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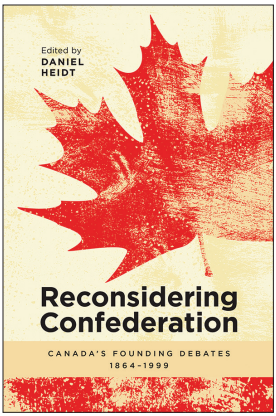

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2

Compact, Contract, Covenant: The Evolution of First Nations Treaty-Making†

J.R. Miller

The history of treaty-making between First Nations and Europeans in Canada has had a lengthy history and many phases. The earliest agreements, usually informal and generally unrecorded in a lasting form that Europeans would recognize, were compacts governing commercial relations between European traders and indigenous suppliers of fur. Alongside these commercial pacts, treaties of peace and friendship emerged in the late seventeenth and eighteenth centuries as the dominant form of treaty-making in north-eastern North America. Like commercial agreements, these procedures for making and maintaining diplomatic and military associations largely followed Aboriginal practices. In the latter decades of the eighteenth century and throughout the first part of the nineteenth, land-related treaties emerged as the most frequent form of treaty-making between First Nations and Europeans in Canada. Very often these territorial agreements resembled, at least superficially, simple contracts for straightforward transactions. Perhaps because later record keeping has proven better and more enduring, it is clear that, in the latter part of the nineteenth century, land-related treaties shifted in character. From the 1870s onward, the agreements by which Europeans obtained access to First Nations territory took the form of a covenant, a three-sided agreement to which the deity was a party. Through the twentieth century, especially

in its latter decades, First Nations have insisted on the covenant nature of treaty-making as the norm, while for a long time the Government of Canada emphasized that land-related treaties were contractual in nature. In all the discussion, the original form of treaty as commercial compact tended to get lost. If, as the Supreme Court of Canada decreed in 1985, treaties between First Nations and the Crown were *sui generis*, unique, it might be because, historically, they had taken so many forms.

In sorting out the complex and shifting history of treaty-making in Canada, no scholar has been of greater assistance than Arthur J. Ray. As Ray has noted, First Nations' objectives in making treaty and the nature of treaties are important issues: "For Canada's First Nations it is a crucial question that has a bearing on the pursuit of treaty rights issues" that have become so important since the refashioning of the Constitution in 1982. With characteristic modesty, Ray has suggested that he contributed to the discussion about the nature of treaties by proposing an alternative to the interpretation "that the accords should be seen primarily as peace agreements through which Aboriginal nations agreed to share their lands with newcomers." His alternative interpretation stressed the economic aspects of treaty-making: "I closed *Indians in the Fur Trade* with the observation that the Aboriginal People of the prairie West sought to adapt through treaty negotiations to the radical economic developments that were taking place in western Canada in the late nineteenth century. In other words, I emphasized the economic dimension."[1]

In spite of Ray's modest statement, his contributions to scholarly understanding of First Nations treaties with Europeans throughout Canadian history extend far beyond his emphasizing the economic aspect of treaty-making. This is not to say that Ray's emphasis was not important and badly needed. Prior to his work, treaty-making had been but dimly understood in published scholarship. For a long time the prevailing view seemed to echo the federal government's position: treaties were simple contracts for land that in some cases—the Numbered Treaties, for example—were also distinguished by the inclusion of provident and far-sighted provisions to encourage agricultural development and schooling by a wise and benevolent government in Ottawa. While that perspective, celebrated most notably in George Stanley's 1936 *The Birth of Western Canada*,[2] was starting to be questioned in the late 1970s and early 1980s,[3] it had not been dislodged by the time Ray began to publish his work on First Nations in

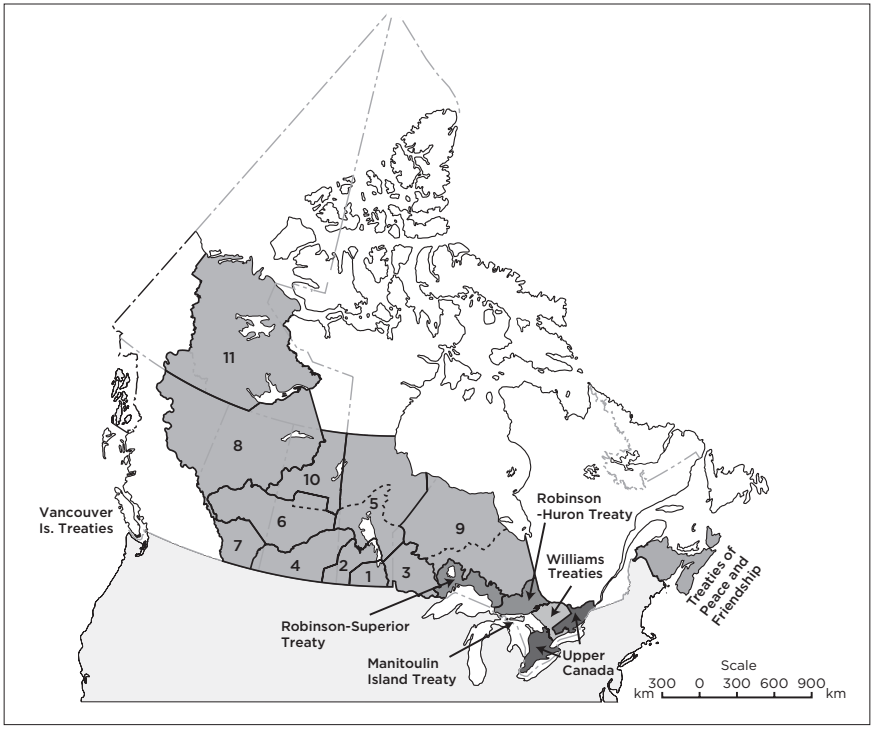

Fig 2.1 Historical Treaties of Canada. Developed from Canada, "Historical Treaties of Canada," *Indigenous and Northern Affairs Canada*, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/htoc_1100100032308_eng.pdf.

the fur trade.

The second major contribution to treaty studies made by Arthur Ray's scholarship was its explanation of trade protocol and, later, how that protocol informed treaty talks in nineteenth-century Western Canada. More so than in *Indians in the Fur Trade*, in "*Give Us Good Measure*," his quantitative history written with Donald Freeman, Ray laid out the elaborate ceremonialism with which the trade was conducted, particularly at York Factory.[4] Quoting contemporary observer Andrew Graham, Ray and Freeman explained that, when a trading party got about three kilometres from a Hudson's Bay Company (HBC) post, they halted out of sight while their trading captains organized their approach. They "soon after appear in sight of the Fort, to the number of between ten and twenty in a line abreast of each other. If there is but one captain his station is in the centre,

but if more they are in the wings also; and their canoes are distinguished from the rest by a small St. George or Union Jack, hoisted on a stick placed in the stern of the vessel."[5] When they got closer to the fort, a group of would-be traders would join other parties to form a flotilla of canoes. The approaching Natives saluted the post by firing "several fowling-pieces," while the HBC post master, having already given the order to hoist "the Great Flag" at the fort, returned the compliment with his twelve pounders. These opening salutations and honours were merely the prelude to more elaborate ceremonialism.

Once the Aboriginal traders had landed and the women had set up camp, the trading captains and their immediate subordinates engaged in a lengthy ceremony with HBC personnel. The man in charge of the post, on learning the leaders of the Natives had arrived, had his trader introduce them formally: "Chairs are placed in the room, and pipes with smoking materials produced on the table. The [Indian] captains place themselves on each side [of] the Governor, but not a word proceeds from either party, until everyone has recruited his spirits with a full pipe."[6] Then, and only then, the leaders of the two parties would make speeches of welcome. The spokesman for the visiting Aboriginal People would begin by explaining how many there were in the party, what had transpired with other traders who were not accompanying them this year, and general news since last the parties had met to trade. He likely would also make a call for fair and generous treatment in trade, and he would always ask how things had been with his English partners since they met last. For his part, the post factor would welcome them and assure them of his good will and generosity.

