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THE *RESTOULE* CASE: A TURNING POINT IN THE IMPLEMENTATION OF HISTORICAL TREATIES?

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ABSTRACT

The Supreme Court of Canada's decision in *Restoule* marks a significant departure in historical treaty interpretation. By treating Anishinaabe principles of respect, responsibility, reciprocity, and renewal as foundational to the Robinson Treaties, the Court opened new ground for how historical land-sharing treaties might be understood going forward. This article examines whether *Restoule*'s interpretive framework should extend beyond the rare historical treaties that include express amendment provisions. It argues that historical land treaties should be treated as instances of a distinct intersocietal legal institution, created to permit peaceful coexistence during the settlement of Canada by non-Indigenous populations in perpetuity, and subject therefore to universal obligations of periodic renewal and benefit-sharing. The largely graphocentric approach that has dominated treaty jurisprudence disadvantages the Indigenous parties to historical treaties, whose legal traditions were not text-based and whose access to evidence of oral assurances made long ago

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becomes ever more tenuous. On the other hand, approaching the historical land treaties as imposing certain basic reciprocal obligations, regardless of whether they are stipulated in the Crown's written texts, would bring treaty interpretation into closer alignment with the shared premises of the historical land treaty as an institution and the Crown's own repeated historical assurances that the land treaties would benefit their peoples in perpetuity.

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RÉSUMÉ

La décision de la Cour suprême du Canada dans *Restoule* marque une rupture significative dans l'interprétation des traités historiques. En reconnaissant la centralité des principes anishinaabe de respect, de responsabilité, de réciprocité et de renouvellement aux obligations mutuelles créées par les traités Robinson, la Cour a ouvert de nouvelles perspectives pour la manière dont les traités historiques de partage des terres pourraient être compris à l'avenir. Cet article examine si le cadre interprétatif de *Restoule* devrait aller au-delà des rares traités historiques qui incluent des dispositions explicites d'amendement. Elle soutient que les traités historiques de partage des terres sont des exemples d'une institution juridique intersociétale distincte, créée pour permettre la coexistence pacifique pendant la colonisation du Canada par les populations non autochtones à perpétuité, et donc soumis à des obligations universelles de renouvellement périodique et de partage des bénéfices. L'approche largement graphocentrique qui a dominé jusqu'à maintenant la jurisprudence des traités désavantage les parties autochtones aux traités historiques, dont les traditions juridiques n'étaient pas basées sur l'écriture et dont l'accès aux preuves d'assurances orales faites il y a longtemps devient de plus en plus précaire. D'autre part, reconnaître que les traités historiques de partage des terres imposent certaines obligations réciproques fondamentales, qu'elles soient stipulées ou non dans les textes écrits de la Couronne, rapprocherait l'interprétation de ces traités avec les principes implicites à leur création et les assurances historiques répétées de la Couronne selon lesquelles les traités de partage de terres bénéficieraient à leurs peuples à perpétuité.

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> The Robinson Treaties are not merely transactional instruments about the exchange of money for a tract of land. They are living agreements embodying a relationship nurtured over many years before 1850 and requiring ongoing renewal into the future. It is time for the parties to return to the council fire and rekindle the perpetual relationship that the Robinson Treaties envision. Nothing less will demonstrate the Crown's commitment to reconciliation.[1]

INTRODUCTION

THE judgment of the Supreme Court of Canada in *Ontario (Attorney General) v. Restoule* (*Restoule*) is remarkable for a number of reasons. In interpreting the meaning of the Robinson Treaties of 1850 and the extent of the Crown's current obligation, if any, to revisit the annuities payable under those treaties, the Court devoted a significant portion of its analysis to the Anishinaabe understanding of the treaties.[2] The Court also cast an unprecedented focus on the application of Anishinaabe principles and treaty protocols to the interpretation of the parties' common intention. Finally, the judgment broke new ground in remedial terms, ordering the treaty partners to negotiate, under the supervision of the courts, an appropriate amount of compensation to reflect the Crown's breach of the treaties.

This article will review the potential of the principles espoused by the Court in *Restoule* to transform the implementation of other historical land-sharing treaties in Canada, including treaties that do not contain an

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1 *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at para 13 [*Restoule* SCC].

2 The Robinson Treaties included two separate agreements negotiated by Sir William Robinson in 1850. The *Robinson-Huron Treaty* secured the sharing of the Anishinaabe territory surrounding Lake Huron in central Ontario, while the Robinson-Superior Treaty dealt with the Anishinaabe lands surrounding Lake Superior. Other than the descriptions of the lands "surrendered" by the Anishinaabe, the treaty terms were almost identical (see *Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Superior Conveying Certain Lands to the Crown*, 7 September 1850, online: <rcaanc-cirnac.gc.ca> [perma.cc/BRA3-5KWB] [*Robinson-Superior Treaty*]; *Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron Conveying Certain Lands to the Crown*, 9 September 1850, online <rcaanc-cirnac.gc.ca> [perma.cc/8L8P-WJNM] [*Robinson-Huron Treaty*]).

express provision for the amendment of their terms going forward. The treaties reviewed in *Restoule* included an express provision that contemplated a potential increase of the annuities payable by the Crown should circumstances permit.[3] Under those treaties, the question of whether to increase the annuities and by how much was subject to the discretion of the Crown. The Crown had not, in fact, raised the amount of the annuities since 1875. According to the Robinson-Superior First Nations, that inaction amounted to a breach of the treaty. After a careful review of the treaty's annuity augmentation clause, the Supreme Court of Canada upheld their claim. It issued a declaration that the Crown was required to engage in meaningful and honourable negotiations to arrive at a just settlement regarding the compensation owing for its failure in the past to diligently implement the annuity augmentation clause.

In *Restoule*, the Court was able to rely upon an express term of the treaty text that called for the Crown to review its treaty promise in the future. What is the significance of the judgment in *Restoule* for the other historical treaties entered into by Indigenous Peoples and the Crown during the 150 years or so[4] following the *Treaty of Niagara* of 1764? The vast majority of those treaties do not include in their written texts a provision requiring the treaty partners to discuss or review the terms of their coexistence on the treaty lands in the future (even the Robinson Treaties themselves made no provision for the future review of any treaty term outside the annuities provision). The purpose of this article is to analyze the extent to which the treaty principles enunciated in *Restoule* support a broader, more dynamic interpretation of the historical treaties generally.

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3 The text of the annuities clause reads as follows:

> The [Queen] ... further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order (see *Robinson-Superior Treaty*, *supra* note 2).

4 The last of those land-sharing treaties, which I refer to throughout this article as "the historical treaties," was Treaty 9. That treaty was signed by First Nations in northern Ontario in 1905–1906, with subsequent adhesions in 1929 and 1930 (see *The James Bay Treaty – Treaty No 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930*, 25 July 1930, online: <rcaanc-cirnac.gc.ca> [perma.cc/LHR9-TR5L] [*Treaty 9*]).

In particular, this article proposes that the Court's mode of analysis in *Restoule* is consistent with a conception of the historical treaty as a legal institution whose singular nature and context comport certain universal ongoing obligations for the treaty partners.

