

The *Proclamation* Trap: How the *Royal Proclamation of 1763* Shapes Understandings of the
Southern Numbered Treaties and Obscures Their Confederal Nature

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Abstract

This thesis is an investigation into the nature of the southern Numbered Treaties (Treaties 1-7) negotiated between the First Nations of the North-West and the Crown in the period 1871-1877 in what is now Western Canada. Interpretations of these treaties have varied with some historians viewing them as land surrenders while others see them as products of cultural and/or linguistic misunderstandings or as land sharing agreements. Across all extant interpretations, the role of the *Royal Proclamation of 1763* (the *Proclamation*) in shaping treaty-making policy in Western Canada is unquestioned. The prominence of the *Proclamation* in the historiography of the southern Numbered Treaties has no basis in the historical record and is, in fact, an invention of the historiography. Accordingly, the *Proclamation* has distorted existing understandings of the treaty relationship and obscured the ‘confederal’ nature of that relationship. The persistence of the *Proclamation* in the subject’s historiography can be understood as an historiographical trap. This thesis argues that while some of the procedural guidelines established by the *Proclamation* were present at the negotiations of the southern Numbered Treaties, the *Proclamation* itself had no direct influence on the process that led to their negotiations. Instead, a host of historical developments and forces (including Canadian insecurity, American annexationism, Fenianism, British anti-colonial sentiment, and First Nations military capacity) compelled the Dominion of Canada to pursue treaty-making in order to gain secure access to the North-West. The similarities between the treaty-making process and the process of Canadian Confederation indicate that the southern Numbered Treaties are better understood as confederal-like agreements (analogous to the *British North America Act* or *Manitoba Act*) than as land surrenders, products of misunderstanding, or land sharing agreements rooted in the *Proclamation*.

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Introduction: The (Re)Invention of the *Royal Proclamation of 1763*

2013 marked the semiquincentennial, or 250th anniversary, of King George III's promulgation of the *Royal Proclamation of 1763* (the *Proclamation*) on October 7, 1763. In what is now Canada, the *Proclamation* has been viewed as a foundational document that amounts to an Indigenous "Magna Carta."¹ Accordingly, historian Thomas Peace echoed the call of then federal New Democratic Party leader Thomas Mulclair to publicly "celebrate" the *Proclamation* upon its 250th anniversary on October 7, 2013. Peace noted that the *Proclamation* was conspicuously absent from Prime Minister Stephen Harper's commemoration agenda and argued that the momentum of the grassroots #IdleNoMore movement provided the appropriate context in which to re-evaluate the *Proclamation*.² The #IdleNoMore movement, which peaked in 2013, organized around 50 events across Canada to commemorate the *Proclamation*.³ In Gatineau, academics and Indigenous leaders convened at the Canadian Museum of Civilization for the Creating Canada conference to contemplate the importance of the *Proclamation* while delegates from the Federation of Saskatchewan Indian Nations (FSIN) travelled to England for the occasion.⁴ At Oxford University, FSIN Chief Perry Bellegarde discussed with faculty members, among other things, "the fact that the Royal Proclamation of 1763 is a foundational

¹ J.R. Miller, "The Royal Proclamation – "the Indians' Magna Carta"," *Active History: History Matters*, last updated September 30, 2013, <https://activehistory.ca/blog/2013/09/30/the-royal-proclamation-the-indians-magna-carta/>.

² Thomas Peace, "2013: It's time to commemorate the 1763 Royal Proclamation," *Active History: History Matters*, last updated February 4, 2013, <https://activehistory.ca/blog/2013/02/04/2013-its-time-to-commemorate-the-1763-royal-proclamation/>.

³ The message at these events was that the *Proclamation's* anniversary could be utilized "to usher in a new era of reconciliation of Canada's shameful history..." Ken Coates, *#IdleNoMore and the Remaking of Canada* (Regina: University of Regina Press, 2015), 151.

⁴ "Canadian Indigenous Chiefs and Delegation in London to Mark the Royal Proclamation of 1763," *Market Wired, Yahoo! Finance*, last updated October 4, 2013, <https://finance.yahoo.com/news/canadian-indigenous-chiefs-delegation-london-140633329.html>; Anthony J. Hall, "Royal Proclamation of 1763," *The Canadian Encyclopedia*, last updated August 30, 2019, <https://www.thecanadianencyclopedia.ca/en/article/royal-proclamation-of-1763>.

document to the legal framework in Canada.”⁵ If the manner in which the *Proclamation* was commemorated upon its 250th anniversary is any indication, it appears that the *Proclamation* was understood as a positive instrument worthy, not merely of remembrance, but of celebration.

Charles Colby’s astute observation in 1905 that “all historical writing is provisional” serves as a helpful reminder that historiographical perceptions can change even when the material facts upon which these perceptions are based remain constant.⁶ In this respect, the basic facts surrounding the *Proclamation* can be identified with some confidence. At the least, it can be said that the *Proclamation* was issued in order to manage the lands acquired in North America by Britain following its victory in the Seven Years’ War.⁷ Insofar as Indigenous land rights are concerned, the *Proclamation* recognized that Indigenous Peoples in North America could not be dispossessed of their lands without agreeing to surrender their rights at a public meeting (or treaty) for that purpose.⁸ The negotiations of the southern Numbered Treaties in the 1870s bear some resemblance to the procedures established by the *Proclamation*; they were negotiated at public meetings called for the purpose of a treaty between Crown and First Nations negotiators. In total seven treaties were negotiated between 1871 and 1877 which granted the Dominion of Canada access to most of the arable land lying between Lake Superior and the Rocky Mountains.⁹

⁵ “Canadian Indigenous Chiefs.”

⁶ Quoted in Carl Berger, *The Writing of Canadian History: Aspects of English-Canadian Historical Writing: 1900 to 1970* (Toronto: Oxford University Press, 1976), 17.

⁷ Michael A. McDonnell, *Masters of Empire: Great Lakes Indians and the Making of America* (New York: Hill and Wang, Farrar, Straus and Giroux, 2015), 230.

⁸ Mark D. Walters, “The Aboriginal Charter of Rights: The Royal Proclamation of 1763 and the Constitution of Canada,” in *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada*, eds. Terry Fenge and Jim Aldridge (Montreal & Kingston: McGill-Queen’s University Press, 2015), 52-53.

⁹ Gerald Friesen argued that the Dominion was guided by “the British proclamation of 1763” in its treaty-making policy. See Gerald Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1984), 136 and 136-149.

However, the prevailing view of historians—that the southern Numbered Treaties were negotiated pursuant to the *Proclamation*—is an invention of the historiography rather than a conclusion drawn from the historical record. In fact, as this thesis will demonstrate, the historical record indicates that the *Proclamation* had no direct influence upon the process that led to the southern Numbered Treaties even as the procedures outlined in the *Proclamation* were followed in the negotiations.¹⁰ In the same vein, it is submitted that while the *Proclamation*'s legal applicability in the territories covered by the southern Numbered Treaties is beyond dispute, there is no evidence that Crown or Dominion officials consciously applied the *Proclamation* during the treaty-making process in the North-West in the 1870s. The retention, and centrality, of the *Proclamation* in analyses of the treaty relationship established by the southern Numbered Treaties is, therefore, an impediment to a proper understanding of this important treaty relationship and the nature of these treaties as analogous to confederal agreements. Interpreting the southern Numbered Treaties as confederal agreements, as this thesis will argue, constitutes a construction of these treaties that is more historically and presently tenable than a construction that is rooted in the myth of the *Proclamation*'s whole application in the context of these treaties.

The positive view of the *Proclamation* as an Indigenous Magna Carta has largely persisted in Canadian public consciousness and the historiography of treaty-making in Canada—making it easy to lose sight of the origins of this view and its discord with the historical

¹⁰ It is important here to distinguish between 'procedure' ("a set of actions that is the official or accepted way of doing something") and 'process' ("a series of actions that you take in order to achieve a result"). *Cambridge Dictionary*, "procedure," n.d., <https://dictionary.cambridge.org/dictionary/english/procedure>; *Cambridge Dictionary*, "process," n.d., <https://dictionary.cambridge.org/dictionary/english/process>. Thus, it is possible that the southern Numbered Treaties abided by the procedures outlined in the *Proclamation*—either because these procedures had the force of statute and policy architects and administrators were aware of them or because these procedures were transmitted through time by custom, usage, practice, or precedent—while the process that led to their negotiations did not resemble the process by which other treaties made pursuant to the *Proclamation* were negotiated.

experiences of First Nations in Western Canada.¹¹ With the possible exception of those First Nations contemporaneous with the *Proclamation*'s ratification at the Treaty of Niagara of 1764, it was in British Columbia—where its application is most hotly contested—that it was first explicitly invoked in defence of First Nations' land rights. In 1909, Coast Salish bands sought clarification of their land title at which time they became aware of the *Proclamation*.¹² Four years later, the Nisga'a sent a petition to London explaining that they did not oppose white people coming into their territory so long as they did so "in accordance with the British principle embodied in the Royal Proclamation."¹³ Political scientist Paul Tennant explained that for First Nations in British Columbia, federal officials were seen as less blameworthy than their provincial counterparts for land dispossession because they "obeyed the proclamation east of the Rockies."¹⁴ In explaining a legal finding antithetical to the aims of the Nisga'a, Chief Justice Allan McEchearn of the Supreme Court of British Columbia stated that First Nations "west of the Rockies" were not under the protection of the British Crown pursuant to the *Proclamation*.¹⁵ Thus, both proponents and opponents of the *Proclamation*'s application in British Columbia have assumed that the *Proclamation* was wholly applied and/or adhered to "east of the Rockies"—an assumption that historians of the southern Numbered Treaties have also internalized. Such an assumption, while appearing politically useful for stressing the need for "nation-to-nation"

¹¹ In 2023, for example, the 260th anniversary of the *Proclamation* brought academics to Queen's University to consider the *Proclamation* as "originally an apparent affirmation of Native rights and latterly as a mechanism that—it is argued—helped to institutionalize the narrowing and erosion of those rights in Canadian public law." Here the *Proclamation*'s positive attributes are apparent while its negative ones are merely arguable. "Connected Nations: Indigenous Rights and the Royal Proclamation of 1763," *Treatied Spaces Research Group*, 8 October 2024, <https://treatiedspaces.com/2023/08/22/connected-nations-indigenous-rights-and-the-royal-proclamation-of-1763/>.

¹² Peter J. Usher, Frank J. Tough, and Robert M. Calois, "Reclaiming the Land: Aboriginal Title, Treaty Rights, and Land Claims in Canada," *Applied Geography* 12, no. 2 (1992), 119.

¹³ Quoted in Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990), 90.

¹⁴ Tennant, *Aboriginal Peoples and Politics*, 91.

¹⁵ *Delgamuukw v. British Columbia*, at pp. 262-263, 1991 CanLII 2372 (BC SC).

relationships and continued treaty-making, is at odds with the historical record. This thesis will explain why.

This thesis will reveal that public commemoration and the historiography of the southern Numbered Treaties have wrongfully implanted the notion that these treaties were premised on the *Proclamation*. This thesis contends that this view is not supported by the historical record; the southern Numbered Treaties were not negotiated pursuant to the *Proclamation* but were negotiated because the Dominion found itself unable to exercise sovereignty in the North-West without these treaties. While one of the objectives of this study is to demonstrate how the view of the southern Numbered Treaties as an extension of the *Proclamation* is antithetical to the basic requirement of the historian to derive interpretations from historical facts (rather than manipulate historical facts to suit their interpretations), the consequences of assuming the *Proclamation*'s whole application in the context of the southern Numbered Treaties are not purely (nor even primarily) academic—and the correcting of that assumption is more than splitting historiographical hairs. Instead, the *Proclamation* must be understood not as a static instrument but one capable of invention and reinvention for the purpose of suiting unique ends and contexts. In the context of the southern Numbered Treaties, inventing and reinventing the *Proclamation*'s application serves two ends. At worst, the *Proclamation* is upheld as an instrument in which First Nations land can be sold in a manner deemed morally and legally correct in order to manage Canadian guilt over the dispossession of First Nations.¹⁶ At best, the *Proclamation* serves to distort the true meaning of the southern Numbered Treaties into something more than mere land surrenders but less than the confederal agreements this thesis will contend that they are.

¹⁶ On the concept of guilt management see Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993), 18-21; Roger Epp, *We Are All Treaty People: Prairie Essays* (Edmonton: University of Alberta Press, 2008), 133.

An understanding of the nature of the southern Numbered Treaties as confederal, then, is necessary precisely because of the lack of historical evidence supporting the assertion that the *Proclamation* was applied in this context. For if the *Proclamation* did not apply (because the Dominion chose not to apply it), what the southern Numbered Treaties mean beyond the framework of the *Proclamation* becomes a question of the utmost importance. While analogy to contracts and the Manitoulin Island and Robinson Treaties have populated the historiography,¹⁷ the analogy of Canadian Confederation and the *Manitoba Act* to treaty—which exists in the historical record, common law, and political theory—is of greater coherence, relevance, and utility.¹⁸ Given that the same forces (namely, British anti-colonial sentiment, American annexationism, Fenianism, and the declining or diminished power of the parties involved) accompanied Confederation, the *Manitoba Act*, and the southern Numbered Treaties, it stands to reason that the analogy (of confederal agreement to treaty) ought to be inverted to understand the southern Numbered Treaties as confederal agreements fundamental to the constitutional structure of Canada. In short, this thesis argues that the *Proclamation* has no direct influence on the nature of the southern Numbered Treaties and that the view of these treaties as confederal (in a similar way that the *British North America Act* and *Manitoba Act* are confederal) is more historically and presently tenable than the prevailing, *Proclamation*-centric renderings of these treaties.

Before one can arrive at this understanding with any satisfaction, they must understand how the *Proclamation* has been invented and reinvented in the historiography of the southern Numbered Treaties. This Introduction does this work. Moving beyond such invention and

¹⁷ For representative examples see Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), 149; and Sheldon Krasowski, *No Surrender: The Land Remains Indigenous* (Regina: University of Regina Press, 2019), 23-25.

¹⁸ *An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba*, SC 1870, c 3 [the *Manitoba Act*]. See the discussion on pp. 24-25 in this chapter.

reinvention does not entail the use of startling new evidence but the application of novel methodologies to the same sources which have concerned contributors to the existing historiography. Once the state of the historiography is accounted for, the sources are identified, and the methodology adopted is explained, a brief overview of the thesis and its key chapters is outlined. It is in the core chapters that the nature of the southern Numbered Treaties will be crystallized via an analysis of the extant historical evidence.

The myths underpinning the (re)invention of the *Proclamation* are firmly entrenched in the historiography of treaty-making in Canada. Two years after the Creating Canada conference—and based on its proceedings—the publication of *Keeping Promises: The Royal Proclamation of 1763, Treaties, and Aboriginal Rights in Canada* kept the state of the historiography in lockstep with public sentiments regarding the positive nature of the *Proclamation* and its application in the context of the southern Numbered Treaties. That the majority of contributions in *Keeping Promises* portrayed the *Proclamation* as an affirmation of “a government-to-government relationship,”¹⁹ is demonstrative of the evolution of the historiography since George F.G. Stanley described the *Proclamation* in 1936 as merely “the acknowledgement of Indian title” leading to “the formal surrender of the same.”²⁰ The more recent historiographical embrace of the *Proclamation* as a positive reinforcement of Indigenous nationhood shares a common lineage with the body of literature that emerged in the 1970s in opposition to the cultural misunderstanding hypothesis reflected in Stanley’s *The Birth of Western Canada: A History of the Riel Rebellions*.

¹⁹ Reflecting on this “government-to-government relationship” pursuant to the *Proclamation* was the stated goal of the Creating Canada conference—which spawned the publication of *Keeping Promises*. Hall, “Royal Proclamation of 1763.” See also Cathy Towtongie and Mitchell Stevens, “Foreword,” in *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada*, eds. Terry Fenge and Jim Aldridge (Montreal & Kingston: McGill-Queen’s University Press, 2015), xxviii.

²⁰ George F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (London: Longmans, Green and Co., 1936), 206.

Until the 1970s, *Birth of Western Canada* was the standard and accepted account of the southern Numbered Treaties. The first challenge to Stanley's authority was made by John Leonard Taylor who, in 1975, argued against the idea that the Dominion initiated and carried out treaty-making in the North-West without meaningful contributions from First Nations.²¹ In 1983, John L. Tobias contended that the Dominion's policy for the North-West was not as far-sighted as Stanley portrayed it to be and that the treaties were negotiated on the initiative of the First Nations.²² D.J. Hall challenged both Stanley's interpretation of Treaty 1 as negotiated in a "serene atmosphere" and Tobias's argument that the Dominion had no plan for negotiating treaties in the North-West upon its acquisition of the same in 1869-70.²³ The contributions of Taylor, Tobias, and Hall served to erode the hold that Stanley's interpretation previously had on the historiography. Each of them, however, left Stanley's view of the *Proclamation* intact.

Neither Tobias nor Hall addressed the *Proclamation*. Taylor found that the *Proclamation* "established the further principle that Indian title could only be extinguished by the Crown at a general meeting of the Indians affected"—a principle that he argued guided the Crown negotiators in the 1870s.²⁴ Thus, even as the cumulative effect of the challenges to Stanley in the 1970s and 1980s was to place greater emphasis on First Nations agency in treaty negotiations by dispelling the myth of Crown/Dominion benevolence, the traditional view of the *Proclamation*—

²¹ John Leonard Taylor, "The Development of an Indian Policy for the Canadian North-West, 1869-79," (PhD dissertation, Queen's University, 1975), 4-5. See also John Leonard Taylor, "Canada's North-West Indian Policy in the 1870s: Traditional Premises and Necessary Innovations," in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991), 208-210.

²² John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885," *Canadian Historical Review* 64, no. 4 (1983): 520-521.

²³ D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited," *Canadian Journal of Native Studies* 4, no. 2 (1984): 322 and 324.