The factor would conclude his presentation by providing gifts to his Aboriginal trading partners. The presents usually consisted of clothing, food, smoking materials, and alcohol. The items of clothing were especially significant for the development of a treaty-making tradition in Canada:

> A coarse cloth coat, either red or blue, lined with baize with regimental cuffs and collar. The waistcoat and breeches are of baize; the suit ornamented with broad and narrow orris lace of different colours: a white or checked shirt; a pair of stockings tied below the knee with worsted garters; a pair of English shoes. The hat is laced and ornamented with feathers of different colours. A worsted sash tied round the crown, and

> end hanging out on each side down to the shoulders. A silk handkerchief is tucked by the corner into the loops behind; with these decorations it is put on the captain's head and completes his dress. The lieutenant is also presented with an inferior suit.[7]

The factor would also present his gifts of food, tobacco, and liquor, and escort the Natives from the trading post to their encampment in a formal procession.[8] At the Aboriginal encampment, the other half of the reciprocal ceremonial welcome and exchange occurred. The factor and perhaps an officer or two would be invited into the carefully prepared lodge and seated in the place of honour. The Aboriginal trading captain would then make a speech and cause gifts to be distributed to his visitors.

After a period of a day or more during which the Natives indulged in liquor, songs, and dance in their encampment, both sides were prepared to move on to the main event: trading furs. However, before the truly commercial part of the visit got under way, more ceremony was required. The Natives came back to the trading post to smoke the calumet, or ceremonial pipe, with the Europeans and to complete trade preliminaries. An observer at York Factory reported:

> As the ceremony of smoking the calumet is necessary to establish confidence, it is conducted with the greatest solemnity, and every person belonging to that gang is admitted on the occasion. The Captain walks in with his calumet in his hand covered with a case, then comes the lieutenant and the wives of the captains with the present, and afterwards all the other men with the women and their little ones. The Governor is genteely dressed after the Indian fashion, and receives them with cordiality and good humour. The captain covers the table with a new beaver coat, and on it lays the calumet or pipe; he will also sometimes present the Governor with a clean beaver toggy or banian to keep him warm in the winter. The Puc'ca'tin'ash'a'win [gift of furs prepared in advance] is also presented. Then the Governor sits down in an arm-chair, the captain and the chief men on either hand on chairs; the others

> sit round on the floor; the women and children are placed behind, and a profound silence ensues.[9]

The solemn smoking of the pipe then occurred, with the factor first lighting the pipe. The ceremonial smoking was followed by another exchange of speeches, quite lengthy this time, and the HBC man's distribution of food to the Natives.[10] On this occasion, the Aboriginal traders might also renew their calls for fair and generous treatment in trade with phrases such as "pity us" and "give us good measure," followed by an examination of the measures used in trading to satisfy themselves as to their "goodness." In some cases, as Arthur Ray pointed out more recently, the HBC representative would make gifts of medicines to those of his visitors who had responsibility for curing: "The captains and several others are doctors, and are taken singly with their wives into a room where they are given a red leather trunk with a few simple medicines such as the powders of sulphur, bark, liquorice, camphorated spirit, white ointment, and basilicon [ointment of 'sovereign' virtues], with a bit of diachylon plaster [an ointment made of vegetable juices]."[11]

As Ray and others have noted, the significance of these and other trade-related events that are known thanks to the richness of HBC records and researchers' efforts is great. In the ceremonies of welcome, speech making, gift-giving, and reassurance, the newcomers were adjusting to the Natives and their ways. These ceremonies and exchanges were part of Aboriginal protocol that governed interactions, including trade relations, between First Nations. In other words, the European newcomers had to accommodate Aboriginal values, observances, and practices in order to establish their sincerity and bona fides as trading partners. What was being created by these ceremonial observances was a commercial relationship that was enduring. They did not signal a one-time trade transaction. Further supporting this interpretation of HBC trade protocol was one further Aboriginal practice that Ray underlined. A First Nations trading captain who was content with how he and his party had been treated would leave his pipe at the post to be used the next year; if he was unhappy, he would take the pipe with him. The actions, respectively, signified maintaining or rupturing the commercial partnership.[12] The pipe was laden with symbolic significance. More generally, the entire protocol surrounding fur trade activity demonstrated European adjustment to Aboriginal ways.

Arthur Ray's scholarship on the fur trade also contributed one other important point relevant to the story of treaty-making: he outlined how HBC practice recognized First Nations occupancy and control of territory in Rupert's Land. Even though the Royal Charter of 1670, which authorized the "Gentlemen Adventurers" to monopolize trade in all the lands drained by Hudson Bay and James Bay, also purported to confer on the HBC freehold ownership of the lands, the company, in practice, behaved as though it had no foreordained territorial rights. Just as Cornelius Jaenen has explained that French claims and pretensions to ownership of Aboriginal lands in New France were a formality intended for European, rather than Aboriginal, ears,[13] so Ray demonstrated that the HBC recognized the necessity of securing First Nations permission to operate in their lands. The distinction is parallel to one of Walter Bagehot's insights about the British system of government. In *The English Constitution* (1867), Bagehot distinguished between two "two parts" of the Constitution: "First, those which excite and preserve the reverence of the population—the *dignified* parts, if I may so call them; and next, the *efficient* parts—those by which it, in fact, works and rules."[14] The same point was expressed, acidly as usual, by Goldwin Smith, who observed of the monarch and Governor General that: "Religious Canada prays each Sunday that they may govern well, on the understanding that heaven will never be so unconstitutional as to grant her prayer."[15] The distinction was between the formality of the strict letter of theory and the reality of practice on the ground.

Arthur Ray explained very clearly that this distinction applied to the HBC and the title to Rupert's Land that the company derived from its charter. He pointed out how, in 1680, the directors of the HBC instructed their representative in James Bay as follows:

> There is another thing, if it may be done, that wee judge would be much for the interest & safety of the Company. That is, In the several places *where you are or shall settle*, you contrive to make compact with the Captns, or chiefs of the respective Rivers & places whereby it might be understood by them that you had purchased both the lands & rivers of them, and that they had transferred the absolute propriety to you, *or at least the only freedome* of trade, And that you should cause them to do some act wch. By the Religion or Custome of their Country

should be thought most sacred & obliging to them for the confirmation of such Agreements . . .

As wee have above directed you to endeavour to make such Contracts with the Indians in all places where you settle as may in future times ascertain to us *all liberty of trade & commerce and a league of friendship & peaceable cohabitation*, So wee have caused Iron marks to be made of the figure of the Union Flagg wth. wch. wee would have you burn Tallys of wood wth. Such ceremony as they shall understand to be obligatory & sacred. The manner whereof wee must leave to your prudence as you shall find the mode & humours of the people you deal with, But when the Impression is made, you are to write upon the Tally the name of the Nation or person wth. Whom the Contract is made and the date thereof, and then deliver one part of the Stick to them, and reserve the other. This wee suppose may be sutable to the capacities of those barbarous people, and may much conduce to our quiet & commerce, and secure us from foreign or domestic pretenders.[16]

Ray's insight into the practical nature of HBC practice is the key element in demonstrating that the fur trade yielded the earliest form of First Nations treaties. Agreements of the sort that the directors instructed their man in James Bay to secure were, in effect, commercial compacts and, as such, a form of treaty. The record of the French fur trade of the seventeenth and eighteenth centuries also yields examples of Europeans entering into agreements with First Nations to further their exploration and fur commerce. The famous pact between Champlain and the Huron in the early years of the seventeenth century, whereby the French secured permission to operate in Huron country and the Huron received French help against their Iroquois enemies is only one of many.[17] The relationship between trade and peaceful relations was well expressed by an eighteenth-century Iroquois orator, who said "Trade and Peace we take to be one thing."[18] Ray and Freeman made the same point for the western trade: "Exchange between North American Indian groups was a political as well as an economic activity. Indians would not trade with groups with whom they were not formally at peace. Therefore, prior to the commencement

of trade, ceremonies were held to conclude or renew alliances."[19] In Aboriginal society, trade relations were impossible outside a friendly relationship established and renewed according to First Nations protocols. There is even some evidence from the later period of ententes that were, in effect, fur trade compacts. According to Canon Edward Ahenakew, in the nineteenth century Chief Thunderchild noted that the HBC "gave one boat load of goods for the use of the Saskatchewan River" to Natives at Fort Carlton.[20] Hugh Dempsey documented the use of pre-trade ritual—including welcoming ceremonies, gift-giving, smoking of the pipe, and speeches—at Rocky Mountain House down to the 1850s.[21]