To analyze the potentially transformative aspects of the *Restoule* judgment, we will begin by reviewing the Court's use of Anishinaabe principles in assessing the common intention of the treaty partners. We will focus on the Court's treatment of those principles as foundational, not just to the Anishinaabe perspective, but to the interpretation and implementation of the Robinson Treaties themselves. Second, we will consider an aspect of the *Restoule* judgment which might be argued to constrain its applicability to other historical land-sharing treaties, namely the degree to which the Court nonetheless centers its analysis on the written texts of the treaties. Third, this article will examine whether the Anishinaabe principles cited in *Restoule*, or principles very similar to them are, in fact, principles that are necessary to make sense of the entire historical treaty land-sharing enterprise. Finally, we will briefly address the remedial implications of treating those or similar principles as universally applicable to the historical land-sharing treaties.

I. THE SIGNIFICANCE OF THE COURT'S TREATMENT OF ANISHINAABE PRINCIPLES IN *RESTOULE*

The negotiation of treaties of co-existence between Indigenous Peoples and the Crown has been described by the Supreme Court of Canada as foundational to the project of honourably reconciling the pre-existing rights of Indigenous Peoples with the sovereignty claims of the Crown.[5]

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5 In *Haida Nation v British Columbia (Minister of Forests)*, the Supreme Court wrote:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" ...
>
> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the

The historical process of treaty-making to permit the sharing of Indigenous lands with the Crown and, ultimately, Canadian settlers began under the framework of the *Royal Proclamation of 1763* and the *Treaty of Niagara* in 1764.[6] Today, treaty rights are enshrined in and guaranteed by section 35 of Canada's *Constitution Act, 1982*,[7] and modern treaties continue to be negotiated in places where no historical treaty was signed.

This article will focus exclusively on those treaties that were negotiated in the historical period to provide for the sharing of land between settlers and Indigenous Peoples in Canada. Despite the diversity of those treaties, they have common features, including the fact that where there are written versions of the treaties that were drafted exclusively in English, using terms familiar to the common law (some like "surrender" and "cede" being hotly disputed as not reflecting the Indigenous understanding of the treaty).[8] Further, the texts of those historical land treaties, unlike the treaties negotiated in Canada since the 1970s, do not address how disputes over the meaning or the implementation of the treaty should be resolved or how the treaty partners' mutual commitments might evolve as circumstances change over the decades and centuries following their negotiation. Both of these gaps in the written texts of the historical land treaties stand in contrast to modern treaties between Indigenous Peoples

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Constitution Act, 1982 (see 2004 SCC 73 at paras 17, 20 [*Haida*] [footnotes omitted]).

6 George R, Proclamation, 1763 (3 Geo III), reprinted in RSC 1985, Appendix II, No 1. For a useful review of the relationship between the Royal Proclamation and the Treaty Council at Niagara in 1764, see John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 155 [Borrows, "Wampum at Niagara"].

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

8 For historical evidence on this point see Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 76–78, 88–94, 106–11; Janna Promislow, "Treaties in History and Law" (2014) 47:3 UBC L Rev 1085 at 1129–35; Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich, 2013) at 87–93; Robert Dennis Sr (Emchayiik) & Kevin Neary, "Huu-ay-aht *t'ayii ḥawiɬ* ƛiishin's Land Transaction with William Banfeld" in Peter Cook et al, eds, *To Share, Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia* (Vancouver: UBC Press, 2021) 162 at 175–78, 182–83.

and the Crown, which include dispute resolution provisions[9] and, most recently, expressly acknowledge that the parties intend them to be "living agreements," subject to periodic review and amendment in the future.[10]

In the absence of provisions for renewal and amendment in the written texts of the historical land treaties, the benefits received by the Indigenous treaty partners, at least until the *Restoule* decision, have been left largely frozen in time. Worse, the net benefits of historical annuity promises have been undermined by decades and decades of inflation, while written guarantees of harvesting rights have been eroded in practice by the introduction and expansion of settlement and resource extraction in treaty territories.[11] At the same time, the Crown, the general public, and

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9 See e.g. *Nisga'a Final Agreement*, 27 April 1999 at ch 19, online: <rcaanc-cirnac.gc.ca> [perma.cc/4AGH-ABP7]; *Vuntut Gwitchin First Nation Final Agreement*, 29 May 1993 at ch 26, online: <rcaanc-cirnac.gc.ca> [perma.cc/AH75-BLHR]; *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada*, 25 May 1993, art 38, online: <publications.gc.ca> [perma.cc/PJT8-5KPL].

10 See e.g. *K'ómoks First Nation Treaty: "A Living Agreement"*, 22 July 2024, online (pdf): <engage.gov.bc.ca> [perma.cc/J5X5-NH9C]. This treaty expressly provides for its own evolution over time, including the renewal and future evolution of the parties' fiscal arrangements and consultation processes:

> 1) The Parties recognize and acknowledge that this Agreement is a living agreement and provides a foundation for an ongoing relationship amongst the Parties.
>
> 2) The Parties commit to the following specific arrangements that support the evolution of this Agreement:
>
> (a) periodic renewal; ...
>
> (c) the review, renewal or amendment in accordance with their terms, of agreements associated with this Agreement but do not form part of this Agreement;
>
> (d) the development over time of Fiscal Arrangements and Fiscal Provisions referred to in the Fiscal Relations Chapter;
>
> (e) the evolution of consultation processes or arrangements pursuant to paragraphs 66 to 79 (see *ibid*, ss 1–2).

See also *Kitselas Treaty: A Living Agreement*, 24 June 2024 at ch 1, ss 1–2, online: <engage.gov.bc.ca> [perma.cc/HT6Q-JBVU]; *Kitsumkalum Treaty: A Living Agreement*, 25 June 2024 at ch 1, ss 1–2, online: <engage.gov.bc.ca> [perma.cc/C9LC-3J4Z].

11 Activities like the building of infrastructure, clear-cutting of forests, mineral extraction, urban expansion and industrial development inevitably disturb and endanger wildlife, while pollution can render traditional fishing and hunting a danger to human health. For an example of the former, see *Yahey v British Columbia*, where the

mining, forestry, and hydro-electric companies continue to benefit from new technologies and amplitudes of resource extraction that did not exist at the time of the historical treaty negotiations. And, until the *Restoule* judgment, the courts generally did not intervene to remedy that disproportionate evolution in the benefits received under the historical treaties, and neither did the Crown. In short, the courts and the Crown have generally interpreted the historical treaties as if they were intended to provide a detailed and complete blueprint in perpetuity of the benefits to be obtained by each party from the now-shared treaty territory.[12]

The *Restoule* decision stands as a striking repudiation of this interpretation of the historical treaties, ruling that the Robinson Treaties did require the Crown to revisit the appropriate amount of those annuities with the passage of time. In reaching that conclusion, the Court applied the principles that had been developed in earlier jurisprudence for the interpretation of treaty texts. Importantly, however, the judgment gives particular weight to the importance of Anishinaabe norms to a proper understanding of the Robinson Treaties. The interpretive approach taken by the Court appears to have significant implications for historical land treaties even where the treaty texts do not address the possibility of treaty

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Court held that the taking up of treaty lands by British Columbia had left the Blueberry River First Nations with an "empty shell of a treaty promise" (see 2021 BCSC 1287 at paras 511–12, 534). For a tragic example of the latter, consider the situation of Grassy Narrows First Nation whose watershed was destroyed by mercury pollution caused by a paper mill (see Sarah Law, "Mercury Poisoning Near Grassy Narrows First Nation Worsened by Industrial Pollution, Study Suggests", *CBC News* (last modified 24 May 2024), online: <cbc.ca> [perma.cc/4M98-W6YZ]).

