultation law is unknown. Sara Mainville argues that article 32 can be helpful for beginning "treaty-based discussion on a truly nation-to-nation basis".[579] This could very well mean that under Canadian law, UNDRIP, and its provision of FPIC specifically, may impact how the duty to consult and accommodate will operate in the foreseeable future.

How FPIC will be interpreted going forward is something to question as prior to receiving Royal Assent, there were lively debates as to whether FPIC is enshrined in UNDRIP, as well as whether FPIC equates to a veto.[580] Regarding both, Coast Salish legal scholar Sarah Morals argues that the power imbalances in the duty to consult become apparent "when one considers the words of the court in *Haida* regarding the power to issue a veto". As she argues, "the duty to consult does not provide Indigenous peoples with the opportunity to say no to a Crown initiative that has the potential to adversely affect their rights and interests". *Mikisew Cree*, however, alludes to the notion that veto may occur in circumstances where "an Indigenous community could be left with 'no meaningful right to hunt', however, the court is clear that, other than in this limited circumstance, the duty does not provide Indigenous peoples with the ability to stop or prevent outright a particular Crown initiative from occurring". The notion that consent does not equal a veto, Morales argues, "is damaging enough to a relationship of reconciliation in and of itself [and] this damage is compounded further by the court's acknowledgment that the duty to consult does not include a duty to reach an agreement".[581] Morales goes on, arguing that,

> [It] is well established in international law that Indigenous peoples, as peoples, have the right to self-determination. It could be argued that in order to be meaningful, self-determination must include economic self-determination, which ultimately involves

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[579] Mainville, *supra* note 566 at 125.

[580] UNDRIP and the provision of FPIC could be an entire thesis of its own. Due to time and scope of this thesis, I will be addressing what a few scholars say about FPIC. For more, I suggest looking to Dwight Newman, "Interpreting FPIC in UNDRIP" (2020) International Journal on Minority and Group Rights, vol 2019(2). See also what some Canadian jurisprudence says about veto power: *Haida Nation*; *Tsilhqot'in Nation; Snuneymuxw First Nation v Board of Education – School District #68*, 2014 BCSC 1173; *Ross River Dena Council v Canada*, 2017 YKSC 5; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445; *Nunatukavut Community Council Inc. v. Canada (Attorney General),* 2015 FC 981; and *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada),* 2018 CHRT 4.

[581] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult", as found in The Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (2017) Special Report at 67.

> control over traditional lands, territories and resources. Thus, it could be argued that Indigenous peoples have the right to be informed and to engage with, and grant or withhold consent, to certain development projects within their lands.[582]

The understanding that FPIC flows from self-determination could "greatly influence the interpretation of the duty to consult".[583] Morales supports this argument by explaining that the duty has not been developed in a way that "recognized the right to self-determination" and, as argued above in this chapter, has been developed on basis of assumed Crown sovereignty.[584] The court's statements on consent and veto in the jurisprudence further support assumed Crown sovereignty.[585] Therefore, it is arguable that UNDRIP's "recognition of a right to consultation, interpreted as deriving from an overarching right to self-determination, could greatly advance the project of reconciliation in Canada".[586] FPIC, as a right,

> …is articulated in many provisions of UNDRIP and arises prior to the approval of any project affecting Indigenous peoples' lands or territories or other resources; prior to the taking of any lands, territories and resources that Indigenous peoples have traditionally owned or otherwise occupied or used; prior to the storage or disposal of hazardous materials in Indigenous peoples' lands or territories; and prior to the taking of any cultural, intellectual, religious and spiritual property.[587]

This, Morales agues, demonstrates that FPIC is "required whenever state action pertains to lands that Indigenous people occupy or otherwise use, whether or not they hold title to those lands".[588] As to whether consent is a strict requirement, UNDRIP, Morales argues, requires "states engage in good faith negotiations in an effort to reach an agreement or consent".[589]

Ibironke T. Odumosu-Ayanu writes that the definition of FPIC as a veto – a process which "may include the option of withholding consent" – has resulted in some states objecting to FPIC.[590] Consent, she argues, often triggers thoughts of contract law as defined through the common law.[591] This is problematic because Indigenous understandings of consent, as well as

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[582] *Ibid* at 69.
[583] *Ibid*.
[584] *Ibid*.
[585] *Ibid*.
[586] *Ibid*.
[587] *Ibid*.
[588] *Ibid*.
[589] *Ibid* at 74.
[590] See Ibrionke T. Odumosi-Ayanu, "The (Legal) Nature of Indigenous Peoples' Agreements with Extractive Companies" as found in Indigenous-Industry Agreements, Natural Resources and the Law (2021) edited by Ibironke T. Odumosu-Ayanu and Dwight Newman, Routledge, at 21.
[591] *Ibid* at 22.

their own processes of reaching consent, are important for FPIC's success.[592] Citing Aaron Mills, Odumosu-Ayanu notes that for many Anishinaabe legal orders, the issue is not giving a yes or no to a project, but instead, the processes itself and the relationship building.[593] Gordon Christie argues that the concern of FPIC equaling a veto is reflected in the "actual fears of Canadian governments (Liberal and Conservative), their courts and those who voice caution about UNDRIP".[594] This fear comes from the hope to understand and implement UNDRIP, and therefore FPIC, through "a liberal discourse, within the language of rights".[595] As explored in previous chapters, this liberal discourse and language of rights stems from Canadian colonial understandings of law, and its understanding of rights as extensions of assumed sovereignty. One of the issues with wanting to frame UNDRIP and FPIC in this way is that it further pushes the principles into colonial understandings, which ultimately results in interpreting the articles as being yet another extension of Crown power and control (hence a controlled head of the powerful sea-monster). UNDRIP and FPIC may appear to be a non-threatening head of Scylla as of right now, and perhaps a head of Scylla to be celebrated, but I caution that it is still controlled by the body of the sea monster, namely, the colonial state. Therefore, as Mainville writes, "The *UNDRIP* does have some promising 'reconciliation' ingredients, but only if those ingredients include co-development with Indigenous peoples to create the final recipe and solution".[596] This means that until co-development happens, Canada controls which way Scylla looks, where she bends down, and at what she snaps her pearly teeth.

