

COMPACT, CONTRACT, COVENANT

Canada's Treaty-Making Tradition

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CANADIANS ARE ALL BECOMING TREATY PEOPLE. The idea that everyone who lives in this land, Native and newcomer alike, is part of a treaty relationship has always been central to how First Nations see themselves and their links to non-Aboriginal peoples. In Western Canada, where both Aboriginal people and treaties are ever-present facts of life, the realization that all of us are involved in a treaty relationship with First Nations, a bond that historically legitimizes newcomer presence in the West, has been dawning on non-Aboriginal people for some time. However, Canadians who reside south of the sixtieth parallel and east of the prairies have not, hitherto, shared this view. The numerical dominance of non-Natives has made it possible to ignore or remain oblivious to the fact that close relationships between Natives and newcomers are a central component of the Canadian tradition. Within the past fifteen years, however, events have begun to change perceptions in the rest of Canada, too. The trauma of the Oka crisis in 1990, the report of the Royal Commission on Aboriginal

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Peoples in 1996, the Nisga'a and Nunavut agreements, and the Supreme Court of Canada decision on Aboriginal title in *Delgamuukw* (1997) have collectively reminded non-Native Canadians of the importance of Aboriginal peoples and their historic rights. In light of the growing awareness across the country of the importance of Native/newcomer relations in general, and of the treaty relationship between First Nations and immigrants in particular, it is timely to examine the roots and evolution of the treaties between Indians and the Crown.

TREATY MAKING BETWEEN FIRST NATIONS AND EUROPEANS in Canada has gone through a number of phases, some of them overlapping. The initial stage was made up of commercial compacts in the fur trade, arrangements that facilitated the taking and export of furs to European markets. While the fur trade was going on in Eastern Canada, and to a large extent founded on fur-trade relationships, a second form of diplomatic association developed in the latter part of the seventeenth and in the eighteenth centuries. These were treaties of alliance, or of peace and friendship. They either prepared for war in North America between contending European powers by linking Native and newcomer forces together in an alliance system, or they symbolized the conclusion of hostilities by arranging a peace. In the aftermath of one particular European-inspired conflict, the Seven Years' War that began in 1756, there emerged the Royal Proclamation of 1763, an imperial document that was to have a profound impact on the evolution of treaty making. The Royal Proclamation paved the way for the negotiation of several series of land-related treaties between First Nations and the increasingly numerous European colonists who now desired access to Aboriginal lands more for the development of sedentary agriculture than the prosecution of commerce. The land-related treaties that in significant measure stemmed from the Royal Proclamation of 1763 dominated the relations of Native and newcomer, first in Upper Canada before Confederation, then in the West in the 1870s, and, finally in the North in the two decades following 1899. After a hiatus of fifty years, from about 1923 until 1975, the modern phase of treaty making began in Quebec and later spread to the North and British Columbia. In the early twenty-first century, we are still in that most recent phase. This lengthy evolution of treaty making reveals a number of things about Canadian history, none more significant than the shifts over time in the relative strengths of indigenous and immigrant peoples.

The first agreements were commercial compacts, arrangements between European fur traders and First Nations. The word “compact” is advisedly chosen to describe these arrangements, because a compact is an agreement between parties that is established informally, perhaps in a succession of practices, rather than a formal document. The reason such consensual agreements underlay the commerce in furs is not hard to understand. Simply put, to trade furs the newcomer Europeans were enormously dependent on Aboriginal peoples. First Nations and, later, Métis were located in fur-trade country, knew the habitat and the behaviour of the creatures through long experience of hunting for food and clothing, and were skilled at taking, processing, and delivering the furs to the European traders. For their part, Europeans were initially ignorant and dependent in the North American forest, largely devoid of the skills needed for trapping and skinning animals, and, in any event, not present in the woods in the numbers necessary to support a fur trade.¹

The dependence of Europeans on Native peoples in the fur trade was most obvious in the commerce in beaver fur. The fur of *castor Canadensis* was eagerly sought in the seventeenth century when the fur trade began in New France and in the lands to the northwest worked by the Hudson’s Bay Company that the English called Rupert’s Land. While the beaver pelt was a tradable commodity, one particular version of it was highly prized as the raw material for the manufacture of men’s hats. What the French called *castor gras d’hiver* – literally “greasy winter beaver” – made the best beaver felt for making hats because the beaver had been taken in winter when the fur was thickest and because it had in a sense been “processed” to make it more suitable for hats. Beaver fur consisted of two elements: long, coarse guard hairs and shorter, fine downy hairs that had tiny barbs at their tips. Felt for hats was made by stripping the pelt of the guard hairs, leaving only the downy filaments that the hatter would then lock together to produce a thin, shiny, stable product. The best way to get rid of the guard hairs was by wearing the beaver pelts with the fur side against the skin in a cloak over the winter. A combination of abrasion, body grease, and smoke from fires worked to loosen the guard hairs and render the skin pliable by the absorption of oils from the wearer. So, not only were First Nations best positioned to locate, capture, and skin the beaver, they also processed the hide to make it the best possible candidate for hats. The production of *castor gras d’hiver* revealed the dependence of the European on Native people

in the fur trade in its most intense form. While the trade in other furs did not require Native processing as the beaver hat trade did, all fur commerce relied on Aboriginal people. Without Native knowledge, skills, technology, and labour, there would have been no fur trade in early Canada.

The London directors of the Hudson's Bay Company (HBC) recognized that their representatives in North America required the co-operation of indigenous fur suppliers. For example, the Governor and Committee of the HBC instructed their principal agent in James Bay in 1680:

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 severall places, *where you are or shall settle*, you contrive to make compact wth. the Captns. or chiefs of the respective Rivers & places, where by 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 wth. 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 to 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 modes & 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 domestick pretenders.²

Clearly, the HBC expected their representatives to secure the agreement of the indigenous population to their presence and commercial activity, and,

moreover, they instructed their men to go about securing such agreement in ways that the First Nations with whom they were dealing would “understand to be obligatory & sacred.”

Such initial contacts and compacts by no means ended the steps that HBC traders took to ensure that they operated in ways that the Natives would consider familiar and acceptable. To conduct their trade, they adopted a series of Aboriginal practices. For example, when a party of Indian traders with whom the HBC men were familiar approached the fur trade post for the first time in the season, the Company representatives would carry out a welcoming ceremony, often beginning with a cannon salute from the post. That would be followed by a ceremonial entry into the traders’ precincts by the Indians, accompanied by the postmaster. Indians and traders would meet inside and exchange speeches of welcome, and the HBC representative would present gifts to the visitors. Most important of all, the assembly would eat food provided by the HBC, and they would all smoke the pipe. Then, and only then, would trading commence. At the end of the transactions, which might be spread over several days, an Indian trader who was content with how he had been treated by the HBC postmaster would leave his pipe at the post, signifying that the relationship he had with the Company continued. He would be back next season. However, a Native who was displeased with the reception the HBC factor gave or with the remuneration provided for furs would retrieve his pipe, thereby signaling that the trading relationship between the Native trader and the HBC was ruptured.³ All these practices, of course, were vastly different from the European style of trading, which was a simple barter transaction carried out in businesslike fashion.

The significance of the fact that Hudson’s Bay Company representatives undertook these ceremonies was threefold. First, the fact that European fur traders employed Aboriginal ceremonies to conduct their commerce reveals which was the dominant partner in this economic relationship. Just as traders in New France had to use the Huron language to communicate with these important trade intermediaries, so others had to adopt Aboriginal ways of doing business. In all these cases, the Europeans’ adoption of Aboriginal practice testifies to the indispensability of Aboriginal peoples in the commercial forum. Second, it is important to emphasize that such customs as welcoming traders, making gifts, and smoking the pipe with them were Aboriginal practices. Aboriginal peoples had to go through

such ceremonies before they could deal on serious matters with strangers because, in their cultures, it was necessary to be in some sort of kin-like relationship in order to interact peacefully. Anyone who was not kin in some sense – blood, marital, or fictive – was assumed to be an enemy. Aboriginal people had to establish a formal relationship with people to do business with them, and that strict requirement involved the European strangers, with their vastly different customs, too.

Finally, the customary practices that constituted commercial compacts are significant historically because they were long-lasting, especially in Western Canada. As long as the Hudson's Bay Company operated in the West, it found it necessary to maintain such practices as giving gifts, making speeches, and smoking the pipe with First Nations. Chief Thunderchild in the nineteenth century noted that the HBC "gave one boat load of gifts for the use of the Saskatchewan River" to Cree at Fort Carlton, and Hugh Dempsey has documented the use of pre-trade ritual, including welcoming ceremonies, gifts, pipe, and speeches at Rocky Mountain House down to the 1850s.⁴ These were the formative situations in which western First Nations learned to deal with the newcomers from far away. These conditioning experiences would influence Plains Indians' approach to treaty making in the 1870s, especially since the Crown negotiators participated in many of the same ceremonials before sitting down to negotiate the terms of treaties.