Arthur Ray further contributed to scholarly understanding of the treaty-making process by linking HBC practices to events of the latter part of the nineteenth century:

> The First Nations of western Canada forged their relations with Europeans in the crucible of the fur trade. Successful long-term commercial intercourse required the development of institutions and practices that accommodated the sharply different diplomatic, economic, political, and social traditions of the two parties. When First Nations treaty-making with Canada began in the nineteenth century, Aboriginal People carried over into negotiating practices and strategies many long-established fur trading customs that they incorporated into the treaties.[22]

Such practices as welcoming formalities, speeches, exchanges of gifts, smoking of the pipe, and assurances of good will figured as prominently in the making of the Numbered Treaties, for example, as they had in the earlier commercial exchange. Moreover, First Nations formed their opinions and expectations of nineteenth-century European or Euro-Canadian emissaries in accordance with earlier fur trade exchanges. Both because the agreements forged in the fur trade, especially the HBC trade, bore the characteristics of commercial compacts and because they bequeathed a tradition that manifested itself in the Numbered Treaties of the late nineteenth century and early twentieth century, these fur trade arrangements deserve to be recorded as the first phase of treaty-making in Canadian history.

Two other forms of treaty-making soon emerged. The first, which developed contemporaneously with the commercial relationships of New France, was the treaty of peace and friendship. Administrators, most notably the governor in New France, had constructed an elaborate system of alliances on the base of France's extensive fur trade networks during the seventeenth century. On occasion, in the case of the Huron Confederacy for example, the combined commercial-military alliance did not survive. With the Huron, repeated Iroquois attacks on Huronia, about which French forces were not able to do much, resulted in the dispersal of the Huron. In most other cases, however, the alliances that France forged with Nations such as the Montagnais, Algonkin, and a large variety of "western Indians" proved to be enduring and effective. As was the case with the HBC's commercial dealings with northern and western First Nations, the French style of treaty diplomacy featured essentially Aboriginal practices such as gift-giving, elaborate ritual, speeches, and ceremony. Onontio, as the governor of New France was known, was expected to strike an imposing figure and make both grand gestures and elaborate gifts to renew the alliances that were established. The giving of presents was especially important for both material and symbolic reasons. Presents sustained First Nations allies who might have been hard pressed by poor hunting or harrying attacks by their enemies. But, equally important, presents represented a renewal of alliance and another token of good will and intentions. In the diplomatic parlance of the seventeenth and eighteenth centuries, presents "dried the tears" of allies who had suffered losses, "opened the throats" of people so they could speak, and "opened the ears" of partners so that they would hear what was said. The speeches, gifts, and other rituals that were held regularly when French and forest diplomats[23] met were a mechanism for renewing the alliance.

The British south of the lower Great Lakes and St. Lawrence learned to practise diplomacy as the First Nations did as well. Indeed, from the Thirteen Colonies, and more particularly from New York, came one of the most remarkable artefacts of the era of treaties of peace and friendship: the Covenant Chain. In the late seventeenth century, England began to fashion an extended system of alliances with the Five Nations of the Iroquois. (Early in the eighteenth century, the Tuscarora would move north into Iroquoia, and the Iroquois Confederacy would become the League of the Six Nations.) In time, an extensive structure evolved that

paralleled the French alliance with the western First Nations. By the late 1600s, the Covenant Chain linked the English, with greater or lesser effectiveness depending on the exigencies of the moment, to a vast range of First Nations. In this system, the governor of New York, known as Corlaer to the Natives, functioned as the counterpart of Onontio in New France. Indeed, Aboriginal diplomats frequently used "Onontio" or "Corlaer" as shorthand references for their links to the French or the English.[24]

Over time, the English developed methods of reaching arrangements with their First Nations allies that were very similar to those employed by the French. They, too, used elaborate ritual, speech making, gifts, and other ceremonies to maintain their links to their allies. Most remarkable, perhaps, was the way in which British diplomats learned and employed the elaborate rituals of the Iroquois, including the condoling and requickening ceremonies. When an Iroquois chief died, there were lengthy ceremonies to mourn his passing (the condoling ceremony) as well as rituals to recognize publicly the man who would succeed the deceased in office (the requickening ceremony). Another example of European adaptation to Aboriginal ways in the diplomatic field involves the use of wampum to record important actions. Wampum, belts made of shells or beads of different colours arranged in patterns, were for the First Nations of northeastern North America both a mnemonic, or memory-assisting, instrument and a way of recording events.

So, a First Nations diplomat—and in time European diplomats, too—would deliver a section of his speech and then lay a belt of wampum before the people to whom he was making his oral proposal. In an important conference diplomats might eventually present a dozen or more belts of wampum. Equally important was the use of wampum to record the results of conferences designed to secure peace or alliance. The principal terms of the deal would be commemorated graphically in a wampum belt. One of the most famous of these instruments was the *gus wenta*, or the two-row wampum, which the Five Nations of the Iroquois fashioned with the Dutch in the seventeenth century. The two-row wampum contained symbols that represented the two parties in separate water craft that travelled side by side. The meaning, Iroquois maintain even today, is that the two parties agreed to work together in partnership but to respect each other's difference and not to attempt to interfere with each other. Iroquois also insist that the British inherited the Dutch role after they took control of

New Netherlands in 1664.

These complex treaty-making systems came to a meeting of sorts in 1701. In that year, the French and a variety of First Nations, the Iroquois prominent among them, fashioned the Great Peace of Montreal, while the Iroquois also concluded a separate arrangement with the English at Albany. The motives of the various parties were complex but complementary.[25] The Iroquois, who were weakened by disease and population loss after some seven decades of off-again-on-again warfare with the French and their allies, wanted to relieve the pressure and replenish their ranks by an exchange of prisoners. The Five Nations were also anxious about the persistent worrying of their western flank by New France's Aboriginal allies. The French were similarly wearied by long periods of devastating guerilla warfare and sought peace for the respite and stability it would provide. The English hoped, by treaty-making, to maintain their ties with the Five Nations and spare themselves attacks by the Aboriginal allies of the French.

The complex treaty talks of 1700–1 revealed Native-newcomer treaty-making at a very sophisticated level. The Great Peace of Montreal, called "great" partly because over three dozen First Nations from a region stretching from the Maritimes to the edge of the Prairies signed it, established peace among the Iroquois, the French, and the allies of the French; promised a return of prisoners; and guaranteed the Iroquois the right to remain neutral in any hostilities between France and England. The last clause was enormously beneficial to both New France and the Five Nations, for both had been gravely weakened by the attrition of prolonged warfare.[26] If those terms understandably worried the English, who saw their Covenant Chain allies removed to a neutral category by the Peace of Montreal, further diplomatic action by the Iroquois in the same year attempted to reassure them. By a treaty often referred to as the Albany Deed, the Five Nations renewed their friendship with Corlaer and his people, while simultaneously purporting to convey hunting grounds north of the Great Lakes to English protection. While interpretations of the significance of this arrangement differ,[27] it clearly provided some reassurance to the English allies of the Iroquois, while simultaneously leaving untrammeled the Five Nations' right to stand neutral in a European imperial rivalry that seemed certain to play itself out in the interior of North America before very long. In any event, the Iroquois would choose their own course of action—neutrality or alliance with a European power—as

their interests dictated whenever conflict broke out. That had always been the case with First Nations approaches to diplomacy and alliance in wartime; it would continue to be so during the war-torn eighteenth century in eastern North America.

Although the Great Peace of Montreal of 1701 and the Albany Deed were important instances of the genre of treaty-making known as the treaty of peace and friendship, they were by no means the only examples. European-First Nations diplomacy figured prominently in the succession of imperial clashes that culminated in the Seven Years' War (or the French and Indian War, as it is more commonly known in the United States) as well as the War of the American Revolution and, ultimately, the War of 1812. A particularly important and revealing theatre of the wars of imperial rivalry of the period to 1760 was the Atlantic. Acadia, the French colony in peninsular Nova Scotia, along with the St. Lawrence River Valley colony of Canada, constituted what the French called New France. If Canada stood for access to the fur trade and its attendant system of Indian alliances, Acadia represented the entrée to the Atlantic fishery and to strategically important sites. France would develop the latter in the early 1720s, after the 1713 Treaty of Utrecht forced it to concede "Acadia with its ancient limits" to Great Britain, by building the massive fortress of Louisbourg on Cape Breton. Acadia had one other strategic asset so far as the French were concerned: the Mi'kmaq.