For this thesis, how FPIC and UNDRIP will be understood is only somewhat important. FPIC is a standard that could be included in such understandings, but what is more important is consensus and decision-making. I argue that if processes regarding the development of Indigenous land are that of Indigenous legal orders, FPIC will be inherent: decision-making of lands will be done through one's own legal process. Consensus of the community on the development project will not be understood through colonial terms either; therefore veto may not

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[592] *Ibid*.
[593] *Ibid* at 23 citing Aaron Mills, "Aki, Anishinaabek, kaye tahsh Crown" [2010] 9 Indigenous LJ 107 at 162; for more on different Indigenous laws and legal orders on UNDRIP and FPIC, see the many works compiled in the Centre for International Governance Innovation, 2017 Special Report.
[594] Gordon Christie, "Implementation of UNDRIP within Canadian and International Law: Assessing Challenges" (2018) UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws Special Report, Centre for International Governance Innovation at 29.
[595] *Ibid* at 30.
[596] Mainville, *supra* note 566 at 104.

even be of concern. As Karen Drake agues, in Anishinaabe legal orders, whoever is advocating for the project would participate in Anishinaabe legal norms.[597] Being part of a mutual aid community would result in the project's proponent being kin. Under this understanding, there would not necessarily be a veto[598] as all parties would be guided by whether a need truly exists that needs fulfilling.[599] Drake's argument re-raises the importance of having legal meanings understood by the affected Indigenous Nation. A different Indigenous legal order may operate with veto, and that is unproblematic, as the process will reflect their own legal structures.

Lifting the Lid Once More

I have now told you the tale that is the duty to consult and accommodate. Perhaps now you understand why it is my Pandora's Box, a Sirens' song, a boat sailing at sea being pushed by the winds of settler supremacy. I hope my telling of Homer's epic poem, *The Odyssey*, as a metaphor for the jurisprudence served its purpose: to juxtapose a mythical tale to reality. While Calypso's control over Odysseus was a figment of Homer's imagination, Canadian control over the duty to consult is not: it is the reality of the system. However, there is room for Hope. I call the final chapter *Gabekana*, at the end of the road, as it is the end of this thesis, my Hope. In this chapter, I will describe my version of an Anishinaabe understanding of consultation, shaped through everything explored thus far. I want to repeat that this is my understanding, not a specific community's. To borrow from my supervisor Karen Drake, to be consistent with *inaakonigewin*, I am not claiming that this is the only means of understanding Anishinaabe legal orders.[600] As Drake writes, "There may be many other ways of giving effect to these constitutional norms and procedures. What I have proposed is merely the best I am able to articulate at this time".[601] I, too, am proposing one way, articulated at this time given my current knowledge and experiences. To borrow further, Drake offers not a directive to adopting Anishinaabe constitutionalism, but rather offers an invitation.[602] I, too, am offering this final chapter, this thesis, as an invitation.

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[597] See Karen Drake, "Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation" (2020) Federal Law Review 1-16 at 7, 8 and 15.
[598] *Ibid* at 15 and 16 where Drake explains why, under her understanding of Anishinaabe constitutionalism, veto is inconsistent with persuasive compliance, and any government who approves a project in violation of such Anishinaabe constitutionalism removes itself from the mutual aid relationship.
[599] *Ibid* at 8.
[600] Drake, *supra* note 594 at 16.
[601] *Ibid* at 16.
[602] *Ibid*.

Five: *Gabekana* – at the end of the road

Here we are, at the end of the road. While the road of Indigenous legal orders across Turtle Island will continue to curve and bend for years to come, this road, this thesis, must now come to an end. When I was writing this final chapter, my grandfather's favourite song kept flowing through my head:

> On the road again
> Goin' places that I've never been
> Seein' things that I may never see again
> And I can't wait to get on the road again

I can remember being a young girl and listening to him play this iconic Willie Nelson song. I'd be visiting him in Northern Ontario, and he would be sitting on the front step with his guitar in hand, playing the cords and singing the words. The road I took to get to writing this thesis I have laid out already, so you know it was influenced by my personal experiences. I think it is fitting, then, that this song keeps playing in my memory while I write this: Bernice is who this thesis is dedicated to, and it is through my grandfather that I am linked to her, her son. So, in honour of them both, let us get on the road again and take it to the end.

Miikanaake – she makes a road

The current duty to consult process and the systems which support and create it are rooted in settler supremacy and violence.[603] As explored in Chapter One, they are founded on ideals of law, land, property, and ownership that are incommensurable with the legal orders of Indigenous peoples who have inhabited and cared for the land since time immemorial. This has been displayed throughout the entirety of this thesis, starting from Lockean theories of property all the way to the categorization of rights and title under the *Constitution*. I also explored how governance structures, from the very building blocks of persuasion vs coercion,[604] are incommensurable to each other. Even language and the varying meanings of words and grammar are so vastly different that without learning the language rules and exceptions, the laws and principles can get lost in translation.[605] I then outlined the Canadian law of the duty to consult and accommodate in juxtaposition to Homer's *The Odyssey*, explaining throughout why the duty is my Pandora's Box. Now, I can take at all I have explored and suggest how my understanding of Anishinaabe legal orders could be one version of an Anishinaabe understanding of the duty to consult. So, I invite of you, one last time to remove the colonial laws and systems from your mind as you read this final chapter. I invite you to let the understandings of language and grammar,[606] stories and laws,[607] kinship and mutual aid[608] explored in the chapters above to take the wheel and guide you down this road. I firmly believe that the Canadian colonial understandings of what is law, governance, and rights that were also explored throughout this thesis will only hinder you from seeing how practical and logical a system understood by Indigenous legal orders is. The colonial system has controlled the roads we, as a collective, have taken, as well as the turns we have all made for far too long. I believe it is time to have the Crown, proponents, and courts, participate in the legal orders which have governed Turtle Island since time immemorial. I invite, also, these colonial parties to let Indigenous laws form the road.

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[603] See Chapter One's discussion on settler supremacy and the three forms of violence, as set out by Aaron Mills, *supra* note 3.

[604] See Chapter Three's discussion on governance structures at *Doodem/Kinship as a Foundation of Governance*.

[605] See Chapter Two's discussion of the three forms of language.

[606] See Basil Johnston, *supra* note 178; Gordon Christie, *supra* note 186 and 189; and Robin Wall Kimmerer, *supra* note 85.

[607] See John Borrows, *supra* note 210; Jerry Fonatine, *supra* note 197; Larry Chartrand, *supra* notes 227 and 229; and Aaron Mills, *supra* notes 3, 5 and 177.

[608] See Aaron Mills, *supra* note 3.

