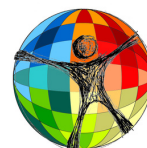


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Living the Treaty Relationship: The Role of Courts in Treaty Revitalization Today

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ABSTRACT

This article seeks to share what I have come to understand of Indigenous perspectives on treaty, then it questions whether Canadian courts are able to take into account Indigenous perspectives in a way that fosters respectful relationship.

I base my analysis of Western and Indigenous treaty paradigms using Aaron Mills's framework of a legality tree. Using this, I present two contrasting visions of treaty—as a justiciable contractual exchange between autonomous parties and as a mutual aid relationship between interdependent kin grounded in the earthway—along with my understanding of the normative frameworks that give life to these visions. I then articulate two principles of reconciliation: respectful dialogue across constitutional orders and recognizing our mutual relationship with the land. Turning to the courts, I argue that Canadian courts' history, imposed nature, reliance on a contractarian view of treaty and Crown sovereignty, and location within only one of the legalities of the treaty relationship prevent it from adjudicating treaty disputes in a manner that promotes respectful dialogue between legalities and connection with the earth. I then overview various proposals for what the courts could do to pursue reconciliation, all of which, from my perspective, hold both promise and risk.

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Introduction

We call upon the Government of Canada, on behalf of all Canadians, to ... [r]enew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.¹

During the summer of 2021 I completed a remote internship with the Indigenous Law Centre at the University of Saskatchewan. Although my first year of law school had sparked an interest in learning more about Indigenous legal orders, I felt like I knew very little and was anxious to discover what tasks I would be assigned. Consequently, I was both excited and overwhelmed when asked to help design a course proposal on Indigenous perspectives on Treaty. I understood that “treaties’ intentions [could] only be discerned by understanding the larger framework of Indigenous governance and legal traditions,” which I felt I had barely begun to do.² I also understood that these legal traditions themselves were only comprehensible within a broader normative framework, which I needed to try to grasp.³ In grappling with these cascading levels of difference, I hoped to take to heart Sarah Morales’ insistence that “[t]he starting point of any research pertaining to Indigenous law must be to gain a better understanding of the particular cultural context in which the laws and legal orders take place,” knowing that, “failure to do so

¹ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015) (Call to Action 45(iii) at 252–53).

² John Borrows & Michael Coyle, “Introduction” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 3 at 10.

³ See Hon Lance SG Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (paper delivered at Indigenous Legal Orders and the Common Law, 9 Vancouver, November 2012), Paper 2.1, Continuing Legal Education Society of British Columbia materials, 2012, (“[w]hether speaking of Canadian law or of Indigenous legal orders, law both arises out of, and is continuously shaped by, broader cultural narratives. And such narratives, whether part of a written or oral tradition, will only make intellectual and normative sense viewed in their larger context” at 22).

would risk translating the laws and legal traditions through an inappropriate cultural lens.”⁴

I was also encouraged to know that the Supreme Court of Canada had committed itself to reconciliation and to similar work of understanding, stating in *R v. Van der Peet*, “[i]n assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right.”⁵ Regarding treaty relationships, the Court has clarified that the terms of treaty “must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing,”⁶ and that “[i]n determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.”⁷ Yet, as I read these and other cases, I was disheartened to see the courts struggle to avoid what appeared to me to be translation of Indigenous perspectives through an inappropriate cultural lens. This caused me to reflect on whether, and how deeply, the courts can engage with Indigenous perspectives, and what role they could play in establishing and maintaining respectful relationships.

This essay represents the bringing together of these two strands: my own attempt to understand Indigenous perspectives on treaty, as well as my questioning of whether and how Canadian courts take into account Indigenous perspectives in a way that fosters respectful relationship. I begin with a brief note on who I am, followed by a description of the analytical method I use and a sketch of its application to Canadian state treaty paradigms. I then overview my understanding of the treaty paradigms and corresponding normative framework of the Indigenous peoples I focus on, before turning to Canadian courts. After identifying two principles of reconciliation, I argue that there

⁴ Sarah Morales, “Locating Oneself in One’s Research: Learning and Engaging with Law in the Coast Salish World” (2018) 30:1 CJWL 144 at 149.

⁵ *R v Van der Peet*, [1996] 2 SCR 507 at para 49, 137 DLR (4th) 289 [*Van der Peet*]. See also *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR] (“it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake” at 1112).

⁶ *R v Badger*, [1996] 1 SCR 771 at para 52, 133 DLR (4th) 324 [*Badger*].

⁷ *Marshall v Canada*, [1999] 3 SCR 456 at 78(5), 177 DLR (4th) 513 [*Marshall v Canada*].

are serious problems with Canadian courts' structure and jurisprudence that inhibit them from playing a positive role in establishing and maintaining respectful treaty relationships. I then conclude with a brief survey of potential actions the courts could take to foster reconciliation.

Preliminary Matters

Who I Am

I have been struck in listening to Elders how frequently they identify what they share as 'the truth as they know it, as taught to them by their Elders.'⁸ This has impressed on me the importance of acknowledging the perspective from which I am speaking and from whom I have learned, and thus I would like to do so here. My first introduction to Indigenous law came through taking the course Indigenous Legal Traditions, taught by Aaron Mills. Aaron's teaching profoundly impacted me: I became intrigued by how both he and the Elders who spoke to us seemed to embody a different way of being and I wanted to learn more, in part leading to my summer internship.⁹ I came to see Aaron as a mentor, and both his teaching and scholarship largely shape the perspective that I will share.

Since I learned about treaty through Aaron's course on Anishinaabe legality and my research developing a treaty course in Saskatchewan, my analysis will focus on treaty perspectives of the Indigenous peoples from the upper Great Lakes region and Saskatchewan. The treaties referenced will be the Treaty of Niagara of 1764 and the post-Confederation numbered treaties. Even within this region there is ample diversity, which I do not wish to diminish. However, I believe many Elders are supportive of presenting the common ground of their treaty paradigms. Harold Cardinal and Walter Hildebrandt state that

⁸ See e.g. Ogimaagwanebiik / Nancy Jones, "Animals" in H James St Arnold & Wesley Ballinger, eds, *Dibaajimowinan: Anishinaabe Stories of Culture and Respect* (Odanah, WI: Great Lakes Indian Fish & Wildlife Commission, 2013) 92.

⁹ When speaking of Aaron Mills, I will refer to him on a first name basis when I am sharing what I have learned from him in a personal capacity and will refer to him by his last name when I am engaging with him as a scholarly source. This is done with permission from Aaron, and in referring to him as such I hope to model a relational epistemology.

[t]he Elders of the Dene, Cree, Assiniboine, and Saulteaux¹⁰ peoples presented remarkably similar and consistent descriptions of their belief systems, in spite of the fact that they come from widely divergent regions, speak different languages, and each practise their own distinct cultural traditions ... Treaty Elders expressed their unease with any treaty process that is divided on a region-specific or First Nations-specific basis because such an approach does not accord with the fundamentally unified First Nations spiritual philosophies and teachings that accompanied the treaty negotiations in Saskatchewan.¹¹

In presenting my understanding of these treaty paradigms, I hope to practice two values that Aaron taught in his class. First, *dabaadendiziwin*, which means *humility* and *taking up the right amount of space*. Second, *debwewin*, is speaking the truth as received in relationship; accurately sharing the truth as one knows it.¹² Regarding *dabaadendiziwin*, I aim to proceed in a spirit of humility, while also acknowledging that what I have been taught is a gift to share.¹³ In practicing *debwewin*, I do not seek to definitively represent any Indigenous person's or people's perspective; I am not in any position to do this. This also holds true of my understanding of the courts' jurisprudence, which is partial and developing. Instead, what I can offer is an account of what I am learning about treaty: the truth as I know it at this time.

¹⁰ Anishinaabe.

¹¹ Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2010) at 5 and 9.

¹² See Aaron Mills, *Introduction*, Lecture notes (Faculty of Law, McGill University, 14 September 2020). See also, John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) ("[t]ruth in Anishinaabemowin is to tell what one knows according to his/her fluency ... *deb* means 'to a certain extent,' we is 'a wave of sound' " at 53).

¹³ As someone who is not Indigenous, I have greatly worried about misunderstanding or misrepresenting the treaty paradigms I will present. In expressing this with Aaron, he reminded me that *dabaadendiziwin* means taking up the right amount of space, and that when Elders share knowledge, the Elders he knows do so with the intention that this is a gift that we are to share.

Analytical framework

To avoid translating Indigenous peoples' understandings through an inappropriate cultural lens, my analysis will use an analytical method developed by Aaron Mills which he calls the legality tree. This is a tool for legal comparative analysis which highlights the cascading levels of normativity that bring integrity and coherency to law.