FROM THE FERTILE SEEDBED OF COMMERCIAL COMPACTS in the fur trade grew the second form of treaty making in Canadian history: treaties of alliance, peace, and friendship. In the late seventeenth century, and more especially in the first half of the eighteenth, the eastern half of North America was caught up in the territorial rivalries of France and England. Part of a larger confrontation that embraced Europe as well, the struggle for control of North America between His Most Catholic Majesty and His Most Britannic Majesty swept a large number of First Nations in the eastern half of the continent into its machinations. For the European powers and their colonial extensions – New France and the Thirteen Colonies of Great Britain – the reasons for desiring Native alliances in this contest were obvious. First Nations knew the geography, had the means of transport and of war, and could muster many thousand more warriors for a battle than could either the colonies or their mother countries. For their

part, many of the First Nations participated in the alliances that sometimes led to warfare for their own, clear-cut reasons.

For those First Nations located in Atlantic Canada, north of the St. Lawrence, and in the northwestern hinterland of New France, the alliance system that developed was a direct outgrowth of the commercial ties they had to the French in the fur trade. From the earliest contacts, such as Champlain's alliance with the Huron early in the seventeenth century, French and a number of northern First Nations drew strength and mutual support in times of military crisis. In the latter part of the seventeenth century, France's St. Lawrence colony became a refuge for a variety of First Nations who had either been bested in warfare, as in the case of the Abenaki who populated a reserve at St. François, or who found themselves unwelcome in their homelands because of their attraction to Christianity, as was the case with the Mohawk at Kahnawake, on the south shore opposite Montreal, or, later, at Akwesasne, near Cornwall, Ontario. Eventually a number of such settlements – known to the French as *les domiciliés*, and to their enemies as “the praying Indians” or the Seven Nations of Canada – developed in New France. Even more numerous and impressive, however, were the many nations located in the north and northwest who saw the French as essential commercial partners and important diplomatic and military allies.

For their part, the British developed considerable expertise in forest diplomacy, too. Indeed, the Covenant Chain, an artifact of Britain's Indian diplomacy, is rightly regarded as one of the most impressive examples of European-Aboriginal diplomacy in the seventeenth and eighteenth centuries in North America. The Covenant Chain was a metaphor for a vast, extended alliance system that radiated out from the British governor in Albany, New York, and embraced a United Nations of Indian groups to the west and southwest. Britain's essential partner in the Covenant Chain was the Iroquois Confederacy, known as the Five Nations until the second decade of the eighteenth century and as the Six Nations when the Tuscarora joined them at that time. Like France's Indian alliance system, the Covenant Chain was held together by a combination of material benefits and martial assistance. The governor of New York, Corlaer as he was known to the Iroquois, was expected to make regular presents to Britain's forest allies, just as Onontio, the French governor in Quebec, was expected to do to his Algonkian friends and partners. As the eighteenth century wore on, the increasing numbers and strength of the British in the northern

Thirteen Colonies gave alliance with them the additional benefit of greater military strength. Especially from the 1750s until 1774, William Johnson, Britain's Northern Superintendent in the Indian Department created in 1755 to oversee relations with First Nations, displayed enormous skill and persistence in keeping the Covenant Chain effective.

A notable product of the era of alliance was the treaties of peace and friendship that figured prominently in European-Indian diplomacy in the first six decades of the eighteenth century. Remarkable among these agreements was the Great Peace of Montreal of 1701, a diplomatic achievement that brought more than sixty years of on-and-off warfare between New France and the Iroquois Confederacy to a conclusion. For New France, the attraction of a peace treaty with the Iroquois and their allies was relief from the state of vulnerability the colony had been in since the 1630s. For the Iroquois, the Great Peace not only terminated hostilities that were beginning to sap the Confederacy's strength through loss of young men, but also put them in a position of safety in the confrontation between Britain and France. The Iroquois at Montreal negotiated a clause that guaranteed them the right to remain neutral in any clash between the two European powers, something that everyone recognized was an inevitability by 1701.



*A chief holds a wampum
believed to depict the Great
Peace of Montreal of 1701
(Library & Archives
Canada: C38948).*

In the same year, the Iroquois negotiated an agreement with the British that solidified their ties with them, too. By these feats of diplomacy, the Iroquois Confederacy secured peace and security on all fronts, an achievement that has led some historians to describe the Great Peace of Montreal of 1701 as “the triumph of Iroquois diplomacy.”⁵

If the Peace of Montreal stabilized relations between the Iroquois and the French, it did not remove the causes or pretexts of war between France and Britain. Between 1701 and 1763, the eastern half of North America was regularly convulsed by outbreaks of warfare between the two European powers and their colonial militias. From the 1740s onward, the Maritime region became as hotly contested as the region between the St. Lawrence and New England or the Ohio Valley of the southwest. In the Maritimes, which the French called Acadia and the British Nova Scotia, the dominant First Nation was the Mi'kmaq, who were to be found in Nova Scotia, Prince Edward Island, and northern New Brunswick. Both France and Britain correctly saw the Mi'kmaq as a key to success in the region, and both bent their efforts to securing peace and friendship arrangements with them. However, there was a major difference in the diplomatic style of the two European powers in the Maritime theatre. For one thing, France made far fewer formal treaties than did the British. Between 1610 and 1760, France concluded exactly one treaty with the Mi'kmaq, while the British made no fewer than thirty-two between 1720 and 1786.⁶ In part, the difference was explained by the fact that France could and did rely on informal mechanisms to maintain alliance. They had been trade partners with the Mi'kmaq from their earliest presence. Equally important was the fact that French missionaries had converted most Mi'kmaq in the region to Catholicism. France would use its commercial ties, the usual giving of presents, and the diplomatic skills of Catholic missionary priests to maintain the diplomatic bonds of friendship and alliance between the Mi'kmaq and His Most Catholic Majesty. On their side, the British, lacking the tradition of commercial and religious ties, had to make treaty after treaty in a vain attempt to win and hold Mi'kmaq allegiance in the region. Ultimately, the many treaties that the British concluded with the Mi'kmaq were evidence of the futility of their diplomacy in Nova Scotia.

Though British diplomacy with the Mi'kmaq might have been unavailing, it nonetheless has been historically important. Some of the treaties the British negotiated contained clauses on trade and commerce that have

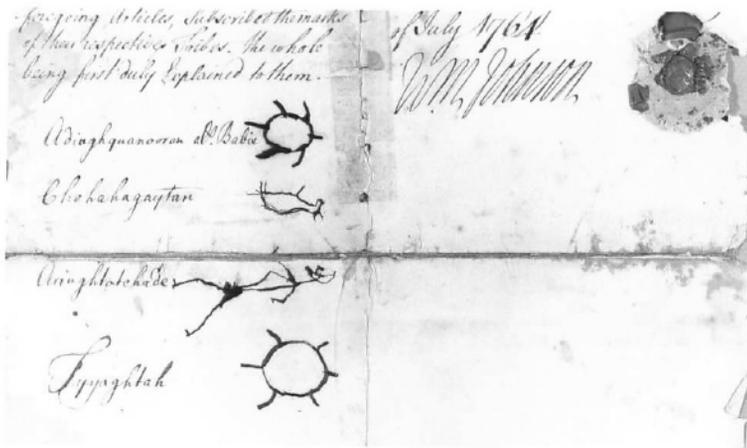
had a remarkably long historical shelf life. The 1725 Treaty of Boston, for example, guaranteed the Mi'kmaq "their lands, Liberties and properties not by them convey'd or sold to or possessed by any of the English Subjects as aforesaid. As also the privilege of fishing, hunting, and fowling as formerly." Similar assurances were included in the 1752 Treaty of Halifax, while a series of agreements reached by the British and Mi'kmaq in 1760-61, at the conclusion of hostilities in the region, contained a different type of trade guarantee clause.⁷ In 1999, the Supreme Court of Canada, in its *Marshall* decision, concluded that these clauses from eighteenth-century treaties of peace and friendship meant that the Mi'kmaq of the Maritimes have a treaty right to fish for a moderate livelihood, a right protected by our *Constitution* since 1982. This latter-day recognition of a constitutionally protected Mi'kmaq right to fish has revolutionized the fishery in the Maritime region and forced a rapid revolution in Native-newcomer relations there. The *Marshall* decision and its turbulent aftermath are potent reminders of how important eighteenth-century treaties of peace and friendship can be, not just in their own time but since.

Another major outcome of the Seven Years' War was also to have a long-standing impact on Aboriginal rights and Native-newcomer relations in Canada. This result was the Royal Proclamation of 1763, an imperial policy document that Britain issued to tidy up a number of details concerning new territories that it acquired by its victory in the final stage in the showdown between France and Britain for control of the eastern half of North America. The proclamation was designed in part to establish boundaries and institutions of government and law for newly acquired territories such as Quebec, but it had enormous implications for Britain's future relations with First Nations east of the Mississippi River. It was inevitable that Britain would also try to address relations with First Nations which had formerly been allied with France in 1763, if for no other reason than these nations had declared war on Britain the previous year. Pontiac's War – or the Beaver War, as the First Nations referred to it – led to the capture of seven British forts and the death of 2,000 soldiers and settlers at the hands of the followers of the great Ottawa diplomat and general, Pontiac, before it ended two years later. As British planners in Whitehall turned to the puzzle of its newly expanded colonies in eastern North America in 1763, the challenge presented by angry First Nations was as present in their minds as the question of what to do with exotic new

colonies such as the French and Roman Catholic Quebec.