The Anishinaabe understanding I am about to propose need not be so strict that it does not adapt to the individual community who is using it. The purpose of an Indigenous-led process is not to impose Anishinaabe laws on every Indigenous Nation and community of Turtle Island, nor is it to impose my interpretation of an Anishinaabe legal orders onto Anishinaabe communities. The purpose, instead, is to create a template that other communities, Anishinaabe or not, can build on and adapt to reflect and imbody their own legal orders. This template, I hope, will contribute to conversations happening across Nations about reclaiming legal orders on broader extents and using them to create systems for decision-making.

The bottom line is that the Canadian system and understanding of the duty to consult, from the very building blocks which form notions of property to the government created consultation guidelines, are incommensurable with Indigenous legal orders. The categorization of Aboriginal rights and title are meant solely to continue the assimilation of Indigenous Nations to colonial rules and understandings,[609] and as it stands, Indigenous legal orders, for the Crown and courts, are only something the Crown 'may' consider during their consultations.[610] I invite you to see how such categorizations are a continuation of assumed Crown sovereignty and Aaron Mills' third form of settler violence. Instead, should it not be the legal orders of the affected Indigenous Nation that are considered by the Crown and proponent, and which inform the understanding of the process? Through my understanding of Anishinaabe legal orders, mutual aid would say that the Crown and proponent would have roles in the decision-making process alongside the Anishinaabe Nation, welcoming them to express their needs and discuss if this need really needs to be met.[611] The understanding of the process should therefore change so to be that of the affected Indigenous Nation's legal orders. To continue otherwise is to continue the assertion and forced dominance of Euro-centric supremacy, inflictions of violence, and justification of assumed sovereignty.

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[609] See Gordon Christie, *supra* note 448; Michael Asch and Patrick Macklem, *supra* note 450; and Ryan Beaton, *supra* note 457.

[610] See Federal Guidelines, *supra* note 539 at page 48; see also In *Nunatsiavut v Canada (Department of Fisheries and Oceans)*, 2015 FC 492 at para. 128, where the court held that the Department of Fisheries and Oceans, by following the Federal Guideline and enacting a subsequent agreement with the affected communities for accommodation, did satisfy their duty to consult. By following the Federal Guideline and creating a subsequent agreement for the accommodation of the affected communities, the government was able to fulfill their duty to consult and accommodate meaningfully.

[611] See Karen Drake, *supra* note 594.

To demonstrate my proposed Anishinaabe understanding of the consultation process, I will tell you two stories. These stories are small snapshots of hypothetical consultations between the Crown, a proponent, and a fictional Anishinaabe community. In both stories, the Crown can be assumed to be the Federal Crown, and the proponent is a fictional development agency with no name. The first hypothetical tells us the story of how the consultation process currently works; the second hypothetical tells us the same story, but with a consultation process guided by Anishinaabe legal orders. By telling you the same story, with the same characters, plot, proposed project, and objective of consultation, but with the narrative flipped, I will show the gaps in the current process and one possible way to fix it. The First Nation, proposed project and characters throughout these stories are figments of my imagination, however, the Crown process is not, and neither is the Anishinaabe understanding. Anishinaabe legal orders have been governing the land and Anishinaabeg of Turtle Island since time immemorial. I am proposing just one version of an Anishinaabe understanding which will allow for the Crown to approach affected communities and know that the process which will follow will allow them to act honourably and not run roughshod over rights or land. Relationship building between the Crown and Indigenous Nations has the opportunity to grow, and decisions about the development of Turtle Island can be conducted in meaningful ways, influenced by legal norms that reflect the principle that we have brothers and sisters everywhere. Broader societal interests and concerns can be brought to the table without them dominating the decision-making process. The environment and possible impacts can be weighed on their own merit as the subsequent studies will not determine consultation writ-large, but instead, educate the decision-makers.

Let me make this clear once again: this Indigenous process is not new. Indigenous legal orders have been around far longer than the colonial laws and systems and have been applied for far longer than the systems that Canada unquestionably calls 'law'. It is also not something of my imagination, or that of another's. It is a system rich in customs, respect, and efficiency. It is an old system, a good system. A system that has worked for centuries and can continue to work for many, many more. I am merely just writing one version of it down for you to read.

For the stories I am about to tell you, the circumstances which surround the consultation will be the same: a road is being proposed that runs through traditional territory. A road is simple yet still complex. It can be moved, altered, or not built at all. It can run through trap lines, natural medicine gardens, sacred sites, hunting grounds, or abandoned fields. The road can affect a

myriad of rights, and it can also affect the environment in similar ways. The road could affect fishing, wild rice gathering, and the overall health of those who swim in and live by the water. A road can do many things, good and bad, and it can affect one thing, or it can affect countless things. Roads, no matter their consequence, are built by humans for human benefit, interrupting nature, ecology, and ways of life. A road is simple, yes, but it can also be very complex, and because I am at the end of this road with you, reader, I believe it makes sense to use this metaphor for my stories' proposed project as well. This road therefore will run through traditional territory of a fictional Anishinaabe First Nation in an undisclosed part of Turtle Island. Consultation on the part of the Crown has been triggered because the proposed road is to be built where the Anishinaabeg have traplines. The difference between each story is why the duty is triggered, the consultation process, and how decisions are ultimately made. So, without further adieu, these will be the final stories I tell you.

Which is best, I leave to you to decide.

Maanadamon – the road is bad

This first story begins on the fictional Anishinaabe First Nation, Waagosh First Nation.[612] The duty to consult process is dictated by the Crown and Canadian laws and processes.[613] In order to trigger the duty to consult, the proposed Crown conduct may affect asserted or proven Aboriginal rights or title as defined through the Canadian *Constitution* and case law.[614] When this happens, the Crown must notify the affected Indigenous Nation(s) of the proposed project. The Crown then decides the scope and amount of consultation necessary to fulfill their legal and constitutional duty to consult.[615] This story focuses on Raven,[616] an Anishinaabe-kwe from Waagosh First Nation. She is part of a group of members who work on consultation requests.

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[612] *Waagosh* is Anishinaabemowin for fox. Waagoosh First Nation is a fictional Anishinaabe First Nation; note that throughout the hypothetical stories, Waagosh First Nation is never shortened, and always typed out in full. This was intentional. Often when we shorten words, we lose the full meaning. I had the pleasure of learning under Coast Salish legal scholar Sarah Morales in my final year of law school. During her course, she explained to me why she never shortens certain words because typing or saying them in full maintains the power the words hold. Taking this teaching, I have decided to keep Waagosh First Nation in full.