12 This remains so, notwithstanding that the Supreme Court of Canada has recognized that the mode of exercising a treaty right may evolve over time, to accommodate for example, changes in technology (see e.g. *Simon v The Queen*, 1985 CanLII 11 at paras 28–31 (SCC); *R v Sundown*, 1999 CanLII 673 at paras 26–33 (SCC)). For the application of the same principle to Aboriginal rights, see *R v Sparrow*, 1990 CanLII 104 (SCC); *R v Van der Peet*, 1996 CanLII 216 (SCC). Scholars have nevertheless criticized the Supreme Court for failing to embrace fully the potential evolution of the activities protected by section 35, particularly in the context of Aboriginal rights (see e.g. John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997–1998) 22 Am Indian L Rev 37; Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R* v *Pamajewon*" (1997) 42:4 McGill LJ 1011; Leonard I Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van der Peet*" (2011) 8:2 Constitutional Forum 40).

renewal or amendment. To understand why this is so, we need to examine the treatment of Anishinaabe principles in *Restoule*.

In some respects, the Court's approach to treaty interpretation in *Restoule* is a conventional one. Accordingly, Justice Jamal, writing for the Court, reviews the established canons of treaty interpretation and applies them to the text of the augmentation clause in the Robinson Treaties as part of the effort to determine the treaty partners' common intention.[13] Applying those principles to the treaties, the Court rejects an interpretation that would leave the Crown with unfettered discretion as to whether to raise the annuity amount.[14] Instead, the Court ruled, the annuity clause requires the Crown, if and when economic conditions permit, to exercise its discretion and determine whether to increase the annuities and, if so, by how much.[15] The Crown must exercise that discretion diligently, honourably, liberally, and justly.[16]

What is striking, as noted earlier, is the attention paid to relevant Anishinaabe norms in the Court's final analysis of the treaty understandings.[17] The Court concluded that both the written text and Anishinaabe principles supported its conclusions about the meaning of the annuity

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13 *Restoule* SCC, *supra* note 1 at paras 78–81, 125ff.

14 *Ibid* at para 196.

15 *Ibid*.

16 *Ibid* at para 197.

17 *Ibid* at paras 18, 179–80, 197, 263, 284. The attention that all levels of court devoted to Anishinaabe norms in *Restoule* reflects the sustained work of the First Nations elders, counsel and other representatives who invited the judges and Crown counsel to understand and participate in Anishinaabe ceremonies, diplomatic protocols and culture. Elders Fred Kelly, Rita Corbiere, Irene Stevens, and Irene Makedebin, as well as Chiefs Dean Sayers, Duke Peltier, and Angus Toulouse and law professor Heidi Kiiwetinepinesiik Stark were among those who gave evidence to the court about Anishinaabe teachings and legal principles. During the trial, Justice Patricia Hennessy and Crown counsel also proved willing to participate actively in learning about Anishinaabe teachings and protocols. In the words of Justice Hennessy,

> As a court party, we participated in Sweat Lodge ceremonies, Pipe ceremonies, Sacred Fire teachings, Smudge ceremonies, Eagle Staff and Eagle Feather presentations, and Feasts. During the ceremonies, there were often teachings, sometimes centered on *bimaadiziwin*—how to lead a good life. Often teachings were more specific (*e.g. on the role of the sacred fire, the role of sacred medicines, or the meaning and significance of the ceremonies*) (see *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 9–10, 610 [*Restoule* SC] [emphasis in original]).

promise. Consideration of the Indigenous perspective is something that the Canadian courts have regularly described as an important element of treaty interpretation, forming part of the historical and cultural context of the parties' agreement.[18] In practice, however, it has often been unclear precisely how in a particular case the Indigenous perspective affected the treaty interpretations adopted by the courts.[19]

The *Restoule* judgment identifies four key principles—respect, responsibility, reciprocity, and renewal—as central to the Anishinaabe's system of governance and to their relationship with the Crown.[20] The Court repeatedly returns to those precepts, and the way the Court applies them is significant. The concept of "respect," for example, is not described in vague interpersonal or nation-to-nation terms, encompassing some attitude of mutual esteem. "Respect" and the other Anishinaabe values identified by the Court are described in terms of their acknowledged connection to the treaty-making process and to the correct interpretation of the treaties. In this way, the Court's treatment of Anishinaabe values is not limited to describing the cultural context of the treaties or the Anishinaabe perspective on the treaties. Instead, the Court concludes that the treaty agreements themselves embody those key principles.

Thus, according to the Court, the annuities augmentation clause

> demonstrates *respect* by acknowledging both the Anishinaabe's jurisdiction over the land and their authority to conclude an agreement with the newcomers, ... shows *reciprocity* by making concrete the Anishinaabe's expectation that a "gift" would attract

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18 See e.g. *R v Marshall*, 1999 CanLII 665 at para 19 (SCC) [*Marshall*]; *R v Sioui*, [1990] 1 SCR 1025 at 1036, 1990 CanLII 103 (SCC).

19 See e.g. *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*]; *Shot Both Sides v Canada*, 2024 SCC 12 [*Shot Both Sides*]. For a powerful counterexample, see the Supreme Court of Canada judgment in *Marshall*, *supra* note 18 at paras 41–44, in which the Court focused on the historical context, including the Mi'kmaq understanding of their 1760 Treaty of Peace and Friendship in deciding that the treaty contained an implied promise that the Mi'kmaq had a right to fish. In *Marshall*, however, unlike *Restoule*, the Court did not describe or engage with any particular Indigenous (in that case Mi'kmaq) norms, values or diplomatic principles.

20 In this respect, the Supreme Court of Canada adopted the findings of the trial judge, who identified the four principles based on evidence provided by the elders and other experts on Anishinaabe law and culture (see *Restoule* SCC, *supra* note 1 at para 18; *Restoule* SC, *supra* note 17 at paras 412–23).

> a reciprocal "gift" of commensurate value, ... embodies *responsibility* in affirming the Anishinaabe's ongoing duties to their people, at the time the Robinson Treaties were signed and in perpetuity, ... [a]nd it allows for *renewal* since the Robinson Treaties would adjust as economic circumstances changed.[21]

The Anishinaabe perspective on the Robinson Treaties was obviously understood by the Crown at the time and, significantly, the Court in *Restoule* concludes that the treaties themselves were "founded on these principles of mutual respect, mutual responsibility, reciprocity and renewal."[22]

The Court's treatment of these four Anishinaabe principles[23] as founding pillars of a bilateral treaty is noteworthy. So too is the fact that the Court invokes the longstanding prior relationship between the Anishinaabe and the Crown to understand and interpret the treaty documents, including the parties' obligations to each other today. On several occasions the Court refers to the Covenant Chain alliance previously entered into by the treaty partners, with its commitments of kinship and mutual assistance, as framing both the treaties themselves and the treaty partners' current relationship.[24] It is with that context in mind that the Court concludes that the Robinson Treaties are living agreements, "embodying a relationship nurtured over many years before 1850 and requiring ongoing renewal into the future."[25]

In the *Restoule* case, the interplay of common law treaty interpretation principles and Anishinaabe concepts led to a declaration that the Crown is obligated to negotiate honourably with the Robinson-Superior

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21 *Restoule* SCC, *supra* note 1 at para 179 [emphasis added, references omitted].

22 *Ibid* at para 284.