The Mi'kmaq, an Algonkian people who dominated Nova Scotia, Prince Edward Island, and northern New Brunswick, were drawn to the French for both negative and positive reasons. As Cornelius Jaenen has well explained, the French presence in Acadia after 1604 did not threaten Mi'kmaq territorial interests because the settlers who would evolve into the Acadians settled in areas largely unused by the Mi'kmaq—farming land reclaimed from the waters by dyking and draining. To this compatibility of location and land usage was added the fact that French representatives from the earliest days of contact with the Mi'kmaq wove bonds of friendship and affinity between the two peoples. The most important of those links was religion: from the early conversion of Chief Membertou and his entire family in 1610, French Roman Catholic missionaries worked among the Mi'kmaq, ministering both to Acadians and Natives. Over time, the process of intermarriage and acculturation developed close ties between the two communities. This experience of the seventeenth century

stood in dramatic contrast to events of the first half of the eighteenth. Following the Treaty of Utrecht, Britain moved to make good its claim to Nova Scotia, as it preferred to call what had been "Acadia" to the French, by settlement and military presence. Unfortunately for British-Mi'kmaq relations, the territorial compatibility that had figured so prominently in Acadian dealings with the Mi'kmaq did not exist in the portions of the colony where British and British-sponsored settlers chose to locate. Unlike the French, the British presence brought to the surface a strong territorial incompatibility between the Indigenous People and the new European power in the region.

Religion played an important role in the growing friction between the British and the Mi'kmaq. His Britannic Majesty, as head of a militantly Protestant country, took a dim view of Roman Catholicism in his new Atlantic colony and among an Aboriginal People who for so long had had close relations with His Most Catholic Majesty, the king of France. For their part, the Mi'kmaq had close ties to Roman Catholic missionaries from France and, according to at least one authority, even believed that they had entered into a concordat, a treaty-like agreement between the Vatican and their nation, as a result of the conversion of Membertou in 1610.[28] During the first half of the eighteenth century, and most especially after about 1720, the governor of New France regularly employed Catholic missionaries as emissaries in Acadia to influence the Mi'kmaq in ways that assisted French strategic designs of maintaining a presence in Nova Scotia. Such complications explain why the British had such difficulty making their hold on Nova Scotia good between the Treaty of Utrecht and the end of the Seven Years' War, as well as why British forces found it necessary to expel the Acadians in 1755. One measure of the greater difficulty the British had in the region compared to the French is that, over the century and a half that the French associated with the Mi'kmaq, France made precisely one formal treaty with the First Nation, whereas the British entered into no fewer than thirty-two treaties with them between 1720 and 1786.[29] The unusual treaty history of Canada's maritime region illustrates that treaty arrangements, which could be founded on factors such as trade and religion, took many forms and that a propensity to make treaty by itself did not guarantee stability in a country's treaty regime.

In contrast to the impermanence and ineffectiveness of its treaty system in eighteenth-century Nova Scotia, Britain's next foray in Native policy

would have a profound and long-lasting impact. The Royal Proclamation of October 1763, which Britain issued to provide institutions of government and law for territories newly acquired in the Seven Years' War, contained extremely important provisions concerning First Nations lands. Although the Proclamation, which was a unilateral Crown document, is often described as the "Indians' Magna Carta" and is said to bestow many territorial blessings on First Nations, it was written as though the royal author assumed the territories all belonged to the Crown. When the Proclamation turned to the First Nations and their territorial rights, it described them as "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection," and said that they "should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds." In other words, the Proclamation said that the Crown reserved from its dominions land for First Nation allies and associates as their grounds for hunting and maintaining themselves. Be that limited recognition as it may, it then went on to lay out a regime that was to govern those lands "reserved to them . . . as their Hunting Grounds." First, it forbade settlement in the interior beyond the height of land and regulated commercial penetration of the region by requiring traders to get licences from the governor before going beyond the mountains. The purpose of these clauses was to hold back and control non-Native entry into the interior so as to placate the First Nations and prevent clashes between them and intruding colonists intent on making Aboriginal "Hunting Grounds" into settlers' fields. The fact that Pontiac's War, a rising of interior First Nations against the newly victorious British, was raging when the Proclamation was issued underlined the need to control non-Native access to lands beyond the mountain ranges west of the Thirteen Colonies.

The Proclamation continued with important clauses concerning interior First Nations territories. It reserved "for the use of the said Indians, all the Land and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company," and the King did "hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first

obtained." The objective of forbidding settlement or purchase of First Nations lands was to put an end to "great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians." Or, as American historian Francis Jennings was later to put it, the Proclamation aimed to put a stop to the "deed game," the dubious practice by which pioneers or land speculators—the distinction between the two categories was often a fine one in settler societies—obtained a transfer deed from a Native by fraud or employment of alcohol. When the colonists acted on the dubious deed, trouble ensued between the First Nations and incoming settlers.

The Proclamation's alternative to the "deed game" was a policy for acquiring First Nations land that would give the document its long-lasting influence:

> In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Causes of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie.

Analogous rules were laid down for acquiring First Nations lands in colonies where there already was a colonial government. In other words, in both the lands beyond settlement that were reserved for First Nations and within settled colonies the Proclamation held that the only way Aboriginal lands could be obtained lawfully was by a representative of the Crown, not a private citizen or a company, and only through a public process that would help to avoid fraudulent dealings. As the Proclamation also said, these restrictions on acquiring lands were motivated in large part

by Britain's desire that "the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Causes of Discontent."

Although these terms of the Royal Proclamation of 1763 were important in their own right, they paled in significance with the implications and legacy of the document. For one thing, according to one Aboriginal law specialist, British officials in 1764 took actions that converted the Proclamation from a unilateral Crown document into a treaty. According to John Borrows, in 1764 William Johnson, Britain's superintendent of the northern First Nations, called together some two thousand First Nations representatives from districts stretching from Nova Scotia to the Mississippi, explained the contents of the Royal Proclamation, and procured their agreement to them.[30] The implication of the events, according to Borrows' interpretation, is that, through the Niagara conference of 1764, the Royal Proclamation became a treaty protected by Section 35 of Canada's 1982 Constitution Act. Although documentary sources such as the published Johnson Papers, *New York Colonial Documents*, and government-compiled collection of treaties do not explicitly support his argument, there is evidence that Johnson explained the Royal Proclamation's territorial guarantees to Iroquois groups early in 1764.[31] If he did this with relatively small groups of Iroquois in January 1764, it is reasonable to infer that he did the same thing with much larger numbers of First Nations at Niagara that summer. Borrows also points out that First Nations oral traditions and wampum do provide evidence for his view of the Proclamation.[32] If this interpretation is upheld, the Proclamation will itself be a key development in the Canadian treaty-making tradition.