Mills explains this analytical tool through the analogy of a tree, comprised of roots, a trunk, branches, and leaves. Each successive part of the tree grows from the previous levels, and while there is contingency, the range of possibility for each proceeding level is conditioned by the previous ones. Mills states that law within its normative context can be understood as similarly comprised of four levels, each conditioned and empowered by what is below.¹⁴ Mills calls this a legality tree, which consists of lifeworlds, constitutionalisms, legal institutions, and law.

The first level, analogous to roots, is "the ontological, epistemological, and cosmological framework through which the world appears to a people."¹⁵ Mills calls these fundamental starting points a lifeworld, which can be found in and serves as a creation story. As Mills explains,

creation stories present what I call the *belonging analytic*. It establishes the internal relationships between a conception of persons, of freedom, and of belonging ... how one thinks about persons directly informs how one construes freedom, and finally that what one takes freedom to mean in turn directly informs how and why one thinks about community.¹⁶

¹⁴ See Aaron James Mills, *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD dissertation, University of Victoria, 2019) [unpublished] ("although every legality is doing the same thing, each is doing it differently—and perhaps radically so. The particulars of what renders law its legitimacy may vary dramatically from one legality to another" at 38). See also, Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 ("[e]ach level of legality within the lifeworld-law relationship is both empowered and constrained by the levels below" at 862).

¹⁵ Mills, "The Lifeworlds of Law" *supra* note 14 at 850, n 6.

¹⁶ Mills, *Miinigowiziwin*, *supra* note 14 at 42–43.

If a lifeworld provides a *vision* of existence, belonging, and freedom, the next level, constitutionalisms, provides the *form* and *logic* that this vision takes in constituting political community.¹⁷

Constitutionalisms remain conceptual frameworks, and their normativity is enacted through legal institutions and law. Mills defines legal institutions, the third level, as “the assemblage[s] of processes and institutions a society uses to generate or adopt, interpret and modify, and destroy law.”¹⁸

Finally, law—generated by these institutional processes—serves “to coordinate social interaction commensurate with the conception of freedom internal to the legality of which it forms part, such that community remains viable for its members.”¹⁹

In sum, the legality tree presents successive levels of normativity, with the contingency of each level being empowered and conditioned by the previous ones.²⁰ The fundamental vision of persons, freedom, and belonging that a lifeworld entails conditions the range of forms and logics by which community is constituted; legal institutions then serve to manage law by providing processes by which a constitutionalism may be enacted, and law finally serves to coordinate social interaction in a manner coherent with the preceding levels. This analytical tool helps clarify the normative structures that underly different systems of law on their own terms, recognizing that none are universal, but instead “all systems of law live within and are generated through particular worlds.”²¹

Mills’s legality tree provides two important further insights. First, just like trees, any legality is rooted in *something*, and whatever diversity is found between legalities, what is shared is

¹⁷ See Mills, “The Lifeworlds of Law” *supra* note 14 (“any constitutional order ... reflects an understanding of what a person is and what community is, and pursues a vision of freedom determined by these understandings for its members” at 855, n 14).

¹⁸ *Miinigowiziwin*, *supra* note 14 at 45.

¹⁹ *Ibid* at 46.

²⁰ See Mills, “The Lifeworlds of Law” *supra* note 14 (“We tell different stories of creation ... and the story we tell powerfully conditions the constitutional order we bring into being. For all societies, that constitutional order will shape legal processes and institutions, and thus ultimately what we count as law” at 863).

²¹ Mills, “The Lifeworlds of Law” *supra* note 14 at 856.

an existential dependence on the earth as the condition of possibility.²² Mills identifies legalities as *rooted* when they seek to intentionally recognize their connection to the earth and model their constitutionalism after the order found in Creation; what many Elders refer to as Natural Law, and what Mills refers to as the earthway.²³

Second, treaty serves to extend legalities across communities, thus constituting community of communities according to a certain form and logic.²⁴ As such, treaties across legalities with different constitutionalisms posing a special problem for community coordination.

Liberal Legality

To illustrate how a legality tree works and to serve as a reference for future discussions of treaty, I will briefly present a minimalist rendering of the legality that underlies a contractual understanding of treaty. Mills refers to this as a liberal legality.

The creation story of a liberal legality provides as its normative basis our independence. Mills states that,

[a]t the centre of liberal lifeworld is a view of individual human autonomy as self-rule ... of having control over one's own ideas, actions and goals. The capacity for such control over one's self is said to presuppose a certain form of rationality.²⁵

Within this ontological framework of autonomy, political community is not innate but is formed. Consequently, belonging comes from entering political community with other beings (humans) who have the same rationality, and thus share a rough equality. Freedom then takes the form of liberty, where any limits to our actions are undertaken only via *consent*, and where our

²² See *ibid* ("[u]nlike Canada's constitutional image of a 'living tree', no tree is actually freestanding ... A lifeworld doesn't reflect the spontaneous ideas of those standing within it. Our creation stories are of something common: the earth beneath and all around us. What varies is how we understand it" at 863).

²³ See Mills, *Miinigowiziwin*, *supra* note 14 at 74.

²⁴ See Aaron Mills, "What is Treaty? On Contract and Mutual Aid" in Borrows & Coyle, *supra* note 2, 208 ("the account a society offers of treaty follows from its constitutional self-understanding: treaties are a constitutional form insofar as they constitute shared political community" at 237).

²⁵ Mills, *Miinigowiziwin*, *supra* note 14 at 56–57.

autonomy is protected through justice, or the enforcing of rights and remedies.²⁶

The constitutional logic that then orders political community around this vision of belonging and freedom is one of agreement, and the form that this takes is contract. Mills explains that,

[a]s a species of contract, liberal political community is a standing agreement between community members. There are literally 'terms' of union and especially in our contemporary era, they're increasingly formalized in a written document externalized as 'a' constitution.²⁷

Institutions that implement this constitutional logic of agreement are thus democratic, with legislatures who are empowered by the consent of the political community to coordinate social interaction (law) by developing and modifying the social contract. The enacting of this social coordination by the executive is done consensually by only using the powers granted by the legislature. Finally, judicial institutions seek to preserve freedom (liberty) by analyzing and upholding what rights and responsibilities citizens could be said to have agreed to—either through the social contract or private contracts—as members of political community, providing remedies in the case of infringement. Finally, since members of this political community need to know what they have consented to, law's work of social coordination takes the form of general rules elaborating rights and obligations, to be consistently and openly applied to all citizens.²⁸

Under this simplistic account of liberal legality, treaty is understood as contract, in which community of communities constitutes itself on the logic of agreement, using institutions—such as signing a document—to enunciate treaty terms which the judiciary can analyze in enforcing what the parties consented to.

²⁶ See *ibid* ("[j]ustice, in this sense, means that the problem just identified is foregrounded: the autonomy of each will be secured against the actions of all, and transgressors will be made to account for their actions" at 57).

²⁷ *Ibid* at 59.

²⁸ See *ibid* ("in all cases where the freedom of persons is at stake (in respect of either its liberty or equality conditions), rules take the unique form of rights. Rights regard freedom in that they represent interests to which persons are entitled" at 64).

Indigenous Treaty Paradigms

When seeking to learn about the normative context for the treaty paradigms of the Indigenous peoples surveyed, Elder Jimmy Myo insisted that “[y]ou cannot begin to understand the treaties unless you understand our cultural and spiritual traditions and our Indian laws.”²⁹ I take this to mean beginning with lifeworlds.

Many Elders shared that who they are is inextricably rooted in their relationship with the Creator. Cardinal and Hildebrandt explain that “First Nations’ histories begin with the creation and the placement of First Nations peoples on the North American continent ... as ‘children of the Creator’ (*otawâsimisimâwak*).”³⁰ This relationship with the Creator is innately grounded in the land—Elder Harry Bone states, “[o]ur laws come from the land, our directions come from the land, our creator comes from the land as well”—and encompasses all beings, embodied in the statement “all my relations.”³¹ Elder Kay Thompson states that “Nakoda law, Nakoda philosophy, Nakoda way of life organizes itself around the concept of *Metah Koyabi* [which] means ‘all my relations.’ We are tied to all our relations. That’s everything. We are all part of the Creator.”³² I understand this to reveal an ontology of interdependence—a fundamentally different framework from that of autonomy—which is the foundation for survival itself.³³ As Harold Johnson states, “[w]ithout the nations of the plant and the animal, neither your family [settlers] nor mine can survive. We are tied to them as surely as your family is tied

²⁹ Cardinal & Hildebrandt, *supra* note 11 at 1. (Elder Peter Waskahat: “those who seek to understand Indian treaties must become aware of the significance of First Nations spiritual traditions, beliefs, and ceremonies underlying the treaty-making process” (*ibid* at 1)).

³⁰ *Ibid* at 3.

³¹ Treaty Relations Commission of Manitoba, “Episode 1: A First Nations Perspective on Treaties with Elder Harry Bone” (last visited 7 July 2022), online: *Let’s Talk Treaty* <www.trcm.ca/multimedia/lets-talk-treaty/>.

³² Cardinal & Hildebrandt, *supra* note 11 at 20.