The Royal Proclamation's answer to the issues created by the defeat of France and the campaign led by Pontiac was several fold. First, the Proclamation created a western boundary of Quebec and drew a western limit, known as "the Proclamation Line," along the height of land west of the Thirteen Colonies. Moreover, the Proclamation forbade settlement west of those boundaries, and even required any colonist who wished to travel into the region to obtain a license from the governor. Britain was trying to avoid or control non-Native presence in Indian territory that might have provoked more hostilities. However, the document had related clauses that did even more to influence Native-newcomer relations both at the time and indefinitely for the future.

First, the Royal Proclamation, which is often referred to as "the Indians' Magna Carta," provided British recognition of Aboriginal rights in the western lands. All lands west of the Proclamation Line were, the Proclamation declared, "reserved to them [First Nations] . . . as their hunting grounds." As noted, the western lands were closed to non-Natives. In addition, however, the Proclamation forbade individuals to purchase any of these lands "reserved to them" on their own. Freelance acquisition of Aboriginal land was illegal. However, "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



The signature panel of a Huron peace treaty of 1764 with the British (Library & Archives Canada: C135291).

for the purpose of the Governor or Commander in Chief of our Colony respectively within which they shall lie.” The purpose of this prohibition on the acquisition of land by anyone other than the Crown was to prevent what the Proclamation termed “Great Frauds and Abuses” that had happened in the past.⁸ Previously, when individuals could negotiate with Indians for land, sometimes fraudulent arrangements were made, perhaps lubricated with alcohol, or some individual purported to transfer land that properly belonged to the entire nation to a non-Native. The result of such “Great Frauds and Abuses” had often been outbreaks of warfare as angry Indian groups repelled the intrusion of settlers who, for their part, often thought they had a legal right to the lands they were attempting to occupy. In the midst of Pontiac’s War, Britain desperately wanted to avoid further provocations. Accordingly, non-Native penetration and acquisition were regulated. Only the Crown could treat for any of those “lands reserved to them.”

According to a distinguished Anicinabe legal scholar, the Royal Proclamation went even further than this recognition of Aboriginal territorial rights. According to Professor John Borrows, the year following the issuing of the Proclamation, William Johnson met at Niagara with over 2,000 chiefs from all over the eastern half of North America, explained the terms of the Proclamation to them, and secured their agreement to it. What these events did was convert the Proclamation from a unilateral Crown document, as important as such an instrument was in its own right, to a treaty. And treaties between the Crown and First Nations, Borrows reminds us, are constitutionally protected agreements.⁹ While it is too early to say whether a scholarly consensus has developed to support Borrows’s interpretation, there is no doubt that his view is well argued and supported, or that it is plausible.

WHILE TIME ALONE WILL TELL whether the view that the Royal Proclamation of 1763 is linked to a subsequent agreement called the Treaty of Niagara, it is certain that the clauses of the Proclamation that dealt with boundaries and First Nations’ territorial rights have been historically important. Long after Pontiac’s War was concluded by a peace treaty, the Proclamation continued to influence Native-newcomer relations from that time to this. Simply put, the mechanisms specified by the Royal Proclamation have emerged over time as the protocol for making treaties with First Nations concerning their lands. The emergence of the

Royal Proclamation as the template for Canadian treaty making was not immediate, but by Confederation it had been firmly established as the basis on which the Crown treated with First Nations for access to lands they controlled.

Upper Canada, the future southern Ontario, was the forum in which treaty making on the model of the Royal Proclamation was developed. The first impetus was created by the necessity after Britain's defeat in the War of the American Revolution to provide lands on which to settle Loyalist allies from the northernmost of the former Thirteen Colonies. The logical place to relocate both First Nations and non-Native allies was the unsettled region along the St. Lawrence west of its confluence with the Ottawa River. However, these lands in the 1780s were at least nominally under the control of the Anicinabe people, a First Nation that newcomers to the region usually called the Mississauga. As early as the first months after the Treaty of Versailles, 1783, that recognized American independence, the British Governor, Frederick Haldimand, began to negotiate with the Mississauga for access to lands north of Lake Ontario and Lake Erie. For example, the Crawford Purchase in 1783 made accessible lands from approximately the site of Belleville to near present-day Brockville, Ontario, on which the British settled both First Nations and non-Native Loyalists. Mohawk allies led by Captain John Deseronto were provided with land at Tyendinaga, near the town of Deseronto, and the followers of Captain Joseph Brant were settled along the Grand River, near what is now Brantford Ontario. Non-Native Loyalists were settled on "the front," the water's edge along the lakes and the St. Lawrence River. By 1806, all "the front" from Windsor to the Ottawa River had been covered by treaties between the Crown and the Mississauga.

These early Upper Canadian treaties were rudimentary affairs that in many ways resembled simple contracts for the purchase of land. For example, Treaty No. 8, negotiated in 1797 with the Mississauga by William Claus, Superintendent of Indian Affairs "on behalf of the Crown," covered 3,450 acres north and east of Burlington Bay, the western end of Lake Ontario, and paid the Mississauga "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, and butcher knives and brass kettles to the specified value as having been conveyed to the First Nations

signatories.¹⁰ What the motivation of the First Nation parties to these early treaties was is not clear, although it is possible that in these early years of newcomer immigration, when vast tracts of forested land were largely untouched along “the front,” giving up these lands in return for material benefits might have seemed an attractive proposition with very little potential downside.

The second wave of treaty making in Upper Canada was, like the first, initiated by the need of the British Crown to make provision for its allies. As in the 1783 Treaty of Versailles, so with the 1814 Treaty of Ghent that concluded the War of 1812, Britain’s inability to protect the territorial interests of its First Nations allies in the peace talks with the Americans obligated the Crown to make provision for some of them north of the lower Great Lakes. The relocation of these groups, in combination with the first few waves of what would become an inundation of non-Native immigration, led to the negotiation of another set of land treaties in Upper Canada. In this second phase of Upper Canadian treaty making, there was an important modification from what had been done in the early treaties. From 1818 onward, Great Britain replaced the one-time payments that had



Artist’s depiction of Chief Tecumseh and General Isaac Brock cementing their alliance at the beginning of the War of 1812 (Library & Archives Canada: CII052).

been part of the earlier treaties with annual payments, or annuities. The theory behind the switch was that paying compensation in the form of annuities would reduce Britain's financial obligations. As lands acquired by treaty were settled by productive farmers, the ensuing revenues would swell government coffers so that the overall land program would pay for itself. From the perspective of the First Nations, the change from one-time payments to annuities was probably attractive because it was more in accord with the way First Nations had done business with both the French and the British earlier. The traditional way of making and renewing treaties with First Nations was by providing presents, and the annual giving of presents within the alliance systems in the East had been very much like the annual ceremonies, including gift giving, that typified the commercial compacts in the North and Northwest. Presumably, then, First Nations in Upper Canada would not have objected to the move to annuities, and on that basis more treaties were concluded in the second, third, and fourth decades of the nineteenth century in the future Ontario.

If the contents of the Upper Canadian treaties seem meagre – and they were – they were more than was available anywhere else in British North America prior to Confederation. There were no land-related treaties in Atlantic Canada, where the Royal Proclamation did not have effect. Once the imperial wars ended in the region prior to 1760, even the making of treaties of peace and friendship diminished, and eventually died out. In Quebec, the only agreements that were made by the British were a few peace and friendship treaties concluded with former allies of the French to regularize their relations with the newly dominant European power. One of these, the Murray Treaty of 1764, guaranteed the Iroquois safe passage and freedom of religious observances, and the latter protection would be the basis of the *Sioui* case, an important Supreme Court of Canada decision in favour of the Indians in 1990.

In the West, the grip of the Hudson's Bay Company precluded the making of treaties. The Bay's Charter of 1670 purported to give the company territorial as well as commercial rights, and the HBC's conduct of the fur trade according to First Nations protocols cemented the ties that the newcomers needed. Because Rupert's Land was, in a sense, covered by the HBC Charter, the Royal Proclamation specifically exempted Hudson's Bay Company lands from its operation. In spite of this, the creation of an agricultural colony, Lord Selkirk's Settlement, in 1811 led to the conclusion of an agree-

ment with local *Saulteaux* in 1817. The planting of an agricultural colony in the midst of fur-trade provisioning routes was regarded by many *Métis* as a threat to their interests, and in 1816 the contending forces clashed in a battle at Seven Oaks that left a number of colonists dead. It was in response to this that Selkirk's representative concluded what the official termed a "quit claim" the following year for a "present or quit rent consisting of one hundred pounds weight of good and merchantable tobacco" each year.¹¹ The Selkirk Treaty covered lands along the Red and Assiniboine Rivers "from the Great Forks and in other parts extending in breadth to the distance of two English statute miles back from the banks of the said rivers, on each side." When the Native negotiators asked how far two miles were, they were told it was "the greatest distance, at which a horse on the level prairie could be seen, or daylight seen under his belly between his legs."¹²

In what would become the province of British Columbia, pre-Confederation treaty making was even more rudimentary than in Rupert's Land. As settlement began to trickle in and replace fur traders in the Fort Victoria area and a few other points on Vancouver Island, the colonial governor, James Douglas of the Hudson's Bay Company, was anxious to make some provision for the local First Nations whose lands were being occupied. The governor's request to the Colonial Office in London for advice on how to proceed with treaty making yielded copies of some land transfer agreements that the New Zealand Company had used in that South Pacific colony. Armed with this model, and using his position with the HBC, Douglas dipped into Company stores for the goods that enabled him to make fourteen small treaties around Victoria, Nanaimo, and Fort Rupert at the northern tip of Vancouver Island between 1850 and 1854. Although Douglas offered the First Nations annuities as compensation, they preferred one-time payments. After 1854, when Douglas found himself saddled with an elected assembly of colonists, the governor's treaty making plans were frustrated. The local legislature refused to vote funds for more treaties, arguing that Indian treaties were an imperial responsibility, whereas London declined to furnish funds, contending that the settlers who benefited from treaties should underwrite them. The result of this disagreement about financing was that treaty making halted in British Columbia. Soon afterward, Douglas was succeeded by officials who lacked his interest in making further treaties. As a consequence, British Columbia remained largely uncovered by land treaties.