[613] See *Delgamuukw*, *supra* note 470; *Haida Nation*, *supra* note 22; *Taku River*, *supra* note 456; *Mikisew Cree*, *supra* note 495; *Little Salmon*, *supra* note 440; *Mantioba Métis Federation*, *supra* note 497; and *Chippewas of the Thames* and *Clyde River*, *supra* note 27.

[614] See *Haida*, *supra* note 22.

[615] See *Mikisew Cree*, *supra* note 495.

[616] The character of Raven is fictional, but she is based on a dear friend of mine, Raven-Dominique Gobeil. She is an Anishinaabe and Métis lawyer from Poplar River First Nation in Manitoba. I was lucky enough to cross her path when we were taking the property law course in Saskatchewan. I am thankful to her for allowing me to name my character after her.

Often, her work is very exhausting: her community rarely has time to discuss the proposed project before the next consultation request comes flying in, due in part to a lack of resources.[617] The road that is being proposed runs through territory that has been used and protected by her community and their laws since time immemorial. While their right to trap is what's triggering the consultation,[618] there is so much more to the land that is of importance to her community. However, interest in the land does not trigger the duty to consult,[619] and so her community is forced to focus on their Aboriginal right to trap.

Raven sits down at her desk, placing her mug of hot coffee down beside her. With a sigh, she opens the large filing drawer and searches for the letter ***F***. Flipping through the file, her index finger lands on the document she wants. Pulling it out and sitting upright at her desk, Raven stares at the document in her hands. The document looks back at her, its large letters dancing on the page, *ABORIGINAL CONSULTATION AND ACCOMMODATION: UPDATED GUIDELINES FOR FEDERAL OFFICIALS TO FULFILL THE DUTY TO CONSULT*. With a deep breath, she places the document on her desk and flips it open to the table of contents. She picks up her mug and takes a sip. Placing her mug back down with a small thud, she starts to read the all-too familiar Federal Guideline Step-by-Step Guide to Consultation and Accommodation, hoping to find what she's looking for: an opening to force the Crown to consider their laws.

What never ceases to amaze her is that for such a complex, time consuming, and expensive process, the Crown's guide isn't all that complex. It's broken down into four phases, each with numbered steps. In total, there are 18 steps, and Phase 3 – accommodation – may not even be triggered,[620] meaning there may only be fourteen steps in total. Fourteen to Eighteen steps, all dictated by the Crown.

Raven leans over the document, her left elbow against the desk, her chin resting on her fist. With her right hand, she drags her finger down the table of contents,[621] drinking in each step. Raven's finger hovers over phase two before moving back up the page to phase one's step

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[617] See Kaitlin Ritchie, "Issues associated with the implementation of the duty to consult and accommodate aboriginal peoples: threatening the goals of reconciliation and meaningful consultation" (2013) University of British Columbia Law Review, 46:2 at 400.
[618] See *Mikisew Cree*, *supra* note 495 for a similar fact pattern.
[619] See *Ta'an Kwacha'an Council v Yukon,* 2008 YKSC 60 (Y.T. S.C.) at paras. 58-59.
[620] *Haida*, *supra* note 22 defines the duty to accommodate as being 'when appropriate' and is case-by-case specific.
[621] The steps are taken directly from the Federal Guidelines - see *supra* note 539 at page 3 to see them in full.

six. *Design the form and content of the consultation process*, she reads. Raven leans back in her seat, taking her mug in her hand. She thinks, *if step six is designing the content of the process, maybe that's where our laws can be implemented*. A small smile forms on Raven's face as she moves her mug to her lips, musing over the idea. *But of course*, she thinks, *there is nothing driving the Crown legally to implement our laws at this stage. Maybe honourably, but even that is a long shot.* Raven sits up and places her mug down on her desk again. She flips quickly to the page where Phase 1: Step 6 begins and starts to read:

'The Guiding Principles and key elements of a meaningful consultation process: A Crown approach that is forthcoming, flexible and responsive; an inclusive processes to manage issues, decision-making and ensure accountability; pro-active solicitation of Aboriginal involvement and active listening to their concerns; real opportunities to inform and influence decisions; assistance to support participation; serious consideration of feedback; clear and direct responses on how concerns have been addressed or why they cannot be addressed –'[622] A knock sounds at her office door. Looking up, she sees her fellow consultation member, Roger.[623] With a smile Raven waves him into her office and says, 'Aanii Roger.'

'I hope I'm not interrupting anything,' Rogers says as he sits down at a chair across her.

'No, not at all,' she says. Raven turns the document to face Roger, her finger pointing to the middle of the page. 'I think I figured out how we can get the Crown to implement our laws for the road project. You see here, how it says *Pro-active solicitation of Aboriginal involvement and active listening to their concerns; Real opportunities to inform and influence decisions before they are made*?'

Roger studies the page for a moment before looking back up to Raven. 'Yeah, I see it,' he says, skepticism in his voice. 'It's always been there, and it's never worked in our favour.'

Raven's smile drops from her face. 'What do you mean? If it says they have to pro-actively solicit us for involvement and to inform decisions, then we can use this to demand implementation of our laws that apply to the tract of land, at a minimum, right?'

Roger shrugs. 'Well, I mean it is always worth a shot. Maybe you'll be lucky and have a Crown actor who is open to this, but they don't *have* to do anything to bring our laws or interests into the conversation, let alone the decision.' Roger slides the document closer to him and

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[622] See *ibid* at 44 to see the principles in full.
[623] The character Roger is named after my Great Uncle.

quickly scans the pages. Finding the passage, he points to it and turns it back to face Raven. 'See, look here.' Raven looked from Roger to the page, a sinking feeling in her stomach. Her eyes glance over the words: *Many First Nation, Métis or Inuit groups have developed consultation policies, guidelines or protocols and request that the Crown adhere to them. Officials must follow the Updated Guidelines and their departmental or agency approaches. However, understanding the policies, guidelines or protocols of the Aboriginal group may become the starting point for a discussion on an effective and meaningful consultation process.*[624]

'See?' Roger says when she looked up to him from the page, anger in his voice. 'They *must* follow their own guidelines. They don't have to consider anything we have. The word *may* implies being optional. And even if they do look at our protocols – which they've done in the past – it has never turned into anything meaningful. We send them documents with our laws and they take it with the promise they'll look at it, but they never do.' Roger drops the document on the desk and crosses his arms. 'Unless there is a real change to the system, we'll keep putting time, effort and money into creating documents that would result in real relationship building, real progress, and they'll continue to take it with a smile then ignore it.'