23 Interestingly, the Court does not identify them as Anishinaabe *legal* norms, although the Court recognizes the relevance of Anishinaabe law to the treaty-making process in other parts of its judgment (see *ibid* at paras 17–18, 34). Note that the Anishinaabe plaintiffs did not ask the trial judge to apply Anishinaabe law but rather to treat Anishinaabe law as part of the factual background to the Anishinaabe perspective on the Robinson Treaties. See *Restoule* SC, *supra* note 17 at para 13. This may have been a tactical decision by the Anishinaabe plaintiffs to keep their submissions clearly within the bounds of existing canons of treaty interpretation. It is also possible that it was a decision taken to avoid the possibility of a non-Indigenous court misinterpreting or distorting Indigenous law.

24 *Restoule* SCC, *supra* note 1 at paras 4, 19–20, 22, 286.

25 *Ibid* at para 13.

First Nations in an effort to settle upon a just amount of compensation for the Crown's past failures to increase the annuity.[26] The broader question nevertheless arises: what are the implications of the Court's use of Anishinaabe principles for the implementation of other historical treaties and even, potentially, for the remaining terms of the Robinson Treaties?

It is not implausible to suggest that other Anishinaabe groups who entered historical treaties with the Crown, whether closer in time to the *Treaty of Niagara* in southern Ontario, or after 1850 in northern Ontario and Manitoba brought the same or broadly similar Anishinaabe principles to their treaty negotiations. Those treaties too were negotiated in the backdrop of the Covenant Chain relationship of kinship and mutual aid. Nor is it implausible, given the records that remain of the Crown negotiators' consistent assurances of Her Majesty's generosity during the making of those historical treaties,[27] that those treaties were also founded on the same or similar premises. If so, does it follow that the same principles are also foundational to the Crown's obligations under those other historical treaties? Arguably, the judgment in *Restoule* gives considerable credibility to that conclusion (that those treaties were also premised on respect for Anishinaabe jurisdiction, the responsibility of the Anishinaabe leaders to provide for their communities' future welfare, reciprocity in the value of the commitments made by each treaty partner, and a commitment to continued renewal of their relationship over time). This is an argument to which we will return in section 3 of this article.

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26 *Ibid* at para 305.

27 See e.g. Alexander Morris' assurance in the negotiation of Treaty 3 that the Treaty would be "for your good and for your children's," and his statement in the discussions leading up to Treaty 4, "The Queen has to think of what has to come long after today. Therefore, the promises we have to make to you are not for to-day but for tomorrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean" (see *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*: *Including the Negotiations on Which They Were Based, and Other Information Relating Thereto*, Prospero Canadian Collection (Toronto: Prospero Books, 2000) at 59, 96.

II. POTENTIAL LIMITATIONS ON THE APPLICABILITY OF *RESTOULE* TO OTHER HISTORICAL TREATIES

A possible constraint on applying the *Restoule* analysis to other historical treaties and, indeed, to the other terms of the Robinson Treaties themselves, arises from the Court's continued emphasis on the text of the written treaty document in ascertaining the meaning of the treaties' promises. In this regard, the Court followed its longstanding practice. According to Justice Jamal, citing *R. v. Marshall*: "[t]he starting point in interpreting the Augmentation Clause is to examine 'the specific words used' in the treaty document and to determine 'their facial meaning.'"[28] Absent surviving evidence of specific oral promises modifying a treaty term, absent proof that the written document is incomplete in its recording of the parties' understanding,[29] and absent evidence that the document was inaccurately translated to the Indigenous negotiators, the treaty interpretation process established by the Court, and unchanged by *Restoule*, focuses largely on the written document prepared at the end of negotiations by the Crown's representatives.[30]

Such a focus on the surviving written document has obvious evidentiary attractions in the case of agreements entered decades or centuries ago. From a court's perspective it seems to provide certainty in limiting the scope of argument about the parties' actual common intention, if any, in making the treaty. Ultimately, in the *Restoule* case itself, the text of the written treaty documents provided its own clear foundation for a reconsideration of the treaties' annuities, quite apart from the evidence about the Anishinaabe understanding of the treaties. In *Restoule*, as we have seen, the text of the Crown document was found to be consistent with the Anishinaabe principles that the Court found undergirded the treaties.

However, in most contexts this graphocentric approach will not give equal respect to the perspective of the Indigenous historical treaty partners, who did not come from societies that privileged the written word over oral communication. Further, the importance of the relational

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28 *Restoule* SCC, *supra* note 1 at para 127, citing *Marshall*, *supra* note 18 at paras 5, 82 [referneces omitted].

29 *Ibid*.

30 The Court's analysis of four possible ways to interpret the written text of the annuities promise lasted almost sixty paragraphs (see *ibid* at paras 138–95).

aspects of the treaties is all but ignored in the written texts of the historical land treaties prepared by the Crown's representatives after 1763.[31] This stands in sharp contrast to other surviving memorials of treaty-making between Indigenous Peoples and the Crown, like the Covenant Chain belt and the Two-Row Wampum[32] which focus almost exclusively on the nature of the parties' future relationship.[33] So too did the commemorative medals prepared by the Crown in honour of the numbered land treaties.[34] Inevitably then, giving primacy to the written texts of historical land treaties introduces an interpretive bias, even in cases where the written texts are not misleading in the content that they do describe. Additionally, an

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31 The written texts of those treaties were typically drafted in transactional language – regularly describing a "ceding" of land in exchange for money, goods, the guarantee of certain liberties and, occasionally the provision of medical or educational services by the Crown. The texts of the Robinson Treaties exemplify this kind of transactional framing. See the texts of the "Upper Canada Land Surrenders", the "Douglas Treaties", and the "Numbered Treaties" in Canada, "Historic Treaties" (last modified 17 February 2026), online: <rcaanc-cirnac.gc.ca> [perma.cc/SJL7-5V9Q].

32 The Two-Row Wampum, or *Kaswentha*, was created in the seventeenth century to describe the relationship between the Haudenosaunee in what is now New York and the Dutch and subsequently English settlers. Given physical form in wampum belts displaying two parallel purple lines of beads, the *Kaswentha* portrays a relationship of peaceful relations, mutual respect and self-determination. For descriptions of the history and symbolism of the Two-Row Wampum, see e.g. Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*, (New York: Oxford University Press, 1997) at 4–12, 51–52, 124–37; Jon Parmenter, "The Meaning of *Kaswentha* and the Two Row Wampum Belt in Haudenosaunee (Iroquois) History: Can Indigenous Oral Tradition be Reconciled with the Documentary Record?" (2013) 3:1 J Early Am History 82; Richard W Hill Sr & Daniel Coleman, "The Two Row Wampum-Covenant Chain Tradition as a Guide for Indigenous-University Research Partnerships" (2019) 19:5 Cultural Studies & Critical Methodologies 339.

33 Although both the Covenant Chain and the Two-Row Wampum and their significance are regularly described in the Crown's historical records at least until the early 1800s, neither conceptual framework is alluded to in the written texts of any of the land-sharing treaties negotiated after 1764. On the history of documented references to the Two-Row Wampum prior to 1764, see Parmenter, *supra* note 32 at 88–97.