Even in Upper Canada, which clearly was the pace-setter in early treaty making, the treaties that were concluded were limited in their coverage. By comparison with later developments, the Upper Canadian treaties were noteworthy for the absence of hunting guarantees and promises to create reserves for the First Nations who entered into them. In Upper Canada, as in all of eastern British North America, there were some reserves for Indians, but they had not been created as a result of treaties. Rather, beginning in New France, reserves were provided by missionary bodies, often with the co-operation of the colonial government, and state involvement was limited. This pattern began to change after 1830, when the Indian Department initiated some reserves as an experiment in promoting agriculture. This initiative was part of what was known at the time as the Department's "civilization policy," an assimilative program that attempted to turn hunter-gatherers into sedentary agriculturalists who professed the Christian religion and educated their children, now that an onrushing tide of non-Native settlement was cutting down the forests of southern Ontario to make farms. However, in none of the treaties that were made to facilitate the process of locating non-Native immigrants on newly created farms in Upper Canada were reserves promised.

The pattern in Ontario changed in 1850 in what were known as the Rob-
inson Treaties. As their names imply, the Rob-
inson-Huron and Rob-
inson-Superior Treaties dealt with lands adjacent to two of the upper Great Lakes. They were initiated in response to a confrontation that pitted Anicinabe and Métis near Sault Ste Marie against a group of miners who had been authorized by the colonial legislature to develop mines. The genesis of these agreements in newcomer intrusion and Native resistance is a reminder that not all the Upper Canadian treaties were made pursuant to the protocol embodied in the Royal Proclamation of 1763. In any event, the Rob-
inson Treaties, which dealt with much larger areas than had previously been the case in Upper Canada, contained clauses that guaranteed the Anicinabe continuing gathering rights, annuities, and reserves to be created within the area covered by the treaties. The Rob-
inson Treaties, in short, brought colonial treaty making to a new level: now land-related treaties dealt with large tracts, recognized continuing hunting and fishing rights, committed the Crown to annuities, and contained provision for reserves for the First Nations signatories. This combination of features was to become the pattern or template for post-Confederation treaty making in the West and North.

THE REASON THAT PRE-CONFEDERATION UPPER CANADIAN practice became post-Confederation national policy was fairly simple. For one thing, the politicians who dominated the federal government for the first thirty years after 1867 were largely from Ontario or Quebec. Men like John A. Macdonald, George Etienne Cartier, Alexander Mackenzie, Alexander Campbell, and David Mills all hailed from the central provinces. There were Maritime exceptions such as Joseph Howe and David Laird involved with Indian policy in the late 1860s and 1870s, but most of the national political leadership was Central Canadian. When these leaders found themselves faced with the necessity of making treaties with First Nations in the West in the 1870s, they simply adopted what they knew: Upper Canadian treaty-making practice.

The reason this first generation of government leaders turned fairly quickly to making treaties requires some explanation. That they would do so was neither obvious nor a foregone conclusion. After all, the traditional British position about Rupert's Land was that the lands had been conveyed by the king to the Hudson's Bay Company in 1670. Furthermore, in 1870, with Great Britain providing pressure to get the deal done, the Hudson's Bay Company transferred its rights in Rupert's Land to the new Dominion of Canada for £300,000 and one-twentieth of the land, which the Bay would retain around the sites of its trading posts. There were numerous and pressing reasons why Canada chose to negotiate with western First Nations in the 1870s, despite having apparently acquired the lands from the HBC. For one thing, the Deed of Surrender covering the 1870 transfer contained a clause that said that Canada, not Great Britain or the Hudson's Bay Company, was responsible for resolving any Indian claims in the territory covered by the Deed.

In addition, Canada had learned lessons from its disastrous failure to consult the Red River Métis prior to attempting to assert its authority there. Prime Minister Macdonald acknowledged in the House of Commons that the *Manitoba Act*, the statute that established the province of Manitoba as the resistors in Red River had desired, contained a provision of 1.4 million acres for mixed-blood families because they shared in "Indian title." Obviously, if Canada conceded that the Métis shared in Aboriginal title, it followed logically that western First Nations had territorial rights with which Canada should deal if it wished to avoid complications with them. A further influence on the federal government was the recognition that, to be effective, the acquisition of Rupert's Land had

to be followed up with the construction of a railway through the West and the establishment of thousands of agricultural settlers to make the region economically viable. Transcontinental railway building and promotion of settlement would be more difficult if restive Plains Indians barred the way. And First Nations from the North West Angle of northwestern Ontario through southern Manitoba and Saskatchewan all the way to the foothills of the Rockies between 1869 and the mid-1870s made it known to the federal government that they regarded the lands that newcomers coveted as theirs, and that Canada had better deal with them before sending in settlers, telegraph crews, or road builders. Macdonald, a canny Scot, knew that Canada could not afford to deal with these intimations of First Nations resistance other than by negotiation. In the early 1870s, when the entire annual budget of the Government of Canada was a bit more than \$19 million, the United States was spending over \$20 million a year on its western Indian wars.¹³ Economy, prudence, and the lessons learned at Red River combined to make it clear to federal politicians that making treaties in the West was essential in the 1870s.

If such factors as finances and experience explain Ottawa's willingness to negotiate treaties in the West after Confederation, why did most of the First Nations in the region agree to do the same? First, it is important to note that not all first First Nation leaders were willing to enter treaty. Among the leading holdouts were the powerful Plains Cree chiefs Mistahimusqua (Big Bear) and Little Pine. Others, like Poundmaker, opposed the agreements in the early stages of negotiation, but eventually signed the treaty that resulted. However, most western Native leaders were open to making treaty for a number of clear and compelling reasons.

Their way of life was threatened by change – change that might be alleviated by adjustments that would come with entering a treaty with the Crown. In northwestern Ontario, where seasonal employment was one of the mainstays of the Cree and Ojibwa, Hudson's Bay Company changes to the way it brought trade goods into the country and furs out were sharply reducing the work available to Native workers. More serious was the situation on the Plains, where the drastic and obvious decline of the buffalo from overhunting threatened the Saulteaux, the Plains Cree, the Assiniboine, and the Blackfoot Confederacy. The bison was the foundation of the Plains economy, culture, and way of life. What corn was to the First Nations of the northeastern woodlands and salmon was to the nations of

the North West Coast, the buffalo was to Plains people. It provided them with food, fuel, clothing, implements, tipi coverings, and sacred objects used in spiritual ceremonies such as the Sun Dance. The alarming reduction in the number of buffalo migrating in the prairie region was obvious by 1870, and throughout the following decade it got steadily worse, until by 1879 the buffalo were no longer available in any significant numbers. This devastating blow fell upon Plains nations who were already weakened by intertribal warfare and epidemic disease, especially smallpox, in the 1860s. These changes made Plains peoples especially worried and apprehensive about their future.

Compounding those anxieties was the news they were getting from missionaries and neighbouring nations to the south. From the missionaries who had begun to establish themselves in their midst by the 1860s, they heard that vast numbers of people like the missionaries – non-Natives, in other words – would soon be coming west to establish themselves as farmers. From this information, and from American precedents, they knew that an influx of agricultural settlers was inevitable. In the United States, settlers and miners had by the 1860s established themselves in large numbers and disrupted the treaties and way of life that many Native American groups relied upon. Most Plains peoples ranged back and forth across what they referred to as “the medicine line” and non-Natives called the border, and some of them, such as the Assiniboine, Cree, Piegan, and Blood had many relatives south of that imaginary barrier. From kin and trade contacts in the American republic they learned that the “long knives,” as Indians referred to the American cavalry and their destructive sabres, were inflicting enormous damage on any nations that resisted the assertion of American authority. In 1871, just as Canada was about to begin negotiating a series of western treaties, the United States turned its back on treaty making and began to use force to control Native Americans in the West. These events, like the collapse of the buffalo economy, disease, and the imminence of non-Native immigration, were well known to western First Nations on the eve of treaty making.

We know what motivated these First Nations to make treaty from two kinds of sources. First, there is now a growing body of oral history research conducted with First Nations in Alberta and Saskatchewan that informs us directly about Aboriginal concerns and motives. In addition to the oral history, we are fortunate to have two documentary sources that capture what First Nation leaders were thinking as Canada approached to negoti-

ate. The first of these documents dates from the spring of 1871 and comes from a group of Cree chiefs who sent their message to the government through the Hudson's Bay Company representative at Fort Edmonton. Chief Sweetgrass, a venerable leader who had converted to Christianity, expressed their viewpoint eloquently, beginning with a reference to the recent transfer of Hudson's Bay Company lands to Canada:

Great Father, – I shake hands with you, and bid you welcome. We heard our lands were sold and we did not like it; we don't want to sell our lands; it is our property, and no one has a right to sell them.