²⁴ Taylor, "Canadian North-West," 271.

as an instrument of Indigenous dispossession—was renewed and upheld.²⁵ Accordingly, the view of the *Proclamation* advanced by Stanley held until it was challenged by John Borrows in the 1990s.²⁶ In his 1997 article, “Wampum at Niagara: The Royal Proclamation of 1763, Canadian Legal History, and Self-Government,” Borrows rejected the view of the *Proclamation* as a unilateral instrument of Indigenous dispossession. Instead, Borrows maintained that the *Proclamation* was ratified by the Treaty of Niagara of 1764—for which 2,000 chiefs from 24 nations located as far west as Mississippi, as east as Nova Scotia, and as north as Hudson’s Bay gathered (with some evidence suggesting the presence of Cree and Lakota representatives).²⁷ When read together, Borrows argued, the *Proclamation* and the Treaty of Niagara serve as Crown recognition of Indigenous sovereignty.²⁸ From this premise, Borrows reasoned that “from 1764 to 1994, principles derived from the Royal Proclamation have provided the procedural rules which govern the treaty-making enterprise in Canada.”²⁹ In tandem with the Treaty of Niagara, the *Proclamation* was, for Borrows, “the most ‘fundamental agreement’ yet entered into between First Nations and the Crown.”³⁰ In the event that the principles of the *Proclamation* were not applied, they must be assumed to apply implicitly.³¹ This statement imbued the *Proclamation* with a blanket applicability across Canada from Borrows’s vantage.

²⁵ There are still instances of this reasoning in recent historiography. See Martin Papillon, “The Two Faces of Treaty Federalism,” in *Canadian Politics*, 7th ed., eds. James Bickerton and Alain-G. Gagnon (Toronto: University of Toronto Press, 2020), 220.

²⁶ Borrows initially made this argument in “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation,” *U.B.C. Law Review* 28, no. 1 (1994).

²⁷ John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: University of British Columbia Press, 1997), 161, 163, and 263n70.

²⁸ Borrows, “Wampum at Niagara,” 169.

²⁹ Borrows, 169.

³⁰ Borrows, 169.

³¹ Borrows, 169-171.

It is difficult to overstate the influence that “Wampum at Niagara” has had on the historiography of the southern Numbered Treaties (and Indigenous-Canadian relations generally). Given the frequency with which its central arguments are reproduced in the literature and the length of time (nearly 30 years) it has enjoyed without being meaningfully challenged, its grasp on the present state of the historiography is as firm as *Birth of Western Canada*’s was on the historiography preceding Taylor, Tobias, and Hall.³² Given the centrality of Indigenous agency in Borrows’s argument, it is reasonable to consider it as part of an historiographical intervention that sought to take the roles and perspectives of First Nations in treaty-making more seriously.

By the 1970s, the analytical frameworks of dependency and passivity began to be replaced by an emphasis on Indigenous agency by scholars of Native-Newcomer Relations.³³ In treaty-making historiography, this trend became discernable in the 1979 book, *The Spirit of the Alberta Indian Treaties*.³⁴ By 1996, *The True Spirit and Original Intent of Treaty 7* combined oral history and the documentary record into a coherent narrative that framed Treaty 7 as a peace treaty rather than as a land surrender.³⁵ The nature of the treaty relationship, in this portrayal, is demonstrative of the fact that First Nations negotiators were historical actors with agency rather than victims of historical circumstances. Having excluded oral history from its analysis, Arthur J.

³² A representative example is Asch, *Here to Stay*, 110. In this text, Asch adopts Borrows’s interpretation of the *Proclamation* and the ‘nation-to-nation’ relationship it embodies as a conceptual basis for justifying the presence of settlers on Indigenous lands. Niigaan Sinclair, *Winipêk: Visions of Canada From an Indigenous Centre* (Toronto: McClelland & Stewart, 2024), 55 is a more contemporary example that demonstrates the prevailing appeal of Borrows’s argument.

³³ See, for example, Arthur J. Ray, *Indians in the Fur Trade: their role as hunters, trappers and middlemen in the lands southwest of Hudson Bay, 1660-1870* (Toronto: University of Toronto Press, 1974).

³⁴ See, for example, John Leonard Taylor, “Two Views on the Meaning of Treaties Six and Seven,” in *The Spirit of the Alberta Indian Treaties*, 3rd ed., ed. Richard T. Price (Edmonton: University of Alberta Press, 1999).

³⁵ Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal & Kingston: McGill-Queen’s University Press, 1996), xi and 112.

Ray, Jim Miller, and Frank J. Tough's *Bounty and Benevolence: A History of Saskatchewan Treaties* constituted an outlier upon its publication at the beginning of the twenty-first century—even if it was intended to cover the documentary record in tandem with Harold Cardinal and Walter Hildebrandt's engagement with oral history in *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations*.³⁶ Read on its own—and as a consequence of its prioritization of the documentary record—*Bounty and Benevolence* serves as a good barometer of the state of the historiography at the turn of the century.

In explaining the legal impetus for treaty-making, *Bounty and Benevolence* perpetuated a tendency that has gone unchecked into the present historiography. Ray, Miller, and Tough described the land rights of First Nations in the North-West as at once an “Aboriginal title” and an “Indian title.”³⁷ The first use of Aboriginal title to describe Indigenous land rights appears to have been in the 1950s by Donald Creighton in *John A. Macdonald: The Old Chieftain*.³⁸ Creighton's use is curious given that his only source on the southern Numbered Treaties was *Birth of Western Canada* which used the term “Indian title.”³⁹ It is possible that Creighton simply substituted the popular nomenclature of the time in much the same way that academics are currently using “Indigenous title.”⁴⁰ By 1975—when “Aboriginal title” was being employed by Taylor—the Supreme Court of Canada (S.C.C.)'s decision in *Calder et al. v. Attorney-General of British Columbia* had germinated in the minds of academics for two years. The idea that

³⁶ Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal & Kingston: McGill-Queen's University Press, 2000), xvi.

³⁷ Ray, Miller, and Tough, *Bounty and Benevolence*, 34 and 51.

³⁸ Donald Creighton, *John A. Macdonald: The Old Chieftain* (Toronto: The Macmillan Company of Canada, 1955), 246.

³⁹ Creighton, *The Old Chieftain*, 368 and 602.

⁴⁰ See, for example, Ted Binnema, *The Vancouver Island Treaties and the Evolving Principles of Indigenous Title* (Toronto: University of Toronto Press, 2025).

Aboriginal title is a legal continuity of Indian title advanced in *Calder* was promptly adopted by academics even as the legal contours of Aboriginal title formed in a manner antagonistic to such a conflation.⁴¹ The later decision in *Delgamuukw v. British Columbia* has failed to dispel the use of Aboriginal title interchangeably with Indian title in spite of the fact that the S.C.C. found that the former exists pursuant to prior occupancy and is only affirmed by the *Proclamation*—while the latter is pursuant to the *Proclamation* and confers only an usufructuary right to land.⁴²

The conflation of Aboriginal title and Indian title has been intertwined with the reinterpretation of the *Proclamation* since “Wampum at Niagara.” In the aftermath of the patriation of the constitution in 1982, the protection of “existing Aboriginal rights” gave rise to the opportunity to re-establish the basis of Indigenous-Canadian relations.⁴³ Self-government became the central pursuit of Indigenous Peoples in this context and attempts to realize such an ideal were thwarted in a series of First Ministers Conferences (FMCs) in the 1980s.⁴⁴ It was in this political moment that “Wampum at Niagara” transformed the *Proclamation* from an instrument of Indigenous dispossession to one affirming Indigenous sovereignty and self-government.⁴⁵

The failure of the FMCs in the 1980s to produce a clear definition of Aboriginal rights in s. 35 of the *Constitution Act* created an opportunity for the judiciary to forge a new path in Aboriginal law and place the principles of Canadian-Indigenous relations on a more equitable

⁴¹ *Calder et al. v. Attorney-General of British Columbia*, 1973 CanLII 4 at p. 314 (SCC), [1973] SCR 313 [*Calder*]. See also Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001), 109.

⁴² *Delgamuukw v. British Columbia*, 1997 CanLII 302 at paras. 112-115 (SCC), [1997] 3 SCR 1010 [*Delgamuukw*].

⁴³ Boldt, *Surviving as Indians*, 28.

⁴⁴ Boldt, 29-30.

⁴⁵ The Royal Commission on Aboriginal Peoples (RCAP) helped sustain the idea of self-government into the 1990s and early 2000s until the ‘reconciliation era’ following the Truth and Reconciliation Commission in 2015. See RCAP, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group – Publishing, 1993).

basis. From the vantage of Menno Boldt, the S.C.C. squandered this opportunity by “reaching not *behind* the Royal Proclamation, but *into* the Royal Proclamation and its regressive colonial standards for their principles of justice” in *R. v. Sparrow*.⁴⁶ Although the S.C.C. has not rejected the finding of underlying Crown title in *Sparrow*, the common law has developed in such a way that Aboriginal title is more expansive by describing a *sui generis* right that is held communally (whereas Indian title was held by the Judicial Committee of the Privy Council (J.C.P.C.) in 1888 to be “personal and usufructuary.”).⁴⁷ It was an usufructuary right to land that most likely would have existed within the “colonial common sense” at the time that the southern Numbered Treaties were negotiated.⁴⁸ Using Aboriginal title in this context imposes a category of land rights that is ahistorical.

That the *Proclamation* was somehow the basis of the southern Numbered Treaties constitutes a comparable distortion of the historical record advanced in *Bounty and Benevolence* and subsequent texts. Ray, Miller, and Tough found Borrows’s argument regarding the *Proclamation* to be persuasive but conceived of the *Proclamation* as “Crown recognition that lands occupied by First Nations... were *in some sense* Indian lands and prescribed that access and title to these lands could legally be obtained only by the Crown.”⁴⁹ Ray, Miller, and Tough

⁴⁶ The court found that the *Proclamation* bears witness to British respect for the right of Indigenous Peoples to occupy their traditional lands but that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.” *R. v. Sparrow*, 1990 CanLII 104 at p. 1103 (SCC), [1990] 1 SCR 1075 [*Sparrow*]; Boldt, *Surviving as Indians*, 32.

⁴⁷ *Delgamuukw* at paras. 112-115. Interestingly (because the consequences remain unclear), the Court found in *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 at para. 69 that “The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763.” How the Crown acquired underlying title via the *Proclamation* independently of the doctrine of *terra nullius* remains unclear.

⁴⁸ On the idea of the “colonial common sense” see Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton: Princeton University Press, 2009), 3.

⁴⁹ Ray, Miller, and Tough, *Bounty and Benevolence*, 34, emphasis added. The vagueness and ambiguity of the phrase ‘in some sense’ are reflective of the authors’ reticence to endorse Borrows’s argument completely and allow them to acknowledge that the *Proclamation* provided some protection of Indigenous lands without specifying what sort of protection this entailed exactly.

quoted extensively from the *Proclamation* but neglected to reproduce the section that conflicts most sharply with their analysis of the historical context prior to the negotiations of treaties.⁵⁰ The omitted clause prohibits governments from “grant[ing] Warrants of Survey, or pass[ing] Patents for any Lands... or upon any Lands whatever, which, not having been ceded to, or purchased by Us, as aforesaid, are reserved to the said Indians, or any of them.”⁵¹ As Ray, Miller, and Tough observed, the treaties negotiated in Saskatchewan in 1874 and 1876 (Treaties 4 and 6) were negotiated after First Nations obstructed the work of telegraph line and Geological Survey crews that were operating in contravention of the *Proclamation*.⁵² Thus, while their own description of what the *Proclamation* means is unclear, its whole application in the context of the southern Numbered Treaties is treated as a fixed fact by Ray, Miller, and Tough.

That the *Proclamation*’s application is now ingrained in the historiography of the southern Numbered Treaties is difficult to dispute. In 2009, Robert J. Talbot implied that Alexander Morris—who negotiated Treaties 3-6 and renegotiated Treaties 1 and 2—was informed by the *Proclamation* in shaping his treaty-making approach though no evidence is provided to directly support such a claim.⁵³ Jill St. Germain reasoned that although the *Proclamation* did not apply in Rupert’s Land by virtue of the *Proclamation*’s terms—an idea that will be dealt with more thoroughly in Chapter 1—“[a]dherence to the principles in the Proclamation of 1763 were fundamental” in the context of Treaty 6.⁵⁴ In contrast, Miller’s *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* neglected to consider the

⁵⁰ Ray, Miller, and Tough, 33-34.

⁵¹ “By the King. A Proclamation,” in Adam Shortt and Arthur G. Doughty, eds., *Documents Relating to the Constitutional History of Canada: 1759-1791 (CHCD)*, rev. and 2nd ed., Part I (Ottawa: J. de L. Taché, Printer to the King’s Most Excellent Majesty, 1918), 167.

⁵² Ray, Miller, and Tough, *Bounty and Benevolence*, 103-104.

⁵³ See Robert J. Talbot, *Negotiating the Numbered Treaties: An Intellectual & Political Biography of Alexander Morris* (Saskatoon: Purich Publishing Limited, 2009), 59, 65, and 136.

⁵⁴ Jill St. Germain, *Broken Treaties: United States and Canadian Relations with the Lakotas and the Plains Cree, 1868-1885* (Lincoln: University of Nebraska Press, 2009), 17.

Proclamation in relation to the southern Numbered Treaties. Given that the *Proclamation* is analyzed in preceding chapters of his book and no argument against the *Proclamation*'s application in the North-West was offered, Miller's omission is more reasonably understood as an assumption of the *Proclamation*'s application in the context of the southern Numbered Treaties rather than as a rejection of the same.⁵⁵ *Compact, Contract, Covenant*, thus, occupies a middle space between the perpetuation of the cultural misunderstanding hypothesis in St. Germain's *Broken Treaties: United States and Canadian Relations with the Lakotas and the Plains Cree, 1868-1885* and the ascendancy of the land sharing hypothesis in Talbot's *Negotiating the Numbered Treaties: An Intellectual & Political Biography of Alexander Morris*.⁵⁶

It is difficult to date the origins of the land sharing hypothesis with any precision. While Talbot's work was certainly innovative within the mainstream historiography, more overt views had been expressed by Sharon Venne in 1997 and by Harold Johnson in 2007.⁵⁷ By 2013, Aimée Craft's *Breathing Life Into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* was not a response to the dominant cultural misunderstanding hypothesis but an addition to the growing strength of the land sharing hypothesis.⁵⁸ A year later, Michael Asch's *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* bolstered the land sharing hypothesis by reconciling European notions of sovereignty and Indigenous kinship practices.⁵⁹ The

⁵⁵ J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009), 109 and 110.

⁵⁶ St. Germain, *Broken Treaties*, xvii and 177-250; Talbot, *Negotiating the Numbered Treaties*, 175. Rather than arguing that the idea of a land surrender was miscommunicated, Miller argued that "it is doubtful the oral version of the agreement had such a sweeping provision" as the blanket extinguishment clause. See Miller, *Compact, Contract, Covenant*, 172.

⁵⁷ Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: University of British Columbia Press, 1997), 191; Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing Limited, 2007), 29.

⁵⁸ Aimée Craft, *Breathing Life Into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing Ltd., 2013), 61.

⁵⁹ Asch, *Here to Stay*, 100-115.

contributions of Craft and Asch were then reinforced in 2019 by Sheldon Krasowski's *No Surrender: The Land Remains Indigenous*—to date the most exhaustive and persuasive contribution within the land sharing hypothesis in terms of its use of the historical record.⁶⁰

Against the torrent of contributions to the land sharing hypothesis in the last two decades, D.J. Hall's *From Treaties to Reserves: The Federal Government and Native Peoples in Territorial Alberta, 1870-1905* is better understood as the last gasp of the cultural misunderstanding hypothesis rather than as a contribution to an historiographical contest between competing hypotheses of roughly equal strength. Despite the tension of their conclusions, Craft, Asch, and Krasowski share a similar understanding of the *Proclamation* with Hall. Craft quoted directly from “Wampum at Niagara” in asserting that the Anishinaabe of Treaty 1 were aware of the *Proclamation*'s provisions and viewed the *Proclamation* as requiring a resolution to the issue of “Indigenous title” in the North-West.⁶¹ Asch reasoned that treaties negotiated between 1763 and 1921—including the southern Numbered Treaties—were negotiated according to the *Proclamation*.⁶² Krasowski explained that the *Proclamation* was seen as an “Indian Magna Carta” and “by the time negotiations of the western Canadian numbered treaties began, the protocols of the Royal Proclamation were well entrenched in government policy.”⁶³ Hall argued that the principles of the *Proclamation* applied in the context of the southern Numbered Treaties even though it did not apply in Rupert's Land.⁶⁴ Thus, while the authors discussed may differ drastically in their conclusions and marginally in their

⁶⁰ A particular strength of *No Surrender* is Krasowski's use of eyewitness accounts of the negotiations (including newspapers) to demonstrate that a surrender was not discussed by negotiating parties. See Krasowski, *No Surrender*, 272-275.

⁶¹ Craft, *Stone Fort Treaty*, 32-33 and 44.

⁶² Asch, *Here to Stay*, 74.

⁶³ Krasowski, *No Surrender*, 3-4.

⁶⁴ D.J. Hall, *From Treaties to Reserves: The Federal Government and Native Peoples in Territorial Alberta, 1870-1905* (Montreal & Kingston: McGill-Queen's University Press, 2015), 43.

understandings of the *Proclamation*, the practical application of the *Proclamation* to the context of the southern Numbered Treaties is uncontested.

That such a consensus can be reached between proponents of both the land sharing hypothesis and the cultural misunderstanding hypothesis is demonstrative of how the *Proclamation* has persisted while other elements of the historiography have receded or vanished. A year before “Wampum at Niagara,” Boldt observed that Canada’s “history books are filled with myths to abate Canadians [sic] guilt over unconscionable actions towards Indians.”⁶⁵ Generations of historians have devoted their careers to disabusing Canadians of such myths.⁶⁶ The initial historiographical responses by Taylor, Tobias, and Hall successfully dismantled the notion of Crown/Dominion benevolence in the treaty-making process. Since Stanley offered no evidence in support of the idea that the southern Numbered Treaties were negotiated according to the policy “which had governed the relations between the whites and the Indians since the days of Sir William Johnson”, the *Proclamation*’s whole application in the context of these treaties constitutes a similar myth, or an invention, of the historiography.⁶⁷ Rather than reject the *Proclamation*’s whole application in the context of the southern Numbered Treaties, “Wampum at Niagara” and subsequent texts have reinvented the *Proclamation* with no greater support from the historical record. Consequently, the *Proclamation* (within the historiography of the southern Numbered Treaties) has assumed the character of an historiographical trap which has ensnared even the most competent of historians.