Raven let out a deep sigh, rubbing her hand over her temple. 'So, what do we do?'

'Keep trying, I guess. Eventually they have to listen us.' Raven scoffs as she turns to look out the window adjacent her desk. From her office window, she overlooks the creek that leads to the proposed road site. She knows that the creek will be affected by the road; it's inevitable. Her heart sinks at this thought, at the damage that could be caused to her community and their way of life. She starts to think about all the times she and her siblings swam in the creek on hot summer days and picked and braided sweetgrass with her mother at the water's edge. She thinks about Nokomis and all the times they sat with their feet dangling in the cool water, listening as Nokomis told her all kinds of stories. What will happen to all those memories? Will they simply be that: memories? Or will she be able to continue living them?

'Do we know if the EA[625] is going to consider the creek?' She asks Roger, her head still facing the window.

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[624] Federal Guidelines, *supra* note 539 at 48.

[625] As seen in Chapter Four, Environmental Assessments can be used to fulfill the duty to consult, and the law is not clear on whether this is always sufficient or not. The use of EAs for the duty to consult could be an entire thesis of its own. Due to time and space, and to keep the focus of this thesis on the broader duty to consult, I have vaguely mentioned an EA in this story. The extent to which it is used is intentionally not addressed.

‘Not likely,’ he says, his voice deflated. Raven looked back to Roger from the window and watched as he too looked out the window, his mind in a faraway place. Finally, Roger said, ‘Just past the creek is a sacred site that isn’t being considered as part of the process. To the Crown and proponent, it’ll just look like an empty meadow that doesn’t trigger any consultation: the Crown’s position is that the project’s impact on the site – if any – is minimal, so it doesn’t need to be accommodated. Even if we tell them how important that site is, it won’t matter; it isn’t where we lay our traplines, so the sacred site isn’t being addressed.’

‘Not to mention the road isn’t considered that large-scale of a project.[626] Based on the consultation notification we received, the Crown is considering the road a weak claim without serious impact.[627] I doubt the EA will change where it hits on the spectrum that much, which means it is unlikely the Crown will open up the scope of what should be considered, such as the sacred site.’ Raven fumbles through some papers on her desk, picking up a correspondence letter she received from the Crown a few days ago. ‘This latest letter says that once the EA comes in, there will be a town hall meeting where the project will be talked about for Waagosh and non-Waagosh citizens. Concerns and issues can be raised in response to the project notice, as well as anything presented at the town hall.’ Placing the letter back on the desk, she takes a long drink from her mug. ‘As much as I want to take control of the process, I don’t know how feasible that idea is. Without proper funding, or resources on our end, we’d be in just as precarious a spot we are now, forced to go through their system and their laws. And with the building of this road, we can assume more requests are going to come. Roads make land accessible, and accessible land screams development and money.’

‘You’ve got that right,’ Roger said shaking his head. ‘The Elder Council, as keepers of our environmental laws,[628] feel their perspective should be taken seriously and given real, careful thought by the Crown. Having to tell them each time that that isn’t how Canada sees the process, breaks me more and more.’[629] Raven and Roger both sat in silence for a few moments, looking out the window once more. What was once optimism and hope building inside her just a few

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[626] For more on the *Haida* spectrum in practice regarding large- and small-scale projects, see Malcom Lavoie, “Assessing the Duty to Consult” (2019) The Fraser Institute.

[627] As the party responsible for defining the scope of the project and the scope of the duty, the Crown will indicate where the project lays on the *Haida* spectrum.

[628] See John Borrows, *supra* note 168.

[629] As seen in Chapter Four, the duty to consult and accommodate is not a duty to agree, nor does it give the affected Nations a ‘veto’. Societal interests must be balanced with the Aboriginal rights and interests. Aboriginal rights and interests cannot outweigh societal concerns and interest in the project.

short minutes ago was now replaced with fear and dread. Once again, her community, land and laws will be at the mercy of the Canadian state in the name of economic development. The only reason they are involved at all is because the road may affect their trapping rights; rights defined by the Canadian state, not Waagosh First Nation.

Minwamon – it is a good road

This next story begins once again on the fictional Waagosh First Nation. The duty to consult process which was used across Turtle Island by the Crown was overhauled years ago, being replaced by community-specific laws and processes. On Waagosh First Nation, this has translated to governance structures informed by doodem,[630] decisions through consensus and councils,[631] the use of Anishinaabemowin, giftedness, kinship, and mutual aid.[632] All decisions and application of laws are done through their own legal order whose legal standing is recognized, respected and followed. Decision-making processes will be needed that are relevant to the proposed project. The Crown and/or proponent approaches Waagoosh First Nation with their need – in this case that need is the building of a road – and they join Waagosh First Nation as a kinship relationship through mutual aid.[633] Through doodem, Waagosh First Nation will assess whether this need the Crown/proponent has asserted is truly a need that must be met. If the need is determined as a valid need that must be met, the full consultation process begin which includes studies, reports, Traditional Knowledge, and the application of Waagosh First Nation's laws. This starts the timeline of the Crown and proponent providing all necessary documentation, studies, and environmental reports to the affected Nation. I am not proposing what this documentation and study timeline looks like, as I believe a strict timeline is counter productive. When the timeline is so strict, it can force the studies to be rushed. It does not allow for proper due diligence, the application of western and traditional science and knowledge, nor does it foster relationship building.

I acknowledge that not having a timeline could be interpreted as 'dragging out a process'. To that I say, we only have one earth: rushing development projects in the name of timeliness does not aid anyone except those who are set to make a profit, and through meeting needs via

[630] See Leanne Simpson, *supra* note 352; Darlene Johnston, *supra* note 269; Heidi Bohaker, *supra* note 197.
[631] See Heidi Bohaker, *supra* note 1947; Jerry Fontaine, *supra* note 198.
[632] See Aaron Mills, *supra* note 3; James (Sakej) Youngblood Henderson, *supra* note 264; Lindsay Keegitah Borrows, *supra* note 1; and Robin Wall Kimmerer, *supra* note 85.
[633] See Karen Drake, *supra* note 594; Aaron Mills, *supra* note 3.

mutual aid and kinship, a need that is purely that of a capitalist mindset would not be a need that is to be fulfilled. Furthermore, flexible timelines "reflect attempts to address the imbalance in negotiating power".[634] Therefore, I leave the logistics of the timeline undisclosed. Timelines should be decided between parties with flexibility built in so as not to force or rush studies and risk compromising findings which will influence decisions. Additionally, timelines of each party should be influenced, to a degree, by the laws which govern them. This would mean any timelines on the Indigenous Nation side would be influenced by their laws and processes; government and proponent timelines would be influenced by their laws and processes. Any timelines which are collaborative should by default be informed by the Indigenous Nation unless they decide otherwise. Funding on the part of the Crown and/or proponent will need to be laid out as well. As with timelines, funding is project and process specific. All parties are unique and have different funding and resource capacities. It would serve no purpose for me to state a number or formula that must be followed. Additionally, as the process begins and builds, new expenses may arise. Therefore, funding needs to be an ongoing discussion between parties.