Our country is getting ruined of fur-bearing animals, hitherto our sole support, and now we are poor and want help – we want you to pity us. We want cattle, tools, agricultural implements, and assistance in everything when we come to settle – our country is no longer able to support us.

Make provision for us against years of starvation. We have had great starvation the past winter, and the small-pox took away many of our people, the old, young, and children.

We want you to stop the Americans from coming to trade on our lands, and giving firewater, ammunition and arms to our enemies the Blackfeet.

We made a peace this winter with the Blackfeet. Our young men are foolish, it may not last long.

We invite you to come and see us and to speak with us. If you can't come yourself, send some one in your place.¹⁴

Sweetgrass summarized the concern of Plains leaders about the declining resource of the hunt, losses to disease and war, and, in general, the future of their people.

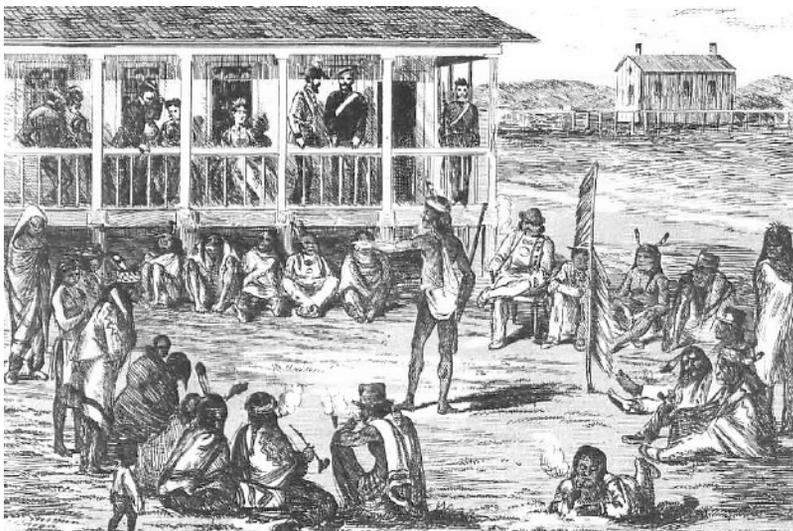
A bit more than five years later, confirmation that these were pressing anxieties came from other Plains Cree leaders along the North Saskatchewan. Ahtakakoop and Mistawasis – respected leaders like Sweetgrass – prepared for negotiations with the Queen's representative at Fort Carlton in August 1876 by hiring Peter Erasmus, a Métis trader, to serve as their interpreter. Prior to commencement of negotiations with the government representatives, the First Nation leaders held a private caucus, to which Erasmus was invited, at which they thrashed out their approach to the im-

pending talks. Some of the younger leaders, such as Poundmaker and The Badger, were adamantly opposed to making treaty, and the older leaders Ahtahkakoop and Mistawasis had the job of countering their arguments and persuading the group to agree to negotiate in order to take a united First Nations front into the talks with the Crown representatives.

Mistawasis went first:

I have heard my brothers speak, complaining of the hardships endured by our people. Some have bewailed the poverty and suffering that has come to Indians because of the destruction of the buffalo as the chief source of our living, the loss of the ancient glory of our forefathers; and with all that I agree, in the silence of my teepee and on the broad prairies where once our fathers could not pass for the great number of those animals that blocked their way; and even in our day, we have had to choose carefully our campground for fear of being trampled in our teepees. With all these things, I think and feel intensely the sorrow my brothers express.

I speak directly to Poundmaker and the Badger, and those others who object to signing this treaty. Have you anything better to offer our people? I ask, again, can you suggest anything that will bring



Treaty 1 negotiations in 1871 (Canadian Illustrated News, 9 Sept. 1971; Library & Archives Canada: C56481).

these things back for tomorrow and all the tomorrows that face our people?

I for one think that the Great White Queen Mother has offered us a way of life when the buffalo are no more. Gone they will be before many snows have come to cover our heads or graves if such should be.



Cree chiefs Ahtahkakoop (left front) and Mistawasis (right front) were eloquent pro-treaty spokesmen at Treaty 6 talks in 1876 (Library & Archives Canada: C19258).

Mistawasis let that gloomy prospect sink in, and then proceeded with his argument:

I, for one, look to the Queen's law and her Red Coat servants to protect our people against the evils of white man's firewater and to stop the senseless wars among our people, against the Blackfoot, Peigans, and Bloods. We have been in darkness; the Blackfoot and the others are people as we are. They will starve as we will starve when the buffalo are gone. We will be brothers in misery when we could have been brothers in plenty in times when there was no need for any man, woman, or child to be hungry.

We speak of glory and our memories are all that is left to feed the widows and orphans of those who have died in its attainment. We are few in numbers compared to former times, by wars and the terrible ravages of smallpox. Our people have vanished too. Even if it were possible to gather all the tribes together, to throw away the hand that is offered to help us, we would be too weak to make our demands heard.

Look to the great Indian nations in the Long Knives' country who have been fighting since the memory of their oldest men. They are being vanquished and swept into the most useless parts of their country. Their days are numbered like those of the buffalo. There is no law or justice for the Indians in Long Knives' country. The Police followed two murderers to Montana and caught them but when they were brought to the Montana court they were turned free because it was not murder to kill an Indian.

The prairies have not been darkened by the blood of our white brothers in our time. Let this always be so. I for one will take the hand that is offered. For my band I have spoken.¹⁵

When Mistawasis was finished, in what appeared to be a carefully orchestrated move, Ahtahkakoop supported the pro-treaty position. Ahtahkakoop's audience in the caucus outside Fort Carlton would have known that Ahtahkakoop had actually had an Anglican clergyman, John Hines, living with his community, providing schooling for the children and some agricultural instruction for the adults, for a couple of years by 1876. That experience would have given Ahtahkakoop, who already enjoyed

enormous respect because of his age and exploits, even more credibility when talking about dealing with the White Queen Mother's children:

Can we stop the power of the white man from spreading over the land like the grasshoppers that cloud the sky and then fall to consume every glade of grass and every leaf on the trees in this path? I think not. Before this happens let us ponder carefully our choice of roads.

There are men among you who are trying to blind our eyes, and refuse to see the things that have brought us to this pass. Let us not think of ourselves but of our children's children. We hold our place among the tribes as chiefs and councilors because our people think we have wisdom above others amongst us. Then let us show our wisdom. Let us show our wisdom by choosing the right path now while we yet have a choice.

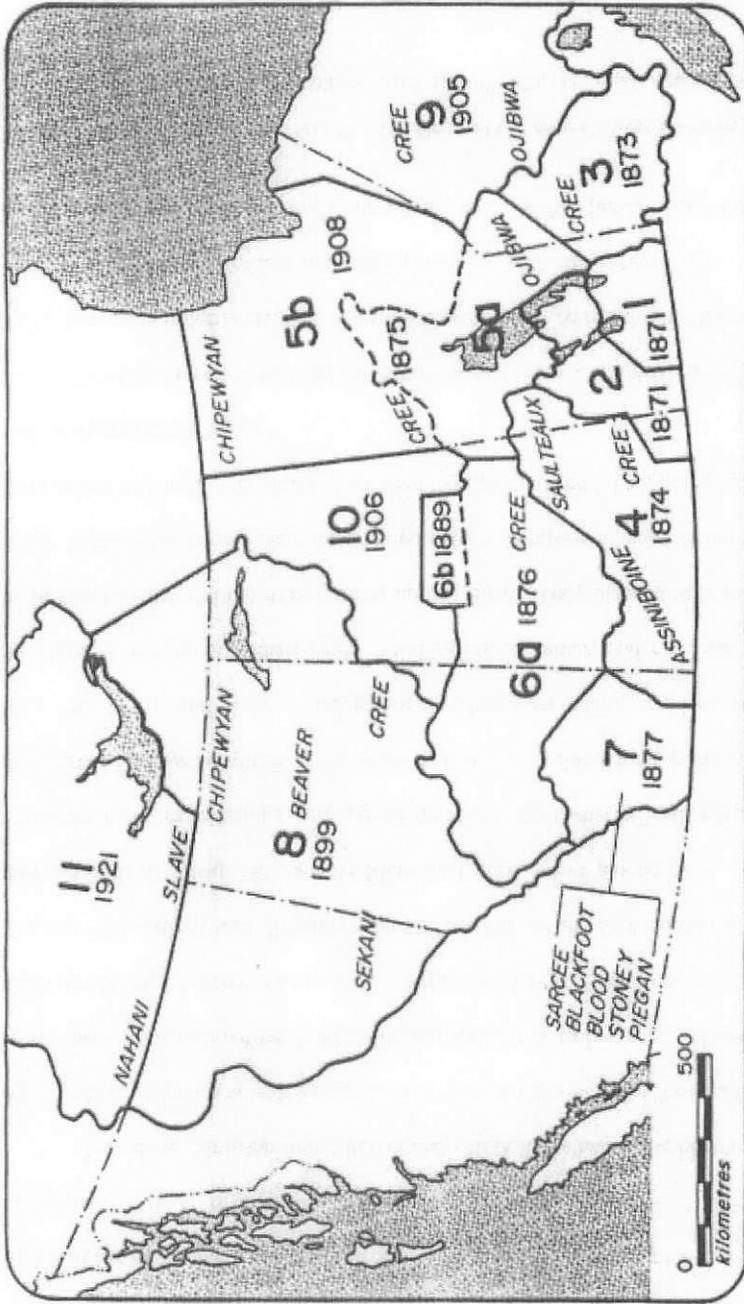
We have always lived and received our needs in clothing, shelter, and food from the countless multitudes of buffalo that have been with us since the earliest memory of our people. No one with open eyes and open mind can doubt that the buffalo will soon be a thing of the past. Will our people live as before when this comes to pass? No! They will die and become just a memory unless we find another way.