34 A typical example of these medals shows a representative of each treaty partner shaking hands in front of a perpetual sun, once again foregrounding the significance of the land treaty as a framework promising strengthened relationships (see Joseph Shepherd Wyon & Alfred Benjamin Wyon, *Indian Chiefs Medal, Presented to Commemorate Treaty Numbers 3, 4, 5, 6, 7, 8 (Queen Victoria)*, (1873–1899) held by Library and Archives Canada [medal], online: <recherche-collection-search.bac-lac.gc.ca> [perma.cc/S79N-EDVN].

approach to treaty interpretation that is centered on historical treaty texts and followed by a search for surviving evidence of the parties' intent risks prejudicing the Indigenous side of every historical treaty where there are no surviving elders able to present evidence of their people's perspective on the mutual assurances made during its negotiation.[35]

Finally, giving primacy to the written text of the historical land treaties may also ignore Indigenous understandings at the time as to which portions of a dialogue were important, or intended to be binding. For that purpose, at the time of the historical treaties, the Indigenous treaty partners relied on a distinct set of long-established diplomatic protocols and symbols like the council fire, totems, wampum belts, the exchange of gifts, and pipe ceremonies.[36] The Crown's negotiators were well aware of the significance of these protocols, a fact underlined repeatedly in the Crown's historical records.[37] To its credit, the Supreme Court of Canada in *Restoule* pays considerable attention to relational metaphors, like that of the Covenant Chain, even though there is no reference thereto in the Robinson Treaties' texts. The Court's interpretative method allows it to do so because the treaties' texts themselves addressed the issue of the

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35 This was the case in *Grassy Narrows*, *supra* note 19. According to the Ontario Court of Appeal judgment in that case, "The parties to this litigation were not able to identify Ojibway elders with relevant oral traditions" (see *Keewatin v Ontario (Minister of Natural Resources)*, 2013 ONCA 158 at para 37 [*Keewatin*], aff'd 2014 SCC 48).

36 In the words of a speaker from Six Nations to Sir William Johnson in 1757, "our words are of no weight unless accompanyd with Wampum" (see Almon W Lauber & Alexander C Flick, eds, *The Papers of Sir William Johnson* (Albany: University of the State of New York, 1939) vol 9 at 604). See also Mary A Druke, "Iroquois Treaties: Common Forms, Varying Interpretations" in Francis Jennings, ed, *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League*, The Iroquois and Their Neighbors (New York: Syracuse University Press, 1985) 85 at 89; John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28:1 UBC L Rev 1 at 20. For further description of the various uses and importance of wampum symbolism see William N Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy*, The Civilization of the American Indian Series, vol 223 (Norman, Okla: University of Oklahoma Press, 1998) at ch 16.

37 For Sir William Johnson's use of the symbolism of the wampum belt as the senior Crown representative at the Treaty Council at Niagara in 1764, see Borrows, "Wampum at Niagara", *supra* note 6 at 163. Similarly, Alexander Morris repeatedly refers to the significance of pipe ceremonies in cementing alliances with the Indigenous nations with whom he negotiated (see *supra* note 27 at 97, 183, 198, 230, 234).

parties' evolving obligations going forward. It is not clear, however, how the conventional text-based approach to interpretation will be able to honour the same enduring relational commitments in other historical land treaties whose texts are silent on this point.

Is there a solution to this dilemma that avoids what seems to be an interpretive bias in favor of the Crown, but neither disregards the treaty texts nor requires the courts to engage in pure speculation as to the treaty partners' intentions? This question is of vital importance not just for Indigenous Peoples who entered land-sharing treaties during the historical period, but also for the Crown in assessing its continuing obligations under those treaties.

III. RECONSIDERING THE HISTORICAL TREATY AS A PRODUCT OF INTERSOCIETAL LAW

In reflecting on how the law might evolve to better reflect both partners' historical perspectives on treaty-making, it may be helpful to keep in mind five overarching criteria that are consistent with the existing jurisprudence. Thus, the law of historical treaty interpretation should strive to avoid bias against Indigenous perspectives, to reflect the practices that guided the historical treaty-making process, to recognize that each historical treaty was the product of two sets of values and laws, and to give effect to the historical treaties as "vital, living instruments of relationship," to cite the language used by the Supreme Court of Canada in another recent treaty decision.[38]

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38 *Shot Both Sides*, *supra* note 19 at paras 39, 76. The focus on treaty-making as a framework primarily aimed at strengthening or establishing new relationships was not unique to the Anishinaabe amongst Indigenous nations in North America (see e.g. Robert A Williams Jr, "Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace" (1994) 82:4 Cal L Rev 981 at 990–96 [Williams, "Multicultural Constitutionalism"]. On the centrality of establishing "right relationships" in Anishinaabe treaty-making, see Heidi Kiiwetinepinesiik Stark, "Changing the Treaty Question: Remedying the Right(s) Relationship" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 248 at 270–74. For the concept of treaty, "*inaistisinni*" as presented by a representative of the Blood Tribe, see Asch, *supra* note 8 at 75. For a brief survey of recent scholarship on relational approaches to treaties, see Sylvie Poirier & Clinton N Westman, "Vivre

With those criteria in mind, there are at least three ways that the principles of respect, reciprocity, responsibility and renewal identified in *Restoule* might come to be applied to other historical treaties. One avenue, already hinted at, is that the Anishinaabe signatories to other historical land treaties might reasonably argue that since the Court has recognized that Anishinaabe principles were foundational to the Robinson Treaties, there is no reason to think that any other land treaty entered by the Anishinaabe during the historical period would have flowed from different underlying principles and assumptions. That being the case, the courts should be willing to treat those principles as implied terms of the other Anishinaabe land-sharing treaties, regardless of their written texts.

There is a second method by which the principles enunciated in *Restoule* might be adopted in the case of other historical land treaties. The Anishinaabe, after all, were not the only Indigenous nations involved in the Covenant Chain alliance. The roots of that alliance lie in treaties made between the British and the Haudenosaunee in the seventeenth century and the metaphor of the Covenant Chain was applied in 1764 to all the Indigenous nations who participated in the Treaty Council at Niagara.[39] The Covenant Chain alliance was symbolized by an iron or silver chain linking the British ship of state to a tree in the heart of Indigenous lands. The chain bound the Crown and Indigenous Peoples together in peace, with a promise of mutual assistance which either side could request by pulling on the chain. The Covenant Chain metaphor also included an undertaking by each side to "polish" or "brighten" the chain through

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ensemble avec la terre : Conclure et honorer les traités avec les peuples autochtones" (2020) 62:2 Anthropologica 223 at 228–30.

39 At the Treaty Council, Sir William Johnson presented a Covenant Chain belt to representatives from twenty-four Indigenous nations. Referring to the belt, Johnson announced "I desire you will take fast Hold of the same, and never let it slip, to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipaweighs at St. Mary's [Sault Ste Marie] whilst the other end remains at my house"(see JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) at 73). For more on the Covenant Chain relationship, see Mark D Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after *Marshall*" (2001) 24:2 Dal LJ 75 [Walters, "Brightening the Covenant Chain"]; Mark D Walters, "Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain Be Judicially Enforced Today?" in Borrows & Coyle, *supra* note 38, 187; Williams, "Multicultural Constitutionalism", *supra* note 38 at 989–96; Miller, *supra* note 39 at 49–59, 72–73.

periodic meetings between Crown and Indigenous representatives to renew and revitalize their treaty commitments.[40]

The Court in *Restoule* affirmed that the Covenant Chain continues to be relevant to an understanding of the obligations created by the Robinson Treaties—agreements that were negotiated almost ninety years after the Council at Niagara.[41] It would not be unreasonable to suggest that the principles of the Covenant Chain alliance also informed other land-sharing treaties negotiated in the historical period.[42] The Covenant Chain commitment of mutual assistance (related to the concept of reciprocity), its image of linked arms reflecting kinship and respect between the treaty partners, and its mutual engagement to "polish" the terms of their relationship agreement, all arguably require that the promises of the historical land treaties would be revisited and renewed periodically, regardless of the written texts' silence on this point.