The affected Indigenous Nation(s) provide any consultation protocol they have to the Crown and proponent. The purpose of this is to give guidance, in writing, regarding what the process will look like, by which legal orders, and what is expected to be included in the documentation and studies. For example, the Nation may outline how the documentation given to them will be disseminated and discussed, outlining the governance and decision-making structures of their community. It may also outline who is the contact person for communications between parties, who is to be contacted for Traditional Ecological Knowledge (TEK) inclusion in environmental impact studies, and any expectations for written correspondence.

For this second hypothetical story, there is once more a proposed road that will run through fictional Waagosh First Nation traditional territory. The Anishinaabeg have been keepers of this territory since time immemorial where they have been protecting, living on, and using the land through their laws, kinship connections, and mutual aid. There is an Elders Council which safeguards and applies environmental laws to this land,[635] as well as a Youth Council who discuss how the land's gifts should be protected and used for their generation, and the next ones to come. As a Nation who uses doodem, each doodem has their own council to discuss decisions

[634] See Ariss et al, *supra* note 556 at 8.
[635] See John Borrows, *supra* note 168.

about land within their responsibility, with respect to doodem kinship relation to land.[636] And because consensus is how final decisions are made, each doodem council has a representative who is then part of a larger council of all doodemag.[637] There are many councils of doodemag on Waagosh First Nation, each with different responsibilities.[638] For example, there is a safety council, education council, health council, and a consultation council.

The consultation council is responsible for the dissemination of consultation documentation and studies, as well as organizing the other councils to discuss the information, interpret and apply applicable laws, initiate any community studies, and of course, come to an end decision on whether the proposed project can go ahead as is, if there are to be any modifications, whether there is an opportunity for employment and financial benefit agreements, and if the project cannot go ahead. On this consultation council is our character Raven. Raven is of the Marten doodem, and because of her personal gifts,[639] she was chosen to be on the consultation council, representing the other Marten doodem of her First Nation. She is responsible for organizing correspondence on this proposed project, acting as a liaison between her First Nation, the Crown and proponent. She also helps the Crown and proponent organize town halls with non-Waagosh First Nation people who live in the area. At these town halls, she explains Waagosh's status on decision-making, where they are in the consultation process, and how broader societal concerns are being discussed and considered. For this specific proposed project, that means focusing much of the discussions with community, parties, and broad society on the sacred meadow close to the proposed road site, the community's interest in keeping the creek that runs from the road site into the community clean and unaffected by run-off, and minimal to no interference with community member's traplines.

'Aanii Raven,' Nokomis says to Raven as she walks into the house. 'I thought I'd let you know the rest of the documents have been sent by the government for the proposed road project. The finished Impact Assessment and EA reports are there as well. I placed it all on your desk.' Raven kisses her grandmother on the forehead as she sits down beside her at the table.

'Miigwetch for telling me. I will be sure to take a look first thing tomorrow.'

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[636] See Leanne Simpson, *supra* note 352.
[637] *Ibid*.
[638] *Ibid*; see also Aaron Mills, *supra* note 3; Darlene Johnston, *supra* note 269; Edward Benton-Banai, *supra* note 375; Heidi Bohaker, *supra* note 197; and Jerry Fonatine, *supra* note 198.
[639] See Aaron Mills, *supra* note 3; Robin Wall Kimmerer, *supra* note 85; James (Sakej) Youngblood Henderson, *supra* note 264; Heidi Bohaker, *supra* note 197; Leanne Simpson, *supra* note 352.

‘Shall I let the Elder Council know to expect a meeting to continue our discussion now that we have all documents and studies?’ Nokomis asks. Raven nods and smiles wide.

‘Yes, please do. I will speak with the rest of the doodem consultation council about the last of the documents and studies that have come in, and soon we will start the community-wide consultation process back up.’ As a community run through consensus, the consultation process happens in steps. Whenever new information comes from the other parties, the councils are notified, and meetings are held to discuss. This not only allows people to understand the project and information over time, but also allows concerns and questions to be raised throughout the process, informing the next steps.[640] The following week, after reviewing the final studies and reports, Raven met with the other consultation doodem leaders of Waagosh First Nation. Together, they make up the main doodem groupings of their community: *Maang* - Loon, *Ajijaak* - Crane, *Giigoonh* - Fish, *Makwa* - Bear, *Wabizheshi* - Marten, *Wawashkeshi* - Deer, and *Binesi* - Bird. They are responsible for their doodem members throughout Waagosh First Nation and are chosen as doodem leaders for the community’s consultation processes. There are similar councils of doodemag who meet for other things, such as community health and education. This ensures the most qualified and best suited individuals are placed on different councils, and that there is no one group of individuals taking on every aspect of Waagosh First Nation. It also allows for one’s individual gifts to be used for the greater good of the community. As the doodem leaders for consultation, this council of seven are the first community members to review any documents and studies for all consultation requests. After reviewing the information and discussing their first impressions, the council then takes the information to their respective doodem members. Once each doodem council has discussed the materials and recorded feedback, questions and concerns, the consultation doodem leaders meet to discuss and compare notes. A master list of this feedback is then given to other councils, such as the Elder Council and Youth Council, for their review and discussion as holders of the past and future. This allows Elders to have multiple opportunities to review and discuss the information.

This is Raven’s favourite part of the consultation process as it allows new perspectives on the project, which may have gotten lost or not been thought about up until now to be expressed. The Elders, as keepers of the environment and applicable laws,[641] interpret which laws will apply

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[640] See Jerry Fonatine, *supra* note 198.
[641] John Borrows, *supra* note 168.

to the project, and how they will influence the next steps in decision-making. The Youth, as the generation of tomorrow, look at the information while reflecting on how the project may impact their futures and the futures of their children. Together, the two Councils paint a picture for the whole community on how the past and future come together, and how each should influence the next steps in the process and the overall decision. And when there are multiple projects being proposed at once, it allows everyone to think of the individual projects at designated times, as well as how all projects may impact each other.