⁶⁵ Boldt, *Surviving as Indians*, 20.

⁶⁶ A particularly influential contribution in this regard (though not directly relevant to the scope of this thesis) was Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal & Kingston: McGill-Queen’s University Press, 1990) which contested the prevailing idea that farming on reserves failed due to First Nations apathy or antipathy towards agriculture.

⁶⁷ Stanley, *Birth of Western Canada*, 206.

Precisely how this trap functions may constitute a separate study in its own right. For the purposes of this thesis, it is necessary to understand only its fundamental aspects. First, what might be called the “*Proclamation* trap” persists not because historians have malevolently and intentionally distorted the historical record. On the contrary, since the earliest contributions to the historiography, the *Proclamation*’s whole application in the context of the southern Numbered Treaties has been assumed. It is this assumption that continues to be reproduced across time and schools of thought even as the meaning of the *Proclamation* changes. The second aspect of the *Proclamation* trap is its basis in the historiography. In other words, this thesis does not portend to analyze the essential character (whether good or bad) of the *Proclamation* (nor does it call for an abandonment of the *Proclamation* in treaty-making historiography generally) but instead to challenge its assumed whole application by historians of the southern Numbered Treaties in order to place the basis of the treaty relationship on a footing that is both more historically and presently coherent.

The persistence of the *Proclamation* within the historiography is not a reflection of its stature in the historical record. On the contrary, the sources which historians have utilized in making their arguments have too often been misunderstood or distorted in order to support the perceived fundamental myth of the *Proclamation*’s influence. The papers of John A. Macdonald, Alexander Morris, and Adams G. Archibald, for examples, give no indication that those Canadian and Crown authorities involved in the treaty-making process understood their actions as informed, promoted, or inhibited by the *Proclamation*. Similarly, the *Canada Sessional Papers* and the *House of Commons Debates* of Canada are nearly silent about the *Proclamation* altogether in the 1860s and 1870s.⁶⁸ The *Papers of Sir William Johnson, Documents Relative to*

⁶⁸ This near silence is addressed and explored more thoroughly in Chapter 1.

the Colonial History of the State of New York, and Documents Relating to the Constitutional History of Canada have been utilized to testify to the application of the *Proclamation*.⁶⁹ There is just as much evidence within these collections that the *Proclamation*'s application was not timeless but subject to the appetite of British (and later Canadian) authorities to enforce its terms. This thesis will be as concerned with secondary (historiographical) materials as it will be with primary documentary evidence. In other words, the analysis in this thesis is both historiographical and evidentiary. Dislodging the *Proclamation* from its position within the historiography of the southern Numbered Treaties does not require a disavowing of the evidence that has solidified that position but the application of different methodologies to the same evidence.

Having discussed the relevant literature, it is necessary to describe the methodologies that will be utilized in this thesis. As a methodological tool, First Nations agency is fundamental to a proper understanding of the southern Numbered Treaties. However, historians have often been too concerned with demonstrating that such agency existed than with explaining what the nature of this agency is.⁷⁰ Perry Anderson's classification of agency into individual, pursuit of social goals, and pursuit of global social transformation offers a remedy to this lacuna.⁷¹ The first two classes of agency (individual and social) are of immediate import in seeking to understand why and through what means First Nations and Crown negotiators engaged in negotiations with each other. Agency, of course, is not exercised without constraint. Some Marxist theorists have

⁶⁹ See, for example, Brian Slattery, "The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories," (PhD dissertation, Oxford University, Wadham College, 1979), 472, 475, and 476.

⁷⁰ In this regard, the contributions from Taylor and Tobias loom large for their emphasis on the role of First Nations in initiating the treaty-making process and their active involvement in negotiations without engaging in a discussion of how to understand such expressions of agency as a methodology. See Taylor, "Canadian North-West," 3; Tobias, "The Plains Cree," 519-522; Taylor, "Treaties Six and Seven," 40.

⁷¹ In Alex Callinicos, *Making History: Agency, Structure, and Change in Social Theory* (Leiden: Brill Academic Publishers, 2004), 1-2.

interpreted structures as the modifying force on the expression of agency.⁷² However, in the context of the southern Numbered Treaties the exercise of agency by First Nations and the Dominion was limited by the duress under which these agents were operating (principally, the decline of the fur trade economy, and its attendant consequences, in the case of the former and financial and military limitations in the case of the latter).⁷³ Some historians and settler-colonial studies scholars have framed their analyses around the concept of settler anxiety to explain the actions of non-Indigenous governments in relation to Indigenous Peoples—particularly when the latter is sufficiently powerful to jeopardize the interests of the former.⁷⁴ In the context of the southern Numbered Treaties, not only were the *interests* of the Dominion threatened by Indigenous resistance but the very continuity of the nascent Canadian state was put at risk. As Chapter 2 will demonstrate, it was not exclusively (nor primarily) the safety of the few actual settlers and the many prospective settlers (though this was certainly a factor) that was at risk. Accordingly, the analytic of settler anxiety is substituted for that of duress.

In restoring agency to First Nations in the context of the southern Numbered Treaties, Talbot has argued that historians have portrayed Crown negotiators as monolithic “classic imperialist[s].”⁷⁵ Talbot pushed back against such broad strokes—most persuasively in

⁷² See Callinicos, *Making History*, xxix.

⁷³ Chapter 2 will address these manifestations of duress in more detail. The collapse of the bison by 1879—which had concerned First Nations negotiators throughout the treaty-making process—and the oft-quoted fact that the Dominion’s entire budget in the 1870s was \$19 million (at a time when the United States was expending \$20 million on Indian Wars annually) are representative examples of such duress. See Carter, *Lost Harvests*, 69; James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013), 183-184; Asch, *Here to Stay*, 155.

⁷⁴ See Kenton Storey, *Settler Anxiety at the Outposts of Empire: Colonial Relations, Humanitarian Discourse, and the Imperial Press* (Vancouver: University of British Columbia Press, 2016); Sean Carleton, *Lessons in Legitimacy: Colonialism, Capitalism, and the Rise of State Schooling in British Columbia* (Vancouver: University of British Columbia Press, 2022), 48-76; Sarouche Razi and Amy Hamilton, “Skeletons in the cupboard: reading settler anxiety in *Mabo* and *Love*,” *Griffith Law Review* 32, no. 4 (2023).

⁷⁵ Talbot, *Negotiating the Numbered Treaties*, 15—in this instance, Talbot was responding to Jean Friesen’s evaluation of Morris. See Jean Friesen, “Morris, Alexander,” *Dictionary of Canadian Biography*, 1982, https://www.biographi.ca/en/bio/morris_alexander_11E.html.

describing how Morris differed fundamentally in his understanding of how the treaties should be implemented from Department of the Interior personnel.⁷⁶ Talbot's intervention was reinforced by Asch in *On Being Here to Stay*.⁷⁷ As important as Morris's personal agency is to understanding the treaties, he is only one of three principal Crown negotiators alongside Wemyss M. Simpson and David Laird—the latter two of whom also understood the treaty relationship in ways that did not always conform with the Dominion's implementation of the same.⁷⁸ Thus, an explanation is needed for how individual behaviour (of Morris, Simpson, and Laird) interacts with political/diplomatic roles (that of Crown negotiator). In this pursuit, recognizing that structures act in conflict as much as in cooperation can explain how Crown negotiators exercised agency in the negotiation of the southern Numbered Treaties—and how representatives of the Crown sought to, could have, or still can preserve the treaty relationship against the actions of the legislature.⁷⁹ This “structural agency” manifests itself most effectively in the exercise of the Crown's prerogative power and the divisibility of the Crown's authority—even when the Crown itself was believed to be unitary.⁸⁰

⁷⁶ Talbot, 154.

⁷⁷ Asch, *Here to Stay*, 161.

⁷⁸ Ray, Miller, and Tough noted that Simpson—who negotiated Treaties 1 and 2—accepted the understanding of Treaty 1 communicated to signatories of Treaty 2 by other First Nations. The understanding of Treaty 1 and Treaty 2 First Nations of the treaty relationship would come sharply into conflict over the issue of ‘Outside Promises’ made at the negotiations and the Dominion's failure to fulfill them. See Alexander Morris, *Treaties of Canada the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Calgary: Fifth House Publishers, 1991), 127; Provincial Archives of Manitoba (PAM), P5279/10, Alexander Morris (Lieutenant-Governor's Collection) Fonds, E.A. Meredith to Morris, 5 November 1873, 548; Ray, Miller, and Tough, *Bounty and Benevolence*, 59 and 68. For Laird's part, he agreed with Morris's view of the “necessity of placing the management of the Treaties 1, 2 + 3 on a better footing than at present existed [in 1875]” and preserved Morris's role in treaty implementation against attacks from Indian Affairs personnel. See PAM, P5283/1, Alexander Morris (Lieutenant-Governor's Collection) Fonds, Laird to Morris, 8 July 1875, 1034; Talbot, *Negotiating the Numbered Treaties*, 154.

⁷⁹ See Asch, *Here to Stay*, 159-160.

⁸⁰ D. Michael Jackson, *The Crown and Canadian Federalism* (Toronto: Dundurn Press, 2013), 61-73; Asch, *Here to Stay*, 159.

The denial of agency to Crown negotiators exists in tandem with the propagation of the myth that there are fractured understandings of the treaties. Some historians maintain that Crown negotiators could not understand certain protocols of treaty-making.⁸¹ Such a claim is an impediment to the idea that First Nations and Crown negotiators were able to share a common view of the treaty relationship even as interpretations were not always perfect. It is an objective of this project to demonstrate the weakness of such a claim and establish that the treaty relationship is not only characterized by an agreement to share the land but also by a generally clear understanding between negotiating parties.

Deciphering precisely what the negotiators agreed to threatens to be as divisive in the historiography as whether or not they had the ability to agree. Many contributions have described the southern Numbered Treaties as historical events. The southern Numbered Treaties certainly fit the definition of historical events described by William H. Sewell Jr. as causing transformations of structures in (Canadian) society.⁸² However, conceiving of the southern Numbered Treaties as establishing sets of relationships eludes the connotations of the static and fixed historical event. The idea of the treaty relationship also accords with a growing theoretical body of literature that emphasizes relationality—which in the context of the southern Numbered Treaties centres the ideas of respect, reciprocity, and sharing rather than specific treaty terms.⁸³

⁸¹ Both Taylor and Robert Alexander Innes argued that Morris was incapable of comprehending the significance of the pipe-stem ceremony. See Taylor, “Treaties Six and Seven,” 18; Robert Alexander Innes, *Elder Brother and the Law of the People: Contemporary Kinship and Cowessess First Nation* (Winnipeg: University of Manitoba Press, 2013), 64.

⁸² William H. Sewell Jr., “Historical Events as Transformations of Structures: Inventing Revolution at the Bastille,” *Theory and Society* 25, no. 6 (December 1996): 843. <https://www.jstor.org/stable/657830>.

⁸³ In addition to Johnson’s *Two Families*, see Aaron Mills, “What Is a Treaty? On Contract and Mutual Aid,” in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, eds. Michael Coyle and John Borrows (Toronto: University of Toronto Press, 2017), 223-226. Gina Starblanket has extended the methodology of relationality to historical scholarship relating to treaty historiography. See Gina Starblanket, “Crises of Relationship: The Role of Treaties in Contemporary Indigenous-Settler Relations,” in *Visions of the Heart: Issues Involving Indigenous Peoples in Canada*, 5th ed., eds. Gina Starblanket and David Long with Olive Patricia Dickason (Don Mills: Oxford University Press, 2019).

That relationality is both theoretically and historically coherent is demonstrated by the language employed by negotiators to explain the treaty relationship. That is, a relationship between the Queen (Great Mother) and the First Nations (her red children)—as it was often described at the time.⁸⁴

Relational language has also been employed to describe relations between provinces in Confederation. A.R.M. Lower described Confederation as a “marriage” between French and English partners while Richard Gwyn used the idea of the Queen as the “Great White Mother” to describe the bond among the British North American colonies.⁸⁵ In this respect, the historiographies of the southern Numbered Treaties and Confederation converge. Both historiographies have also relied heavily on individuals to communicate their interpretations. In the historiography of Confederation, John A. Macdonald has loomed largest of all as an example of the persistence of the “great man” theory of history—even after the turn from political to social history in English Canadian historiography in the 1970s.⁸⁶ Morris—at least to some extent—fills the role of the great man in the historiography of the southern Numbered Treaties while individuals such as Henry Prince, Big Bear, Mistawasis, Ahtakhakoop, and Crowfoot are used in a similar way in what Susan M. Hill described as the “Big Chief” theory of history.⁸⁷ Individuals certainly loom large in the history of both the *Proclamation* and the southern Numbered Treaties, but it is the political systems and circumstances that they operated within

⁸⁴ Ray, Miller, and Tough, *Bounty and Benevolence*, 103.

⁸⁵ Arthur R.M. Lower, *Colony to Nation: A History of Canada* (Toronto: Longmans, Green & Company, 1957), 333; Richard Gwyn, *John A.: The Man Who Made Us: The Life and Times of John A. Macdonald, 1815-1867*, vol. 1 (Toronto: Random House of Canada, Vintage Canada, 2007), 370.

⁸⁶ On this historiographical turn see Larry A. Glassford, “The Evolution of ‘New Political History’ in English-Canadian Historiography: From Cliometrics to Cliodiversity,” *American Review of Canadian Politics* 32, no. 3 (2002).

⁸⁷ Susan M. Hill, *The Clay We Are Made Of: Haudenosaunee Land Tenure on the Grand River* (Winnipeg: University of Manitoba Press, 2017), 2.

that this thesis argues best explains the nature of the relationships such individuals worked to establish and foster.

The dangers of relying too heavily on individuals to communicate interpretations are evident in the historiography of Confederation. Two of Macdonald's main biographers (Creighton and Gwyn) have discredited the compact theory of federalism simply because Macdonald favoured a legislative union.⁸⁸ However, as Ged Martin reminds us, Macdonald was not in complete control of the political landscape in what became Canada.⁸⁹ Further to this point, if Macdonald was in complete control, it is unclear why his vision of a legislative union was not realized in the place of a federation with a strong central government. In making the argument that the southern Numbered Treaties constitute confederal agreements, the analogy being made is to that idea of Confederation championed by proponents of provincial rights—which envisions Confederation as a treaty between its constituent parts (the compact theory).⁹⁰ The analogy made by proponents of the compact theory (that Confederation is a treaty-like agreement between the colonies that later became provinces within Canada) is essentially inverted in this thesis. The confederal analogy (that the southern Numbered Treaties are of a nature tantamount to the *British North America Act* and *Manitoba Act*), thus, does not construct the treaty relationship as actually confederal but instead as confederal-like—a concept that is explored more fully in Chapter 3.

The analogy to Canadian Confederation has been leant credibility in the historical record, jurisprudence, and political theory. Not only has similar language been utilized by thinkers of both Confederation and the treaty relationship but those directly involved in bringing

⁸⁸ Creighton, *The Old Chieftain*, 473; Gwyn, *John A.*, 346n2; Richard Gwyn, *Nation Maker: Sir John A. Macdonald: His Life, Our Times: 1867-1891*, vol. 2 (Toronto: Random House Canada, 2012), 70. Gwyn offered a slightly more nuanced analysis than Creighton that is discussed more substantively in Chapter 3.

⁸⁹ Ged Martin, "Understanding Macdonald: Reviewing a Biographical Project," in *Macdonald at 200: New Reflections and Legacies*, eds. Patrice Dutil & Roger Hall (Toronto: Dundurn Press, 2014), 420.

⁹⁰ Jackson, *Canadian Federalism*, 96.

Confederation to fruition in the 1860s (including Macdonald) described the arrangement between the provinces as “in the nature of a treaty.”⁹¹ Later, the S.C.C. found in *Manitoba Metis Federation Inc. v. Canada (Attorney General)* that the *Manitoba Act* (and s. 31 in particular) constitutes a treaty.⁹² The confederal analogy can also be thought of as a variant of the treaty federalism model which peaked in the same era of mega-constitutional politics that produced the FMCs and the associated self-government movement.⁹³ More recently, Indigenous Studies scholar and political scientist Adam Gaudry has given an historiographical dimension to the idea of the *Manitoba Act* as treaty—though he argues that it is only a ratification of a treaty between the Dominion and the Métis.⁹⁴ This thesis builds upon Gaudry’s conception of the *Manitoba Act* as ratifying a treaty relationship. It is not immediately clear why the analogy made by Gaudry cannot be inverted and the southern Numbered Treaties conceptualized as confederal agreements in a more consequential manner than the current constitutional protections accorded to Aboriginal rights.⁹⁵

The idea that the Indigenous parties to the southern Numbered Treaties were nations has risen consistently in popularity. The appeal of such an idea is that it confers on these groups a

⁹¹ Quoted in Gwyn, *John A.*, 346. Lord Carnarvon, who guided the *British North America Act* through the British legislature, and C.B. Adderley, the junior minister for the colonies, also referred to Confederation as a treaty. HL Deb 19 February 1867, vol 185, col 558; HL Deb 28 February 1867, vol 185, col 1165; *An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith*, 1867 (UK), c 3 [the *British North America Act*].

⁹² *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at paras. 71 and 128 [Manitoba Metis Federation].

⁹³ On treaty federalism, see James Henderson Youngblood, “Empowering Treaty Federalism,” *Saskatchewan Law Review* 58 (1994); Papillon, “Treaty Federalism.”

⁹⁴ Adam Gaudry, “Are the Metis Treaty People?” January 7, 2016, University of Winnipeg, Weweni Indigenous Scholars Speaker Series, Winnipeg, Manitoba, 1:04:03, YouTube, <https://www.youtube.com/watch?v=oU8b5QFB53g>.