³³ See Wapshkaa Mia’iingan (Aaron Mills), “Aki, Anishinaabek, kaye tahsh Crown” (2010) 9(1) *Ind LJ* 107 (“essential to Anishinaabe world view is an omnipresent and robust notion of relation – a foundational understanding that all things exist contingently, in respect of one another” at 153).

to mine.”³⁴ Finally, this interdependent existence is sustained through gift:

All the things that First Nations required for survival were given to them by the Creator, whether reflected by the life-giving and life-sustaining forces represented by sun, water, grass, animals, fire, or Mother Earth.³⁵

Elder Bart McDonald shares that “[t]he land is who we are. The wildlife provides for us. Fish, water, trees, everything, the plants, all the animals, all the beings of the Earth all provide for us.”³⁶

This ontology of interdependence structures an understanding of belonging in which political community need not be formed, but instead always already exists, and is comprised of all relations—not simply humans.³⁷ Cardinal and Hildebrandt state that “[t]he Elders maintain that the land belongs to their peoples as their peoples belong to the land. The land, waters, and all life-giving forces in North America were, and are, an integral part of a sacred relationship with the Creator.”³⁸ Further, since survival is found in the gifts of all our relations, freedom is to be a part of this order of Creation. As Mills shares, “interdependent persons experience freedom always and only with and through others.”³⁹ This freedom is not only comprised of receiving gifts, but in recognizing the role our own gifts play within Creation. Leroy Little Bear states that “[t]he function of Aboriginal values and customs is to maintain the relationships that hold creation together ... Values and customs are the participatory part that Aboriginal people play in the maintenance of creation.”⁴⁰

³⁴ Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing Ltd, 2007) at 60.

³⁵ Cardinal & Hildebrandt, *supra* note 11 at 11 [emphasis added].

³⁶ *Ibid* at 44.

³⁷ See Mills, “What is Treaty?” *supra* note 24 (“[s]o tightly are we bound that although we are distinct, unique peoples, we are not and have never been autonomous peoples: as interdependent persons and communities within creation, we’re always-already in relationship” at 210–11).

³⁸ Cardinal & Hildebrandt, *supra* note 11 at 10.

³⁹ “The Lifeworlds of Law” *supra* note 14 at 865.

⁴⁰ Leroy Little Bear, “Jagged Worldviews Colliding” in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision*, (Vancouver: UBC Press, 2000) 77 at 81.

According to my understanding, it is this lifeworld vision—of belonging in an always-existing interdependent political community, with freedom found through being part of “the relationships that hold creation together”—that serves as the basis for constituting community. Mark Walters states that, “[f]or the Anishinaabeg and other Indigenous peoples of the territories surrounding the Five Great Lakes in North America, ideas about societal ordering were inseparable from ideas about the natural order of water, sky, and land within which they lived.”⁴¹ This reveals a rooted constitutionalism, in which community is structured according to the order of Creation itself—the earthway. This takes the *form* of familial kinship relationships. Cardinal and Hildebrandt explain that “[t]he relationship between the Creator and First Nations peoples is understood to be like that which exists between the various members of a family and is thus governed by laws of *wâhkôhtowin*, laws detailing the duties and responsibilities which take effect for each member of the family unit.”⁴² This constitutional *form* of kinship was organized around a *logic* of mutual aid, where family were expected to ‘hold creation together’ through cycles of gift, gratitude and reciprocity.⁴³ Robert Williams states that “[t]o be related to another in a system of kinship is to expect assistance from that other person and to expect to be asked for and be ready to render assistance as well.”⁴⁴ Cardinal and Hildebrandt explain that “[m]utual sharing meant first and foremost that the parties would share with one another some elements of the special gifts accorded to them by the Creator.”⁴⁵

Regarding how this logic of mutual aid was organized through the form of kinship, as Williams explains, “[kinship] terms—“brother,” “grandmother,” “grandfather,” “nephew,”

⁴¹ Mark Walters, “Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain be Judicially Enforced Today?” in Borrows & Coyle, *supra* note 2, 187 at 193.

⁴² Cardinal & Hildebrandt, *supra* note 11 at 18.

⁴³ See Robin Kimmerer, “Returning the Gift” (2014) 7:2 *Minding Nature* 18.

⁴⁴ Robert Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997) at 63. See also James (Sákéj) Youngblood Henderson, “*Sui Generis* and Treaty Citizenship” (2002) 4:6 *Citizenship Studies* 415 (“[i]nstead of promoting abstract rights, 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” at 425).

⁴⁵ Cardinal & Hildebrandt, *supra* note 11 at 37.

“uncle”—in essence defined the individual’s lines of appeal and responsibility to others arising by virtue of an established relationship of connection.”⁴⁶ Elder kinship roles entailed a recognition of having more gifts to offer and needing less in return. These kinship norms further defined relations with all of Creation. Walters states that

[p]olitical order was intimately connected to spiritual order, and both were oriented toward relations of kinship. Kinship transcended temporal and physical boundaries: trees, water, and animals were infused with spiritual life—with manitous—and survival necessitated spiritual balance with them through constant gift-giving. Peaceful relations with the elements of the natural world and peoples within that world meant establishing and maintaining relationships of spiritual-kinship by creating reciprocal obligations of care. To give or receive presents was to renounce the status of alien and to become kin.⁴⁷

With this normative framework—in which political community is constituted through the logic of mutual aid and the form of kinship, grounded in an ontology of sacred interdependence—we can now turn to treaty and the institutions that were used to extend this constitutionalism across communities.

Since the purpose of legal institutions used in treaty are to allow social coordination through enacting the underlying constitutionalism of a community, Indigenous institutions served not to establish contract, but instead, mutual aid kinship relationships. As Elder Bone explains, “our very word about treaties, *ago’idiwin*, meaning relationship. Making relationships with one another, that’s what the treaty means.”⁴⁸ Heidi Kiiwetinepinesiik Stark states that “Indigenous nations primarily saw treaties as living relationships, diplomatic processes that enabled the expansion of intricate kin-based networks situated within a relational paradigm that saw the world as a deeply

⁴⁶ Williams, *supra* note 44 at 65; see also, Ruth Landes, *Ojibwa Sociology* (New York: Columbia University Press, 1937) at 7.

⁴⁷ Mark Walters, ““Your Sovereign and Our Father”: The Imperial Crown and the Idea of Legal-Ethnohistory” in Shaunnagh Dorsett and Ian Hunter, eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (New York, NY: Palgrave MacMillan, 2010) 91 at 94.

⁴⁸ Treaty Relations Commission of Manitoba, “Episode 1” *supra* note 31.

interconnected and interdependent place.”⁴⁹ These kinship relationships were not discrete but grounded in Creation’s network of interdependent relations. Elder Musqua states that

[w]e made a covenant with Her Majesty's government, and a covenant is not just a relationship between people, it's a relationship between three parties, you and me and the Creator.⁵⁰

The institutions which helped to create and maintain kinship relationships grounded in the earthway were sacred, and as such are often referred to as ceremony or ritual. Although the Indigenous groups surveyed had a diverse number of institutions used in treaty, I will focus on those found within accounts of the Treaty of Niagara and the numbered treaties; councils,⁵¹ peace pipe,⁵² adoption of kinship roles,⁵³ language invoking creation,⁵⁴ and gifts.⁵⁵

Councils served as the sacred forum in which kinship relationships could be created and renewed. For parties already in relationship, the council fire served to invoke their sacred kinship through the “uncovering of the slumbering embers of

⁴⁹ Heidi Kiiwetinepinesiik Stark, “Criminal Empire: The Making of the Savage in a Lawless Land” (2016) 19:4 Theory & Event.

⁵⁰ Cardinal & Hildebrandt, *supra* note 11 at 32.

⁵¹ See William Johnson & Guy Johnson, “An Indian Congress” in Alexander C Flick, ed, *The Papers of Sir William Johnson*, vol 11 (Albany: University of the State of New York, 1925) 309; Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including The Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co, 1880) at 65.

⁵² See William Johnson & Guy Johnson, “A Conference with Chippewas” in Flick, *supra* note 51 at 478; Morris, *supra* note 51 at 47 & 97 (mentions the use of the peace pipe during Treaty 3 and Treaty 4 negotiations).

⁵³ See Alexander Henry, *Travels and Adventures in Canada and the Indian Territories Between the Years 1760 and 1776* (New York: I Riley, 1809) (the King is referred to as “Great Father” at 166); Morris, *supra* note 51 at 58 (refers to Queen as “Great Mother” during Treaty 3 council).

⁵⁴ See Morris, *supra* note 51 at 202.