There is a third way by which the Court's invocation of the principles of respect, responsibility, reciprocity, and renewal might be applied to the interpretation of other historical land treaties. That third approach, arguably the most robust, involves considering whether the principles are, in fact, bedrock principles that are necessary to make sense of the entire historic treaty-making enterprise, whether examined from the Indigenous or the Crown's side of those treaties. From first principles alone it can be argued that the historical endeavour embarked on by the Crown and Indigenous nations to establish the terms of their co-existence on

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40 See Walters, "Brightening the Covenant Chain", *supra* note 39 at 84.

41 For example, the Court in *Restoule* quoted the finding of the trial judge that the Robinson Treaties were motivated largely by the principles of kinship and mutual interdependence reflected in the Covenant Chain (see *Restoule* SCC, *supra* note 1 at para 286). Significantly, when it came to deciding an appropriate remedy for the Crown's breach of those Treaties, the Court returned to the Covenant Chain metaphor, concluding that "[t]he Anishinaabe treaty partners have been tugging on the rope for some 150 years now, but the Crown has ignored their calls. The Crown has severely undermined both the spirit and substance of the Robinson Treaties" (see *ibid*).

42 In this context it is worth noting the recent decision of the Quebec Superior Court in *R c Montour*, 2023 QCCS 4154. In that case, which did not involve a land treaty, Justice Bourque ruled (*ibid* at para 1052) that the Covenant Chain relationship created enforceable treaty rights for the Mohawks of Kahnawà:ke. Those rights included the right to be consulted by the Crown prior to the enacting of legislation regulating the importation of tobacco.

Indigenous territories in perpetuity was inevitably based on certain shared premises. A logical way for the courts to honour those premises would be to acknowledge that the negotiation of land-sharing treaties led to the creation of a new institution of intersocietal law.[43]

The treaty relationship can undoubtedly be viewed from many perspectives. With its associated protocols of commitment, relationship-building and renewal, treaty-making had long been a tool of diplomacy between Indigenous nations in North America.[44] For their part, the British and French had their own traditions and rules surrounding the use of treaties in international relations. However, the negotiation of treaties designed to permit the sharing of lands between the Crown and Indigenous Peoples in North America was different from either of these predecessors. The negotiation of those treaties required the creation of a new normative order by which the treaty partners would agree to abide on the same territory. Bringing to the Council Fire very different cultural, diplomatic and legal traditions, the Crown and diverse Indigenous nations were able repeatedly to develop land-sharing arrangements that, although varied in their specific terms, created a framework for co-existence across the country. Because of this, Indigenous-Crown treaties are best viewed, not merely as a group of individual sui generis agreements, but as a new kind of institutional arrangement within whose framework the treaty partners would be expected to interact. The consequence of treating the historical land-sharing treaties in this way, as instances of an overarching legal institution, is that it permits the universal application of certain fundamental principles to their interpretation and implementation.

For what it is worth, to approach the historical treaties as institutional arrangements that are subject to certain overriding substantive principles would be to adopt a method long used by the common law. Particularly in cases where people interact in commonly used arrangements that render them dependent on each other, the courts have been willing to develop new legal categories, or institutions, to govern their relationships.

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43 For an extended analysis of the historical treaties as institutions and the principles that arguably flow from that institutional recognition, in a publication that predates the *Restoule* litigation, see Michael Coyle, "As Long as the Sun Shines: Recognizing That Treaties Were Intended to Last" in John Borrows & Michael Coyle, *supra* note 38, 39 [*As Long as the Sun Shines*] at 53–66.

44 See Williams, "Multicultural Constitutionalism", *supra* note 38 at 994–1006.

In cases that fit those distinct categories, the courts have imposed appropriate rules and obligations to protect the parties' interests, as well as those of the public. Those rules will be applied by the courts regardless of the terms of any agreement that the parties have made. The development of contracts as a category of obligations is one example of this. Certain rules, such as those surrounding the exchange of consideration, amendment of the agreement, and the remedies available for unconscionability govern the parties' obligations regardless of the written terms of their private agreement. The development of the law of partnerships is similar. The courts decided centuries ago that persons pursuing certain kinds of public-facing joint enterprises would be subject to fixed rules both to each other and to the public, like the principle of joint and several liability among partners for the partnership's debts.[45] As in the law of contract, the courts determined that certain rules were foundational to the nature of the partners' relationship and were not subject to being ousted by the parties' written agreement.[46] So too, the rules surrounding trusts and fiduciary relationships are another example of the courts treating certain interpersonal arrangements as subject to universal principles governing the parties' relationship.[47] In all such cases the courts developed a set of institutional rules/principles to protect the parties involved while

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45 Cases citing the rule on the joint and several liability of partners date back to at least to 1793 and the case of *Waugh v Carver* (1793), 125 ER 536, [1793] EngR 1595 (CommonLII) (EW Ct Com Pl) [*Waugh*]. For a description of the origins of the rules governing partnerships at common law, see John Collyer, *A Practical Treatise on the Law of Partnership*, 1st American ed by Willard Phillips & Edward Pickering (Springfield, Mass: G and C Merriam, 1834) at 1.

46 See e.g. *Waugh*, *supra* note 45 at 532:

> But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing.

47 For two of the earliest cases to recognize and develop the principles that would come to govern the relationship between a fiduciary and its beneficiary, see *Keech v Sanford*, [1726] EWHC Ch J76 (BAILII); *Walley v Walley*, [1687] EngR 1001 (CommonLII) (EW ChD). See also Leonard I Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005) at 58–66.

permitting them to develop their own customized arrangements within the framework of that institution.[48]

Of course, the historical treaties were not a product of the common law alone; they resulted from the interaction of distinct Indigenous legal orders and British and Canadian state law. This writer is not trained in Indigenous law, but it seems clear from the writings of Indigenous scholars that the concept of ongoing normative frameworks that define the reciprocal rights and responsibilities of groups and individuals within and across communities is not unknown to Indigenous legal orders.[49] And returning to historical treaty-making, the over-arching treaty principles described by the Anishinaabe witnesses in *Restoule* appear to capture the same idea, namely that individual treaty arrangements were understood as being subject to certain overriding norms that would guide the treaty relationship. Using the word "institution" to describe this framework of the overarching obligations created by the treaty-making process might at first blush seem inadequate to capture what are undoubtedly diverse Indigenous perspectives on treaties. Nevertheless, from its literal roots the word "institution" denotes an arrangement within which people can "stand together"—much like the metaphors of linked arms and the Covenant Chain. It is at least one way of translating Indigenous conceptions

48 For more on the common law's development of general institutions (like the partnership), and the particular "institutional arrangements" made by people who make use of those institutions, see Neil MacCormick, "Norms, Institutions, and Institutional Facts" (1998) 17:3 Law & Phil 301 at 336–38; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory*, Law, State, and Practical Reason (New York: Oxford University Press, 2007) at 35–36, 159–63.