Whether or not the courts treat it as a treaty, there is no doubt that, since the late eighteenth century, the Proclamation has profoundly influenced treaty-making. Although the requirements of the Proclamation were not followed scrupulously in every case, from 1764 until Confederation, treaties were made by the Crown with a variety of First Nations in central British North America to gain access to First Nations lands. For the first half century after 1763, the acquisitions were motivated by a desire to obtain lands on which to settle allies of the British and then immigrants to British territory. The former motive was exemplified by the acquisition of lands immediately north of Lake Erie and Lake Ontario for Mohawk allies defeated in the War of the American Revolution. The latter reason, the need to provide access to lands for immigrants, became especially

compelling after the creation of Upper Canada as a separate political unit in 1791. In this first fifty years of Proclamation-style treaty-making, the documents that resulted provided for a straightforward transfer of territory in return for a one-time payment, often in goods. So, for example, Treaty No. 8 in 1797 provided access to 3,450 acres of land north and east of Burlington Bay. A group of Mississauga (Ojibwa) negotiated the pact with William Claus, superintendent of Indian Affairs "on behalf of the Crown," in return for "seventy-five pounds two shillings and sixpence Quebec Currency in value in goods estimated according to the Montreal price." A certificate attached to the government version of the treaty listed blankets, several types of cloth, butcher knives, and brass kettles to the specified value as having been conveyed to the First Nations signatories.[33]

The land-related treaties of this fifty-year period following the Royal Proclamation are the agreements that bear the closest resemblance to simple contracts in Canadian history. At least as explained in the government's version of them, they exchanged a specific tract of land, usually a relatively small piece, from the First Nation in return for a one-time payment. The treaties usually were negotiated, as the example (above) was, by an official who clearly represented the Crown. There were, however, exceptions. One was the so-called Selkirk Treaty of 1817, negotiated in the Red River area by a representative of Lord Selkirk, the landlord who had acquired a large tract of land from the HBC and established a struggling colony on it in the second decade of the nineteenth century. The origins of this agreement were anything but exemplary of Proclamation policy, which, in any event, was not intended to apply to Rupert's Land. The background of the Selkirk Treaty was a violent clash between mixed-ancestry[34] forces and colonists at Seven Oaks in 1816. Only then was Selkirk, who had acquired lands from the HBC in 1811 and started his colony in 1812, moved to have an arrangement with local Saulteaux (Western Ojibwa) negotiated. Also instructive was the fact that the Selkirk's text labelled the agreement "This Indenture," an indenture being a legal agreement or contract that bears a seal. The treaty or indenture conveyed 3.2 kilometres on either side of the Red and Assiniboine rivers to Selkirk on "the express condition that the said Earl, his heirs and successors, or their agents, shall annually pay to the Chiefs and warriors of the Chippewa or Saulteaux Nation, the present or quit rent consisting of one hundred pounds weight of good and merchantable tobacco."[35]

The Selkirk Treaty, whether or not it was part of a treaty-making tradition founded upon the Royal Proclamation of 1763, stands at a transitional point in the history of such agreements in Canada. Between 1763 and the War of 1812, the agreements that had been made covered small areas, provided for one-time compensation to the Aboriginal signatories, and resembled simple contracts. By means of such agreements, the Crown had dealt with First Nations territorial rights in a large portion of Upper Canada, now southern Ontario, in preparation for settlement by allies and immigrants. In retrospect, Selkirk was a harbinger of change that was on its way in British practice in Upper Canada. What the Selkirk Treaty unknowingly foreshadowed was a shift in the type of compensation provided by the Crown, a change that introduced an element to treaty-making that was both a novelty and a throwback. The change that was introduced by the British in 1818 was the use of annuities, annual payments to the First Nations in compensation for land rights obtained by treaty. From that time onward, the Crown used annuities mainly for reasons of economy. In another surge of treaty-making in preparation for immigration and settlement after the War of 1812, Britain moved to reduce its financial obligations by using annuities. The theory was that, once settlement commenced and colonists paid fees for the lands, income from this source would fund the annual payments to the First Nations. The annuity system would thereby reduce Britain's outlay.

However, annual payments to First Nations would be reminiscent of earlier transactions with allies, transactions that were still carried out down to 1858 in central British North America. Annuities resembled the annual presents that first the French and later the English had used to cement their alliances with First Nations. They "wiped the rust from the chain of friendship," "dried the tears" of bereaved partners, and "opened the ears and throats" for friendly dialogue. Moreover, to First Nations, the giving of presents, like the annual exchange of gifts at fur-trading posts, symbolized the renewal of a partnership, whether commercial or diplomatic and military. Introducing annuities into treaty-making linked land treaties in the nineteenth century to the commercial compacts and diplomacy of an earlier era. The action also complicated the view of Upper Canadian treaties as simple contracts and paved the way for a more complex form of treaty-making.

Before that complicated type of treaty emerged, however, the making of

land treaties continued and evolved in Upper Canada. Between 1783 and the War of 1812, the Crown dealt with First Nations territorial rights in a band covering the "front" (river-front and lake-front). The depth back from the water that was embraced in these treaties was usually moderate, but in the regions at the east end of Lake Erie and along the river in the eastern part of the province the land treated for stretched noticeably further in-land.[36] These were the treaties in which the compensation for First Nations took the form of one-time payments. Between 1818 and the 1830s, the Crown dealt with a broader band of territory to the north in a series of treaties in which the compensation was annuities. For example, Upper Canadian Treaty No. 27 between the Crown and Mississauga dealt with a large tract in eastern Upper Canada that stretched to the Ottawa River, and it guaranteed the First Nation signatories "the yearly sum of six hundred and forty-two pounds ten shillings, Province Currency, in goods at the Montreal price to be well and truly paid yearly and every year by His Majesty, His Heirs and successors, to the said Mississaugua [sic] Nation inhabiting and claiming the said tract."[37] For the Upper Canadian treaties, a culmination occurred in 1850 with what are known as the Robinson Treaties.

The Robinson Huron and Robinson Superior treaties, named for the Great Lakes to which they were adjacent, advanced treaty-making in the pre-Confederation era. Geographically, they extended the Crown's claim to lands stretching well up into the Canadian Shield, where the attractions of mining had begun to draw non-Natives. They also advanced treaty-making practice by dealing with much larger tracts than had hitherto been the case in Upper Canada. The Robinson Treaties also broke new ground by specifying that provision of reserves was a Crown obligation flowing from the treaties. Prior to this time, reserves had existed as a result of missionary or Indian Department initiative, but they were not associated with treaties or Crown treaty obligations. From the time of Robinson onward, treaties and reserves normally went together. Finally, the Robinson Treaties reintroduced an element that had been present in some of the eighteenth-century Nova Scotia treaties: Crown recognition of the First Nations' continuing right to hunt and fish. As Commissioner Robinson explained to his superiors this concession was not altruistic: by acknowledging "the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from their usual means of subsistence and therefore have no claims for support, which they no doubt

would have preferred, had this not been done."[38] Commissioner Robinson gave the Ojibwa who signed the 1850 treaties the choice of a lump sum payment or a small upfront sum and annuities; they chose the latter. The Robinson Treaties combined elements that would form the template of later treaties in the West: they dealt with large territories, they established reserves for the First Nations, they included annuities, and they recognized a continuing Aboriginal right to hunt and fish.

By the time of Confederation, the Upper Canada treaty-making tradition had evolved into a sophisticated protocol that conformed in many respects to the requirements of the Royal Proclamation. That the Proclamation was not always followed was demonstrated in the background to both the Selkirk and Robinson treaties. In both instances, Native resistance had brought on overtures to make treaties. However, treaty-making in Upper Canada did involve the Crown and First Nations in public negotiations concerning territory. During the first fifty years after the Proclamation, the use of one-time payments had made the agreements resemble simple contracts for territory, although practice after the War of 1812 shifted to the use of annuities, which would prove to be the harbinger of a different style of treaty-making. Another exception to the general use of annual payments for compensation was to be found in colonial British Columbia. When Governor James Douglas responded in the 1850s to the pressure of encroaching settlement on Vancouver Island, he entered treaty talks with a variety of groups; this led, by 1854, to the conclusion of fourteen treaties for small parcels of land on the Island. In the talks, Douglas explained, he offered the First Nations leaders the choice of one-time compensation or annuities. The Natives chose a single payment upfront, making BC treaties unconventional in their compensation clauses as well as in the amount of territory they covered. Elsewhere in British North America, however, annuities were the norm, as were provision of reserves, large tracts, and guarantees of hunting and fishing.

The Numbered Treaties that were concluded in the West between 1871 and 1877 introduced a third category of treaty: the covenant. Of course, the official record, the government's version of the treaties that was published in 1880, continued to portray the agreements that covered the region from the Lake of the Woods to the foothills of the Rockies as simple contracts transferring territory from First Nations to the Crown. For example, Treaty No. 1, the Stone Fort Treaty in Manitoba, had the

"Chippewa and Swampy Cree Tribes of Indians . . . cede, release, surrender, and yield up to Her Majesty the Queen, and her successors for ever, all the lands included within the following limits, that is to say," in return for reserves, a signing payment, schools, and annuities of fifteen dollars paid in goods. Later, after the First Nations had successfully argued that there were other "outside promises" that did not turn up in the printed version of the treaty, Treaty No. 1 also increased annuities, made four rather than two headmen eligible for annual stipends, and provided livestock and equipment for the pursuit of agriculture.[39] The view of treaties between the Crown and First Nations as contracts for territory would prevail on the government side of transactions through the later negotiation of the northern Numbered Treaties between 1899 and 1921. The same interpretation informed the federal government's approach to dealing with claims arising from the treaties throughout the twentieth century.