⁵⁵ For a contractarian legality material exchange was the focus of treaty, and as such accounts of gift giving are ubiquitous.

former councils.”⁵⁶ Crucially, the ceremonies, deliberations, and shared understandings created in Council were not separate from treaty, but integral to the treaty relationship.⁵⁷

Of central importance within Council was smoking of the calumet pipe, which created and renewed a sacred bond of kinship. One historical source states that

the meaning of the pipe and also of the belt of wampum was that these were a pledge of everlasting peace and bound the brothers to help anyone of them that might be in trouble ... [making] an eternal brotherhood.⁵⁸

Williams states that “smoking the sacred pipe enabled treaty partners to speak truthfully and to listen to each other closely, just as relatives would.”⁵⁹ Further, the pipe grounded this kinship relationship in the earthway:

In the pipe ceremony, treaty parties signified their oneness in the undertaking that nations represented in the treaty would place their new relationship created by treaty in the hands of the Creator.⁶⁰

This relationship grounded in the earthway was also created through the institution of adoption and taking on of kinship roles. As Elder Musqua states, “[t]he Queen has adopted [First Nations] as children ... a joint relationship will come out of

⁵⁶ Peter Jones / Kahkewaquonaby, “Councils” in *History of the Ojibway Indians; with Especial Reference to Their Conversion to Christianity* (London: A.W. Bennett, 1861) 105.

⁵⁷ See Heidi Kiiwetinepinesiik Stark, “Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada” (2010) 34:2 *Am Indian Culture & Research J* 145 (“the Anishinaabe understood the entire council deliberations as the treaty” at 149).

⁵⁸ Kawbawgam, “The League of the Four Upper Algonquian Nations” in Arthur P Bourgeois, ed, *Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jacques LePique, 1893–1895* (Detroit: Wayne State University Press, 1994) 112.

⁵⁹ Williams, *supra* note 44 at 76.

⁶⁰ Cardinal & Hildebrandt, *supra* note 11 at 31. See also Mills, *Miinigowiziwin*, *supra* note 14 (“[b]ecause the smoking of a pipe is an invocation of Gizhe Manidoo, it naturally takes a central role in the establishment of inter-community kinship: it purposefully grounds treaty in Creation’s way” at 238).

that ... because the Queen is now our mother."⁶¹ Harold Johnson states that

[w]e adopted you in a ceremony that your family and mine call treaty. In Cree law, the treaties were adoptions of one nation by another. At Treaty No. 6 the Cree adopted the Queen and her children. We became relatives.⁶²

This allowed the new community to be integrated into the mutual aid kinship network of the Indigenous peoples. Walters states that

[b]y renaming an official whose authority and powers were alien to aboriginal legal traditions, native peoples were, in essence, remaking the image of that official to fit within their understandings of what political leaders were. Once integrated within the aboriginal network of kinship, an official became obligated, like any family member, to contribute to the spiritual and material well-being of his relations in proportion to his abilities and their needs.⁶³

It is crucial to understand that these kinship terms—that of Great Father or Great Mother—within this rooted legality entailed becoming family. This adoption never indicated an affirmation of Crown sovereignty. As William Johnson himself stated,⁶⁴

you may be assured that none of the Six Nations, Western Indians &ca. ever declared themselves to be Subjects, or will ever consider themselves in that light ... the very Idea of Subjection would fill them with horror ... it is necessary to observe that no Nation of Indians have any word which can express, or convey the Idea of Subjection, they often say, 'we acknowledge the great King to be our Father, we hold him fast by the hand, and we shall do wt. he desires' many

⁶¹ Cardinal & Hildebrandt, *supra* note 11 at 34. See also Henderson, *supra* note 44 ("[w]ithin Aboriginal diplomacy and treaties, kinship models meant adopting the foreign sovereign through the metaphors of a father, mother, uncle or auntie, brother, or sister" at 426).

⁶² H Johnson, *supra* note 34 at 13.

⁶³ Walters, "Your Sovereign" *supra* note 47 at 97. See also Williams, *supra* note 44 ("[b]esides determining many of the minor protocols of council diplomacy, kinship terms were used to define the expected forms of behavior among treaty partners. In this sense, these terms could assume legal significance" at 71).

⁶⁴ The government representative at the Treaty of Niagara.

such like words of course, for which our People too readily adopt & insert a Word verry different in signification, and never intended by the Indians without explaining to them what is meant by Subjection.⁶⁵

The language used in council also served to ground this kinship relationship in the earthway. Alexander Morris regularly adopted language invoking Creation when negotiating the numbered treaties, stating, for example, that

[w]hat I trust and hope we will do is not for today and tomorrow only; what I will promise, and what I believe and hope you will take, is to last as long as the sun shines and yonder river flows.⁶⁶

As Elder Fred Kelly explains,

[s]o when I said last time, ‘as long as the sun shines, the rivers flow and the grass grows’, those are not just poetic terms of the ‘noble savage’. Those are invocations of sacred law, meaning that the Grandfather that lights the day, as long as he is bringing life and shining upon, on a, on a daily basis—and he’s still here—and then the Grandmothers look after the waters, so that ‘as long as the rivers flow’, and Grandmother Earth, as long as she brings forth life and the plants, the trees, all the sources of our medications and life, and livelihood. So those are still alive, so that means that the treaty is well, [and] was intended to be dynamic and everlasting: as long as those references would last, as long as they were made.⁶⁷

Finally, gift giving “created fictive kinship ties”⁶⁸ reflecting the gift cycles of the earthway. As an expression of mutual aid, gifts affirmed a trusting relationship which allowed for communication. Williams states, “An important message not accompanied by a gift, in the language of Indian diplomacy, was

⁶⁵ William Johnson, “To Thomas Gage, Johnson Hall Octbr 31st 1764”, in Flick, *supra* note 51, 394 at 395.

⁶⁶ Morris, *supra* note 51 at 202.

⁶⁷ Treaty Relations Commission of Manitoba, “Episode 12: Interview of Elder Fred Kelly by Commissioner Loretta Ross” (last visited 7 July 2022), online: *Let’s Talk Treaty* <www.trcm.ca/multimedia/lets-talk-treaty/>.

⁶⁸ Cary Miller, “Gifts as Treaties: The Political Use of Received Gifts in Anishinaabeg Communities, 1820–1832” (2002) 26:2 *Am Indian Q* 221 at 223.

not even worth listening to.”⁶⁹ William Johnson himself called gift giving “the surest method of proving the reality of Words to Indians.”⁷⁰ As I understand it, this giving of gifts—rather than being the object of treaty and taking the form of bargained exchange—was to “expand social relations” by demonstrating that the parties would take care of each other’s needs.⁷¹

In summary, institutions of council, peace pipe, adoption of kinship roles, sacred language, and gift giving served to create and maintain kinship ties, grounded in the earthway, and committed the parties to meet each other’s needs through sharing of gifts.

Regarding the final level of legality, law—since what is being coordinated is mutual aid and kinship, rather than contract—does not take the form of rules or agreement on set material exchange, but instead is deliberation on how to best share our changing gifts and have our changing needs met within relationship. As Mills states, “*inaakonigewin* and *dibaakonigewin*—‘law’ for Anishinaabeg—[is] a process of careful decision-making: a process of forming legal judgments. Rooted law is deeply deliberative.”⁷² Yet, despite the contingent nature of this deliberative social coordination, the way treaty relationship was to be lived out was still understood to adhere to certain principles.

First, the range of choices that could be made was to be conditioned by the earthway: “[i]n the view of the Elders, the treaty nations—First Nations and the Crown—solemnly promised the Creator that they would conduct their relationships with each other in accordance with the laws, values, and principles given to each of them by the Creator.”⁷³ Since this was a sacred undertaking, various Elders stated their understanding that this

⁶⁹ Williams, *supra* note 44 at 76.

⁷⁰ William Johnson, “Sir William Johnson to the Lords of Trade” in EB O’Callaghan, ed, *Documents Relative to the Colonial History of the State of New York*, vol 7 (Albany: Weed, Parsons and Company, 1856) 525.

⁷¹ Miller, *supra* note 68 at 223.

⁷² Mills, *Miinigowiziwin*, *supra* note 14 at 144.

⁷³ Cardinal & Hildebrandt, *supra* note 11 at 7.

treaty relationship could not be broken.⁷⁴ Harold Johnson states that

[t]he treaties are forever. We cannot change them because the promises were made, not just between your family and mine, but between your family and mine and the Creator ... When my family adopted your family, we became relatives, and that cannot be undone. A bond far stronger than any contractual obligation holds us together. Your law of contract and treaty allows for breach and remedy. The Creator's law does not allow for any breach whatsoever. Failure to comply [instead] has consequences.⁷⁵

Second, treaty relationship was not zero-sum, but was supposed to enhance what the parties already had. Commissioner Alexander Morris stated that "[w]hat I have offered does not take away your living, you will have it then as you have now, and what I offer now is put on top of it."⁷⁶ This took the form by gift giving and sharing the land according to the understandings of Indigenous peoples. As Elder Peter Waskahat sates, "[t]he sacred earth could never be sold or given away, according to the principles of the First Nations, but it could be shared."⁷⁷

Third, the treaty relationship was to respect the way of life of Indigenous peoples. Elder Bone states that "[t]he intent of the treaties, for First Nations, it was to protect our languages, our teachings, our history and our way of life, to make sure that we honour the Creator and the land."⁷⁸ As Cardinal and Hildebrandt explain,

⁷⁴ See e.g. Cardinal & Hildebrandt, *supra* note 11 (Elder George Rider: "The treaty was made with a pipe and that is sacred, that is never to be broken ... never to be put away" at 30; Elder Peter Waskahat: "The [treaties] can only be broken through the will of the Creator" at 25).