49 The principles governing clan structures and responsibilities, to the extent that they transcend whatever commitments an individual or group might make, is one example of an ongoing relational framework that could be described as an institution (see Law Commission of Canada, *Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada*, by John Borrows, Catalogue No JL2-66/2006E-PDF (Ottawa: LCC, 2006) at 34–41, online (pdf): <publications.gc.ca> [perma.cc/ 9ZJ4-ANCB]). The norms governing the mutual obligations of married couples and relatives might be similarly described, as might the structure of traditional processes for resolving disputes within and across Indigenous nations (see e.g. Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 45).

of the land treaties as ongoing, living frameworks within which the treaty partners would be expected to interact.[50]

It has been suggested above that the historical treaty-making process embarked on by the Crown and Indigenous nations to establish the terms of their future co-existence on Indigenous territories was inevitably based on certain premises. The land-sharing treaties negotiated across the country during the historical period undoubtedly unfolded in the context of differences in the treaty partners' perspectives and circumstances. Nevertheless, it is possible to identify certain basic premises that are necessary for the treaty-making enterprise to make any sense at all, particularly from the Indigenous treaty partners' point of view. A just legal framework for the implementation of historical treaties should reflect those premises.

One of those shared premises was that each treaty partner was capable of being held accountable for its promises, that each partner's representatives had the authority to make commitments in relation to their lands and peoples. Otherwise, neither treaty partner could make plans based on the promises made by the other. That recognition of each treaty partner's capacity to make decisions on behalf of its people and in connection with the treaty lands is the same principle that the *Restoule* judgment refers to as the Anishinaabe principle of "respect" for each treaty partner's underlying jurisdiction.[51] It is evident, however, that this recognition of each party's decision-making authority is not unique to the Robinson Treaties. Instead, it is a necessary principle of all treaty-making: *each treaty partner had the jurisdiction to make commitments binding on their people and continues to retain sufficient decision-making authority to implement the treaty on behalf of their respective peoples*.

A second aspect of the historical land treaties is that they were intended to bind the treaty partners in perpetuity. The frameworks they

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50 Compare Justice Jamal's description of the Anishinaabe perspective of their land treaties,

> [f]or the Anishinaabe, "the Treaties were not a contract and were not transactional; they were the means by which the Anishinaabe would continue to live in harmony with the newcomers and maintain relationships in unforeseeable and evolving circumstances" (see *Restoule* SCC, *supra* note 1 at para 300, citing *Restoule* SC, *supra* note 27 at para 423).

51 *Restoule* SCC, *supra* note 1 at para 18.

established were destined to guide the treaty partners long after their immediate circumstances changed. Both treaty partners were aware that non-Indigenous settlement, the building of transportation infrastructure, like the railways, and resource development by the Crown had the potential to change the ways that the Indigenous treaty partners had heretofore lived on and enjoyed their territories. Yet none of the historical treaties purport to set out a blueprint for how the treaty partners would adjust to those changes over the coming decades and centuries. Nor do any of those treaties include a mechanism for resolving disputes between the treaty partners about its future implementation. In the absence of such a mechanism and framework for how the party's mutual obligations would evolve over time, an obligation of dialogue between the parties to periodically discuss and revisit the details of the treaty arrangements is necessary to give efficacy to their agreement of perpetual co-existence. The obligation to respect the treaty relationship by engaging in periodic negotiation about and potential adjustment of the treaty terms is captured by the Supreme Court of Canada in *Restoule* as the Anishinaabe principle of "renewal", but it is clearly the only rational basis on which any Indigenous leaders would agree to share their lands forever.[52] In short, the perpetual nature of all the historical land-sharing treaties logically *requires the parties to engage in a dialogue periodically to address in good faith both sides' contemporary needs in light of changing circumstances*.

A third implementation principle also flows from the inevitability of changes to the parties' use of the treaty lands over the decades and centuries following the treaty. This principle derives from the premise (underscored by repeated declarations made by the Crown's negotiators at the time of the historical treaties) that the Indigenous partner's agreement to share their lands would be matched by corresponding benefits that would accrue to them over the life of the treaty. In other words, implicit in all the land-sharing treaties was an assurance that the implementation of the treaty over time would not be carried out in such a way as to render the treaty an improvident bargain. The law governing treaty interpretation and implementation of historical treaties should reflect at least this minimal standard: *that in the periodic negotiations to address significant changes in circumstances over time the Crown must act in good faith to ensure*

52 For a deeper analysis of this point, see *As Long as the Sun Shines*, *supra* note 43 at 55–62.

that the Indigenous treaty partner receives benefits that are in some way commensurate to what they have given up under the treaty.

This third rule is consistent with an existing principle of treaty jurisprudence, namely that the Crown is and has always been required to act honourably in the negotiation and implementation of treaties.[53] As it turns out, the rule is also consistent with the Supreme Court's interpretation of the Robinson Treaties in *Restoule*. There, the Court identified the Anishinaabe principles of "reciprocity" and "responsibility" as engaging the concepts that the Treaties were expected to provide commensurate value to each treaty partner and to permit the Anishinaabe leaders to safeguard the well-being of their peoples going forward under the treaty. Indeed, as we have seen, the Court interpreted the Robinson Treaties' texts as recognizing and reflecting those two principles.[54]

To summarize, an institutional approach to the historical land-sharing treaties would recognize that certain universal rules flow from the particular context in which those agreements of co-existence were negotiated. Similar to the way that the law approaches other specific relations of high interdependence, those rules should govern all historical land treaties, in addition to the specific undertakings made by the treaty partners. In this way, the texts of each historical treaty will continue to be of central importance but the language of their written terms should not be permitted to displace the fundamental principles outlined above. Those fundamental principles should apply to all historical land-sharing treaties as a matter of logic, not evidence. Further, like the rules governing other legal institutions, those principles would apply without the need to find an ambiguity in the parties' written agreement.[55]

Adopting an institutional approach to the historical treaties would serve access to justice by not requiring the Indigenous partners in those

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53 See *Haida*, *supra* note 5 at paras 17, 20.

54 In the words of the Court, "[t]he Robinson Treaties recognized the Anishinaabe's authority to conclude agreements to share their territory and their responsibility to their people, embodied the idea of reciprocity and mutual dependence, and cemented a longstanding nation-to-nation relationship that would be renewed in perpetuity" (see *Restoule* SCC, *supra* note 1 at para 195).

55 Thus, the universal application of these rules to the historical land treaties would differ significantly from, and would not rely on, the test for ascertaining implied terms in individual agreements.

treaties to bear in every case the considerable, and sometimes insurmountable,[56] burden of trying to locate surviving evidence of the contemporaneous understandings of their ancestors (for example, as to whether they thought the treaty was a one-time transaction and whether they thought the treaty relationship was intended to benefit their descendants) and to identify any specific oral assurances that were made during the treaty negotiations. At least with respect to the fundamental principles outlined above, that is an unnecessary evidentiary onus that Indigenous treaty partners should not be required to meet as the dates that those treaties were negotiated continue to recede into the past.

Applying these fundamental principles to historical land treaties would continue to respect the individual context of each treaty. Thus, in addition to examining the language used in the treaty texts, the courts would continue to review the historical context of each treaty and the distinct perspectives of the particular Indigenous nations and their Crown counterparts who negotiated the treaty. Nor, I suggest, would the application of those underlying principles imply a pan-Indigenous approach to the interpretation of historical land treaties, any more than the recognition that certain uniform rights flow from the existence of aboriginal title. Further, applying those principles requires only that the individual treaty partners revisit in good faith their historical arrangements in light of changing circumstances. The content of their negotiations would inevitably reflect the distinct cultures, needs and aspirations of the Indigenous treaty partners involved, as well as the current uses of the treaty lands and the present interests of the Crown and members of the public in relation to the treaty lands.