⁹⁵ Namely, s. 25 of the *Charter of Rights and Freedoms* which protects “any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired” from abrogation by the *Charter* and s. 35 which recognizes and affirms “existing” Aboriginal rights. *Canadian Charter of Rights and Freedoms*, s 25, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Constitution Act*, 1982, s 35, being Schedule B to the *Canada Act 1982* (UK), c 11.

level of parity and equality with their treaty partners. Within the last few decades, so powerful has the idea of nationhood been that ‘First Nations’ has become the accepted and popular nomenclature to describe both individuals and groups of people previously described as Indian(s)—terminology that is retained in particular instances where alternatives would distort the historical record (e.g. ‘Indian title’).⁹⁶ However, when the thesis refers to “First Nations” on either side of the present-day Canada-U.S. border, “Indigenous peoples” will be used instead to avoid political connotations associated with the term “First Nations” in Canada. In the interests of consistency and clarity, historical identifiers will be used instead of present ones (e.g. Plains Cree instead of *nêhiyawak*) when referring to specific groups. It should also be understood that sovereignty—in the context of the southern Numbered Treaties—was exercised by bands (often multicultural in composition) that entered into the treaty relationship.⁹⁷ Thus, the commonplace rhetoric of a “nation-to-nation” relationship between First Nations and Canada is discarded in favour of a sovereign-to-sovereign relationship—a concept that better recognizes the many forms which sovereignty can take and the ability of Confederation to accommodate them.

Understanding the treaty relationship itself has eluded a uniform approach. Many competent studies have focused their analyses on treaties they consider exceptional or useful.⁹⁸ Consequently, most of the southern Numbered Treaties have accumulated their own historiographies—with the most expansive being those of Treaties 1 and 6 and the least being

⁹⁶ Gregory P. Younging, *Elements of Indigenous Style: A Guide for Writing by and About Indigenous Peoples* (Edmonton: Bush Publishing, 2018), 63, emphasis added.

⁹⁷ See Innes, *Elder Brother*, 70.

⁹⁸ Beyond the southern Numbered Treaties, Treaty 9 and the 1923 Williams Treaties—among others—have accumulated their own respective historiographies. See Peggy J. Blair, *Lament for a First Nation: The Williams Treaties of Southern Ontario* (Vancouver: University of British Columbia Press, 2008); John S. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal & Kingston: McGill-Queen’s University Press, 2010).

Treaty 2 which has no independent scholarship of its own.⁹⁹ While these case study approaches are often innovative and informative, they just as frequently fail to capture the fact that the southern Numbered Treaties were part of a uniform historical process and that they cannot be considered independently of each other. Accordingly, the treaty bundle approach—rooted as it is in Indigenous epistemology—is adopted in this study over the case study approach.¹⁰⁰

The use of Indigenous methodologies and epistemologies has invigorated the land sharing hypothesis. While the ideas of relationality and the treaty bundle approach are central to this study, it is (importantly) not conceived of as a work of Indigenous history for the simple fact that the treaty relationship does not exclusively (nor even primarily) concern Indigenous Peoples.¹⁰¹ Further, it is Canadians that benefit most from the treaty relationship (as it is the basis of their existence in what became Western Canada). Therefore, the southern Numbered Treaties properly belong to the field of Canadian history.¹⁰² This project is undertaken through the subdisciplines of political history (insofar as it concerns actors operating within political systems and circumstances), legal history (insofar as the actions of historical actors are shaped by legal

⁹⁹ See, for examples, S. Raby, “Indian Treaty No. 5 and The Pas Agency, Saskatchewan, N.W.T.,” *Saskatchewan History* 25, no. 3 (1973); Hall, “‘A Serene Atmosphere?’”; Brian Walmark, “Alexander Morris and the Saulteaux: The Context and Making of Treaty Three, 1869-73,” (MA thesis, Lakehead University, 1993); Venne, “Understanding Treaty 6.”; Treaty 7 Elders and Tribal Council, et. al., *Treaty 7*; Asch, *Here to Stay*. A modest effort has been made at correcting the overlooking of Treaty 2. See Jack Joseph Nestor, “Treaty 2/The Manitoba Post Treaty (1871),” *Manitoba Historical Society*, 2026, <https://mhs.mb.ca/docs/events/treaty2.shtml>.

¹⁰⁰ Krasowski, *No Surrender*, 2. See also Andrew George, “The Ochapowace Reserve: The Impact of Colonialism,” (MA thesis, First Nations University of Canada, University of Regina, 2009), 108-109.

¹⁰¹ The popularly used phrase that “we are all treaty people” recognizes this fact. See Miller, *Compact, Contract, Covenant*, 308-309.

¹⁰² While this thesis is thought of as a work of Canadian history, there is a significant body of literature by Indigenous thinkers that discusses the complexities of Indigenous Peoples navigations with the state. See, for examples, Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) and John Borrows, “Canada’s Colonial Constitution,” in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, eds. John Borrows and Michael Coyle (Toronto: University of Toronto Press, 2017), 20—the latter in which Borrows argues that “[a]ny compromise with colonialism causes us to be compromised by colonialism.” An interrogation of the ways in which Indigenous Peoples have invoked the *Proclamation* (and the ramifications, both positive and negative, of these invocations) lies beyond the scope of this study. Perhaps the biggest compliment that could be paid to the present work would be for future scholars to investigate these matters in the context of the southern Numbered Treaties specifically.

constraints), comparative history (insofar as the central argument rests on the analogy of the southern Numbered Treaties to Confederation), and alternative history.¹⁰³

Given the potential controversy of this lattermost approach—alternative history—a more thorough explanation is required. While alternative history may carry connotations of historical fiction and the distortion of the historical record, recognizing that history does not progress on a linear and pre-determined chain may reveal facets of the past that are otherwise consigned to oblivion.¹⁰⁴ In *The Audacity of His Enterprise: Louis Riel and the Métis Nation That Never Was, 1840-1875*, M. Max Hamon reasoned that while “we now know that the story [of Louis Riel] would end in failure, Riel did not.”¹⁰⁵ Applying this reasoning to the southern Numbered Treaties we might say that observers in the twenty-first century know that these treaties have not been implemented as confederal agreements, but that they were not (or cannot be) thought of as such was not evident at the time of their negotiations. Indeed, given the centrality of Confederation in Canadian history and the roles that Morris played in bringing both Confederation and the southern Numbered Treaties to fruition, the idea that the southern Numbered Treaties might be of a comparable nature to Confederation is both historically tenable and presently intelligible.¹⁰⁶ In the same vein, the pursuit of an historically tenable construction of the southern Numbered

¹⁰³ With regard to legal history, the distinction between the *de jure* sovereignty asserted by the Dominion in 1870 and the *de facto* sovereignty it failed to exercise in the absence of treaty is particularly important. See Asch, *Here to Stay*, 40.

¹⁰⁴ For commentary on this approach (sometimes referred to as conjectural or counterfactual history) see Eric Hobsbawm, *On History* (London: Weidenfeld & Nicolson, 1997), 80; Richard J. Evans, *Altered Pasts: Counterfactuals in History* (Waltham: Brandeis University Press, Historical Society of Israel, 2013), xv-xviii.

¹⁰⁵ M. Max Hamon, *The Audacity of His Enterprise: Louis Riel and the Métis Nation That Canada Never Was, 1840-1875* (Montreal & Kingston: McGill-Queen's University Press, 2019), 212.

¹⁰⁶ Including the initial confederal compact in 1867, Confederation has been at the forefront of Canadian history in the Rowell-Sirois Commission of 1937-1940, Quebec sovereignty/separatism, and the mega-constitutional era in the decades after the patriation of the constitution. See Edward McWhinney, *Quebec and the Constitution, 1960-1978* (Toronto: University of Toronto Press, 1979), xi; Peter H. Russell, “The End of Mega Constitutional Politics in Canada?” *Political Science and Politics* 26, no. 1 (1993): 33; Robert Alexander Wardhaugh and Barry Ferguson, *The Rowell-Sirois Commission and the Remaking of Canadian Federalism* (Vancouver: University of British Columbia Press, 2021), 10. On Morris's role in Confederation see Creighton, *The Old Chieftain*, 309; Talbot, *Negotiating the Numbered Treaties*, 42-48.

Treaties need not be constrained by the common law if the common law contradicts the historical record.

Discerning the state of the common law and statutory law in the context of the southern Numbered Treaties requires a deviation from the historian's natural impulse to consider all factors (social, economic, political, etc.) bearing on the historical actors' understanding of the law. The contextualist approach to constructing statutes lends remarkably well to this impulse and may be valuable to studies on the forces shaping the law.¹⁰⁷ However, the contextualist approach is not appreciative of the fact that the textualist approach to constructing statutes was dominant in the period of the southern Numbered Treaties.¹⁰⁸ Therefore, in order to understand the thoughts of the historical actors involved with respect to the legal obligations of the Dominion, the adoption of the same approaches to construing statutes with which these actors were familiar—rather than an approach that accounts for the external forces acting upon these actors—is necessary.¹⁰⁹

Dislodging the *Proclamation*'s place in the historiography of the southern Numbered Treaties requires a thorough analysis of its formulation and enforcement. Accordingly, Chapter 1 is devoted to studying the *Proclamation* in three distinct periods. The first period is demarcated by the drafting of the *Proclamation* in 1761 to its alteration in the Treaty of Fort Stanwix in 1768. The second period concerns notable violations of the *Proclamation* including trespassing

¹⁰⁷ On the contextualist approach in Canada see Shalin Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability," *Dalhousie Law Journal* 22, no. 1 (1999): 134-153.

¹⁰⁸ See G. Blaine Baker and Jim Phillips, "Introduction," in R.C.B. Risk, *A History of Canadian Legal Thought: Collected Essays*, eds. G. Blaine Baker and Jim Phillips (Toronto: Osgoode Society for Canadian Legal History, University of Toronto Press, 2006), 15; Bradley Miller, "The Framers Refuted: Originalism and Constitutional Meaning After 1867," *Borealia: Early Canadian History*, last updated September 5, 2017, <https://earlycanadianhistory.ca/2017/06/30/the-framers-refuted-originalism-and-constitutional-meaning-after-1867/>.

¹⁰⁹ That understanding the thoughts of historical actors was possible and even preferable was the position taken in Robert F. Berkhofer Jr., *A Behavioral Approach to Historical Analysis* (New York & London: The Free Press, Collier-MacMillan Limited, 1969), 7-26.

on Iroquois territory in 1773 (in violation of the Fort Stanwix Treaty) to violations of treaty-making protocol and resource extraction in advance of treaty-making in the territories of the Manitoulin Island (1836) and Robinson Treaties (1850) respectively.¹¹⁰ The third period extends from the Dominion's formation in 1867 and acquisition of the North-West in 1868-70 to the clarification of the *Proclamation's* terms and the meaning of Indian title in the J.C.P.C.'s decision in *St. Catherine's Milling and Lumber Company v. The Queen (Attorney-General of Ontario)* in 1888.¹¹¹ The analysis in Chapter 1 will demonstrate that the *Proclamation* gradually disappeared from the colonial common sense of Indian policy architects and administrators by the time the Dominion acquired the North-West.

Precisely why the Dominion entered into treaties with the First Nations of the North-West in the 1870s is a question which eludes a clear answer. It is the objective of Chapter 2 to offer the most persuasive answer that can be derived from the extant historical evidence. The forces that led the Dominion and the Crown negotiators to the negotiating table are varied and intertwined. Accordingly, the linear analysis of conventional history is replaced by a thematic analysis of the British anti-colonial sentiment, American annexationist impulses, Fenian activity, the relative power of Indigenous Peoples in the North-West, and the Dominion's own weakness. Since the *Proclamation* did not inform the treaty-making process in the North-West, it is unlikely that the southern Numbered Treaties were intended to be procedural extinguishments of Indian title. Taken together, the five identified themes indicate that the Dominion was forced to the

¹¹⁰ The 1862 Manitoulin Island Treaty had the effect of reversing the protectionist policy pursued via the first treaty in 1836. See Karl S. Hele, "Manitoulin Island Treaty 1862," *Canadian Encyclopedia*, last updated August 14, 2023, <https://thecanadianencyclopedia.ca/en/article/manitoulin-island-treaty-1862>. Though the histories of the 1836 and 1862 treaties are intertwined, the comparison to the southern Numbered Treaties is usually drawn directly to the 1862 treaty. See Krasowski, *No Surrender*, 89.

¹¹¹ *St. Catherine's Milling and Lumber Company v. The Queen (Attorney-General of Ontario)* (1888), 14 A.C. 46 (J.C.) [*St. Catherine's*, J.C.] in Richard A. Olmsted, *Decisions of the Judicial Committee of the Privy Council Relating to the British North America Act, 1867 and the Canadian Constitution, 1867-1954*, vol. I (Edmond Cloutier, Queen's Printer and Controller of Stationery, 1954), 236-263.

negotiating table because it could not exercise sovereignty in the North-West without these treaties.

That the Dominion was forced to the negotiating table leads one to the conclusion that the southern Numbered Treaties are confederal agreements. Chapter 3 concerns the nature of these treaties in greater detail than can be entertained in the Chapter 2. Among the various themes considered are: the authority of Crown negotiators relative to the Dominion, the terms agreed to by the negotiators of the treaties, the similarities of the circumstances of both Confederation and the southern Numbered Treaties, and the responsibilities of the partners of Confederation (that is, the Dominion, the provinces, and the First Nations signatories of the southern Numbered Treaties). Chapter 3 lays bare how the existing portrayals of the southern Numbered Treaties—usually anchored in the *Proclamation*—cannot stand and must be replaced by an understanding of these treaties as fundamental components of Canada’s constitutional structure. This is accomplished by testing prevailing configurations of the treaty relationship and their outcomes against the historical record and the potential for what the treaty relationship ought to be today.

The ramifications of this thesis are greater than a mere historiographical clarification. Indeed, the argument that the *Proclamation* did not bear upon the negotiations of the southern Numbered Treaties offers a way out of the trap in which the subject’s historiography has been ensnared. As much as the *Proclamation* has aided in the establishment of Indigenous land rights (particularly in territories not covered by historic treaties), the “*Proclamation* trap”—to borrow and slightly alter the titular phrase of Ian McKay and Jamie Swift’s *The Vimy Trap: Or, How We Learned to Stop Worrying and Love the Great War*—has also served the interests of the Canadian state in its pursuit to legitimize land theft in what is now Western Canada.¹¹² If the *Proclamation*

¹¹² On the application of the *Proclamation* in territories not covered by historic treaties, see Slattery, “Land Rights of Indigenous Canadian Peoples,” 281-282 and 314-361; Patricia Margaret Hutchings, “The Argument for the

is maintained as a factor in the context of the southern Numbered Treaties, Canada is able to argue that it exists only as a procedural impediment to the inevitable settlement of Western Canada. If, however, the *Proclamation* is removed from the analysis of the southern Numbered Treaties—as the historical record suggests it should be—Canada must reckon with the fact that these treaties are more than simple real estate transactions (mired by misunderstandings or not) and move towards a configuration of the treaty relationship that better accords with the nature of these treaties as confederal agreements.

Application of the Royal Proclamation of 1763 to British Columbia: Its Force and Effect,” (LLM thesis, University of British Columbia, 1984).

Chapter 1: The Evolution of the *Proclamation* in Three Periods of Treaty-Making

The *Proclamation*'s current popularity has given the impression that it has remained in force and effect since it was issued on October 7, 1763. In reality, the *Proclamation*'s practical force and effect went through three distinct periods prior to its most recent (re)invention in the historiography. Too often—as the historiography discussed in the Introduction indicates—the *Proclamation* has been described as both a pervasive and persistent instrument that is interwoven into the history of Indigenous-Canadian relations. The *Proclamation* is treated as a constant feature of the colonial common sense of British and Canadian officials. Ann Laura Stoler's conception of colonial common sense accounted for the capacity of this common sense to change “as imperial orders changed.”¹ In other words, administrators of Indian policy applied or failed to apply the *Proclamation* according to their own interests and these interests changed over time. Similarly, Murray Sinclair observed that the Crown “simply forgot, conveniently perhaps, but simply forgot about the *Royal Proclamation* and the importance of it.”² This chapter traces the historical evolution of the *Proclamation* from a foundational instrument in British colonial policy to a document that managed to largely escape the consciousness of Indian policy architects and administrators by the time of Confederation. In doing so, the prevailing view of the *Proclamation* as a positive and persistent instrument in the history of treaty-making in Canada will be challenged.

Understanding the decline of the *Proclamation*'s importance as a feature of British/Canadian Indian policy over time is best realized by studying the instrument in three

¹ Stoler, *Along the Archival Grain*, 3.

² Murray Sinclair, “Justice Murray Sinclair on the Royal Proclamation of 1763,” March 16, 2015, Chippewas of Rama First Nation, Rama, Ontario, 30:50, YouTube, <https://www.youtube.com/watch?v=dSQsyZDGoX0>.

distinct and discontinuous periods. This approach allows for an appreciation of how the *Proclamation's* meaning and importance shifted according to its application through both time and space. While the Pontiac Uprising of 1763 is closely associated with the formation of the *Proclamation*, the first period is demarcated by the draft instructions issued to colonial governors in 1761 and the Treaty of Fort Stanwix in 1768.³ This initial period was characterized by British attempts to soothe tense relations with Indigenous peoples by enforcing the *Proclamation*. By 1773, both the *Proclamation* and the Treaty of Fort Stanwix were rarely enforced and marked the nadir of the *Proclamation* in treaty-making in North America that continued into the negotiations of the Robinson Treaties of 1850. It was in this second period (spanning nearly 80 years) that the decline of the *Proclamation* may be most acutely observed. The terminal points of the third period are Canadian Confederation in 1867 (and the subsequent entry of the North-West into it in 1868-70) and the decision of the J.C.P.C. in *St. Catherine's* (J.C.) in 1888. By the time of Confederation, fidelity to the *Proclamation* had declined so severely that when the Dominion inherited responsibilities for settling Indian land claims, Dominion administrators were without any cognizance or understanding of the *Proclamation*. When Confederation was realized in 1867, the Dominion demonstrated a nearly absolute lack of awareness of the *Proclamation* which it did not emerge from until the second half of the 1880s when the *Proclamation* served its interests in the *St. Catherine's* (J.C.) decision. While the influence of the *Proclamation* on the historiography of the southern Numbered Treaties (and Canadian historiography generally) is significant, its sustained importance is not reflected in the historical record.