⁷⁵ H Johnson, *supra* note 34 at 29.

⁷⁶ Morris, *supra* note 51 at 211.

⁷⁷ Cardinal & Hildebrandt, *supra* note 11 at 31; see also H Johnson, *supra* note 34 (the Creator ... mandates that we should be kind and generous and share the bounty of the earth with each other, with the animal nations, the plant nations, and with you, Kiciwamanawak [cousin]" at 41).

⁷⁸ Treaty Relations Commission of Manitoba, "Episode 1" *supra* note 31.

[the Creator] required that First Nations peoples maintain a connectedness to Mother Earth and all of her life-sustaining forces. The Elders understood that, through the treaties, the British Crown undertook to respect the 'way of life' of the First Nations and not interfere with their belief systems.⁷⁹

Finally, treaty relationship was meant to be living, and thus to be renewed constantly. Williams states that "treaty partners were obligated to renew the bonds of connection created by their relationship. Renewal, in fact, was regarded as a continuing constitutional obligation of treaty partners."⁸⁰ As Elder Fred Kelly states, "it was to be dynamic, it was to be adaptive. It was to be continuing, until the Creator decides otherwise."⁸¹ Mills explains that,

[b]ecause mutual aid relationships are always in flux, they're in constant need of renewal. Treaty peoples seek to attend to changes in their respective gifts and needs through regular gatherings enabling communication and adaptation in their relationship.⁸²

A central insight from this is that written terms specifying gifts given, "merely reflect the respective needs of the parties at one moment in time" and were never meant to be determinative of what mutual aid sharing would consist of in the future.⁸³

Thus far, I have presented my understanding of two minimalist visions of treaty that stem from their corresponding legalities: one as an agreement comprised of rights and obligations to be enforced by courts; another as a living relationship between kin who seek to constitute themselves according to the earthway by the dynamic sharing of gifts to meet one another's needs. In light of the stark differences between these treaty paradigms, I would like to highlight two principles that I believe would need to be foundational to any attempt by Canadian courts to work towards reconciliation.

⁷⁹ Cardinal & Hildebrandt, *supra* note 11 at 20.

⁸⁰ Williams, *supra* note 44 at 111–12. See also Stark, "Respect, Responsibility, and Renewal" *supra* note 57.

⁸¹ Treaty Relations Commission of Manitoba, "Episode 12" *supra* note 67.

⁸² Mills, *Miinigowiziwin*, *supra* note 14 at 241.

⁸³ Mills, *Miinigowiziwin*, *supra* note 14 at 243–44.

Principles of Reconciliation

First, if “reconciliation [is] an ongoing process of establishing and maintaining respectful relationships,”⁸⁴ a central tenet of this respectful relationship would be to seek first to understand each community’s treaty paradigm on their own terms, according to their own legality. Coordinating treaty between legalities would then recognize and respect difference at every cascading level and take the form of careful dialogue between constitutional orders. As Gordon Christie states,

[r]ecognition and acceptance of strong forms of legal pluralism require that matters unfold through dialogue, as each source of legal and political authority must be persuaded to act, since *ex hypothesi* no one source of authority enjoys binding authority over all others.⁸⁵

Particularly in the Canadian context, any attempts to resolve differences through unilaterally imposing the legality of the Canadian state as the universal norm would constitute a form of colonial violence, which Mills describes as violence “to indigenous peoples’ capacity to understand the world on our own terms and to organize ourselves accordingly.”⁸⁶

Second, the reconciliation promoted needs to entail not only respectful relationship between two parties, but with Creation as well. As stated in the Truth and Reconciliation Commission’s final report, “Elder Augustine suggested that other dimensions of human experience—our relationships with the earth and all living beings—are also relevant in working towards reconciliation. This profound insight is an Indigenous law, which could be applied more generally.”⁸⁷ It could be argued that this is imposing Indigenous constitutionalisms on the Canadian state, since according to my analysis the Canadian state does not adhere to

⁸⁴ Truth and Reconciliation Commission of Canada, *supra* note 1 at 16.

⁸⁵ Gordon Christie, “Indigenous Legal Orders, Canadian Law and UNDRIP” in John Borrows, Larry Chartrand et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: CIGI, 2019) 47 at 49.

⁸⁶ Mills, *Miinigowiziwin*, *supra* note 14 at 5.

⁸⁷ Truth and Reconciliation Commission of Canada, *supra* note 1 at 17.

a rooted constitutionalism. Although I take this seriously, given the increasingly apparent consequences of living with little regard for how we are connected to the earth, it is my hope that recognizing the rootedness of our legality, whose range of possibility is conditioned by the earthway, will be seen as a gentle invitation to a better way, rather than as violence.⁸⁸

Problems with Courts as Treaty Arbiters

Turning then to the courts, there are several elements within their structure and jurisprudence which I believe hinder these two principles of reconciliation, namely the courts' history, imposed nature, reliance on a contractarian view of treaty and Crown sovereignty, and their location within only one of the legalities of the treaty relationship.

History

One barrier to Canadian courts being trusted to be respectful of Indigenous legalities is their history of being complicit to colonial violence.⁸⁹ The courts have categorized treaties as simply "release and surrender" clauses, since, "[a]s heathens and barbarians[,] it was not thought that they [Indigenous peoples] had any proprietary title to the soil."⁹⁰ They have stated that treaties were not binding, but were "at best ... mere agreement[s] made by the Governor and council with a handful of Indians,"⁹¹ who were "uneducated savages"⁹² and whose 'treaty rights' could be unilaterally extinguished.⁹³ Even in 1991, the British Columbia Chief Justice wrote "and there is no doubt, to quote

⁸⁸ See Mills, *Miinigowiziwin*, *supra* note 14 (a thorough accounting of these two conditions for reconciliation at 192–209).

⁸⁹ Canadian courts and their British predecessors.

⁹⁰ *Saint Catharine's Milling and Lumber Co v The Queen* [1888] UKPC 70, 14 App Cas 46.

⁹¹ *R v Syliboy* [1929] 1 DLR 307 at 313, 1928 CanLII 352 (NS Sup Ct) [Syliboy].

⁹² *R v White and Bob* (1964), 50 DLR (2d) 613, 1964 CanLII 452 (BC CA) [White and Bob].

⁹³ *Syliboy*, *supra* note 91 ("[w]here a statute and treaty conflict a British Court must follow the statute" at 313).

Hobbes, that aboriginal life in the territory was, at best, 'nasty, brutish and short.' "94

Canadian courts have largely moved on from this rhetoric and have developed more flexible interpretive principles in which treaties are seen as *sui generis*,⁹⁵ are meant to be interpreted for the common intention of the parties in a culturally-sensitive way,⁹⁶ and "should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories."⁹⁷ Further, due to honour of the Crown, courts assume that the Crown intends to keep its promises,⁹⁸ and enforce a duty to consult when an Aboriginal or treaty right is potentially impacted.⁹⁹ However, despite these important gains, other substantial impediments to reconciliation remain.

Imposed Nature

First, Canadian courts having jurisdiction to resolve treaty disputes was not a shared understanding of treaty but was unilaterally imposed.¹⁰⁰ Even within a liberal constitutionalism, it

⁹⁴ *Delgamuukw v British Columbia*, 79 DLR (4th) 185, 1991 CanLII 2372 (BC SC).

⁹⁵ See *Marshall v Canada*, *supra* note 7 ("Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation" at 78(1)). See also *R v Sundown*, [1999] 1 SCR 393 at para 24, 170 DLR (4th) 385 [*Sundown*]; *Badger*, *supra* note 6 at para 78; *R v Sioui*, [1990] 1 SCR 1025 at 1043, 70 DLR (4th) 427 [*Sioui*]; *Simon v The Queen*, [1985] 2 SCR 387 at 404, 24 DLR (4th) 390 [*Simon*].

⁹⁶ See *Marshall v Canada*, *supra* note 7 at 78(3) and 78(5). See also *Sioui*, *supra* note 95 at 1068–69.

⁹⁷ *Marshall v Canada*, *supra* note 7 at 78(2); see also, *Simon*, *supra* note 95 at 402; *Sioui*, *supra* note 95 at 1035; *Badger*, *supra* note 6 at para 52.

⁹⁸ See *Manitoba Métis Federation v Canada (Attorney General)* 2013 SCC 14 at paras 73, 75 [*Manitoba Métis*]; *Marshall v Canada*, *supra* note 7 at para 44; *Badger*, *supra* note 6 at paras 41, 47, *Mikisew Cree First Nation v Canada (Governor General in Council)* 2018 SCC 40 at para 28 [*Mikisew v Governor General*].