Western First Nations in particular insisted upon a different view of the nature of their treaties. Rather than a contract involving two parties—Crown and First Nations—First Nations communities see the treaties as three-cornered agreements to which the deity is a party. A covenant is an agreement between humans, in which the deity participates and provides oversight. For Christians, for example, establishing a sacred relationship in marriage is generally described as a covenant because God is witness and participant in the solemn pact. In a similar fashion, First Nations argue that the western Numbered Treaties are covenants. One of the terms that Plains Cree use to describe treaties is *itîyimikosiwiyêcikêwina*, which means "arrangements ordained or inspired by our Father [Creator]."[40] Saskatchewan Saulteaux elder Danny Musqua told interviewers, "We 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 [the Crown] and me [First Nations] and the Creator."[41] A contract between two or more parties is specific and relies on the precise letter of its terms; a covenant among two or more humans and the deity creates a special, solemn relationship in which the partnership is more important than its specific terms.

First Nations point to several forms of evidence to sustain their argument that the Numbered Treaties of the 1870s were covenants rather than contracts. In particular, with the exception of Treaty No. 4, the making of these seven treaties was preceded by observance of First Nations

ceremonies and forms. (Apparently, First Nations negotiators at Fort Qu'Appelle in 1874 did not include Commissioner Alexander Morris in ceremonies—an omission on which Morris pointedly commented[42]—because they were angered by the transfer of Rupert's Land to Canada without their having been consulted or paid.) Morris described a typical instance of First Nations ceremonialism at Fort Carlton in August 1876:

> On my arrival, the Union Jack was hoisted, and the Indians at once began to assemble, beating drums, discharging fire-arms, singing and dancing. In about half an hour they were ready to advance and meet me. This they did in a semicircle, having men on horseback galloping in circles, shouting, singing and discharging fire-arms.
>
> They then performed the dance of the "pipe stem," the stem was elevated to the north, south, west and east, a ceremonial dance was then performed by the Chiefs and head men, the Indian men and women shouting the while.
>
> They then slowly advanced, the horsemen again preceding them on their approach to my tent. I advanced to meet them, accompanied by Messrs [W.J.] Christie and [James] McKay [fellow commissioners], when the pipe was presented to us and stroked by our hands.
>
> After the stroking had been completed, the Indians sat down in front of the council tent, satisfied that in accordance with their custom we had accepted the friendship of the Cree nation.[43]

The significance of the ceremonies was far greater than the commissioner apparently realized. While joining in friendship was certainly part of the ritual's meaning, there was far more to it than that. The use of the pipe invoked the Great Spirit as a participant at the talks that were to follow and bound everyone who smoked the pipe to tell only the truth. Moreover, any agreement produced by such solemn talks was sacred and could not be violated without grave ills befalling the violator. On the more positive side, according to two researchers who conducted many interviews in Saskatchewan, the ceremonies had an inclusive effect: "The treaties, through the spiritual ceremonies conducted during the negotiations,

expanded the First Nations sovereign circle, bringing in and embracing the British Crown within their sovereign circle."[44] Inclusion in any sort of family relationship with Aboriginal Peoples was a potent development. The attribution or creation of kin relationships, as in the language used in the Covenant Chain of the seventeenth and eighteenth centuries, was a prelude to conducting business of any kind, commercial or diplomatic, in North American Aboriginal societies. By embracing the Queen's treaty commissioner through ceremonies, the western First Nations were establishing kinship with the Crown and, through the Crown, with the Queen's people. Little wonder that when Governor General Lord Lorne, the husband of a daughter of Queen Victoria, visited the Prairies in 1881, Kakishiway, a chief who had signed Treaty No. 4 in 1874, greeted him with, "I am glad to see you my Brother in Law" as both of them had a family relationship to the Queen.[45] The chief's link was through the treaties, while Lorne's was by marriage.

A second type of evidence supporting the interpretation of the western treaties as covenants came from the mouths and the actions of the Queen's treaty commissioners. First Nations would have been impressed by the presence and participation of Christian missionaries as interpreters or witnesses at the talks. There were Christian ministers or priests in attendance at the negotiation of treaties 4, 5, 6, and 7. Moreover, the treaty commissioner's insistence on suspending talks so that the Christians could observe the Sabbath properly testified to their adherence to spiritual practices and values.[46] The Queen's commissioners frequently involved the deity in their arguments, and for a variety of purposes. For example, at Treaty No. 4 talks, Commissioner Alexander Morris used a reference to the "Great Spirit" to counter Saulteaux arguments that the HBC had stolen their territory from them when it took the money Canada paid for the HBC lands: "Who made the earth, the grass, the stone, and the wood? The Great Spirit. He made them for all his children to use, and it is not stealing to use the gift of the Great Spirit."[47] At other times, the occasion of a reference to the deity was more positive. When summing up the Treaty No. 6 talks at Fort Carlton in 1876, Commissioner Morris noted: "What we have done has been done before the Great Spirit and in the face of the people."[48] At times, a treaty commissioner's language would have sounded as though the Queen's representative was explicitly accepting the First Nations understanding of treaty as covenant and kin relationship. For

example, at Blackfoot Crossing in 1877, Commissioner David Laird said: "The Great Spirit has made all things—the sun, the moon, and the stars, the earth, the forests, and the swift running rivers. It is by the Great Spirit that the Queen rules over this great country and other great countries. The Great Spirit has made the white man and the red man brothers, and we should take each other by the hand. The Great Mother loves all her children, white man and red man alike; she wishes to them all good."[49] If western First Nations saw the Numbered Treaties as covenants involving the Great Spirit, the Crown, and themselves, and if they believed that the Queen's white-skinned children understood them the same way, it is hardly surprising.

For western First Nations leaders who invoked the Creator with their rituals, it would not have been difficult to conclude that the Queen's commissioners were acting in the same spirit. Their words and their actions both seemed to involve their god in the proceedings. In this way, treaty commissioners in the nineteenth-century West embraced the protocol that Aboriginal People had developed and that, earlier, the HBC had adopted. Other aspects of the customary rites were the Crown's provision of treaty uniforms ("suits of clothing") to chiefs and headmen, much as HBC post masters had issued clothing along with food to trading captains who brought furs to the HBC forts. All these practices illustrated the continuity of Aboriginal and HBC practices, a system of protocol that invoked and involved the deity through the ritual smoking of the pipe. Given this pattern of western treaty-making, it is not surprising that First Nations regard the agreements they made with the Queen's commissioners in the 1870s as covenants, establishing a sacred and permanent relationship between themselves and the Crown.

In the twentieth century, First Nations were to experience a great disillusionment with the way that the Queen's Canadian government interpreted and applied treaties. Indeed, the disappointment did not have to wait for the twentieth century. Once the treaties were concluded (by 1877) and the buffalo economy—the foundation of Plains culture and the source of Plains strength—collapsed (by 1879), Canada began to take a narrow, legalistic, and parsimonious approach to treaty-making and treaty implementation. As early as the 1880s, western First Nations leaders were complaining that the Crown's representatives had used "'sweet promises' . . . to get their country from them" and then ignored the Crown's obligations to

them.[50] Another manifestation of the federal government's attitude was its refusal to act on petitions from a variety of First Nations in regions north of the seven Numbered Treaties to make treaties with them. Ottawa's attitude was that it was not interested in making further treaties, which would entail financial obligations to First Nations, unless and until the lands on which they resided became desirable in the eyes of non-Native economic interests that sought to develop them. Accordingly, numerous petitions for treaty were ignored, but when oil was discovered at Norman Wells in 1920, the wheels were set in motion to make Treaty No. 11, which covered the region in 1921.[51] After the early 1920s, the federal government declined to make any further treaties. For the time being there were no southerners coveting the untreatied lands of the North and British Columbia, and, in any event, by 1920 Ottawa and its Department of Indian Affairs had entered a phase of pursuing coercive and controlling policies towards First Nations that would not lift until the middle of the century.