For as large as the shadow of the *Proclamation* has loomed over Canadian history, historian Hilda Neatby argued that it properly belongs to American history. After all, as Neatby

³ On the correlation between the Pontiac Uprising and the *Proclamation*, see McDonnell, *Masters of Empire*, 230-232.

pointed out, the events that prompted it (or at least gave immediacy to its drafting) occurred entirely in what is now the United States, most of the Indian territory created by the *Proclamation* was in the US, and it was American financial and territorial interests that were immediately threatened by the *Proclamation*'s limitations on westward expansion.⁴ Moreover, the *Proclamation*'s earliest historiographical years were dominated by American contributions. Clarence W. Alvord's "The Genesis of the Proclamation of 1763" and *The Mississippi Valley in British Politics* constituted thorough and largely successful attempts at explaining the drafting of the *Proclamation*.⁵ Clarence Edwin Carter's *Great Britain and the Illinois Country, 1763-1774* further clarified the drafting of the *Proclamation*.⁶ Between the works of Alvord and Carter the process by which the *Proclamation* assumed its final form was (and remains) well-documented.

When British (and subsequently Canadian) historians began to consider the *Proclamation* in historical context, their analyses were confined either to the drafting of the *Proclamation* itself or to its effects on the French-Canadian population of Canada and the constitutional history of Canada.⁷ The English historian R.A. Humphreys, for example, left the crux of Alvord's and Carter's findings intact but disputed the notion that Lord Shelburne—President of the Board of Trade (the Board) from April to September 1763—crafted a version of the *Proclamation* that was

⁴ Hilda Neatby, *Quebec: The Revolutionary Age, 1760-1791* (Toronto: McClelland and Stewart Limited, 1977), 16. See also Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006), 60; Andrew Roberts, *The Last King of America: The Misunderstood Reign of George III* (New York: Penguin Books, 2021), 125.

⁵ Clarence W. Alvord, "The Genesis of the Proclamation of 1763," *Michigan Pioneer and Historical Society Collections* 36, no. 20 (1908); Clarence Walworth Alvord, *The Mississippi Valley in British Politics: A Study of the Trade, Land Speculation, and Experiments in Imperialism Culminating in the American Revolution*, vols. I and II (Cleveland: Arthur H. Clark Company, 1917).

⁶ Clarence Edwin Carter, *Great Britain and the Illinois Country, 1763-1774* (Washington: The American Historical Society, 1910).

⁷ Neatby's own text appears to be one of the first written by a Canadian. Her principal source for her information relating to the *Proclamation* is Jack M. Sosin, *Whitehall and the Wilderness: The Middle West in British Colonial Policy, 1760-1775* (Westport: Greenwood Press Publishers, 1960)—written by an American historian.

manipulated by other parties after Shelburne's departure.⁸ For Shelburne and his contemporaries, Humphreys explained, the issues associated with the *Proclamation* were a consequence of Governor James Murray's poor implementation of its terms in the Province of Quebec.⁹ Humphreys argued that "the story of the wicked uncles [Lord Halifax, Charles Yorke, and John Pownall] ruining the more cautious policy of the young earl of Shelburne is a myth."¹⁰ Neatby came to a similar conclusion, stating that "[i]n spite of changes of ministers in Britain and alarming events in the summer on the western frontier, it was issued, unaltered, in the form of a proclamation in October" after the policy "was agreed on in the spring of 1763."¹¹

The first period of the *Proclamation*'s history spans from the formation of the policy eventually articulated in the *Proclamation* itself in the 1760s to the alteration of the Proclamation Line by the Treaty of Fort Stanwix in 1768. Fidelity to the terms of the *Proclamation* reached its zenith in the years immediately after its promulgation. There is little reason to dispute the claim that the *Proclamation* remained unaltered after the spring of 1763 as Neatby suggested. That the general policy was agreed upon as late as the spring of 1763 seems certain but that this was the beginning of that policy is doubtful. As early as December 9, 1761, the Board had prepared draft instructions for the governors of its existing North American colonies which "upon pain of Our highest Displeasure and of being forthwith removed from your or his office" prohibited governors, their lieutenant governors, presidents of the council or commanders-in-chief from making grants of land "within or adjacent to the Territories possessed or occupied by the said

⁸ R.A. Humphreys, "Lord Shelburne and the Proclamation of 1763," *The English Historical Review* 49, no. 194 (April 1934): 241.

⁹ Humphreys, "Lord Shelburne," 242.

¹⁰ Humphreys, 258.

¹¹ Neatby, *The Revolutionary Age*, 9.

Indians or the Property Possession of which has at any time been reserved to or claimed by them.”¹² These ideas were rearticulated in the *Proclamation* itself two years later.¹³

Two years prior to the draft instructions, the negotiations of the Treaty of Easton were complicated by the Delaware chief Teedyuscung’s complaints regarding improperly surrendered lands.¹⁴ Teedyuscung informed Superintendent William Johnson’s deputy, George Croghan, that land was being sold by Indigenous parties that had no right to sell it. To rectify the issue, Teedyuscung proposed a territory in the Wyoming Valley which could be neither sold by the Delaware nor purchased by others.¹⁵ For his part, Croghan agreed to have Johnson investigate the matter of improprieties in land surrenders.¹⁶ Teedyuscung’s request was assented to at Easton in 1757 but was disputed by the Iroquois who argued that the Delaware only had access to those lands with their permission.¹⁷ The Iroquois were equally threatened by, and dissatisfied with, encroachments on their land by British settlers.¹⁸

¹² “Proclamation of 1761” in Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2nd ed. (Toronto: The Indian-Eskimo Association of Canada, General Publishing Co. Limited, 1973), 285.

¹³ The resemblance of the Draft Instructions was so striking that when it was re-published in *Native Rights in Canada*, it was identified as “Proclamation of 1761.” See Cumming and Mickenberg, *Native Rights in Canada*, 285.

¹⁴ The purpose of this treaty was to negotiate peace with some factions of Indigenous peoples while also assuring them that their lands would be protected after the victory over the French. See Calloway, *Scratch of a Pen*, 93; James H. Merrel, “‘I desire all that I have said... may be taken down aright’: Revisiting Teedyuscung’s 1756 Treaty Council,” *The William and Mary Quarterly* 63, no. 4 (October 2006): 777.

¹⁵ *Journal of Captain George Croghan, and Treaty of Easton, &c., 1757* In E.B. O’Callaghan and Berthold Fernow, eds., *Documents Relative to the Colonial History of the State of New York (NYCD)*, vol. VII (Albany: Weed, Parsons and Company, Printers, 1868), 302.

¹⁶ *Treaty of Easton* in *NYCD*: VII, 305.

¹⁷ The agreement reached at Easton in 1757 appears to have been preliminary to the treaty concluded the following year. In his communication to William Johnson following the agreement, Croghan stated he would “not wonder if I hear of their [Delaware] committing fresh hostilities on his Majesty’s Subjects” in spite of the peace brokered. See *Treaty of Easton* in *NYCD*: VII, 323. The relationship between the Delaware and Iroquois was tributary in nature. In 1756, Canachquayēsa (an Oneida sachem) asserted that the Delaware were his children and belonged to him as evidenced by the “several bags of Wampum which they have sent to me...” Canachquayēsa instructed Johnson not to interfere with the Delaware any further because of the relationship that existed between them and the Iroquois. *Journal of Sir William Johnson’s Proceedings with the Indians*, November 19, 1756 in *NYCD*: VII, 233. See also Anthony F.C. Wallace, *King of the Delawares: Teedyuscung, 1700-1763* (Philadelphia: University of Pennsylvania Press, 1949), 193.

¹⁸ *Sir William Johnson’s Remarks respecting Purchase of Lands from the Indians* in *NYCD*: VII, 329.

Accordingly, Johnson's investigation into the claims of Teedyuscung was undertaken in concert with an investigation into similar claims by the Iroquois.¹⁹ Johnson's investigation yielded a series of remarks or observations including the testimony of John Morris—who fled captivity from the Delaware—which corroborated Teedyuscung's complaints of land theft. Morris informed Johnson that the Delaware believed that “the people of [the] Pensilvania (sic) Government cheated [them] out of” their lands “and drove them from their settlement at Shamokin by crowding upon them, and by that means spoiled their hunting.”²⁰ Morris added that the Delaware complained that “the people of Minisinck used to make the Indians always drunk whenever they traded with them and then cheated them out of their furs and skins, [and] also wronged them with regard to their lands.”²¹ With respect to the Iroquois, Croghan clarified that he “never understood from any of the Six Nations that they deemed the Lands West of the Susquehana as a purchase, but rather as a Deed of Trust.”²²

After considering the testimony of Morris and Croghan with respect to the claims of the Delaware and Iroquois, Johnson reasoned that the Government of Pennsylvania's actions were “impolitick (sic)” and argued that “Unless the Province of Pensilvania (sic) is both able and willing to maintain their land pretentions by force of arms against the Indians” it would be prudent to abandon the deed of sale for lands claimed in the province of Pennsylvania and “to fix with the Indians in the best manner they can the bounds for their settlements, and make them Guaranties (sic) to it.”²³ Thus, it is evident that by the time Lord Egremont asked the Board on May 5, 1763 to consider the best means of preserving “the internal Peace & Tranquility of the

¹⁹ See *Johnson's Remarks* in NYCD: VII, 329-333.

²⁰ *Johnson's Remarks* in NYCD: VII, 332.

²¹ *Johnson's Remarks* in NYCD: VII, 332.

²² *Johnson's Remarks* in NYCD: VII, 332.

²³ *Johnson's Remarks* in NYCD: VII, 333.

Country against any Indian Disturbances”, the general principles regarding land purchases from Indigenous peoples were already established in the minds of British bureaucrats and administrators in northeastern North America.²⁴

A few months after Egremont’s letter to the Board, Johnson informed them of the Pontiac Uprising in his letter of July 1, 1763. In the same letter, Johnson emphasized the importance of resuming the practice of gift-giving—suspended as it was by Commander-in-Chief Jeffrey Amherst—to prevent the Iroquois from joining Pontiac’s alliance which had already captured the posts of Sandusky, St. Joseph, Miamis, Michilimackinac, Venango, LaBoeuf, and Presque Isle.²⁵ The Board acknowledged receipt of Johnson’s letter on September 29, 1763 though Alvord reasoned that the Board likely became aware of the conflict much earlier as mention is made of “the actual Disturbances” in a letter to Egremont on August 5, 1763.²⁶ The Board was sufficiently concerned by the Pontiac Uprising that it urged the King to issue a Proclamation immediately to declare “Your Majesty’s fixed Determination to permit no grants of land nor any settlements to be made within certain fixed Bounds.”²⁷

While the Pontiac Uprising may have elevated the status of the *Proclamation* from Royal Instructions, the contours of its terms with respect to Indian lands had already taken shape by the time the Board became aware of it. In its response to Egremont on June 8, 1763, the Board recommended establishing an “Indian Country” around the Great Lakes which would be free for trade, but within which grants and settlements would be prohibited.²⁸ The policy formulated by

²⁴ Egremont to Lords of Trade, May 5, 1763 in *CHCD*: I, 128.

²⁵ Sir William Johnson to the Lords of Trade, July 1, 1763 in *NYCD*: VII, 526. On Amherst’s suspension of gift-giving see David R. Farrell, “‘To Keep Them in Proper Subjection’: Jeffrey Amherst and the Indians,” *Man and Nature* 4 (1985): 163. On the capturing of the forts identified see Calloway, *Scratch of a Pen*, 71.

²⁶ Lords of Trade to Johnson, September 29, 1763 in *NYCD*: VII, 567; Representation of the Lords of Trade, August 5, 1763 in *CHCD*: I, 152; Clarence Walworth Alvord, *Mississippi Valley*, 187-188n334.

²⁷ Representation in *CHCD*: I, 152.

²⁸ “Report on Acquisitions in America,” June 8, 1763 in *CHCD*: I, 140.

the Board on June 8 was accepted by the King but it was thought advisable to assign jurisdiction over civil matters in the Indian territory to the governor of another colony to prevent criminals and fugitives from taking refuge in the Indian Country.²⁹ The Board considered the matter and on August 5 reasoned that doing so would be inadvisable because it would give the impression that the territory was acquired through cession by France, it could place the governing colony in a position of privilege over others with respect to trade, and that the laws passed by the governing colony could not be enforced without making the governor of that colony the effective commander-in-chief of the American forces.³⁰ On September 19, Halifax communicated the King's approval of the Board's reasoning. The King also assented to the Board's request for a Proclamation but added that other items—including a general prohibition of “private Purchases of Lands from Indians”—were advisable.³¹

In accordance with Halifax's letter, the Board prepared a draft Proclamation on October 4, 1763 that was read before the Privy Council on October 5.³² The *Proclamation* was issued under the Great Seal on October 7, 1763 and this fact was communicated to the Board the following day by Halifax who instructed the Board to transmit copies of the *Proclamation* to the colonial governors and Indian agents in North America.³³ While the *Proclamation*'s anniversary is recognized as October 7, it was not transmitted by the Board until October 10 and Johnson did not acknowledge its receipt until January 20, 1764.³⁴ In July and August of the same year, Johnson set about implementing the *Proclamation* at Fort Niagara.

²⁹ Egremont to the Lords of Trade, July 14, 1763 in *CHCD*: I, 148.

³⁰ Representation in *CHCD*: I, 151-152.

³¹ Lord Halifax to the Lords of Trade, September 19, 1763 in *CHCD*: I, 153-154.

³² Lords of Trade to Halifax, October 4, 1763 in *CHCD*: I, 156-157.

³³ Halifax to Lords of Trade, October 8, 1763 in *CHCD*: I, 163.

³⁴ Calloway suggested that the *Proclamation* was detained until October 11 to allow for printed copies to be sent to America—a view shared by Alvord. Alvord, *Mississippi Valley*, 203; Calloway, *Scratch of a Pen*, 94. In his letter of January 20, 1764, however, Johnson acknowledges receipt of the Board's letter of “10th October last... inclosing me His Maj^{ty}'s (sic) Proclamation of the 7th of that month, to which I have paid all due regard, and caused

The Treaty of Niagara of 1764, and the historiography it has accumulated, have served to further confuse the existing labyrinth of the *Proclamation*'s authorship. Not only did the poor implementation of the *Proclamation* prompt those connected with its drafting to disclaim authorship, but the number of individuals connected to its drafting is considerable.³⁵ It is proposed that each Egremont, Halifax (as Secretary of State for the Northern Department), Shelburne, Lord Hillsborough (who succeeded Shelburne as President of the Board from September 1763 to July 1765), and Pownall (Secretary of the Board) were directly involved in the process.³⁶ Some commentators have described the *Proclamation* as though it were King George III's in both fact and form.³⁷ However, his suggestion to assign the civil government of the Indian territory to the governor of another North American colony—and his relenting to the Board's opinion to the contrary—appears to be the extent of his direct contributions to the *Proclamation*.³⁸ Minor contributions were made by Maurice Morgann whose stance, according

them to be reprinted and made publick (sic), agreeable (sic), to your orders, throughout my Jurisdiction." Johnson to Lords of Trade, January 20, 1764 in *NYCD*: VII, 599.

³⁵ According to Alvord, "severe criticism of the measure and the consciousness that a horrible blunder had been committed caused those who were responsible for it to hide their identities. No one was willing to acknowledge himself the writer of the proclamation." Alvord, *Mississippi Valley*, 209. Shelburne himself, according to Humphreys, was "ambiguously silent both as to his connexion with this document and as to his opinion of it." Humphreys, "Lord Shelburne," 242.

³⁶ Alvord described Hillsborough as an interpreter of the *Proclamation* rather than an author while Shelburne and Pownall were its principal authors. See Alvord, *Mississippi Valley*, 200-201n361. Humphreys explained that Egremont provided an outline and details of a plan for the future policy of America. Humphreys, "Lord Shelburne," 247. With little supporting analysis, Andrew Roberts argued that "Lord Halifax (who for thirteen years had been First Lord of Trade and Plantations) issued a proclamation to prevent the American colonists' westward settlement." Andrew Roberts, *Last King of America*, 124.

³⁷ See Victoria Freeman, "The Royal Proclamation and Colonial Hocus-Pocus: a learned treatise," *Active History: History Matters*, last updated October 4, 2013, <https://activehistory.ca/blog/2013/10/04/the-royal-proclamation-and-colonial-hocus-pocus-a-learned-treatise/>.

³⁸ It is possible that George III's conscious effort to be more actively involved in the operations of government than his grandfather (George II) and great-grandfather (George I), and his well-documented anti-colonial sentiments (particularly after the American Revolution), contributed to the view that the *Proclamation* was more literally than figuratively his. See V.H.H. Green, *The Hanoverians, 1714-1815* (London: Edward Arnold (Publishers) Ltd., 1963), 304 and 347; Stanley Ayling, *George the Third* (St. James Place, London: Collins, 1972), 58-60; John Brooke, *King George III* (New York: McGraw-Hill Book Company, 1972), 309. Brooke added that George III had a tendency to accept the advice of his cabinet "even against his own opinion." Brooke, *King George III*, 309. Thus, George III was somewhere between an autocrat and figurehead and it is possible that he assumed a posture towards the Board of Trade that was similar to that which he held towards his cabinet.

to Humphreys, was the most liberal of all connected to the *Proclamation*.³⁹ It is possible that authorities in North America influenced the terms of the *Proclamation*.⁴⁰ However, Johnson did not reply to the Board's request for information of August 5, 1763 until November 13 and 18, 1763.⁴¹ Humphreys noted that Henry Ellis's "Hints relative to the Division and Government of the conquered and newly acquired territories in America" were almost entirely adopted into the *Proclamation* and that he is considered its author for this reason.⁴²

Until Borrows's intervention in 1997, the above analysis might be considered a satisfactory conclusion to the question of the *Proclamation*'s authorship. However, Borrows's claim that the *Proclamation* (when read together with the Treaty of Niagara) constitutes a treaty between Britain and the Indigenous peoples present at Fort Niagara (rather than a unilateral declaration of Britain), compels one to consider the 2,000 chiefs from 24 nations present at Niagara as authors of the *Proclamation*.⁴³ The volume of thinkers who have accepted Borrows's analysis is suggestive of the historiographical weight behind such a claim of authorship.⁴⁴ Borrows's detractors in general have been few and their basis for challenging his analysis have been weak. The only direct challenge to Borrows is found in Tom Flanagan's *First Nations?*

³⁹ Humphreys, "Lord Shelburne," 247.