⁹⁹ See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

¹⁰⁰ See H Johnson, *supra* note 34 ("[s]ection 24 of your constitution establishes that 'anyone whose rights or freedoms have been infringed may apply to a court of competent jurisdiction for a remedy as the court considers appropriate and just in the circumstances.' What happens when I assert that I have a treaty right

cannot be said that Indigenous peoples consented to the jurisdiction of the courts: they were not included within confederation talks, nor were they represented within the legislature when the Supreme Court was created, since they had no right to vote.¹⁰¹ Although it could be argued that parties choose to go before the courts for civil actions, this is irrelevant for a large proportion of treaty jurisprudence which are criminal cases in which a treaty right was asserted as a defence.¹⁰²

Also unilaterally imposed is the courts' adversarial structure. While this form of dispute resolution may be functional for exacting the performance of terms of a contract or seeking remedy for a breach, it is antithetical to resolving disputes in a way that promotes harmony and care in ongoing kinship relationships. As Harold Johnson states,

[w]e cannot kill the differences between us by fighting each other ... If we let ourselves get caught up in the adversarial process, we will remain adversaries forever. A judge's decision, even a Supreme Court decision, does not resolve differences. In the adversarial system, there are always winners and losers. The loser who is forced to live with the decision rarely walks away without vowing retaliation.¹⁰³

Speaking to the frustration of this imposed nature, Johnson explains that,

[w]hen my family asserts its understanding, your policy analysts insist that it be restated in terms of their own structural requirements. Only when we fill in the proper forms, only when we conform to the rules of your structures,

to my own justice system? Your courts, of whatever jurisdiction, competent or not, are still your courts. A court of competent jurisdiction would have to be a court established by treaty" at 98–99).

¹⁰¹ See Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) (the Supreme Court was created by statute in 1875 and became the final court of appeal in 1949 (at 120); Indigenous people with status under the Indian Act gained the right to vote in 1960 (at 177)).

¹⁰² See e.g. *Syliboy*, *supra* note 91; *White and Bob*, *supra* note 92; *Sioui*, *supra* note 95; *Badger*, *supra* note 6; *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204; *Sundown*, *supra* note 95.

¹⁰³ H Johnson, *supra* note 34 at 39–40.

only when we prostrate ourselves to your structures and
your superiority is our voice allowed to be heard.¹⁰⁴

The Supreme Court itself has affirmed the damage of unilateral imposition to reconciliation, stating, “unilateral Crown action ... not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect.”¹⁰⁵

Contractarian View of Treaty

Second, despite categorizing treaty rights as *sui generis*, the Supreme Court resolutely imposes a contractarian understanding of treaty on Indigenous peoples. In *R v. Badger*, the Court states that “[t]reaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties.”¹⁰⁶ *Marshall v. Canada* further clarifies that the special rules of treaty interpretation do not flow from the difference in constitutional orders, but instead are “to supply the deficiencies of written contracts.”¹⁰⁷ The court insists that the understandings of Indigenous peoples “must be framed in terms cognizable to the Canadian legal and constitutional structure,”¹⁰⁸ and that it is the role of the courts to translate these understandings into “a modern right,” which will then only have legal relevance if the court is able “to seek a corresponding common law right.”¹⁰⁹ Further, even if a treaty right is found after this process of assimilationist translation, the court still renders Indigenous peoples subjects

¹⁰⁴ See *ibid* at 53.

¹⁰⁵ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 49 [*Mikisew v Heritage*]. See also, *Mikisew Cree v Governor General*, *supra* note 98 (“[u]nilateral action is the very antithesis of honour and reconciliation” at para 87).

¹⁰⁶ *Badger*, *supra* note 6 at para 76.

¹⁰⁷ *Marshall v Canada*, *supra* note 7 at para 43.

¹⁰⁸ *Van der Peet*, *supra* note 5 at para 49.

¹⁰⁹ *R v Marshall; R v Bernard*, 2005 SCC 43 at para 51.

rather than treaty partners by allowing unilateral Crown infringement of these rights.¹¹⁰

Thus, from my understanding, the Court's flexible, *sui generis* principles of interpretation do not cultivate respectful dialogue across legalities, but instead assimilate Indigenous understandings into an imposed contractarian form of treaty; Indigenous perspectives serve to clarify the terms of this contract but are not allowed to call into question the universality of this contractual constitutionalism. This assimilation, from my perspective, is overt colonial violence and directly conflicts with the first principle of reconciliation—that of respectful constitutional dialogue, recognizing differences—stated earlier.

Sovereignty

A further barrier to the courts promoting reconciliation is their affirmation of Crown sovereignty over Indigenous lands and peoples. In *R v. Sparrow*, the Court states:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional 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.¹¹¹

This claim of sovereignty inverts the treaty relationship, from one in which settler legitimacy comes from having been welcomed into relationship to share the land according to Indigenous treaty paradigms, to one in which treaty allowed Indigenous peoples, as subjects under a sovereign, to obtain rights.¹¹² This lacks any coherence in either legality involved in treaty.

¹¹⁰ *Badger*, *supra* note 6 ("[a]lthough treaty rights are the result of mutual agreement, they, like aboriginal rights, may be unilaterally abridged" at para 77).

¹¹¹ *Sparrow*, *supra* note 5.

¹¹² See Truth and Reconciliation Commission of Canada, *supra* note 1 ("[i]t is important for all Canadians to understand that without Treaties, Canada would have no legitimacy as a nation. Treaties between Indigenous nations and the Crown established the legal and constitutional foundation of this country" at 249). See also H Johnson, *supra* note 34 ("Kiciwamanawak [cousin], you no longer need sovereignty doctrine to justify taking what you need from this

Within a liberal legality, the ample scholarship which supports the contention that Indigenous peoples understood assertions of sovereignty as kinship terms,¹¹³ along with the rigorous dispute that sovereignty was every accepted by Elders,¹¹⁴ would render these contractual terms void for a lack of consensus *ad idem*. If sovereignty was not ceded, then either the Crown obtained sovereignty fraudulently or had the right and capacity to unilaterally assert sovereignty due to doctrines such as *terra nullius*.¹¹⁵ The Court seems sensitive to this, and therefore in *Tsilhqot'in Nation* emphatically states that *terra nullius* never applied in Canada.¹¹⁶ However, despite this, in the same paragraph, the Court asserts that the Crown has underlying, radical title to all of Canada without explaining how this was legitimately obtained.¹¹⁷ *Haida Nation* appears to acknowledge this lack of legitimacy, and categorizes Crown sovereignty as de

territory. You have a treaty right to occupy and use this territory. You received that right when my family adopted yours" at 89); Mills, "What is Treaty?" *supra* note 24 ("[i]f treaty is a constitutional form and the Treaty of Niagara, 1764 in particular is how settler and Indigenous peoples constituted a shared political community respectful of existing Indigenous constitutional orders, then it's this living relationship and not a state called Canada that serves as the foundation for settler citizenship" at 241).

¹¹³ See e.g. Kent McNeil, "Indigenous and Crown Sovereignty in Canada" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 293; Walters, "Your Sovereign" *supra* note 47; Walters, "Rights and Remedies" *supra* note 41; Michael Asch, "Confederation Treaties and Reconciliation: Stepping Back into the Future" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 29.

¹¹⁴ See Cardinal & Hildebrandt, *supra* note 11 at 58.

¹¹⁵ See Joshua Nichols, "Sui Generis Sovereignities: The Relationship between Treaty Interpretation and Canadian Sovereignty" in Oonagh E Fitzgerald, Valerie Hughes & Mark Jewett, eds, *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en droit international* (Waterloo, ON: CIGI Press, 2018) 131.

¹¹⁶ See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 69.

¹¹⁷ See John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 ("[i]f that land was owned by Indigenous peoples prior to the assertion of European sovereignty, one wonders how the Crown acquired title in the same land by merely asserting sovereignty, without a version of terra nullius being deployed" at 703).

facto.¹¹⁸ This is an improvement, and yet even this statement is incomprehensible within a rooted legality.

In *Haida Nation*, the Court justifies their finding of *de facto* sovereignty by referencing the Crown's "control of land and resources that were formerly in the control of [Indigenous] people."¹¹⁹ This is only coherent within a legality in which the land is an inanimate context for competing autonomy between human-only political communities. Within a lifeworld where the land is our Mother, and its beings are our older relatives whose gifts sustain our survival, this assertion of control and authority over Creation is nonsensical.¹²⁰ Cardinal and Hildebrandt state that "[t]he first principle affirmed by the treaties was the joint acknowledgement by the treaty-makers of the supremacy of the Creator and their joint fidelity to that divine sovereignty."¹²¹ As Harold Johnson explains, "I am a grandchild of the earth. I am not her master."¹²² Gary Potts puts it succinctly, saying, "The Land is the boss."¹²³

Given its denial of Indigenous perspectives on sovereignty and implied categorization of the land as being separate from political community and subject to control, the Courts even claiming the Crown has *de facto* sovereignty violates both principles of reconciliation. However, it is understandable that the Court would not deny sovereignty, for to do so would be to deny the legitimacy of the claim of the *Constitution Act, 1982* to be the supreme law of the land, from which the legitimacy of the courts themselves is derived.¹²⁴

¹¹⁸ See *Haida*, *supra* note 99 at para 32.