When treaty-making did resume, with the James Bay and Northern Quebec Agreement in 1975, it was only because better organized and highly assertive First Nations political organizations, specifically the James Bay Cree, went to court to secure a temporary injunction to halt the massive James Bay hydroelectric power development. That contretemps and the 1973 Supreme Court of Canada decision on Aboriginal title in *Calder*, the Nisga'a case, led the federal government to develop a comprehensive claims settlement process to deal with Aboriginal title claims in regions where there were no effective treaties. As the Indigenous and Northern Affairs Canada website once noted, the Comprehensive Claims Branch's purpose is "to negotiate modern treaties which will provide a clear, certain and long-lasting definition of rights to lands and resources for all Canadians."[52] Comprehensive claims settlements were joined in the 1990s by individually negotiated agreements such as the Nunavut pact and the Nisga'a treaty to round out Canada's modern treaty-making processes. In the twenty-first century, Canada and First Nations must negotiate treaties concerning access to territory for Atlantic Canada, parts of northern Quebec, most of British Columbia, and portions of the Far North.

Through those times in the twentieth century when treaties were being made, and certainly since the resumption of treaty-making in the 1970s, the federal government's view of treaties as contracts whose contents are recorded in the government's version has been prominent. As

Cumming and Mickenberg pointed out in their 1970 *Native Rights in Canada*, the courts had often found that Aboriginal treaties were akin to contracts in law. As late as 1969, Pierre Trudeau, initially no friend of treaty or Aboriginal rights, in the aftermath of the uproar over his government's White Paper, said that while his government "won't recognize aboriginal rights[,] We will recognize treaty rights. We will recognize forms of contract which have been made with the Indian people by the Crown."[53] The implications of the government's attitude became clear in the 1980s in the context of comprehensive claim resolution discussions. As a review of the comprehensive claims process put it, "progress has, in the past, been blocked by the fundamental difference between the aims of each party. The federal government has sought to extinguish rights and to achieve a once-and-for-all settlement of historical claims. The Aboriginal Peoples, on the other hand, have sought to affirm their aboriginal rights and to guarantee their unique place in Canadian society for generations to come."[54] The federal position, which only slowly and grudgingly gave way by century's end to a policy that sought "certainty" rather than explicit extinguishment, was consistent with a view of treaties as contracts. The stand of the First Nations who opposed the extinguishment doctrine was the product of a view of treaty that emphasized treaties as the formalization of a relationship that was regularly renewed and might, if necessary, be modified in detail.

These twentieth-century differences in interpreting treaty are a reminder that, in the more than three hundred years that Europeans and Aboriginal Peoples have been making agreements in Canada, there have been several different views regarding what constitutes a treaty. In their earliest forms, which emerged in the commercial forum in which European fur trader and Aboriginal fur supplier met, treaties were commercial compacts. They arose from traders' common-sense recognition that, whatever rights royal charters or licences might purport to bestow on them, the practical thing to do was to secure permission from the occupants, on whom they relied heavily in any event, to establish themselves and carry on commerce. Making these commercial compacts drew the Europeans into the First Nations system of values and protocol as they learned to carry out the ceremonies of welcome, gift exchange, and pipe smoking that governed Aboriginal Peoples' relations with one another. Later, in the century after the Royal Proclamation of 1763 produced land-related

treaties, the ensuing agreements often appeared to resemble contracts. At least according to the government versions of the ententes that have survived, a straightforward swap of land and title for compensation occurred. In the first half-century after 1763, the Crown's reliance on one-time payments strengthened that impression. By the time the Canadian state was established, this view of treaty as contract was firmly established in the minds of Canadian politicians.

As the Numbered Treaties of the West have shown, however, there was another, in many ways richer, view of treaty that vied with the contract interpretation for prominence. This was the conception of treaties that were ostensibly about access to territory as covenants. As treaty-related ceremonies suggest and oral history evidence confirms, western First Nations saw the agreements that they made between 1871 and 1877 as establishing relationships under the oversight of the Creator, relationships that were intended to be renewed annually, last forever, and be modified as circumstances required. As the number and power of First Nations declined and non-native Canada became correspondingly dominant, that interpretation of treaties was pushed back into the shadows. In an era when First Nations were viewed as "a vanishing race" that was "melting like snow before the sun," and when the government of Canada pursued aggressive policies to control and refashion them through the Indian Act and its attendant programs, an exclusive emphasis on treaties as contracts and an insistence that the government text was the valid version were championed by the government and usually acquiesced to by the courts.

As attitudes and power relationships between First Nations and non-Natives began to shift in the late years of the twentieth century, perceptions of treaty were modified, too. Thanks both to the revelations of oral history research and the efforts of a new generation of researchers, including in particular Arthur J. Ray, a more complex understanding of treaties as having taken a variety of forms has emerged. Compacts, contracts, and covenants have at different times and in different quarters been seen as the single authentic form of treaty. In British Columbia in the 1990s, when a stalled treaty-making process left uncertainty about ownership that deterred investment in resource industries, pragmatic resource-company executives and First Nations quietly negotiated local agreements to pave the way for investment and job creation on First Nations lands.[55] In a sense, the approach that fur traders had used in the earliest decades after

contact to ensure peaceful and assured access to Aboriginal territory and resources emerged again in the Pacific province in the 1990s. Given such historical ironies, one looks forward eagerly to see what a postmodern age such as the twenty-first century holds for Canadians' understanding of treaties.

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NOTES

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1 Arthur J. Ray, *Indians in the Fur Trade: Their Role as Trappers, Hunters, and Middlemen in the Lands Southwest of Hudson Bay, 1660–1870*, rev. ed. (Toronto: University of Toronto Press, 1998 [1974]), xxiv. The introduction to the revised edition provides valuable insights into Ray's intellectual development and his views on many topics of importance, including treaties, in Native-newcomer history.

2 G.F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions*, rev. ed. (Toronto: University of Toronto Press, 1961 [1936]).

3 John L. Taylor, "Canada's North-West Indian Policy in the 1870s: Traditional Premises and Necessary Innovations" (1978), and John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983), in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller, 212–40 (Toronto: University of Toronto Press, 1991).

4 Arthur J. Ray and Donald Freeman, *"Give Us Good Measure": An Economic Analysis of Relations between the Indians and the Hudson's Bay Company before 1763* (Toronto: University of Toronto Press, 1978), esp. 55–59.

5 A.J. Ray and D. Freeman, *"Give Us Good Measure,"* 55.

6 A.J. Ray and D. Freeman, *"Give Us Good Measure,"* 56.

7 A.J. Ray and D. Freeman, *"Give Us Good Measure."*

8 A.J. Ray and D. Freeman, *"Give Us Good Measure."*

9 A.J. Ray and D. Freeman, *"Give Us Good Measure,"* 57.

10 A.J. Ray and D. Freeman, *"Give Us Good Measure."*

11 A.J. Ray and D. Freeman, *"Give Us Good Measure,"* 59. See also Arthur J. Ray, Jim [J.R.] Miller, and Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal and Kingston: McGill-Queen's University Press, 2000), 8. Professor Ray drafted the chapter on Aboriginal-Hudson's Bay Company relations in *Bounty and Benevolence*.

12 "Each leader leaves his grand calumet at the Fort he trades at unless he is affronted, and not designed to return next summer, which is sometimes the case": Andrew Graham in Ray and Freeman, "*Give Us Good Measure*," 70.

13 Cornelius J. Jaenen, "French Sovereignty and Native Nationhood during the French Regime," in Miller, *Sweet Promises*, 19–42.

14 Walter Bagehot, *The English Constitution*, with an introduction by R.H.S. Crossman (London: C.A. Watts, 1964 [1867]), 61.

15 Goldwin Smith, *Canada and the Canadian Question* (Toronto: Hunter, Rose, 1891), 147.

16 E.E. Rich and A.M. Johnson, eds., *Copy-book of Letters Outward &c*: *Begins 29th May, 1680, ends 5 July*, 1687 (Toronto: Champlain Society for the Hudson's Bay Record Society, 1948), 4–13, emphasis added. For a second example, see *Copy-book*, 36.