⁴⁰ Henry Ellis (whose contributions are discussed at some length by Humphreys) is predominant. See Humphreys, "Lord Shelburne," 246. However, Calloway observed that by 1763 both Indigenous Peoples and colonists were arguing for boundaries to separate themselves from the other. See Calloway, *Scratch of a Pen*, 81.

⁴¹ See Johnson to the Lords of Trade, November 13, 1763 in NYCD: VII, 535 and 572-584.

⁴² Humphreys, "Lord Shelburne," 246. The "Hints" drafted by Ellis can be found in Vernon W. Crane, "Hints Relative to the Division and Government of the Conquered and Newly Acquired Countries in America," *Mississippi Historical Review* 8, no. 4 (March 1922): 370-373.

⁴³ Borrows, "Wampum at Niagara," 155 and 161-163. See also Nathan Tildridge, *The Queen at the Council Fire: The Treaty of Niagara, Reconciliation, and the Dignified Crown in Canada* (Toronto: Dundurn Press, 2015), 49-60.

⁴⁴ The contributions in Terry Fenge and Jim Aldridge, eds., *Keeping Promises: The Royal Proclamation, Aboriginal Rights, and Treaties* (Montreal & Kingston: McGill-Queen's University Press, 2015) are demonstrative of this point. Indeed, it is easier to demonstrate this point by reference to a notable outlier in Ghislaine Otis who noted that the *Proclamation*'s "deeply imperial and colonial nature is sometimes overlooked or downplayed by those who prefer not to dwell on the way in which the First Peoples were robbed of their international status as independent nations." See Ghislaine Otis, "The Impact of the Royal Proclamation of 1763 on Quebec: Then and Now," in *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada*, eds. Terry Fenge and Jim Aldridge (Montreal & Kingston: McGill-Queen's University Press, 2015), 75.

Second Thoughts. Flanagan found that Borrows's argument—that the *Proclamation* amounts to a treaty—"seems far-fetched to me."⁴⁵ Flanagan failed to substantiate his disagreement in sound evidence and analysis. Accordingly, the only extant critique of Borrows's analysis is, in fact, no critique at all. Beyond Flanagan's personal sensibilities and opinions, there are good reasons to question Borrows's analysis and measure its validity against closer scrutiny.

The most fundamental of these reasons is the inconsistent use of Indigenous agency by Borrows. Borrows reasoned that Indigenous power was substantial enough that when the Articles of Capitulation were drafted at the conclusion of the Seven Years' War its terms reflected the interests of Indigenous peoples as if they had been there when they were drafted.⁴⁶ It is unclear why the *Proclamation*'s terms would not have similarly reflected their interests and required ratification at Niagara since Indigenous power would not (and, if the Pontiac Uprising is any indication, did not) decline significantly in the years between the Articles of Capitulation in 1760 and the *Proclamation* in 1763.⁴⁷ In other words, if the Articles of Capitulation protected Indian land rights because Indigenous peoples were sufficiently powerful despite not being present at their signing, it would stand to reason that the *Proclamation* would similarly protect the rights of Indigenous peoples without requiring modification or ratification at Niagara. Notwithstanding this inconsistent use of Indigenous agency, Borrows perceptively argued that the *Proclamation*

⁴⁵ Tom Flanagan, *First Nations? Second Thoughts* (Montreal & Kingston: McGill-Queen's University Press, 2000), 212n23.

⁴⁶ Borrows, "Wampum at Niagara," 158. Borrows is referring here to the Articles of Capitulation of Montreal which provided that "The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chuse (sic) to remain there; they shall not be molested on any pretense whatsoever, for having carried arms, and served his most Christian Majesty." "Articles of Capitulation (Translation)," in *CHCD*: I, 33.

⁴⁷ Indeed, if British authorities had begun to forget the power of Indigenous peoples after the Seven Years' War, they were starkly reminded by Johnson in July 1763 when participants in the Pontiac Uprising attacked British posts. See Daniel K. Richter, "Native Americans, the Plan of 1764, and the British Empire That Never Was," in *Cultures and Identities in Colonial British America*, eds. Robert Olwell and Alan Tully (Baltimore: John Hopkins University Press, 2006), 364n27.

reflects contradictory perspectives of asserting Crown sovereignty over “Indian lands” and protecting those same lands.⁴⁸ At most, the Treaty of Niagara constitutes a ratification of the *Proclamation*; at least, it offers an interpretive paradigm to make sense of the contradictory provisions of the *Proclamation*.

Such an interpretive paradigm is rendered exceedingly relevant and helpful by the ambiguity and vagueness of the *Proclamation*’s terms with respect to Indigenous peoples and their land rights. At once the *Proclamation* portends to protect Indigenous lands from encroachment and assert ultimate sovereignty over Indigenous peoples and their lands. Sinclair argued that the protection offered by the Crown’s assumption of ultimate sovereignty was, in fact, a protection against nothing.⁴⁹ Further, Sinclair—and historian John W. Shy in his study of the British military in North America immediately prior to the American Revolution—observed that the Treaty of Paris limited (if it did not remove) the threat of interference by other imperial powers (namely, France and Spain).⁵⁰ It remained only for Britain to protect its colonial possessions in North America from local threats.⁵¹ To this end, preventing encroachments on Indigenous lands would serve to mitigate the possibility of violence and bloodshed between Indigenous peoples and colonists. In this context, the fact of Indigenous power relative to the British in the eighteenth century and the nature of the agreement reached at Niagara in 1764—that is, a recognition of Indigenous sovereignty and land rights—suggests that the former principle of protecting Indigenous lands takes precedent over the latter principle of asserting ultimate sovereignty. A legal reading of the *Proclamation*—wherein the text of the *Proclamation*

⁴⁸ Borrows, “Wampum at Niagara,” 159-160.

⁴⁹ Sinclair, “Royal Proclamation.”

⁵⁰ John W. Shy, *Toward Lexington: The Role of the British Army in the Coming of the American Revolution* (Princeton: Princeton University Press, 1965), 55; Sinclair, “Royal Proclamation.”

⁵¹ Shy, *Toward Lexington*, 56.

itself is authoritative over the Treaty of Niagara (which might constitute *contemporanea expositio* evidence)—is unequivocal with respect to the supremacy of the objective of asserting Crown sovereignty over protecting Indian land rights.⁵² The *Proclamation* did not seek to protect Indigenous sovereignty over their lands but rather:

to reserve under Our Sovereignty, Protection, and Dominion, for the *use* of the said Indians, all the Lands 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, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid...⁵³

Thus, in the same sentence, the *Proclamation* asserted ultimate sovereignty over the Indian territory established and recognized an usufructuary right of Indigenous peoples in that territory. Slaterry's observation that "the same attention should be devoted to the language used in each distinct provision of the *Proclamation* as would be normally given to the individual sections of a statute" should be heeded when interpreting the *Proclamation*.⁵⁴ Failing to do so may produce the idea that the *Proclamation* applies only to the geographic spaces described as falling within the Indian territory.⁵⁵ Applying this interpretive rule leads to the conclusion that the *Proclamation*'s protection of unceded Indian lands extends beyond the Indian territory to any unceded lands. Consider the paragraph succeeding the description of the Indian territory which instructs "all Persons whatever, who have wilfully or inadvertently" settled within the Indian territory or "upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid" to remove themselves from their settlements.⁵⁶

⁵² See Slaterry, "The Land Rights of Indigenous Canadian Peoples," 216.

⁵³ "By the King. A Proclamation," in *CHCD*: I, 167, emphasis added.

⁵⁴ Slaterry, "Land Rights of Indigenous Canadian Peoples," 212.

⁵⁵ See the discussion below at pp. 60-63 for this misconception in historiography. In jurisprudence, the S.C.C. found in *Sigeareak El-53 v. The Queen*, 1966 CanLII 70 at para. 650 (SCC), [1966] SCR 645 that the "Proclamation does not and never did apply in the region in question [Rupert's Land] and the judgements to the contrary are not good law." See also Slaterry, "Land Rights of Indigenous Canadian Peoples," 211-212.

⁵⁶ "Proclamation," in *CHCD*: I, 167.

Applying the interpretive rule described above indicates that unceded lands are reserved for the *use* of Indigenous peoples both within and beyond the Indian territory.

In addition to the geographical scope of, and nature of the land rights protected by, the *Proclamation*, the temporal application of the *Proclamation* is not made explicit. However, because the *Proclamation* contains no provisions placing an expiration on its legal effect and because no competent legislative body has wholly nullified its legal effect (a claim which will be scrutinized more carefully below), the *Proclamation* remains valid in perpetuity.⁵⁷ The legal lifetime of the *Proclamation* does not necessarily correspond with the intentions of its drafters or the behaviour of those tasked with enforcing its provisions.

Borrows's analysis of the *Proclamation* and Treaty of Niagara as applying to "all subsequent and future treaties" is consistent with the continued legal validity of the *Proclamation* but creates the false perception that its terms were, or were understood to be, inviolable.⁵⁸ Among those to challenge this perception of the *Proclamation* were Colin G. Calloway and Susan M. Hill. Calloway argued that "the British also fully intended to keep moving the line of separation [drawn along the Allegheny Mountains] westward" and noted that even as speculators were frustrated by the *Proclamation*, "[s]ettlers could, and did, ignore the Proclamation Line."⁵⁹ For her part, Hill argued that the *Proclamation* was almost immediately violated in 1764 when the Seneca gifted the Sugar Islands to Johnson.⁶⁰ A closer reading of Hill's source for this claim (the *Papers of Sir William Johnson*) reveals that Johnson declined the gift precisely because it

⁵⁷ On these points see Kenneth M. Narvey, "The Royal Proclamation of 1763 of 7 October 1763, the Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company," *Saskatchewan Law Review* 38 (1974): 123 and 224-225.

⁵⁸ Borrows, "Wampum at Niagara," 169-170.

⁵⁹ Calloway, *Scratch of a Pen*, 98. Calloway also reasoned that given his reputation for insincerity it was probable that Shelburne "had no intention of permanently halting the westward expansion of the colonies." Calloway, 94.

⁶⁰ Hill, *The Clay We Are Made Of*, 124.

violated the *Proclamation*'s rule that Indian land could only be surrendered at a public meeting with a representative of the Crown or a governor of a proprietary colony.⁶¹ That British officials intended to enforce this provision of the *Proclamation* (at least initially) was made clear by Halifax's letter to Amherst of October 19, 1763 in which he instructed Amherst to enforce the policy forbidding private purchases of Indian land.⁶²

The case law produced in relation to British efforts to enforce the *Proclamation* in the years immediately after its promulgation is limited but instructive. On December 27, 1766, for instance, Marie Joseph Philebot's petition for a grant of 22,000 acres in the Restigouche region of Quebec was dismissed because "the Lands so prayed to be assigned are, or are claimed to be the property of the Indians, and as such by His Majestys (sic) express command as set forth in his proclamation in 1763, *not within their power to grant*."⁶³ On August 26, 1767, the Board upheld a grant of land secured privately by Johnson from the Mohawk on the basis that the transaction occurred prior to the *Proclamation*. The Board clarified, however, that had the transaction occurred after the *Proclamation*'s promulgation, "it is clear beyond a Doubt that such a proceeding would have been expressly Disallowed as Contrary to the Letter of the said proclamation..."⁶⁴

⁶¹ In a letter dated August 15, 1765 to John Vaughan, Johnson stated that the Seneca did "publicly (sic) make me a Present of all the Islands in the Streight from the Great Falls to Lake Erie... but as I thought very little of their Gift, nor ever possessed any Land, but what I formerly bought from the *White Inhabitants*, I Judged it might prove more useful to the Government..." Johnson added that the "only Method of Obtaining Lands at present" was to secure a grant from the government after a public surrender from the affected Indigenous party. To illustrate this point, Johnson noted that a group of colonists was forced to relinquish a grant of 10,000 acres given them by Amherst. Milton W. Hamilton, ed., *The Papers of Sir William Johnson*, vol. XI (Albany: University of the State of New York: 1953), 894-895, emphasis in original.

⁶² Halifax to Sir Jeffrey Amherst, October 19, 1763 in *NYCD*: VII, 571.

⁶³ Quoted in Slaterry, "Land Rights of Indigenous Canadian Peoples," 309, Slaterry's emphasis.

⁶⁴ In James Munro, ed., *Acts of the Privy Council of England, 1745-1766*, vol. IV (Nendeln: Kraus Reprint Ltd., 1966), 750; Slaterry, "Land Rights of Indigenous Canadian Peoples," 310-311.

A year after Johnson's private purchase was confirmed, and four years after the Treaty of Niagara ratified the *Proclamation*, the *Proclamation* was modified by the Treaty of Fort Stanwix in 1768. According to historian Daniel K. Richter, the Treaty of Fort Stanwix was a remnant of a larger plan for the reconstruction of Indian Affairs devised in 1764—the majority of which was scrapped by Hillsborough in his capacity as Secretary of State for the Colonies as Britain sought to limit expenditures after a costly war.⁶⁵ The effect of the Treaty of Fort Stanwix was to modify the Proclamation Line established along the Allegheny Mountains by pushing it westward to the Ohio River.⁶⁶ While the new line was envisioned as a hard boundary on further westward settlement, the years subsequent to the Treaty of Fort Stanwix were characterized by Britain's diminishing willingness and ability to enforce the *Proclamation* and the Fort Stanwix line—demonstrative of the fact that the terms of the *Proclamation* were not understood to be constant by British authorities.

While the willingness of Britain to enforce the *Proclamation* was not as weak as Hill suggested, its capacity to enforce it became exceedingly limited. The Stamp Act crisis of 1765—in which trading licenses were refused by Governor Henry Moore of New York—fostered contempt for British authorities and colonists sought to undermine the regulations on trade with Indigenous peoples.⁶⁷ Johnson found himself unable to evict a squatter on Mohawk land in 1766.⁶⁸ Calloway noted that in 1767, Indigenous peoples complained that there were “more incroachments (sic) on their Country, than ever they had before.”⁶⁹ By 1773—only a decade after

⁶⁵ Richter, “Plan of 1764,” 291.

⁶⁶ Hill, *The Clay We Are Made Of*, 125-126.

⁶⁷ Richter, “Plan of 1764,” 289. Michael A. McDonnell observed that the expenses from the Treaty of Niagara matched the sum that British authorities hoped to raise through the Stamp Act. See McDonnell, *Masters of Empire*, 236.

⁶⁸ Johnson to the Earl of Shelburne, December 16, 1766 in *NYCD*: VII, 881; Richter, “Plan of 1764,” 289-290.

⁶⁹ Calloway, *Scratch of a Pen*, 98.

the *Proclamation* was issued and only five years after the Treaty of Fort Stanwix—Croghan estimated that 60,000 non-Indigenous settlers were squatting beyond the Fort Stanwix line.⁷⁰ In the same year, Lord Dartmouth (Secretary of State for the Colonies) reasoned that “There is no longer any Hope of perfecting that plan of Policy in respect to the interior Country, which was in Contemplation when the Proclamation of 1763 was issued.”⁷¹ As Hill reasoned, the “failure of the 1768 Fort Stanwix Treaty... became another reminder of the Crown’s inability, or unwillingness, to protect [Iroquois] interests, even when promised under the most solemn of agreements.”⁷²

In the years after the violation of the Treaty of Fort Stanwix in 1773, the *Proclamation* entered into a second period characterized by its declining importance that persisted through to the Robinson Treaties of 1850. The decline of the *Proclamation* can be partially explained by the fact that colonists were not daunted by the *Proclamation*’s provisions against settlement on unceded lands. According to political scientist Richard L. Merritt, after rumours circulated of the content of the *Proclamation* prior to its promulgation, the colonial press dropped coverage of the *Proclamation* because its terms were viewed as unenforceable.⁷³ However, the boundary on westward settlement frustrated endeavours of colonists at *legitimate* land speculation. Virginian speculators including Thomas Jefferson, Arthur Lee, Patrick Henry, and George Washington protested against the jeopardization of their claims west of the Allegheny Mountains.⁷⁴

According to Calloway, however, Washington’s evaluation of the *Proclamation* as a “temporary expedient to quiet the minds of the Indians” which “must fall of course in a few

⁷⁰ Hill, *The Clay We Are Made Of*, 126.

⁷¹ Lord Dartmouth to Lieutenant-Governor Cramahé, December 1, 1773 in *CHCD*: I, 485. See also Cumming and Mickenberg, *Native Rights in Canada*, 70.

⁷² Hill, *The Clay We Are Made Of*, 126.

⁷³ Richard L. Merritt, *Symbols of American community, 1735-1775* (New Haven & London: Yale University Press, 1966), 169.

⁷⁴ Calloway, *Scratch of a Pen*, 98.

years especially when those Indians are consenting to our Occupying the Lands” was demonstrative of the view that the *Proclamation* was not viewed as an insurmountable obstacle to land speculators.⁷⁵ Later, in his 2021 biography of King George III, historian Andrew Roberts took an alternative view. In explaining how the *Proclamation* contributed to the cause of the American Revolution, Roberts claimed that if the “British government had possessed sufficient foresight and self-interest, they would have sought to engage with and channel the drive westwards.”⁷⁶ Roberts added that Britain’s fidelity to treaty agreements “verged upon the pedantic” at a time when Roberts believed Britain could have allowed its colonists to spread across the western frontier uninhibited.⁷⁷ According to Roberts, Britain prioritized the short-term gain of the fur trade over the retention of the American colonies.⁷⁸

The fact of Indigenous power unsettles Roberts’s evaluation of Britain’s decisions prior to the American Revolution. The Board initially saw the expansion of settlement westward as “a measure of great public utility” so long as it did not interfere with the claims of Indigenous peoples.⁷⁹ While Britain may have kept its American colonies under its control had the expansion of settlement westward been promoted rather than stifled,⁸⁰ doing so would have encouraged the Iroquois and other allies to take up arms against them.⁸¹ The decision to suspend westward settlement was, therefore, not taken purely to preserve the fur trade (though this was certainly a

⁷⁵ Calloway, 99.