¹¹⁹ *Ibid.*

¹²⁰ See Ogimaagwanebiik, *supra* note 8 (In this story, Anishinaabe are the youngest kin whose survival is only because of the gifts shared by animals who refer to Anishinaabe as their grandchild).

¹²¹ Cardinal & Hildebrandt, *supra* note 11 at 31.

¹²² H Johnson, *supra* note 34 at 74.

¹²³ Gary Potts, "The Land Is the Boss: How Stewardship Can Bring Us Together" in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Don Mills, ON: House of Anansi Press, 1992) 35.

¹²⁴ See *Constitution Act, 1982*, s 52(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Location Within a Liberal Legality

Finally, all these issues—the courts’ history of racism, imposed nature, reliance on a contractarian logic and Crown sovereignty—point to a central problem inhibiting courts from rendering judgment in a way that furthers reconciliation: the courts are incapable of being fully respectful of both legalities because they do not sit over and above the legalities of Canada and Indigenous peoples. Rather, they themselves depend on one of these legalities for their legitimacy; they themselves are institutions situated within this inter-legality dialogue.¹²⁵ Mills states that

[t]he courts are an institution internal to Canada’s constitutional order and, as creations by and under its authority, are by definition incapable of taking up the very issue at stake in treaty: the coordination of distinct constitutional orders.¹²⁶

How could courts be impartial to resolve constitutional dialogue if this dialogue questions their impartiality and authority itself?¹²⁷

Like any legal institution, the processes of the court are structured to enact their legality’s vision of treaty rights and obligations which are justiciable by a third party—and are conditioned by the lifeworld and constitutionalism that enables them. Pointing to the incapacity of the courts to engage with a relational constitutionalism, Johnson states that “[t]he human relationship is too complex for the court system to cope with, so a

¹²⁵ See Peter H Russell, “High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence” (1998) 61 Sask L Rev 247 (“[t]o Aboriginal peoples, these courts are still apt to be seen as the ‘white man’s courts’—too non-Aboriginal in their membership and too tied to the dominant society to be viewed either as truly independent and impartial adjudicators of their rights or as bridge builders” at 274).

¹²⁶ Mills, “What is Treaty?” *supra* note 24 at 224.

¹²⁷ See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: Columbia University Press, 1995) (“[h]ow can the proponents of recognition bring forth their claims in a public forum in which their cultures have been excluded or demeaned for centuries? They can accept the authoritative language and institutions, in which their claims are rejected by conservatives and comprehended by progressives within the very languages and institutions whose sovereignty and impartiality they question” at 56).

legal fiction is created whereby such relationships are reduced to contracts.”¹²⁸

What Courts Can Do

If the courts’ current approach to rendering judgment on treaty is not conducive to reconciliation, this does not mean that they are powerless to take any positive action. In this section, I will overview some suggestions for steps the courts could take and provide my own commentary—in humility—on their potential to cultivate respectful constitutional dialogue grounded in the earthway.

Reading into Historical Treaties Terms from Modern Treaties

Julia Jai proposes that one remedy for the manifestly unfair terms of historical treaties and lack of mutual comprehension would be for the courts to read in terms from modern treaties as “implied terms based on the obligation of the Crown to act honourably.”¹²⁹ Terms that Jai suggests being read into treaties include co-management,¹³⁰ impact benefit agreement,¹³¹ most favoured nation,¹³² and amendment clauses.¹³³

The inclusion of co-management and non-judicial dispute resolution clauses could allow for cooperative dialogue in forums

¹²⁸ H Johnson, *supra* note 34 at 48–49.

¹²⁹ “Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties” in Borrows & Coyle, *supra* note 2, 105 at 148.

¹³⁰ See *ibid* (co-management clauses create joint committees with members of both the Crown and Indigenous groups to provide things such as environmental assessments, development proposals, and decisions on how harvesting rights are practiced (at 140)).

¹³¹ See *ibid* (“In the current legal environment, it would not be unreasonable to read a requirement for impact benefit agreements into historic treaties” at 140).

¹³² See *ibid* (“if in a future negotiation, another First Nation gets a better deal, First Nations who have already signed off on their agreements can open up their agreements and get the benefit of this more favourable provision” at 141).

¹³³ See *ibid* (“[t]he example set out in modern treaties, of a jointly appointed, specialized dispute resolution body could be applied to historic treaties to establish a more neutral body to resolve disputes where negotiations do not succeed” at 144).

more amenable to being responsive to the multiple legalities involved in treaty.¹³⁴ Yet, from my perspective, this approach follows the same assimilationist logic of the Supreme Court and simply provides another method of correcting contractual defects, thus imposing a contractarian constitutional logic as the sole norm and perpetuating colonial violence against Indigenous constitutionalisms.¹³⁵

*Incorporation of Indigenous Law into Jurisprudence,
Increasing Representation*

Another option would be to pursue a form of legal hybridity, in which the courts increase representation of Indigenous peoples within the judiciary,¹³⁶ require judges to learn about Indigenous law, either on the land with Elders¹³⁷ or by applying a common law analysis to stories,¹³⁸ derive a hybrid body of common law based also on Indigenous languages and values,¹³⁹ and interpret

¹³⁴ See *ibid* (“[t]he provisions that establish co-management bodies illustrate that a treaty can be both an agreement intended to define and clarify rights, as well as a means of creating ongoing mechanisms for harmonious relationships at 139).

¹³⁵ See Mills, “What is Treaty?” *supra* note 24 (“[i]t isn’t clear how Indigenous peoples fit into modern treaties though, other than as a means to empower the end of settler certainty” at 222).

¹³⁶ See e.g. John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 215; Jean Leclair, “Nanabush, Lon Fuller, and Historical Treaties: The Potentialities and Limits of Adjudication” in Borrows & Coyle, *supra* note 2, 325 at 342.

¹³⁷ See Brenda L Gunn, “Beyond Van der Peet: Bringing Together International, Indigenous and Constitutional Law” in Borrows, Chartrand et al, *supra* note 85, 135 at 143.

¹³⁸ See Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories” (2016) 61:4 McGill LJ 725.

¹³⁹ See Borrows, *Canada’s Indigenous Constitution*, *supra* note 136 (“[s]tandards for judgment must not only flow from the common law but also from Indigenous legal values. Precedent should not be confined to dusty old law books; it should also be open to the authority of Indigenous teachings and lawways” at 217). See also John Borrows, “Law’s Indigenous Ethics: Patterns for Legal Practice” (Indigenous Scholars Lecture Series, University of Windsor Faculty of Law, 20 January 2021) (Borrows stated that if a body of common law jurisprudence can develop from abstract values such as equality, the same could be done from Indigenous values).

aboriginal and treaty rights with reference to Indigenous legalities rather than the common law.¹⁴⁰

This development of a shared body of law to be interpreted within courts by culturally competent judges has such immense support that engaging with it thoroughly is beyond the scope of this essay. Braiding of legal orders could unhinge the courts' narrow contractual understanding of treaty and lead towards a jurisprudence that allows for more cooperation and even encouragement of relationship with the land. However, this increased representation of Indigenous peoples and laws would not address how the courts' structure itself is conditioned by a liberal constitutionalism and I fear that the necessary translation to make this work—of law into set rules and rights to be enforced by a judge rather than careful decision in relationship—could hinder the integrity of Indigenous law. As Mills states, “[o]ne may be able to translate distinct content across common logics, but translating across distinct logics just makes no sense: a logic is by definition the thing through which sense is made.”¹⁴¹ I worry that hybridity within the courts runs the risk of affirming the colonial premise that the only normative basis for reconciliation allowed by the state is the removal of Indigenous law from its legality and assimilation within supreme Canadian institutions, rather than coordination between distinct legalities.¹⁴² Gordon Christie states that, “[i]f we began this exercise by imagining that the Canadian state and its courts engage in braiding laws the way we might imagine a single person braids a rope out of materials on hand, [then] we would then have to begin with the notion the state has control over Indigenous law.”¹⁴³

¹⁴⁰ See Gunn, *supra* note 137 (“[t]o implement UNDRIP, Canadian constitutional law must shift in its approach to defining Indigenous peoples’ rights toward ensuring that the rights are defined according to Indigenous peoples’ legal traditions” at 141).

¹⁴¹ Mills, *Miinigowiziwin*, *supra* note 14 at 28.