When a consensus is finally reached, Raven is responsible for conveying the decision in writing to the other parties. She gives written reasons explaining the decision, how it was made and why, and if the decision is that the project can go ahead, any mitigating factors that must be taken, and how the community will be accommodated. When the answer is no, the project cannot go ahead, the Crown and proponents have the opportunity to request another meeting with the consultation doodem council to gain a better understanding, if the written reasons are not enough, as to why. However, this meeting is not to be seen as a chance for the Crown and proponent to coerce Waagosh First Nation to change their decision. Through the Crown and proponent's kin relationship to Waagosh First Nation, developed through mutual aid, the Crown and proponent can speak from the heart further about their true needs.[642] The dialogue which takes place at this step involves kinship, giftedness, mutual aid to non-human kin, and whether the wealth coming from the project is truly needed. Essentially, this step allows the depths of the parties' true needs to be discussed, informed by all the previous steps. Even so, doodem members, such as Raven, are unable to make decisions or speak on behalf of their Nation, a system of governance that is respected and understood by the other parties.[643]

If the project may affect multiple Indigenous Nations, an additional step is added. Raven and the other doodem council members meet periodically throughout the process with the doodem council members of the other Anishinaabe First Nations nearby. If the other Nations are not Anishinaabe, or are but do not use doodem, Raven and the others meet with their equivalent council. Select Elders and Youth from each Nation also meet throughout. This allows all Nations to understand the other's process, laws, decision-making, and thought process throughout. It also aims to come to agreements as neighbouring Nations in regard to the proposed project. If one

[642] Karen Drake, *supra* note 594.
[643] *Ibid*; see also Aaron Mills, *supra* note 3; Heidi Bohaker, *supra* note 197; Darlene Johnston, *supra* note 269.

Nation decides through their process and laws that the project will go ahead, but the other Nation affected similarly decides that it will not go ahead, the Nations may be able to come to an agreement as to how each Nation's decision can be implemented and respected. These agreements will be passed onto the other parties in the written reasons for decision. Of course, like anything else, these processes are not always easy. Raven has gone through consultation processes that take many months, if not years, and no consensus decision is reached. She has also gone through processes where the neighbouring affected Nation comes to the opposite decision, and an agreement between the two Nations proves difficult to find. However, her solace is that no matter how easy or difficult the process is, it is her Nation's legal order, government, laws, principles, language, and lifeways that are guiding and informing the process.

'So, are we prepared to start calling councils to meet to discuss the final documents?' Roger says, the Fish doodem representative on the consultation council.

Raven smiles and nods, looking to each of the six other members. 'I am, what about everyone else?' A resounding yes sounded from the other doodem members. '*Minotaagwad*, sounds good,' she says. 'I'm interested in hearing how the Elders view the environmental studies in comparison to the studies they led. It seems both note the impacts run-off could cause to the creek. Interestingly, the government's report notes that the run-off could cause deterioration of the waterbed, affecting the sweetgrass that grows beside the creek. They included it in their studies at the guidance of the Elder Council. This potential needs to be considered carefully.'

Roger nodded as he said, 'Exactly, and seeing as sweetgrass is medicine, the Elders will want to protect it. I'm sure there are specific stories and laws that they will reference in their discussion as a group, as well as when they relate it to their doodem councils and community as a whole. If that is the case, then of course, in our final decision and written reasons we will reference this in the way they see as best suited.'

'And with a road will come more development,' Raven chimed in. 'That could be a good thing for us, for the youth especially, with more opportunities for job growth and access to other schools. But it can also mean development we don't want and impacts to the land that are irreversible, making the road a bad thing.'

The council nodded in unison. 'All things we will note to discuss with our own councils, amongst the Elder and Youth councils, and as a whole community,' Roger said with a smile. 'I'll start drafting the Call to Council Notice.'

As Raven smiles back, an overwhelming sense of calm flooded over her. She starts to think about all the times she swam in the creek and picked and braided sweetgrass at the water's edge, and about all the times she will continue to do those same things, road or not, because the end decision will have been made with these memories, and these future memories, in mind. She also thinks about the meadow, where ceremony has taken place since Turtle Island first began, and will continue to take place, protected by her community and their laws. She thinks about the future of her community, with the possibility of safe, beneficial developments in the years to come. Then, she thinks about all the times she listened to Nokomis tell her stories of all kinds, so often with their feet dangling into the cool creek's water and with the strong smell of sweetgrass flooding their noses, and how as long as the consultation process remained in their control, every little girl and boy will also be able to listen to these stories, speak their language, and respect their kin with their feet dangling in the cool water.

'At least we know,' Raven said as she looked around the room with a beaming smile, 'no matter what we decide, it was through our laws.'

Conclusion

As I shared with you throughout these pages, this thesis was inspired by my own stories, experiences, and questions. I had a lot of questions that needed answering before I could accept the responsibility I have as someone bearing the title 'lawyer'. The biggest of these questions was: *why is the law on the duty to consult what it is*; *why are Indigenous laws not being used to make decisions about Indigenous lands*; and, *how can my writing make a difference*? As my Hope, this thesis set out to answer these questions for myself, but also for Canadian society more broadly. If my thesis reached your hands, that means you, my reader. I hope, then, I answered these questions, in some way, for you as well.

I set out to answer the first two questions in Chapter One by exploring how Lockean theories and legal positivism set the stage for dismissing Anishinaabe legal orders as legitimate law to be applied to the development and management of the natural world. The first question, in particular, drove me to return to school and pursue this Masters of Law. It was also the driving question throughout the entirety of this writing process and was the anchor of each chapter that followed. I then took the second question further, proposing how Anishinaabe legal orders could re-write the understanding of the duty to consult by exploring the building blocks of Anishinaabe language, stories, and laws. Whether I would consider it answered, I would say no, as it is only the beginning of what one Anishinaabe legal order could say about the law. Furthermore, I only addressed one small area of law that requires a re-writing from Indigenous legal orders. As for the last question, whether my writing has made a difference, I truly cannot say. I hope, along the way of reading this thesis, I have given you, my reader, enough to answer that question for me.