⁷⁶ Roberts, *Last King of America*, 125.

⁷⁷ Roberts, 126.

⁷⁸ Roberts, 125.

⁷⁹ Lords of Trade to Lieutenant-Governor De Lancey, June 13, 1760 in *NYCD*: VII, 437.

⁸⁰ This was likely not the opinion held by British authorities as Ellis’s “Hints” argued that colonists should be diverted to Nova Scotia and East and West Florida to prevent them from “planting themselves in the Heart of America, out of the reach of Government, and where, from the great Difficulty of procuring European Commodities, they would be compelled to commence Manufacturs (sic) to the infinite prejudice of Britain.” See Crane, “Hints,” 371.

⁸¹ Johnson’s efforts in the months leading up to the *Proclamation* were oriented towards preventing the rest of the Iroquois from joining the Pontiac Uprising as one of its constituent parts (the Senecas) had already done. Johnson to Amherst, June 19, 1763 in *NYCD*: VII, 524-527. See also Hill, *The Clay We Are Made Of*, 123.

factor) but to avoid a costly and possibly cataclysmic war with Indigenous peoples mere months after the conclusion of an equally costly war with France and its Indigenous allies.

Still, it was the view of Washington and others that a British-Indigenous barrier replaced the French-Indigenous barrier that, in part, prompted the American Revolution.⁸² It was also the power of Indigenous peoples at the basis of that barrier which both combatants in the American Revolution sought to engage for their benefit. Accordingly, the historiography of Indigenous peoples in the American Revolution has concentrated on the cultural impacts of the war and the militaristic role of Indigenous peoples on either side of the conflict.⁸³ Within this fixation of the historiography, the role of the Iroquois has attracted substantial attention.⁸⁴ Barbara Graymont explained how the member nations of the Iroquois Confederacy were initially divided on which side to support. The Cayuga and the Seneca were mostly pro-British with the exception of Big Tree who adopted a course of neutrality.⁸⁵ The Onondaga were divided into pro-British, pro-American, and neutral factions until the Van Schaick Expedition of 1779 (itself part of the Clinton-Sullivan Campaign) pushed the neutral factions towards the British cause.⁸⁶ The Oneida and Tuscarora sided with the Americans because of the availability of trade goods and the

⁸² Calloway, *Scratch of a Pen*, 98.

⁸³ A leading text is Colin G. Calloway, *The American Revolution in Indian Country: Crisis and Diversity in Native American Communities* (Cambridge: Cambridge University Press, 1995). See also Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815*, 20th anniversary ed. (Cambridge: Cambridge University Press, 2011), 366-412.

⁸⁴ See Barbara Graymont, *The Iroquois in the American Revolution* (Syracuse: Syracuse University Press, 1972); David Levinson, "An Explanation for the Oneida-Colonist Alliance in the American Revolution," *Ethnohistory* 23, no. 3 (Summer 1976); Isabel Thompson Kelsay, *Joseph Brant, 1743-1807: Man of Two Worlds* (Syracuse: Syracuse University Press, 1984); Joseph T. Glatthaar and James Kirby Martin, *Forgotten Allies: The Oneida Indians and the American Revolution* (New York: Hill and Wang, 2006); Caitlin A. Fitz, "'Suspected on Both Sides': Little Abraham, Iroquois Neutrality, and the American Revolution," *Journal of the Early Republic* 28, no. 3 (Fall 2008).

⁸⁵ Barbara Graymont, "The Six Nations in the Revolutionary War," in *Sweet Promises: A Reader in Indian-White Relations in Canada*, J.R. Miller ed. (Toronto: University of Toronto Press, 1991), 95.

⁸⁶ Graymont, "Six Nations," 99.

influence of pro-American individuals within their communities.⁸⁷ Similarly, the influence of William, Guy, and John Johnson and the Brant family placed the Mohawk firmly on the side of the British.⁸⁸ Graymont observed that the American Revolution had the effect of destabilizing the Iroquois Confederacy.⁸⁹

On either side of the war, Iroquois warriors were invaluable to their allies. In 1780, for example, a contingent of Oneidas pursued and defeated an invading British force under Major John Ross and Captain Walter Butler.⁹⁰ In 1777, with nearly half of the fighting force of General Nicholas Herkimer—sent to relieve Fort Stanwix from the siege laid to it by Brigadier General Barrimore St. Leger—a combined force of 400 Iroquois warriors, 20 Rangers, and 50 Royal Yorkers soundly defeated Herkimer's forces.⁹¹ When the war ended, however, the consequences for the Iroquois did not reflect their role as allies of the British. In contrast to the Articles of Capitulation of Montreal (where the rights of the First Nations allies of the French were preserved), Britain surrendered the remaining Iroquois land in North America to the United States.⁹² Hill explained that each nation within the Confederacy made its own decisions with respect to returning to the land surrendered by Britain in the Mohawk River Valley but that the Mohawk were forced to vacate their territory because of their active role as allies of Britain.⁹³ The necessity of re-establishing their Indigenous allies (and other Loyalists) within their own

⁸⁷ Graymont, 95. Some Oneidas joined the British in 1780 after a council with the Seneca leader Spruce Carrier. Graymont, *Iroquois in the American Revolution*, 234. Levinson added that in addition to the influence of pro-American colonists and greater economic reliance on Americans, worsening relations with other Iroquois contributed to their alliance with the Americans. Levinson, "Oneida-Colonist Alliance," 266.

⁸⁸ Graymont, "Six Nations," 96.

⁸⁹ Graymont, 94-95.

⁹⁰ Graymont, 96.

⁹¹ Graymont, *American Revolution*, 132-134; Graymont, "Six Nations," 96-97.

⁹² The Clinton-Sullivan Campaign forced many Iroquois to seek refuge at Forts Niagara and Lachine. After the war, many Iroquois moved westward permanently while the Onondaga, Cayuga, and Seneca remained. The Tuscarora re-settled among the Seneca along the Niagara escarpment elected to rebuild their homes and lives in the territories lost during the war. See Hill, *The Clay We Are Made Of*, 128-129.

⁹³ Hill, 133.

colonies prompted British authorities to pursue land surrenders with greater vigour but less integrity.

In 1783, a group of four captains in the British Indian Department at Fort Detroit persuaded a group of Huron chiefs to gift them a tract of land comprising seven square miles along the south shore of the Detroit River.⁹⁴ The officers involved were aware that in the vicinity of Fort Detroit, the *Proclamation*'s provisions against private purchases of unceded lands were rarely enforced despite General Thomas Gage officially invalidating grants of land of this nature.⁹⁵ The officers' subordinate, Jacob Schiefflen (a secretary in the Indian Department), was equally cognizant of the lack of enforcement of the *Proclamation* (and the gains to be made as a consequence). Schiefflen secured the same lands covered by the gift to the officers through a purchase from seven Ottawa chiefs.⁹⁶ One of the officers appealed to John Johnson who subsequently contacted Governor Frederick Haldimand. Curiously, Haldimand disallowed Schiefflen's purchase on the basis that he had violated the *Proclamation*'s forbidding of private purchases but affirmed the officers' grant despite the grant being secured privately.⁹⁷ Robert J. Surtees explained that Haldimand believed that a settlement of officers would be conducive to the protection of British interests in the region.⁹⁸ In this instance, the *Proclamation* was knowingly manipulated to the perceived benefit of British North America rather than uniformly enforced.

⁹⁴ R.J. Surtees, *Indian Land Surrenders in Ontario, 1763-1867* (Ottawa: Department of Indian and Northern Development, 1984), 48.

⁹⁵ Surtees, *Indian Land Surrenders*, 46-47.

⁹⁶ Clarence M. Burton and M. Agnes Burton, *History of Wayne County and the City of Detroit, Michigan* (Chicago-Detroit: The S.J. Clarke Publishing Company, 1930), 215-216; Surtees, *Indian Land Surrenders*, 48; Susan S. Lukesh, "Jacob Schiefflen (1757-1835)," *Immigrant Entrepreneurship: 1720 to the Present*, last updated October 2, 2012, <http://www.immigrantentrepreneurship.org/entries/jacob-schiefflen/>.

⁹⁷ Surtees also noted that the idea that Schiefflen had used intoxicants to persuade the Ottawa chiefs to surrender the land was stressed in the investigation. Surtees, *Indian Land Surrenders*, 49 and 50.

⁹⁸ Surtees, 49-50.

Elsewhere in British North America, British treaty negotiators tended to abide by established protocol and the requirements of the *Proclamation*. A treaty signed in 1784 with the Mississaugas, for example, involved the purchase of 1,000,000 hectares of land encompassing the Niagara Peninsula and lands north of Lake Erie in exchange for £1,180 worth of goods.⁹⁹ According to J.R. Miller, the purchases made in 1783 and 1784 were conducive to the resettlement of Indigenous allies and Loyalists in British North America.¹⁰⁰ In 1785, however, improprieties in treaty-making resurfaced when John Collins concluded a treaty surrendering a two-mile strip of land between Lake Simcoe and Matchedash Bay.¹⁰¹

Collins—in his capacity as Deputy Surveyor General—was dispatched by Lieutenant Governor Henry Hamilton to “take a survey of the communication between the Bay of Quinté, and Lake Huron by Lake La Clie.”¹⁰² Hamilton further instructed Collins to take note of locations where forts might be erected and to note the “nature of the soil, the distance of commanding grounds, the means of procuring water, and of keeping communication by land and water.”¹⁰³ Surtees found that Collins exceeded his authority by reaching a provisional agreement with the Chippewas at Lake La Clie (Lake Simcoe).¹⁰⁴ Although Collins was accompanied by Captain William Redford Crawford (who presumably served as a representative of the Crown), the Collins Purchase was rife with contraventions of the *Proclamation*.¹⁰⁵ First, the *Proclamation* expressly forbade governors from granting warrants of survey “upon any Lands whatever, which

⁹⁹ Miller, *Compact, Contract, Covenant*, 82 and 83.

¹⁰⁰ Miller, 83.

¹⁰¹ Miller, 84.

¹⁰² In Alexander Fraser, *Third Report of the Bureau of Archives for the Province of Ontario* (Toronto: L.K. Cameron, Printer to the King’s Most Excellent Majesty, 1906), 371. See also Gwen Reimer, “British-Canada’s Land Purchases, 1783-1788: A Strategic Perspective,” *Ontario Historical Review* 111, no. 1 (Spring 2019): 36.

¹⁰³ Fraser, *Bureau of Archives*, 372.

¹⁰⁴ Surtees, *Indian Land Surrenders*, 35.

¹⁰⁵ “John Collins’ Memorandum on Indian Purchase,” August 9, 1785 in F.B. Murray, ed., *Muskoka and Haliburton, 1615-1875* (Toronto: The Champlain Society, 1963), 97. Purchases pursuant to the *Proclamation* could only be made on behalf of the Crown (or a proprietary colony). “Proclamation,” in *CHCD*: I, 167.

not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.”¹⁰⁶ Additionally, because Collins was not instructed to pursue a purchase or surrender of land, it is unclear whether a meeting with the Chippewas at Lake La Clie was called for the purpose of making a purchase as required by the *Proclamation*.¹⁰⁷ The *Proclamation* also stated that such a meeting was to be called for the *purchase* of the lands concerned—implying a transaction of either goods or money for land.¹⁰⁸ In Collins’s memorandum on the ‘purchase’ he stated “respecting Payment for the above right, the Chiefs observed they were poor and Naked, they wanted Cloathing (sic) and left it to their good Father to be a judge of the quantity...”¹⁰⁹ The absence of specific compensation (especially in comparison to the purchases of 1783 and 1784) casts doubt upon the Collins Purchase’s satisfaction of the requirements of the *Proclamation*.

Problems continued to plague the Collins Purchase. For one, the actual land surrendered was vague according to Collins’s report.¹¹⁰ To clarify the purchase, John Johnson was instructed to secure the route known as the Toronto Carrying Place—which Collins’s survey was intended to address.¹¹¹ In 1787 and 1788, Johnson and John Butler secured a stretch of land between the Trent and Etobicoke Rivers on the north shore of Lake Ontario.¹¹² Irregularities plagued the purchases of Johnson and Butler. At the Bay of Quinte in 1787, for example, Johnson distributed

¹⁰⁶ “Proclamation,” in *CHCD*: I, 167. It is not immediately clear how to distinguish between a warrant of survey and instructions to a surveyor (or whether a distinction should be made at all). Hamilton’s instructions to Collins satisfy the contemporaneous definitions of ‘warrant’ (“A writ conferring some right or authority”) and ‘survey’ (“to measure and estimate land or buildings”). Samuel Johnson, *A Dictionary of the English Language: In Which the Words are Deduced From Their Originals, and Illustrated in Their Different Significations by Examples From the Best Writers: To Which are Prefixed a History of the English Language and an English Grammar*, 6th ed., vol. II (London: J.F. and C. Rivington etc., 1785), 797 and 1030.

¹⁰⁷ The *Proclamation* required that a surrender was to take place “at some public Meeting or Assembly of the said Indians, to be held for that Purpose...” “Proclamation,” in *CHCD*: I, 167.

¹⁰⁸ “Proclamation,” in *CHCD*: I, 167.

¹⁰⁹ “Collins’ Memorandum,” in Murray, *Muskoka and Haliburton*, 97.

¹¹⁰ Miller, *Compact, Contract, Covenant*, 84.

¹¹¹ Surtees, *Indian Land Surrenders*, 37.

¹¹² Miller, *Compact, Contract, Covenant*, 84.

gifts of ammunition, arms, and tobacco in recognition of the Mississaugas's loyalty to Britain and their services in the American Revolution. These gifts were later considered as payment for the lands acquired.¹¹³ Further, the deed of surrender from this purchase was devoid of accurate descriptions of the lands involved.¹¹⁴ Anxiety among British authorities and settlers with respect to the security of the land purchased at the Bay of Quinte prompted Lord Dorchester to investigate the matter. Dorchester confirmed the purchases of 1787-88 on January 27, 1794—though he was aware of an “omission which would set aside the whole transaction” but thought it best not “to press that matter or shew any anxiety about it.”¹¹⁵ Dorchester's decision did little to stabilize the validity of the purchase as both Lieutenant Governor John Graves Simcoe and Administrator of Upper Canada Peter Russell subsequently sought to clarify the legality of the purchases.¹¹⁶ The issues attending the 1787-88 purchases would not be finally dealt with until the Toronto Purchase of 1805 and the Williams Treaties of 1923.¹¹⁷

In the intervening years between the 1787-88 purchases and their resolution, Dorchester—possibly as a result of his experience with the 1787-88 purchases—issued additional instructions to regularize the purchase of Indian lands on December 26, 1794. The instructions re-affirmed that surrenders could only be taken by the Superintendent General and Inspector General of Indian Affairs (or the Deputy Superintendent General) or a person commissioned for the purpose of securing a surrender, clarified that “Indian Goods to the amount agreed upon are to be given in payment for the Territory ceded,” and demanded that “All

¹¹³ Surtees, *Indian Land Surrenders*, 38-39.

¹¹⁴ Surtees, 41-42.

¹¹⁵ Lord Dorchester to J.G. Simcoe, January 27, 1794 in E.A. Cruikshank, ed., *The Correspondence of John Graves Simcoe: With Allied Documents Relating to His Administration of the Government of Upper Canada, 1793-94*, vol. II (Toronto: The Ontario Historical Society, 1924), 137-138; Surtees, *Indian Land Surrenders*, 43.

¹¹⁶ Surtees, 44-46.

¹¹⁷ Leo A. Johnson, *History of the County of Ontario, 1615-1875* (Whitby: The Corporation of the County of Ontario, 1973), 24. Miller, *Compact, Contract, Covenant*, 84. On the Williams Treaties see Blair, *Lament for a First Nation*.

Purchases are to be made in public Council with great Solemnity and Ceremony according to the Antient (sic) Usages and Customs of the Indians.”¹¹⁸ Miller argued that although the *Proclamation* was never applied in its totality, Dorchester’s instructions had the effect of improving treaty-making practices generally.¹¹⁹

Only a month before Dorchester’s instructions were issued, the importance of maintaining good relations with First Nations allies declined with Britain’s signing of the Jay Treaty of 1794 with the United States. Through this treaty, Britain’s control of the western posts was relinquished and the need of First Nations allies for the security of these posts was severely minimized.¹²⁰ The numerical strength of First Nations militated against a complete disregard for their interests.¹²¹ Still, after the Jay Treaty and the War of 1812 (when the threat of American aggression declined substantially), the orientation of Indian policy transitioned from the “forest diplomacy” of William Johnson to the goal of civilization.¹²² Miller explained that as the possibility of war with the United States became increasingly unlikely after the Treaty of Ghent in 1814 and the Rush-Bagot Pact in 1817, the importance of First Nations as military allies declined critically.¹²³ In 1830, Indian Affairs was transferred back to civilian control.¹²⁴ Five

¹¹⁸ “Additional Instructions, Indian Department,” December 26, 1794 in E.A. Cruikshank, ed., *The Correspondence of John Graves Simcoe: With Allied Documents Relating to His Administration of the Government of Upper Canada, 1794-95*, vol. III (Toronto: The Ontario Historical Society, 1925), 241-242.

¹¹⁹ Miller, *Compact, Contract, Covenant*, 85.

¹²⁰ N.A. MacKenzie, “The Jay Treaty of 1794,” *The Canadian Bar Review* 7, no. 7 (1929): 433; Fernand Ouellet, *Lower Canada, 1791-1840: Social Change and Nationalism* (Toronto: McClelland and Stewart Limited, 1980), 31; Miller, *Compact, Contract, Covenant*, 85; Alan Taylor, *The Civil War of 1812: American Citizens, British Subjects, Irish Rebels, & Indian Allies* (New York: Random House, 2010), 55.

¹²¹ Miller, *Compact, Contract, Covenant*, 88.

¹²² Miller, 104.

¹²³ Miller, 101-102.