¹⁴² See Finch, *supra* note 3 (who argues that the inclusion should function in the other direction: “the current Canadian legal system must reconcile itself to co-existence with pre-existing Indigenous legal orders” at 44).

¹⁴³ Christie, *supra* note 85 at 49.

Declare Crown Sovereignty Sui Generis

Joshua Nichols argues that the courts should declare Crown sovereignty *sui generis* in that it does not conform to international law but is instead shared with Indigenous peoples within a plural legal system. He powerfully argues that

[t]he courts can no longer maintain an equation that begins by assuming that the Crown has sovereignty, legislative power and underlying title, and then positions the treaties as *sui generis* agreements without explicitly endorsing the doctrine of discovery. This move lacks any semblance of legal legitimacy. The path forward is, thus, not to attempt to reconcile Aboriginal peoples to the *de facto* sovereignty of the Crown via a continually shifting labyrinth of judicial procedures that remain grounded in the very assumption of legal authority that is being contested. Instead, there is a need to recognize that if the treaties are *sui generis* in nature, then Canadian sovereignty is as well. That is, Canada is not a nation-state with a consistent and closed legal system. It never was.¹⁴⁴

Nichols argues that section 91(24)¹⁴⁵ should be reinterpreted as a treaty power which does not allow for unilateral infringement of section 35 rights.¹⁴⁶ This, to me, has exciting potential to render overt the logical inconsistency of Crown sovereignty and increase humility within jurisprudence by recognizing its imperfect foundation. Nichols states that, “once the constitutional structures are seen as not absolute and not capable of being absolute (in the sense of being beyond question and contestation), it is possible to work together within the existing set of conditions.”¹⁴⁷ My only hope is that this working together within the existing conditions is the result of dialogue that allows for a full expression of a rooted legality, and does not become a justification for enforced hybridity under the Canadian state, denying Indigenous peoples the possibility of understanding the

¹⁴⁴ Nichols, *supra* note 115 at 143.

¹⁴⁵ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5.

¹⁴⁶ See *Constitution Act, 1982*, *supra* note 124 at s 35.

¹⁴⁷ Nichols, *supra* note 115 at 135.

world on their own terms and constituting their communities accordingly.

Declaratory Relief

A final suggestion comes from Mark Walters, who suggests that the courts use declaratory relief: a remedy used when it is out of the scope of courts to provide clear directives on how the executive should act given the involvement of policy decisions.¹⁴⁸ Helpfully, the scope which this remedy can cover is not subject to the same limitations of personal remedies using “coercive relief.”¹⁴⁹ Although not binding, these statements can help frame future negotiations with the Crown,¹⁵⁰ and are cohesive with the Supreme Court’s preference for treaties being settled through negotiation.¹⁵¹

Although the requirement of finding a right and infringement could render some of these proposals invalid, courts could use declaratory relief to acknowledge the differences in legalities at all levels in the treaty relationship, and how within a rooted legality the Crown has not lived up to its sacred kinship obligations towards Indigenous peoples or to Creation. It could acknowledge that the importance of ceremonies such as putting marks on a piece of paper was not mutually shared, that there were other institutions used which also had legitimacy, and that both parties should be aware of the legal significance when institutions from either legality are practiced.¹⁵² Declaratory relief could encourage parties to work towards a formal shared

¹⁴⁸ See *Canada (Prime Minister) v Khadr*, 2010 SCC 3. See also *Manitoba Métis*, *supra* note 98 (“[a] declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available” at 143).

¹⁴⁹ *Manitoba Métis*, *supra* note 98 at 143.

¹⁵⁰ Walters, “Rights and Remedies” *supra* note 41 at 202.

¹⁵¹ *Haida*, *supra* note 99; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew v Heritage* *supra* note 105; *Manitoba Métis*, *supra* note 98.

¹⁵² See H Johnson, *supra* note 34 (“Kiciwamanawak [cousin, ie settlers], my family did not adopt a piece of paper; they adopted you. The paper at treaty was ancillary to ceremony. My ancestors recognized your paper as your ceremony and participated so as not to offend” at 90).

understanding of treaty through dialogue,¹⁵³ could declare the court as situated within one legality and therefore limited in how it can engage with treaty difference, or perhaps even encourage the development of shared institutions for resolving disputes.¹⁵⁴ Although this remedy carries with it no coercive authority and renders the courts a relatively minor actor within living out the treaty relationship, perhaps this is the point and its humility itself could contribute to reconciliation.

Conclusion

Using Mills's legality tree to structure my analysis, I presented two contrasting visions of treaty—as a justiciable contractual exchange between autonomous parties and as a mutual aid relationship between interdependent kin grounded in the earthway—along with my understanding of the normative frameworks that give life to these visions. I argued that the courts' history, imposed nature, reliance on a contractarian view of treaty and Crown sovereignty, and location within only one of the legalities of the treaty relationship prevent it from adjudicating treaty disputes in a manner that promotes respectful dialogue between legalities and connection with the earth. I then overviewed various proposals for what the courts could do to pursue reconciliation, all of which, from my perspective, hold both promise and risk.

Overall, from my understanding, courts' role to play in treaty reconciliation is not decisive. Mills states that

¹⁵³ See Cardinal & Hildebrandt, *supra* note 11 (“[a] real problem exists with respect to the treaties — there is no formal existing agreement between the Crown and the First Nations as to the meaning and content of the treaties. It is a problem that needs to be addressed and resolved, if the spirit and intent of the treaty relationship is to be properly implemented” at 48).

¹⁵⁴ This could take inspiration from the Treaty of Waitangi Tribunal in New Zealand: see Jacinta Ruru, “A Treaty in Another context: Creating Reimagined Treaty Relationships in Aotearoa New Zealand” in Borrows & Coyle, *supra* note 2, 305. Although Canada has a Specific Claims Tribunal, its members are federal judges rather than shared appointments from both communities, and its capacity for remedies and the scope of treaty claims that it can consider are both very limited: see Michael Coyle, “Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand” (2011) 24:4 NZULR 596. However, it should be noted that the same reservations expressed with hybridity earlier would apply for these tribunals also.

treaty is the relationship itself, not the (always contingent) exchange of goods and services it empowers at any given time. It follows that disputes arising are not to be managed by judges analysing a claimed breach of terms. They must be managed politically, as matters of citizenship.¹⁵⁵

Yet this does not mean that judges themselves have no role to play in reconciliation. Instead, if treaty is a relationship to be lived, they—like me and all Canadians—can seek to personally practice the identified principles of reconciliation every day. I have little to offer in terms of directives for what this could look like but can share what I am seeking to practice personally.

First, I take heed from James Sákéj Youngblood Henderson, who states that

[t]he first step in generating a comprehensive Canadian sense of belonging must be found in learning and protecting its diverse ecology rather than in narrowly conceived political or cultural thought.¹⁵⁶

I am learning that part of this means learning the names of my non-human relatives within the rooted community all around me.¹⁵⁷ I am also coming to see this community as the basis for any shared human political community. As Gary Potts states,

[w]e're not demanding that non-native people learn our language, dress like us and be like us. We're saying we have a fundamental commonality that we need to address. Our commonality is the land and how we're going to use the land for future generations.¹⁵⁸

Second, I can take some basic first steps towards a mutual aid relationship with my treaty relatives by seeking to learn. As Victoria Wells states,

I'll know that reconciliation is happening in Canadian society when Canadians, wherever they live, are able to say

¹⁵⁵ Mills, "What is Treaty?" *supra* note 24 at 208.

¹⁵⁶ Henderson, *supra* note 44 at 432.

¹⁵⁷ See Kimmerer, *supra* note 43 ("There was a time, not so long ago, when to be human meant knowing the names of the beings with whom we cohabit the world. Knowing a name is the way we humans build relationship. It is a sign of respect to call a being by its name, and a sign of disrespect to ignore it" at 20).

¹⁵⁸ Gary Potts, "Growing Together from the Earth" in Engelstad & Bird, *supra* note 123, 199 at 200.

the names of the tribes with which they're neighbours; they're able to pronounce names from the community, or of people that they know, and they're able to say *hello*, *goodbye*, in the language of their neighbours. ... That will show me manners. That will show me that they've invested in finding out the language of the land [on] which they live.¹⁵⁹

In learning about Indigenous understandings of treaty within its proper legality, I have been encouraged to find a welcoming invitation to relationship. Given Aaron's central influence on this paper and my gratitude for this relationship, I would like to give him the last word:

[W]e can reconcile our colonial relationship by constituting ourselves as kin, doing our best to match our respective communities' gifts and needs throughout time in a relationship of treaty mutualism. Neither of our communities shall ever stop changing, which is the point of living relationships. But the relentless change of our becoming shall always be grounded here, in *Mikinaakominis*.¹⁶⁰

¹⁵⁹ Truth and Reconciliation Commission of Canada, *supra* note 1 at 356.

¹⁶⁰ Mills, *Miinigowiziwin*, *supra* note 14 at 244.

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