IV. RESPECTING INSTITUTIONAL ROLES

Implementing the treaty principles outlined above will undoubtably require reflection on the respective roles of the courts, the executive, and the legislatures. There is no doubt that in any effort to renew and revitalize the historical land treaties the courts must act within certain limits. As the Supreme Court stated in *Restoule*, citing Professor Kent Roach, "[c]ourts should provide remedies that respect institutional roles

56 This was the predicament faced by the Grassy Narrows First Nation in *Keewatin*, *supra* note 35.

including the limits on the judiciary."[57] The courts are generally not well equipped by the adversarial process to make polycentric choices or to "evaluate the wide-ranging consequences that flow from policy implementation."[58] And there is no doubt that any assessment of how the historical land treaties should be renewed to reflect changes in circumstances over decades or even centuries will involve considering the diverse interests of all those on the treaty lands.

Thus, it can be argued with some force that respecting the institutional roles of the courts, the executive, and the legislature requires that broad questions like those involved in renewing historical treaties should be addressed through negotiations between the treaty partners, not through the court process. Further, the use of nation-to-nation dialogue to revitalize the treaty partners' relationship is consistent with the historical establishment of the Covenant Chain by the Crown and Indigenous Peoples and the practice of "polishing" that chain. A dialogic approach is also consistent with dispute resolution theory, which posits that voluntary agreements created by the parties are more likely to reflect their values and interests, to be respected by the parties and, accordingly, to endure over time than outcomes unilaterally imposed on them by an outside body like a court.[59] In addition, relying on negotiation permits

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57 *Restoule* SCC, *supra* note 1 at para 293, citing Kent Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 2013) (loose-leaf updated October 2023, release 2) at § 15:2. See also Kent Roach, "A New Constitutional Remedy: The Declaration Plus" (Paper delivered at the Honouring Treaties: Respect, Nation to Nation Relationships and Revenue Sharing Conference, Ottawa, 10 April 2025) [unpublished], DOI: <10.2139/ssrn.6857602> [Roach, "Declaration Plus"].

58 *Restoule* SCC, *supra* note 1 at para 294.

59 See e.g. D Paul Emond, "Alternative Dispute Resolution: A Conceptual Overview" in D Paul Emond, ed, *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora, ON: Canada Law Book, 1989) 1 at 4–6. For an example of the Supreme Court of Canada's stated preference that negotiation be used in the resolution of disputes between Indigenous Peoples and the Crown, Chief Justice McLachlin stated that "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests" (see *Haida*, *supra* note 5 at para 14). See also the following statement from Chief Justice Lamer in *Delgamuukw v British Columbia*:

> By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". ... Moreover, the Crown is under a

parties to reach complex outcomes to respect their multiple interests, in sharp contrast to the limited remedies available through the courts. For those reasons, nation-to-nation dialogue is generally the preferred approach for advancing the reconciliation of Indigenous Peoples and the Crown, as the Court noted in *Restoule*.[60]

There are, nonetheless, powerful factors that support an active role for the courts in addressing disputes about the implementation of historical treaties. As the litigation in *Restoule* exemplifies, in the past the federal and provincial governments have shown little, if any, interest in inviting their historical treaty partners to revisit the terms of those treaties. Even if they do agree to come to the table in the future, negotiations to address the parties' differing positions would be subject to significant power imbalances in favour of the Crown.[61] Further, the absence of clear legal guidance about the mechanics of renewing the historical treaties, combined with the inevitable complexity of the issues to be resolved moving forward, means that the odds of negotiations reaching an impasse are relatively high.

Perhaps the best approach to revitalizing the historical treaties is not an either-or choice. As the remedy ordered in *Restoule* makes clear, the implementation of principles like renewal and reciprocity does not have to rest solely with the courts or solely at the discretion of successive governments. In *Restoule* the Court issued a declaration that a proper interpretation of the annuities augmentation clause meant that the Crown had a duty to consider, from time to time, whether it could increase the annuities payable under the Robinson Treaties. The Crown had admittedly breached that duty. As noted above, this led the Court to direct that the

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> moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (see 1997 CanLII 302 at para 186 (SCC)).

60 *Restoule* SCC, *supra* note 1 ("[t]hese principles concerning the proper role of the courts dovetail with the idea that '[r]econciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences'" at para 297).

61 See Michael Coyle, "Transcending Colonialism?: Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand" (2011) 24:4 NZULR 596 at 601–09.

Crown negotiate with the Robinson-Superior plaintiffs to try to reach a just settlement for its past breaches.[62] But the Court did not stop there; if the treaty partners failed to reach an agreement within six months, the First Nations were authorized to seek judicial review of the Crown's conduct in those negotiations as well as the amount of compensation that the Crown had offered for its breach.[63]

The Supreme Court's use in this way of what has been termed a "declaration plus,"[64] ordering the treaty partners to enter negotiations that would remain subject to supervision by the courts, is a thoughtful and creative approach to the question of how to address disputes about the modern implementation of historical treaties. As such, it would be a promising starting point for judicial enforcement of the treaty principles described in this article. The most appropriate way to address disputes that might arise over the modern implementation of modern promises would be for the treaty partners to negotiate honourably and in good faith in an effort to resolve their differences. Such an approach would be respectful of the parties' historic treaty relationships and compatible with the project of reconciliation. The parties might face difficult issues in their negotiations, but so too did the Robinson-Huron First Nations and the Crown prior to successfully reaching an out-of-court settlement in the *Restoule* litigation.[65] Nonetheless, treaty renewal discussions would likely be challenging, complex and polycentric. In each case, therefore, the courts would need to be creative in designing a framework of judicial supervision (which might well be more periodic than in *Restoule*) adapted to the issues that the treaty partners need to resolve.[66]

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62 *Restoule* SCC, *supra* note 1 at paras 304–05.

63 *Ibid* at paras 305, 307. The parties did not in fact reach a negotiated settlement within this timeframe. By contrast, the Crown was able to reach a multi-billion dollar out-of-court settlement with the Robinson-Huron Treaty plaintiffs (see Aya Dufour, "Distribution of the $10B Robinson Huron Treaty Past Annuities Settlement Finally Begins", *CBC News* (9 August 2024), online: <cbc.ca> [perma.cc/T2Q8-VUNT]).

64 See Roach, "Declaration Plus", *supra* note 57 at 9–13.

65 See Dufour, *supra* note 63.

66 On the courts' need to be creative in the context of crafting remedies for the breach of agreements between the Crown and Indigenous groups, see *Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 at paras 210–24.

CONCLUSION

This article has argued for the recognition of certain fundamental and universal principles in the interpretation and implementation of the historical land-sharing treaties. The predominantly graphocentric approach adopted by the courts to date disadvantages the Indigenous Peoples who entered those treaties. The evolution of Canada's treaty jurisprudence has reached a point where it is appropriate to recognize the historical land treaty as a particular kind of intersocietal legal institution. As such, the institutional arrangements created by the historical land treaties call for the application of certain basic rules to govern the treaty partners' mutual obligations. The fundamental premises of those land-sharing treaties are as important in defining the treaty partners' legal relationship as the spare written texts that purported to document how they would share the territory long into the future.

In *Restoule*, the Court applied overarching general principles of treaty renewal in the context of a written text that appeared to reflect those principles. The opportunity created by *Restoule*, and the interpretive challenge going forward, is to implement the underlying premises of the historical land treaties, including the promise of treaty renewal, in contexts even where the Crown's treaty text is silent.