For my part, I think that the Queen Mother has offered us a new way and I have faith in the things my brother Mista-wa-sis has told you. The mother earth has always given us plenty with the grass that fed the buffalo. Surely we Indians can learn the ways of living that made the white man strong and be able to vanquish all the great tribes of the southern nations. The white man never had the buffalo but I am told they have cattle in the thousands that are covering the prairie for miles and will replace the buffalo in the Long Knives' country and may even spread over our lands. The white men number their lodges by the thousands, not like us who can only count our teepees by tens. I will accept the Queen's hand for my people. I have spoken.¹⁶

Ahtahkakoop, like Mistawasis and Sweetgrass, articulated both the concerns that flowed from changes in the Plains ecology, the disappearing buffalo, and the hopeful belief that an association with the newcomers, accepting the Queen's hand, would provide the answers to their problems.

The combination of anxiety and hope on which Ahtahkakoop and Mistawasis played to persuade their colleagues at Fort Carlton to negotiate Treaty 6 in 1876 similarly impelled other First Nations throughout the West to enter into a series of numbered treaties, Treaty 1 through Treaty 7, between 1871 and 1877. Although they led peoples who were still numerous and powerful – powerful enough to get Canada to take them seriously – they feared that they could not sustain their way of life in the face of threatening change without entering into an association with the Crown before the hordes of settlers fell on their region like the plague of grasshoppers to which Ahtahkakoop had alluded. They saw in an association with the Great White Queen Mother a relationship that would provide benefits, assistance, and, relatively speaking, a more just basis for associating with the Queen's children than was available to their kin south of the Medicine Line. In southern Alberta, in particular, the highly effective job the North West Mounted Police had done to rid the country of American whiskey peddlers and wolf hunters since the Force arrived in 1874 inspired confidence in both the power and fairness of the Queen's law. For these reasons, most of the constituent bands of the First Nations of the West entered into the seven numbered treaties that covered southern Rupert's Land, from northwestern Ontario to the foothills of the Rockies, and from the international boundary to a point roughly midway up what are now the prairie provinces between 1871 and 1877.

AMONG THE MANY MYSTERIES surrounding these western treaties, none are more contentious than the contents and significance of the agreements. The fundamental problem in interpreting the treaties is that the two main parties, government and First Nations, have different understandings of what the treaties did and what they represent. The national government has tended to take the position that these treaties are merely contracts by which western First Nations surrendered title to lands in return for compensation such as annuities, reserves, assistance with farming, and other, more specific benefits. Moreover, Canada until very recently has insisted that the written version of the treaties, which its treaty commissioners and bureaucrats had drawn up, of course, were the sole and complete account of what had been agreed. Consequently, the government has usually refused to interpret treaty commitments as anything other than the literal words of its version of the treaty. So, for example, if a



Numbered Treaties, 1871-1921

treaty said that members of the First Nation that signed it in the 1870s are each entitled every year to five dollars, then that is what they get in the early twenty-first century. Similarly, if a treaty promised “schools on reserves,” then Indian Affairs takes the position that it is obligated only to provide schooling, not support for post-secondary education. (The government does, of course, assist some First Nations students with their university education, but it insists that it does so as a matter of policy, not because postsecondary education is a treaty right.) In short, the federal government has generally interpreted and applied the treaties as contracts, reading them in a strict and literal fashion.

For the First Nations, this reading of the treaties is a perversion of what the agreements were about. First Nations take the position that the treaties were not just contracts, and they disagree that the full meaning of the treaties is found only in the government’s published version. As we have seen from the words of Sweetgrass, Mistawasis, and Ahtahkakoop, western First Nations approached treaty making in search of connection with the incoming people through the Crown. They were looking for assurances of friendship and future support that would guarantee their survival. For them, the meaning of the treaties is found in the relationship they established rather than any specific clause, and the overall significance of treaties to them is that they were promised help to live well. They would expect that, in a relationship that guaranteed the means of succeeding in life, there would have been room for modifying individual terms – such as a five-dollar annuity, or a school on the reserve – to translate them into contemporary terms, terms such as larger financial support, or schooling and postsecondary education as treaty rights. First Nations reject the narrow legalism of the contract view of the treaties.

Equally important, First Nations vehemently reject the idea that the meaning and content of a treaty are found only in the government’s version of the agreement. As people from an oral culture in which learning and memory were transmitted by the spoken word, they consider that *everything said* in treaty talks is as much a part of the treaty as what the government representatives chose to write down at the conclusion of the parleys. And they insist, with good reason, that treaty commissioners promised a great deal more during the talks than was included in the legalese of the government document. For example, during Treaty 6 negotiations, Commissioner Alexander Morris reassured the First Nations that the proposed

treaty did not threaten anything in their way of life, but rather only provided a bonus: “What 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.”¹⁷ In the government version of the treaty, this expansive undertaking is not found, only a guarantee of a continuing right to hunt until the land is taken up by settlers. Again, in Treaty 6 talks, Morris promised the Cree exemption from compulsory military service: “In case of war you ask not to be compelled to fight. I trust there will be no war, but if it should occur I think the Queen would leave you to yourselves. I am sure she would not ask her Indian children to fight for her unless they wished. . . .”¹⁸ There is nothing in the written version of the treaty on this topic, either.

We also know from other events that the government’s version is by no means complete. In Treaty 1, for example, the commissioner exceeded his mandate and verbally promised to supply farming implements. Since this commitment was not in the written version, the government balked at supplying ploughs and other equipment. The First Nations involved insisted, of course, that they had been promised these things, and, since the commissioner in question had written a memorandum to the government that referred to these so-called “outside promises,” Ottawa four years after the initial negotiations conceded that the promises were part of Treaty 1



The medal for Treaties 1 – 7 (1871–77) celebrated the establishment of a relationship between First Nations and the Crown (Library & Archives Canada: C70758).

and provided the farming supplies.¹⁹ These and other instances demonstrate that the governmental view that the treaties are embodied in the published version is not only contrary to the First Nations' record of oral agreements, but also significantly more limited and misleading than the Aboriginal understanding.

First Nations also do not accept the view that the treaties are merely contracts. They see the treaties as covenants. A covenant differs from a contract because it involves the deity. Whether it is the covenant that Jehovah made with Israel or the covenant of marriage that two people make before their God and their community, a covenant brings a higher power into the agreement as a participant and guarantor. For First Nations, invoking the Great Spirit in any dealings with other people was an essential part of their protocol, as in the commercial pacts they made and renewed annually with fur traders. In all but one of the western treaties, negotiation was preceded by First Nations ceremonies, including the pipe ceremony which brought the Great Spirit into the proceedings and bound human participants to speak only the truth. As a Mohawk elder explained about the significance of the pipe ceremony in treaty making, "the smoke from the pipe carried that agreement to the Creator binding it forever. An agreement can be written in stone, stone can be chipped away, but the smoke from the sacred pipe signified to the First Nation peoples that the treaties could not be undone."²⁰ Such observances led First Nations – not surprisingly, given their cultural background and assumptions – to view their treaty as a covenant that bound the Queen's people, themselves, and the Great Spirit forever.

The words and behaviour of the Crown negotiators would have confirmed for First Nation leaders that the other side saw the proceedings in which they were engaged as they did. Indeed, on one occasion a government treaty commissioner referred to one of the numbered treaties as "a covenant" between Indians in northwestern Ontario and the Crown.²¹ Government representatives regularly invoked the name of God in the talks. At Fort Carlton in August 1876, for example, Commissioner Alexander Morris appealed to the deity in closing his initial address, observing, "I will trust that we may come together hand to hand and heart to heart again. I trust that God will bless this bright day for our good, and give our Chiefs and Councillors wisdom so that you will accept the words of your Governor." The Cree would have noted understandingly that the next day,

a Sunday, the Rev. John McKay, the Anglican cleric who was part of Morris's party, held "divine service," first for the Euro-Canadians, and then, at the request of the Indians, "preach[ed] in their own tongue to a congregation of two hundred adult Crees."²²

First Nations would have observed and approved the involvement of religious figures directly in the talks leading to some of the treaties. The Anglican catechist Charles Pratt, for example, served as interpreter at the Treaty 4 talks at Fort Qu'Appelle in 1874. Egerton Ryerson Young, a Methodist minister, signed Treaty 5, the Lake Winnipeg Treaty, on behalf of the Crown, and Rev. John McKay, as noted, served as interpreter at Treaty 6. An ecumenical touch was added when both the Methodist minister, John McDougall, and Oblate priest Constantine Scollen signed Treaty 7 with the Crown's party at Blackfoot Crossing in 1877.²³ The prominence of Christian clergy, as well as Commissioner Alexander Morris's invocation of the Christians' God, would have led the Native negotiators to conclude that the Queen's representatives believed what they did: that a higher power oversaw and guaranteed their talks.