Throughout this thesis, I explored the foundations of Canadian law and the duty to consult and accommodate which are not that of Indigenous legal orders: they are, instead, that of settler supremacy; Lockean theories on property; the dismissing of legal orders as primitive via

legal positivism; natural resources and the grammar of objects; coercion and the hierarchy of humans; and the justification of assumed sovereignty. With each chapter, I shaped my argument that the Canadian and Anishinaabe legal orders are incommensurable, and therefore, a changed understanding of the duty to consult is needed. Chapter One scaled back to the foundational theories that create the laws we know, exploring Lockean theories of property and legal positivism in contrast to the foundations of Anishinaabe legal orders, demonstrating how at their roots, these legal orders are incommensurable. The underlying principles of how land and law are understood set the scene for the remaining chapters to build and shape how an Anishinaabe process could look. I built on this in Chapter Two by introducing what I call the two forms of grammar – formal grammar and the grammar of principles – and the three forms of language – Anishinaabemowin, stories and law. Through my own journey of language, I wove a picture of how learning language is instrumental to learning law: I cannot learn one without the other. There is an order to learning an Indigenous law, just like there is an order in place to learn Canadian law. The first step in this order is the language we speak and write as it makes up the very fabric of law. To assume the grammars of a language and law of a Nation is to assert the supremacy of your law's language. Doing so is continuing legal positivism and what Aaron Mills calls the third form of settler supremacy.

With an understanding of the theories and languages of the legal orders, I moved on to exploring some of the legal principles of Anishinaabe law: kinship, mutual aid, giftedness and relationships with land and other beings of creation; what my mother calls having brothers and sisters everywhere. This makes up the basis of many Anishinaabe legal orders, and therefore, the basis of my Anishinaabe understanding to the duty to consult. In a legal order where there is no hierarchy of species, reasoned decisions can be made about the benefit of all, including the fish and beavers. A legal order built on the dependence we have on the natural world is a legal order that considers more than the money going into one's pocket after the trees are cut down. Chapter Three laid this out, showing how legal principles make up governance and decision-making, giving an example of how an Anishinaabe First Nation may come to the decision of a development project. I then took a step back from Anishinaabe legal orders in Chapter Four, where I dove headfirst into the Pandora's Box that is the duty to consult and accommodate. I told you the tale that is the Canadian jurisprudence, explaining along the way the truth in the case law that is assumed sovereignty, the assimilation of interests into colonial boxes, and the control that

comes with power. Every Pandora's Box has Hope left under the lid; mine was writing this thesis. But ours, as a collective, can be changing the understandings of the consultation process through the laws of the Indigenous Nations that have always called Turtle Island home.

That brought me to my final chapter, Chapter Five. Here, I told you the final stories of our time together. I told you the story of what the duty to consult process can look like through two different narratives: the first is today's process and the second is one way the process could be understood through Anishinaabe legal orders. Which process was best, I left for you to decide. I hope the small snapshots, influenced by everything I explored in the four chapters before, led you to decide that the story with an Anishinaabe narrative was preferable.

Throughout this thesis, I continued to remind you that all I write is my interpretation as I am still a student. An Anishinaabe Nation may agree or disagree with my interpretations in whole or in part, and the beauty of my argument, of course, is that this is warranted. I am calling for an overhaul of the current process, and this overhaul cannot happen if it is not individual Indigenous Nations guiding the process. My interpretation of an Anishinaabe process will not work for every Indigenous Nation, nor is it supposed to. This was one consideration of how Anishinaabe legal orders could create a changed understanding to the consultation and accommodation process. Each Nation is unique and has their own language of law and that, my reader, is the beauty of Indigeneity. Fully autonomous Nations, societies, governance structures and legal orders existed before colonization and continue to exist. They have been used to honour, respect, use, develop, and co-exist with all of creation far longer than European ways of life on Turtle Island have. These legal orders, therefore, should guide the road we are going down; the road we currently call Canada. Until these legal orders are once again seen and respected as real, legitimate legal orders, and have the full autonomy to operate as such unhindered by colonial laws, languages and processes, the colonization, settler supremacy and violence of Euro-centric lifeways will continue to dominate.

I recognize that many people – especially those who love the Canadian legal order – will read these words and shake their head. *How are hundreds of legal orders realistic, and how can you expect the Crown to be able to operate within so many legal orders*? To these questions, and similar ones, I say, one last time, that I invite you to remove what you have been taught about Canada, law, and colonization, for when they remain dominate in your reasoning, Indigenous autonomy of legal processes will continue to be shrouded in question marks. I invite you to leave

settler supremacy at the side of the road: it will not help guide you down these roads nor should it. Remember that we, as humans, were last in order of creation and are greatest in need and dependence. We have brothers and sisters everywhere and they have personhood and languages that shape their laws and lives. We are on Indigenous land, within Indigenous legal orders.

When I first set out to write this thesis, I wanted to work with an Anishinaabe First Nation to develop a process fully guided by their individual Anishinaabe laws, language and grammar, principles, and lifeways. I was guided, rightfully so, to focus this past year on theory. This thesis is therefore a story of theory; theory that can become reality. To become such, I recognize a lot of work will need to be done. Nations will need funding and resources, and Crown actors and proponents will need training. Changing a legal process will take time, and many bumps will be present down this road. I invite you to see this long, bumpy road as a good thing, and not something that may scare you into dismissing it as merely aspirational. Real work must be done, and the first step, I believe, is asking the questions I did: *what is law, and why*. I hope to one day soon work with any Indigenous Nation who wishes to have me. I also hope to work with proponents and Crown actors to make these roads real.

As I said at the very beginning, this thesis was built on the work and knowledge of those who have come before me, all forming my understanding of Anishinaabe law, told to you as stories. And so, I thank you for letting me tell you these stories. I see my storytelling, and the variety of mediums I chose to tell you these stories in, as my 'methodology'. Unconventional, perhaps. True to my identity, gifts, and legal order, I think so. I hope I showed you through my storytelling not only how incommensurable the two legal orders are, but how attainable an Indigenous process truly is. If this road of stories showed you things you have never seen before, I hope they opened your mind to the big, beautiful world that is Indigenous legal orders. If this road of stories was filled with things you have seen and lived through, I hope my stories related to you in some meaningful way. Either way, I firmly believe the road we take as a collective should not be left up to the powers of those akin to Calypso or Scylla. They should be that of Indigenous peoples, the Odysseus' of Turtle Island. At the same time, everyone else, especially those who carry the title of lawyer like me, has a responsibility to work through stories such as the ones I told you and use such meanings to guide your life. It is up to all of us to demand the change we need.

Booshke giin – it is up to you.

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