17 On these early pacts and their relationship to the fur trade, see E.E. Rich, *The Fur Trade and the Northwest to 1857* (Toronto: McClelland and Stewart, 1967), 9–14.

18 Gilles Havard, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century*, trans. Phyllis Aronoff and Howard Scott (Montreal and Kingston: McGill-Queen's University Press, 2001 [1992]), 16.

19 Ray and Freeman, "*Give Us Good Measure*," 22.

20 Edward Ahenakew, in *Voices of the Plains Cree*, ed. Ruth M. Buck (Toronto: McClelland and Stewart 1973), 72–73.

21 Hugh A. Dempsey, "Western Plains Trade Ceremonies," *Western Canadian Journal of Anthropology* 3, no. 1 (1972): 29–33, esp. 31–32.

22 Ray, Miller, and Tough, *Bounty and Benevolence*, 3. See also J.E. Foster, "Indian-White Relations in the Prairie West during the Fur Trade Period: A Compact?" in *The Spirit of the Alberta Indian Treaties*, ed. Richard Price (Edmonton: Pica Pica Press 1987 [1979]), 184. It should be noted that Foster's article refers to a general Aboriginal-European compact—similar to the compact between French Canada and English Canada that George Stanley champions in an article entitled "Act or Pact? Another Look at Confederation," Canadian Historical Association, *Report of the Annual Meeting 1956*, 1–25—rather than to commercial compacts in the fur trade.

23 "Forest diplomats" refers to Indigenous and non-Native representatives who engaged in talks in the northeast woodlands.

24 The literature on the English alliance system, including the Covenant Chain, is vast. The best approach is via the works of Francis Jennings: *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill: University of North Carolina Press, 1975); *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with the English Colonies from Its Beginnings to the Lancaster Treaty of 1741* (New York: W.W. Norton, 1984); and *Empire of Fortune: Crowns, Colonies and Tribes in the Seven Years War in America* (New York: W.W. Norton, 1988).

25 José Antonio Brandão, *"Your Fyre Shall Burn No More": Iroquois Policy toward New France and Its Native Allies to 1701* (Lincoln and London: University of Nebraska Press, 1997); J.A. Brandão and William A. Starna, "The Treaties of 1701: A Triumph of Iroquois Diplomacy," *Ethnohistory* 43, no. 2 (1996): 209–44; Havard, *Great Peace*.

26 A facsimile of the original 1701 treaty in French is found in Havard, *Great Peace*, 112–18 (an English translation is found in app. 3, 210-15, and a photograph of a wampum that some believe commemorates the 1701 Peace is found on page 129 [LAC reference number C-38948]).

27 Starna and Brandão regard it as part of a "triumph of Iroquois diplomacy" in 1701; Havard sees it as a French victory. The clash of interpretations derives, as is often the case, in large part from the different sources upon which the respective historians relied. Starna and Brandão used both British and French documents extensively, while Havard's account is based on a wider range of French sources than Starna and Brandão employed.

28 James Youngblood Sákéj Henderson, *The Mi'kmaw Concordat* (Halifax: Fernwood, 1997). Authorities on Rome's relations with Canada, including with First Nations in the early period, hold that whatever relations existed between the Mi'kmaq and the Roman Catholic clergy, the Vatican would not have considered their arrangement a "concordat." Rome had

no need of a concordat with the Mi'kmaq, and Rome in the early seventeenth century would not have considered the Mi'kmaq a society with a form of government with which it could have formal relations. Private correspondence with Luca Codignola, University of Genoa, 20 September 1999; and Roberto Perin, York University, 29 June 1999.

29 David L. Schmidt and B.A. Balcom, "The Règlement of 1739: A Note on Micmac Law and Literacy," *Acadiensis* 23, no. 1 (1993): 110.

30 John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, ed. Michael Asch (Vancouver: University of British Columbia Press, 1997), 155–72 and 256–67.

31 James Sullivan, ed., *The Papers of Sir William Johnson* (Albany: University of the State of New York Press 1921-65), 11:30–31, 34.

32 For a more equivocal portrait of wampum and the Niagara commitments, see Paul Williams, "The Chain" (LL.M. thesis, Osgoode Hall, York University, 1982), chap. 4, "The Ojibways, the Covenant Chain and the Treaty of Niagara of 1764," 72–94. I am indebted to Professor Brian Slattery of Osgoode Hall, who kindly made a copy of this chapter available to me.

33 Canada, *Indian Treaties and Surrender*s, vol. 1, *Treaties* 1–138 (Ottawa: Queen's Printer. 1891), 22–23.

34 "Mixed-ancestry" refers to all Métis individuals and communities in all regions of Canada.

35 Alexander Morris, *The Treaties of Canada with the Indians* (Saskatoon: Fifth House, 1991 [1880]), 299. The Selkirk Treaty is 299–300; the transfer of land from HBC to Selkirk is 300-01.

36 See Map 6.3 in Robert J. Surtees, "Land Cessions, 1763–1830," in *Aboriginal Ontario: Historical Perspectives on the First Nations*, eds. Edward S. Rogers and Donald B. Smith (Toronto: Dundurn, 1994), 103. Many of the later Upper Canadian treaties are depicted in Map 6.4, E. S. Rogers and D. B. Smith, eds., *Aboriginal Ontario*, 114.

37 Canada, *Indian Treaties and Surrenders*, vol. 1, 62-63.

38 Morris, *Treaties*, 19.

39 Morris, *Treaties*, 314–16. The inclusion of the "outside promises" is found on at 338–42. See also Ray, Miller, and Tough, *Bounty and Benevolence*, 81–85.

40 *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized* as *Nations*, eds. Harold Cardinal and Walter Hildebrandt (Calgary: University of Calgary Press, 2000), 53.

41 *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized* as *Nations*, 32.

42 Morris, *Treaties*, 97. Alexander Morris: "I held out my hand but you did not do as your nation [the Saulteaux] did at the [North West] Angle [last year]. When I arrived there the Chief and his men came and gave me the pipe of peace and paid me every honor."

43 Morris, *Treaties*, 182–83.

44 *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations*, 41. For an elder's understanding of the binding nature of the pipe ceremony at Treaty No. 6 talks, *see The Counselling Speeches of Jim* Kâ-Nîpitêhtêw, ed. and

trans. Freda Aheanakew and H.C. Wolfart (Winnipeg: University of Manitoba Press 1998), 109–13.

45 Notes of Lord Lorne's meetings with chiefs, 1881, LAC, RG10, Records of the Department of Indian Affairs, vol. 3768, file 33,642.

46 For example, at Qu'Appelle in 1874. See Morris, *Treaties*, 86.

47 Morris, *Treaties*, 102,

48 Morris, *Treaties*, 221.

49 Morris, *Treaties*, 267.

50 J.A. Macrae to E. Dewdney, 25 August 1884, LAC, RG 10, vol. 3697, file 15,423.

51 For instances of government's rejecting First Nations requests for treaty, see the following: for Treaty No. 8, Ray, Miller, and Tough, *Bounty and Benevolence*, 148–55; and René Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1975), 36–37. For Treaty No. 9, see John S. Long, *Treaty No. 9: The Indian Petitions, 1889–1927* (Cobalt, ON: Highway Book Shop, 1978), 2ff. For Treaty No. 10, see Ray, Miller, and Tough, *Bounty and Benevolence*, 170–73. And for Treaty No. 11, see Fumoleau, *As Long*, 134–49, 158, and 199–200.

52 Indian and Northern Affairs Canada, *Comprehensive Claims Branch*, accessed 16 February 2011, http://www.ainc-inac.gc.ca/ps/clm/ccb_e.html.

53 P.A. Cumming and N.H. Mickerberg, *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Association, 1972 [1970]), 56–57. The Trudeau quotation is from an 8 August 1969 speech delivered in Vancouver.

54 Murray Coolican, *Living Treaties*: Lasting Agreements: *Report of the Task Force to Review Comprehensive Claims Policy* (the Coolican Report) (Ottawa: Indian Affairs and Northern Development, 1985), 30.

55 I am indebted to my colleague Keith Carlson who drew this point to my attention.