The contrasting governmental and First Nation views of the numbered treaties have been the source of considerable disagreement and conflict over the past century and a quarter. Besides interpreting the treaties narrowly, Indian Affairs has tended to forget about its large promises, such as putting "a little bit on top" of what First Nations already enjoyed, or committing the Crown to respect the treaties "as long as that sun shines and yonder river flows."²⁴ Instead, government has inflicted a series of restrictions on First Nations, especially through the *Indian Act* that was first enacted in 1876 and is still on the books. When First Nations complain that the federal government is violating "the spirit of the treaties," they are referring to Ottawa's failure to uphold its more expansive promises, including those given orally, in favour of the Justice Department's close reading of either treaty text or *Indian Act*. At the heart of many contemporary differences over the interpretation of the treaties is the divergence in understanding of First Nations and government. First Nations see the treaties as Creator-sanctioned covenants that cement a relationship intended to guarantee their livelihood in return for sharing their lands with the newcomers. The government that speaks in the name of those newcomers, in contrast, has until recently insisted that only its own text of the treaties is authoritative, and has interpreted those texts as narrowly as it could.

THE GOVERNMENT'S UNGENEROUS APPROACH to interpreting and applying the treaties it made in the West in the 1870s was also found in its attitude toward making any more treaties after 1877. By that date, Canada had acquired peaceful access to a vast patrimony across which it proposed to drive a transcontinental railway and on which it intended to plant many thousands of agricultural settlers. For the next several decades, the nation's territorial appetite was sated, and the government firmly declined to make more treaties, even in some cases where First Nations asked for them. For example, through the 1880s and 1890s, First Nations in northern Saskatchewan and Alberta as well as the southern Territories frequently asked, usually through their missionaries or Hudson's Bay Company officers who worked among them, to enter into treaty. The federal government regularly and resolutely refused the requests. Its reasoning was simple: it saw the West as principally a grain-growing area, and Canada had acquired the lands suitable for agricultural colonization. To take in lands unsuited to Canada's immediate need for agricultural development would mean unnecessarily acquiring obligations to the First Nations with whom it signed treaties in the northerly latitudes. Since Canada wished to avoid financial liabilities, it would not respond positively to overtures from northern First Nations to enter into treaties.

The lack of interest in making more treaties in the northwest waned only when southern – that is to say, non-Native – economic interests wanted access to lands that were not yet covered by treaty. A clear example of such a process emerged in northern British Columbia in the latter part of the 1890s. The region began to be invaded by prospectors in search of minerals, as well as overlanders who were headed north to the Yukon to search for the gold that rumour said had been discovered on Bonanza Creek. The activities of the intruders angered local First Nation groups, who threatened to inflict harm on them and bar their way. Because of non-Native interest in mineral riches and First Nation resistance to exploration, Canada moved to negotiate Treaty 8, which covered northeastern British Columbia, northern Alberta, and the northwest corner of Saskatchewan in 1899-1900. Treaty 9 in northern Ontario was similarly motivated by southern interest in the mineral, hydro, and forest resources of a region to which coverage provided by the Robinson Treaties of 1850 did not stretch. Treaty 10 of 1906, in northern Saskatchewan, responded to similar interests in the riches the forests held, as well as to a bureaucratic desire to make

treaty boundaries congruent with those of the Province of Saskatchewan that had been created out of the old North West Territories in 1905. The final example, Treaty 11 in the lands north of the sixtieth degree of latitude, provides the starkest example of the way in which treaty making occurred only if and when non-Native economic interests were piqued. Oil was discovered at Norman Wells, NWT, in 1920, and in 1921 Treaty 11 was negotiated with the Dene of the region. The making of the northern treaties, Treaties 8-11, between 1899 and 1921, simply replayed the self-interested tale that had taken place on the plains in the 1870s. When Canada became interested in the resources of Indian country, treaty negotiations occurred.

Following Treaty 11 in 1921, a half-century hiatus in treaty making occurred. Except for the Williams Treaty of 1923, a measure to clean up a number of unresolved issues concerning Anicinabe groups in southern Ontario, there was no more treaty-making activity until the 1970s. The fact that Canada had acquired access to resource-rich lands, especially in the North, by treaties between 1899 and 1921, was part of the reason for the interruption. It would take southern Canadian economic interests the better part of half a century to exploit the northern resources before look-



Treaty 5 commissioners approach Long Lake in northwestern Ontario (Library & Archives Canada: PA59577).

ing around for more. There were other factors as well, though. The view that Indians were “a dying race” contributed to the government’s lack of interest in further treaty making. The 1920s were the nadir of Aboriginal population in Canada, so much so that a leading anthropologist wrote confidently in 1932 that “Doubtless all the tribes will disappear.”²⁵ If this was the case, as the best scholarly opinion held, what point was there in making treaties with First Nations?

Perhaps more important than these factors was the fact that the interwar period marked the lowest point in government-First Nations relations in post-Confederation history. This was the period when the *Indian Act* was changed to make it possible to enfranchise – that is, strip of their Indian status – any adult male Indian whom the Department of Indian Affairs thought should be enfranchised. It was also when the Department attacked First Nations political action, whether by challenging Six Nations’ assertions of sovereignty by police action in the early 1920s or by effectively making it difficult for bands to hire legal help through a 1927 amendment to the *Indian Act* that made it a crime to solicit or contribute money for pursuit of an Indian claim. Finally, it was also the time when First Nations such as the Lubicon Lake Cree in northern Alberta, the Teme-Augama Anishnabai in northern Ontario, and the Mohawk at Oka were all trying futilely to get the government to take their claims for recognition of their land rights seriously. The interwar period, in short, was a time when government showed little sympathy for First Nations, and that attitude included a lack of interest in making treaties with any more of them.

The forces and attitudes that explain the Crown’s refusal to make treaties after the early 1920s gave way slowly, beginning to weaken in the 1940s and largely disappearing by the 1960s. By the time of World War II, Canadian opinion leaders were becoming aware of the racist assumptions on which Indian policy, including residential schools and the *Indian Act*, were based. It was difficult to fight the organized racism that characterized the Nazi regime in Germany and the militarists in Japan without becoming uncomfortably aware that some of the ideological foundations of Canada’s policies toward Aboriginal people also assumed that some racial groups were inferior to others. The shift in government attitudes manifested itself in an overhaul of the *Indian Act* in 1951 that stripped away some of its most coercive and interfering provisions, as well as in the adoption of a policy of integrated schooling to promote the placement of Indian students in

largely non-Native, publicly supported schools. Also important in working a change in attitudes was a reawakened interest in exploiting natural resources in Indian country. Such postwar developments as hydro-electric power, uranium mining, and energy increasingly targeted areas where treaties had not yet been signed for future exploitation. By the 1970s, when gas and oil finds in the North made the construction of long pipelines south to large markets attractive, the southern desire for access to natural resources located in Indian-controlled lands began once more to influence the federal government.

Perhaps the most important factor of all in forcing government and non-Native Canadians to change their attitudes toward First Nations was the emergence from the 1940s to the 1970s of effective national Aboriginal political organizations. Beginning in British Columbia and the Prairies in the late 1930s and 1940s, and subsequently spreading to other parts of the country, First Nations, Métis, and Inuit all fashioned powerful political bodies by the early 1970s. By 1968 the National Indian Council had subdivided amicably into the National Indian Brotherhood, which represented status Indians, and the Canadian Métis Society, which represented Métis and non-status Indians. In 1971 the phalanx of national Aboriginal political organizations was completed with the emergence of the Inuit Tapirisat of Canada. These bodies all took a lively interest in the subject of treaties, whether or not they were in a treaty relationship themselves. For Inuit and First Nations in British Columbia or Northern Ontario who did not have treaties, their principal interest was in entering into one. Of course, the fact that many of these Aboriginal groups who were interested in making treaties occupied resource-rich territories gave them some strength in bargaining.

The clearest example of how non-Native desire for resources and newly assertive Aboriginal organizations came together to force governments to resume treaty making occurred in Quebec in the early 1970s. The newly elected Liberal premier of the province, Robert Bourassa, had won the provincial election of 1970 in part by promising to create 100,000 jobs. His strategy for keeping this commitment depended on an ambitious plan to harness some of the hydroelectric potential of the James Bay watershed. Accordingly, in 1972, the James Bay Corporation, effectively a spin-off from the massive Hydro Quebec utility company, began operations to dam northern rivers and build power-generating stations. So far, these events unfolded as dozens of similar resource-extraction ventures in remote re-

gions had previously, but in 1972 the James Bay Cree were determined to stand up for their rights. They succeeded in getting a temporary injunction, stopping the James Bay Corporation from any work in their lands. While this injunction was fairly quickly overturned, the judicial setback energized the federal and provincial governments to enter into talks with the Aboriginal organizations of northern Quebec. These talks led by 1975 to the James Bay and Northern Quebec Agreement, a pact that was, in effect, Canada's first modern treaty dealing with Aboriginal territory.

The shock that governments got from the political action of the James Bay Cree in 1972 was repeated the following year by a decision of the Supreme Court of Canada. The Nisga'a of the Nass River valley of British Columbia had been attempting since the 1880s to secure a treaty concerning their land, but they had always been rebuffed by both the federal and provincial governments. Perhaps the worst development in their long struggle was the 1927 amendment of the *Indian Act* that prohibited the soliciting or giving of money for the pursuit of an Indian claim, a draconian



Queben premier Robert Bourassa (fourth from right) and federal Indian Affairs minister Jean Chrétien (second from right) sign the James Bay and Quebec Agreement, Nov. 1974, with Cree chief Billie Diamond (far right) (Library & Archives Canada: PA129351).

measure that was in significant part the result of the fact that the Nisga'a and other First Nations in British Columbia were pushing for recognition of their Aboriginal title. When the ban on fundraising was lifted in 1951, the Nisga'a returned actively to political and legal action. Eventually, in 1973, the Supreme Court ruled on a case in which they asserted their Aboriginal title to the Nass valley. Six of the seven justices who heard the case agreed that Aboriginal title existed and was enforceable in Canadian law. Three of the six concluded that the Nisga'a Aboriginal title had not been extinguished, but the other three decided that it had been nullified by governmental action. The seventh judge ruled against the Nisga'a on a technicality. In other words, the Nisga'a lost the case by a margin of four to three, but a majority of the judges who heard the case upheld Aboriginal title. This ruling, too, gained the attention of surprised politicians. While the Nisga'a would wait more than twenty years before negotiations finally produced a treaty for them, their victorious loss in the Supreme Court quickly introduced a policy change that would pave the way for others to negotiate a type of land treaty.

The government of Pierre Elliott Trudeau responded to the *Nisga'a* or *Calder* decision with the creation of the Office of Native Claims (ONC) in 1974. The ONC administered two types of claims resolution processes. One category – specific claims – dealt with instances in which the federal government had not discharged some lawful obligation to a First Nation. The other – comprehensive claims – concerned Aboriginal title claims that arose in instances where government either had not made a territorial treaty with the First Nation, or, in the case of part of the Northwest Territories, a treaty that had been negotiated earlier had never been implemented. The ONC was authorized to negotiate settlements of comprehensive claims that it found to be valid, and the successful results of those negotiations, as the Indian Affairs web site describes it, are “modern treaties which will provide a clear, certain and long-lasting definition of rights to lands and resources for all Canadians.”

While there have not been a large number of comprehensive claims that have reached an end in successful negotiations, there have been some important agreements in the North. The first was the COPE, or Committee of Original Peoples Entitlement, agreement, also known as the Inuvialuit agreement, in 1984 that covered the Inuit in the westernmost portion of the Northwest Territories. In 1990, Canada negotiated two further

comprehensive claims settlements with the Council of Yukon Indians and the Métis-Dene of the Northwest Territories. The latter was rejected in a referendum by the Native peoples involved, but the Yukon pact succeeded, and has led to a number of individual claims settlements with groups such as the Gwich'in (1992), Sahtu Dene and Métis (1994), and Ta'än Kwach'an Council (2002). These modern northern treaties contain compensation for territory and resources lost, arrangements for co-management of territory, and often self-governing agreements as well. The reason that the comprehensive claims settlements to date have all occurred in the territorial north is that the Yukon and the Northwest Territories are under the control of the federal government, meaning that Ottawa does not have to contend with obstreperous provincial governments in trying to reach a settlement. There are many comprehensive claims still being considered or negotiated by Indian Affairs.

The final form of modern treaty arrangement is the treaty negotiated directly by the Aboriginal group with the federal government. For example, in 1990 the Tungavik Federation of Nunavut concluded the Nunavut Agreement that gave birth in 1999 to a new northern territory, Nunavut, carved out of the eastern portion of the Northwest Territories. The governance arrangements of the Nunavut pact are interesting. Nunavut has a "public government," meaning a legislature elected by all citizens who have satisfied the residency requirement. However, since over eighty per cent of the population of Nunavut is Inuit, the new territory's "public government" is, in effect, a form of Inuit self-government. The other form of treaty negotiated in recent years was the agreement in principle in 1996 and the implementation in 2000 of the Nisga'a of the Nass River Valley with the federal and provincial governments. The Nisga'a Treaty, which caused controversy in British Columbia for several years, provides the Nisga'a with about eight percent of their ancestral lands, their own government on that territory, a guaranteed share of the fishery, and compensation for loss of territory and others' use of Nisga'a resources prior to treaty.

Modern treaty making is an ongoing phenomenon in Canada. There are still a number of First Nations in the North who are trying to conclude treaties, and in British Columbia there are some fifty First Nations engaged in negotiations under the aegis of the British Columbia Treaty Commission. In over ten years of operation, the Commission did not make much measurable progress, but in the spring of 2003 a couple of frame-

work agreements – agreements on what is to be negotiated and included in the treaty – were reached with First Nations. Elsewhere in Canada, the federal government faces imminent demands for treaty negotiations from First Nations in Atlantic Canada and the parts of northern Quebec where land-related treaties have not been concluded. Obviously, Canada’s treaty-making tradition, which stretches back more than 300 years into Canadian history, will continue to unfold.

CANADA’S TREATY-MAKING TRADITION emerged and evolved through a succession of phases that reflected the nature of the general relationship between Natives and newcomers in Canada. In the first, commercial phase of Native-newcomer relations, when fur was king, the dominant form of agreement between the two peoples was the informal commercial pact. These commercial agreements were rooted in Aboriginal practice and



An RCMP constable, representing the Crown, pays a member of Treaty 6 his five-dollar annuity in Saskatoon, June 2003 (courtesy the StarPhoenix).

reproduced Aboriginal protocol, for the simple reason that First Nations and later Métis were numerically dominant in these economic partnerships. Following the initial fur trade era in the East – which in the case of the French also built on the foundation of fur-trade relationships – an era developed in which treaties of alliance, peace, and friendship emerged between approximately 1700 and the War of 1812. These agreements were more formally recorded than the commercial arrangements out of which they grew, but formality took both Aboriginal and European forms. First Nations used wampum to record their undertakings and insisted on Aboriginal practices such as gift giving to renew and strengthen the alliances and peace agreements. At the same time, the treaties of alliance, peace, and friendship signaled a shift in treaty making and in the Native-newcomer relationship of which they were a product. It would be the Europeans' written versions of the treaties that would have long-lasting influence, including in twentieth-century courts, and the greatest legacy of this era was the Royal Proclamation of 1763. The Proclamation recognized Aboriginal territorial rights, but it also laid out a procedure by which Europeans could legally obtain those lands.

The Royal Proclamation set the stage for the third phase of treaty making, the era of land-related treaties. These agreements gave Europeans access to First Nations lands for settlement and trade, and often were expressed in the legalistic contract language of the increasingly numerous Euro-Canadian society. First in Upper Canada before Confederation, and then in the West and North after 1867, territorial treaties were made. The Upper Canadian phase, during which land treaties closely resembled contracts, coincided with the onset of the settlement frontier, as non-Natives began to invade First Nations' lands for the purpose of establishing farms and cities, rather than to trade furs or engage First Nations in military alliances. After 1830, the spread of treaties took place alongside the elaboration of what the Indian Department termed a "civilization" policy, meaning a set of programs designed to assimilate First Nations. In other words, the development of a regime of land-related treaties coincided with the descent of the Native-newcomer relationship into an era of oppression of Aboriginal peoples by the now numerically dominant Europeans.

The Plains treaties of the 1870s had a different flavour, recording and preserving an aspect of treaty making that was reminiscent of commercial compacts. This return to an identifiably Aboriginal style of treaty negotia-

tion in a situation where the First Nations were dominant suggests that First Nations, if they could determine the nature of the treaty, would favour treaties that were not contracts, but covenants that involved the Creator as well as human parties. The use by First Nations negotiators of pipe ceremonies and rhetoric that invoked the Creator was matched by the presence of Christian religious officers on the Crown side and by frequent allusions to God by the Crown negotiators. It would hardly be surprising if First Nations who entered into the prairie treaties understood them as covenants, given their own background of relations with Hudson's Bay Company traders and the 1870s treaty commissioners' rhetoric and practices.

In any event, the creative period of numbered treaty making, 1871-1923, ended and gave way to a very different era. The half-century hiatus from the early 1920s until the 1970s witnessed the emergence of anti-First Nations legislation and policies, both of which reflected the fact that Aboriginal peoples had become largely irrelevant to the non-Native majority in Canada. First Nations re-emerged from this period of obscurity and mistreatment because of two factors: their own efforts at building effective political organizations, and a renewed desire on the part of non-Native economic interests to get access to resources located on and under lands controlled by Aboriginal groups. Their re-emergence ushered in a fourth phase of the Native-newcomer relationship: the period of Aboriginal activism and achievement. Moreover, it was the combination of these forces – Aboriginal political assertiveness and non-Native economic ambition – that led the country back to the treaty table. The resistance of the James Bay Cree in 1972 and the decision of the Supreme Court of Canada in the *Nisga'a* or *Calder* Aboriginal title case in 1973 forced the Canadian government to begin to negotiate some treaties in regions where Aboriginal title had not been dealt with, and to provide the comprehensive claims resolution process to produce claims settlements that were, in effect, modern treaties. These twin processes are still at work on Canada's treaty-making landscape. The existence of large numbers of treaty negotiations in British Columbia and the imminent prospect of more demands for recognition of Aboriginal title from the far North, northern Quebec, and Atlantic Canada ensure that the Canadian treaty-making tradition, a heritage three centuries in the making, will continue to evolve and reflect the nature of the underlying relationship between Aboriginal and non-Aboriginal peoples in Canada.

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