¹²⁴ Douglas Leighton, “Napier, Duncan Campbell,” *Dictionary of Canadian Biography*, 1976, https://www.biographi.ca/en/bio/napier_duncan_campbell_9E.html; Indian Affairs was briefly under military control beginning in 1816. See Miller, *Compact, Contract, Covenant*, 101.

years later, Francis Bond Head became Lieutenant Governor of Upper Canada and pursued a treaty-making policy that was counterproductive to the goal of civilizing First Nations.¹²⁵

In the summer of 1836, Head met with several First Nations at Manitoulin Island for an annual distribution of presents.¹²⁶ While the First Nations were gathered there, Head proposed the surrender of the Manitoulin Island chain to the Crown for the purpose of using the surrendered land as a refuge for First Nations from the encroachments of white settlers.¹²⁷ Although Head's attempt to insulate First Nations from white settlement is consequential for students of Canadian Indian policy, it is the circumstances of the Manitoulin Island Treaty that are of interest here. Since the First Nations who treated with Head on August 9, 1836, convened to receive presents, a public meeting was not called for the purpose of negotiating a surrender as required by the *Proclamation*.¹²⁸ If Dorchester's instructions had encouraged greater fidelity to the principles of the *Proclamation*, the negotiation of the Manitoulin Island Treaty demonstrated that administrators of Indian policy had short memories.

Lest the Manitoulin Island Treaty be misunderstood as an aberration in post-1830 treaty-making in Canada, a pair of treaties signed 14 years later (the Robinson-Superior and Robinson-

¹²⁵ S.F. Wise, "Head, Sir Francis Bond," *Dictionary of Canadian Biography*, 1972, https://www.biographi.ca/en/bio/head_francis_bond_10E.html; On the shift to this civilization policy see John S. Milloy, "The Early Indian Acts: Developmental Strategies and Constitutional Change," in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991), 148.

¹²⁶ Surtees, *Indian Land Surrenders*, 89.

¹²⁷ Surtees, 90-91.

¹²⁸ Miller, *Compact, Contract, Covenant*, 109. The lack of payment recorded at the Manitoulin Island Treaty also suggests that the treaty violated the *Proclamation* in much the same way that the Collins Purchase had in 1785. See Surtees, *Indian Land Surrenders*, 91. It is worth noting that on August 20, 1836, Colonel James Givins (Chief Superintendent of Indian Affairs for Upper Canada) requested a copy of the *Proclamation* (on behalf of Head) from Lieutenant-Colonel D.C. Napier (Superintendent of Indian Affairs at Quebec), which Napier apparently referred to in a letter written on January 28, 1835. Napier forwarded the copy of the *Proclamation* on September 6, 1836. The fact that the *Proclamation* was brought to the attention of Head and that he requested a copy of it only *after* he went ahead with the Manitoulin Island Treaty further demonstrates that the *Proclamation* was not at the forefront of colonial common sense in Upper Canada in the 1830s. See LAC, RG 10, vol. 501, Reel C-13342, James Givins to D.C. Napier, August 20, 1836; Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and to Receive Presents, 1815-1843," (PhD dissertation, University of Western Ontario, 1992), 291.

Huron Treaties) indicate that disregarding the *Proclamation* (and Dorchester's instructions) was characteristic of this second period in the *Proclamation's* history.¹²⁹ In contrast to most treaties negotiated previously (which were oriented towards allowing settlement), the Robinson Treaties were negotiated to facilitate the Province of Canada's unencumbered access to mineral resources in the Upper Great Lakes region. The series of events that led to the negotiations of the Robinson Treaties was initiated in 1845 when Canada claimed authority over the north shore of Lake Superior.¹³⁰ Within four years, 66 mining licenses were issued to exploit the resource wealth in the region.¹³¹ When surveyors were sent out to the region, Ojibwe leaders voiced their opposition to surveying in advance of a treaty.¹³² After their calls for the negotiation of a treaty to address their land rights went unheeded, the Ojibwe seized a mine at Mica Bay on Lake Superior which escalated into the Mica Bay Incident.¹³³ To place the mining operations in the Upper Great Lakes on a more solid foundation, Canada commissioned William B. Robinson to complete the treaty process—the negotiations of which were completed on September 9, 1850.¹³⁴

The historical record does not indicate whether or not Canadian authorities were aware that their actions preceding the Robinson Treaties contravened the *Proclamation*. That these actions did, in fact, violate the *Proclamation* is beyond dispute. Since the lands affected had not yet been surrendered and mining operations had been undertaken, the issuing of mining licenses

¹²⁹ The Robinson-Superior and Robinson-Huron Treaties were negotiated between 3-9 September 1850. See Karl S. Hele, "The Robinson Treaties—A Brief Contextualization," in *This Is Indian Land: The 1850 Robinson Treaties*, ed. Karl S. Hele (Winnipeg: Aboriginal Issues Press, 2016), 19.

¹³⁰ Hele, "The Robinson Treaties," 8-9.

¹³¹ Victor P. Lytwyn, "The Hudson's Bay Company at Fort La Cloche: How the Company Took the Land from the Sagamok Anishnawbek," in *This Is Indian Land: The 1850 Robinson Treaties*, ed. Karl S. Hele (Winnipeg: Aboriginal Issues Press, 2016), 317.

¹³² David Calverley, "Ojibwa Harvesting Rights and Family Hunting Territories: Rethinking Treaty Boundaries," in *This Is Indian Land: The 1850 Robinson Treaties*, ed. Karl S. Hele (Winnipeg: Aboriginal Issues Press, 2016), 53.

¹³³ Lytwyn, "Fort La Cloche," 324-325.

¹³⁴ Miller, *Compact, Contract, Covenant*, 114.

contributed to the presence of “Persons” situated on unceded land.¹³⁵ Additionally, the granting of warrants of survey violated the *Proclamation* in much the same way that the Collins Purchase had 65 years earlier. Both the Manitoulin Island Treaty and the Robinson Treaties have been understood as templates for the southern Numbered Treaties because of the written terms agreed to by their negotiators.¹³⁶ Historians have been less cognizant of the violations of, and/or disregard for, the *Proclamation* attending the negotiations of each of these treaties.

The third period of the *Proclamation*’s history (spanning from 1867 to 1888) is thus characterized by ignorance on the part of both historical actors during this period (about the *Proclamation* itself) and on the part of historians studying this period (about the awareness of the *Proclamation* by historical actors). A more thorough analysis and discussion of the circumstances of the southern Numbered Treaties will be undertaken in the Chapter 2. It is the view of the *Proclamation* held by Dominion officials (insofar as they may be said to have one) before, during, and after the negotiations of the southern Numbered Treaties that is the concern of the present analysis. At least two historians have argued that the *Proclamation* did not technically apply in the North-West even as it informed treaty-making in this context. St. Germain argued that while the *Proclamation* did not encompass Rupert’s Land, “arrangements were made to extend the principles that it embodied regarding the recognition of Aboriginal rights” to that territory.¹³⁷ Hall similarly argued that although “the lands granted to the HBC had been specifically excluded from the provisions of the proclamation, both Canada and Great Britain recognized... that the underlying principles of the proclamation would apply” in Rupert’s Land after its transfer to Canada.¹³⁸ Hall added that Canada committed itself to settling Indian land

¹³⁵ “Proclamation,” in *CHCD*: I, 167.

¹³⁶ Krasowski, *No Surrender*, 70.

¹³⁷ St. Germain, *Broken Treaties*, 17.

¹³⁸ Hall, *From Treaties to Reserves*, 43.

claims in Schedule (A) of the *Rupert's Land Act*, 1868.¹³⁹ Both St. Germain and Hall make two—essentially identical—claims. First, that Rupert's Land was absolutely exempt from the provisions of the *Proclamation* and second, that the Dominion arranged for the *Proclamation's* principles to apply in the North-West upon its acquisition of the territory.¹⁴⁰ Neither of these claims are consistent with the contemporaneous rules governing the construction of statutes.

The first claim can be dealt with by appealing to Slattery's observation that the *Proclamation's* provisions must be read as individual clauses in a statute.¹⁴¹ The Indian territory established by the *Proclamation* explicitly reserves for the "use of the said Indians, all the Lands 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.*"¹⁴² However, the first paragraph of the *Proclamation's* provisions relating to Indian lands forbid the granting of warrants of survey or the passing of patents for lands "beyond the Heads or Sources of any of the Rivers which fall into the Atlantick (sic) Ocean from the West and North-West, *or upon any Lands whatever*, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, *or any of them.*"¹⁴³ Thus, while HBCo. lands were excluded from the Indian territory created by the *Proclamation*, these lands were not—as St. Germain and Hall contended—excluded from the entirety of the *Proclamation*.¹⁴⁴

¹³⁹ *An Act for enabling Her Majesty to accept a Surrender upon Terms of the Lands, Privileges, and Rights of "The Governor and Company of Adventurers of England Trading into Hudson's Bay," and for admitting the same into the Dominion of Canada, 1868* (UK), c 105 [the *Rupert's Land Act*]; Hall, 43 and 343n75.

¹⁴⁰ The 'North-West' refers to both Rupert's Land and the North-Western Territory which were admitted into the Dominion on June 23, 1870. See *Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union, 1870* (UK) [the *Rupert's Land Order*] in E.H. Oliver, ed., *The Canadian North-West: Its Early Development and Legislative Records: Minutes of the Councils of the Red River Colony and the Northern Department of Rupert's Land*, vol. II (Ottawa: Government Printing Bureau, 1915), 939-944.

¹⁴¹ Slattery, "Land Rights of Indigenous Canadian Peoples," 204.

¹⁴² "Proclamation," in *CHCD*: I, 167, emphasis added.

¹⁴³ "Proclamation," in *CHCD*: I, 167, emphasis added.

¹⁴⁴ An alternative (and no less interesting) claim might be made that the HBCo.'s charter was nullified by the *Proclamation's* clause establishing "Trade with the said Indians" that was "free and open to all our Subjects whatever" so long as "Regulations as We shall at any Time think fit... to direct and appoint for the Benefit of the

The second claim of St. Germain and Hall—that the Dominion arranged for the *Proclamation* to apply in the North-West—has more support from the historical record and the historiography. Still, this support is not sufficient to confirm the idea that the Dominion deliberately brought the *Proclamation* into effect in the North-West. St. Germain’s evidence in this respect is the 1869 Deed of Surrender—Term 14 of which provided that “Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.”¹⁴⁵ Kent McNeil persuasively argued that the Imperial government would not have intended for the Dominion government to settle Indian land claims in whatever way it saw fit according to Term 14. Instead, the Dominion, in disposing of Indian claims, was to consult with the First Nations affected.¹⁴⁶ The correspondence between Colonial Secretary Lord Granville and Governor General Lord Lisgar affirms this interpretation.¹⁴⁷ However, there is no compelling evidence nor reason to believe that Term 14 carried the *Proclamation* into effect in the North-West.

Hall’s evidentiary basis is more complicated because of the ambiguity of the statute to which he refers. Schedule (A) of the *Rupert’s Land Order* provides that “the claims of the Indian

said Trade” were observed. “Proclamation,” in *CHCD*: I, 168. See Slattery, “Land Rights of Indigenous Canadian Peoples,” 210. It would be conceivable (and indeed logical) that the regulations referred to encompassed the HBCo.’s charter which existed in fact until the Sayer Trial of 1849 and in law until the Rupert’s Land transfer. The *Rupert’s Land Order* in Oliver, *The Canadian Northwest*: II, 942. On the Sayer Trial see Gerald Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987), 100-101; John Herd Thompson, *Forging the Prairie West: The Illustrated History of Canada* (Don Mills: Oxford University Press, 1998), 31. However, the first clause of the Plan for the Future Management of Indian Affairs within the instructions to Guy Carleton in 1775 state that trade was to be free insofar as it did not “interfere with the Charter to the Hudson’s Bay Company,” is persuasive (if not conclusive) evidence that the HBCo.’s charter was left in tact by the *Proclamation*. “Plan for the Future Management of Indian Affairs, Referred to in the Thirty-Second Article of the Foregoing Instructions,” in Shortt and Doughty, eds., *CHCD*, Part II, 614-620.

¹⁴⁵ St. Germain, *Broken Treaties*, 17; The *Rupert’s Land Order* in Oliver, *Canadian North-West*: II, 944.

¹⁴⁶ Kent McNeil, *Native Claims in Rupert’s Land and the North-Western Territory: Canada’s Constitutional Obligations* (Saskatoon: University of Saskatchewan, Native Law Centre, 1982), 22.

¹⁴⁷ See Ray, Miller, and Tough, *Bounty and Benevolence*, 51-52.

tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.”¹⁴⁸ McNeil considered, *inter alia*, which class(es) of people were encompassed by “Indian tribes” and “aborigines” and what “equitable principles” were being referred to. McNeil’s argument that “Indian tribes” refers to each First Nations, Inuit, and Métis as collective groups is sound.¹⁴⁹ That “aborigines” simply refers to the same classes of people encapsulated by “Indian tribes” is less certain. McNeil’s reasoning for this claim is that the article “the” before “aborigines” suggests that a particular group—namely North American Indigenous Peoples—was meant to be identified in this instance. McNeil buttressed this claim with the HBCo.’s use of the terms ‘Indians’ and ‘aborigines’ interchangeably.¹⁵⁰ There are instances of these terms being used interchangeably in the *House of Commons Debates* contemporaneous with the *Rupert’s Land Order*.¹⁵¹ This interchangeable use, however, does not explain why the drafter(s) would have used two different terms to describe the same class of people within the same clause. Additionally, while originalist and contextualist interpretations of statutes are valid, it is worth noting that the textualist approach to constructing statutes was central in the 1860s.¹⁵² For example, while discussing an Ontario bill concerning the issuing of

¹⁴⁸ The *Rupert’s Land Order* in Oliver, *The Canadian Northwest*: II, 946.

¹⁴⁹ McNeil, *Native Claims*, 14-18. The inclusion of Inuit and Métis as Indians within the scope of s. 91(24) of the *British North America Act* was not clarified at common law until 1939 and 2015 respectively. See *Reference as to whether “Indians” includes in s. 91 (24) of the B.N.A. Act includes Eskimo in habitants of the Province of Quebec*, 1939 CanLII 22 at p. 124 (SCC), [1939] SCR 104 and *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC. 12 at para. 50 [*Daniels*].

¹⁵⁰ McNeil, *Native Claims*, 20.

¹⁵¹ See, for example, Canada, *House of Commons Debates: First Session—First Parliament*, 4 December 1867 (William McDougall) (Ottawa: Roger Duhamel, F.R.S.C., Queen’s Printer and Controller of Stationery, 1867), 182.

¹⁵² Evidence does exist to the contrary. Edward Blake argued that if the governor general acted against the advice of his ministers, the effect would be to transfer power to the Colonial Office “which cannot possibly have been *intended* by the framers of the clause.” Canada, *Sessional Papers (CSP)*, 1877, Blake to Carnarvon, September 6, 1876, Paper no. 89, 456, emphasis added. Blake’s use of the originalist approach in the marriage debates serves to further confuse the issue.

marriage licenses in 1869, John A. Macdonald stated that the *British North America Act* must “of course, be construed according to its terms, and not according to the assumed intentions of its framers.”¹⁵³ Accordingly, the use of ‘aborigines’ in addition to ‘Indian tribes’ suggests that two different classes were being referred to. If “aborigines” does not refer to the same class as “Indian tribes”, the question of which “equitable principles” are being referred to becomes more complex than McNeil’s assumption that it refers principally to the *Proclamation*.¹⁵⁴ Instead, because these principles are supposed to have governed the British Crown’s dealings *uniformly*, these principles are those that are characteristic of British relations with Indigenous Peoples throughout the British Empire rather than strictly those principles embodied in the *Proclamation*.

Legal authorities and historians have tended to assume that the *Proclamation* was included in the *British North America Act*. Calloway, for example, found that the “Proclamation was incorporated in the Constitution Act of 1867”—echoing the position of Anthony Pagden in *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500-c. 1800*.¹⁵⁵ When First Nations in Canada attempted to ensure that the Crown in right of the United Kingdom would maintain its treaty obligations notwithstanding the impending patriation of the Canadian constitution in 1982,¹⁵⁶ Lord Denning of the J.C.P.C. saw fit to clarify that the *Proclamation* was binding on the legislatures of the Dominion and provinces as if there was a section in the *British North America Act* stating “[t]he aboriginal peoples of Canada shall

¹⁵³ Quoted in Canada, *House of Commons Debates: Second Session—Fourth Parliament*, February 27, 1880 (Edward Blake) (Ottawa: C.W. Mitchell, 1880), 300.

¹⁵⁴ McNeil, *Native Claims*, 20.

¹⁵⁵ Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500-c. 1800* (New Haven: Yale University Press, 1995), 85; Calloway, *Scratch of a Pen*, 97-98.

¹⁵⁶ The court found in this case that the Imperial Crown owed no obligations towards treaty partners following the divisibility of the Crown pursuant to the Statute of Westminster of 1931. See Venne, “Understanding Treaty 6,” 189; P.B. Waite, *In Search of R.B. Bennett* (Montreal & Kingston: McGill-Queen’s University Press, 2012), 167-168; Asch, *Here to Stay*, 111.

continue to have all their rights and freedoms as recognized by the royal proclamation of 1763.”¹⁵⁷

Lord Denning’s statement on the force and effect of the *Proclamation* served as an organizing thought for Bruce Allan Clark’s analysis of Aboriginal self-government pursuant to the *Proclamation*. Clark argued that the *Proclamation*’s application was sustained throughout the constitutional history of Canada by non-nugatory and affirmative legislation.¹⁵⁸ According to Clark, as new constitutional eras dawned, “the imperial government accepted as given certain axioms of colonial constitutional law that it had previously established.”¹⁵⁹ This idea is similar to Stoler’s conception of colonial common sense except that while Stoler found that the content of this common sense could change with changing imperial orders,¹⁶⁰ Clark viewed the principle of continuity as sustaining this colonial common sense through time.¹⁶¹ While a full review of British understandings of the *Proclamation* is beyond the scope of this study, the evidence that Canadian authorities (whose actions in the administration of the North-West did not invite interference from the imperial government) understood the *Proclamation* as binding is scarce.¹⁶²

Clark’s analysis is deficient for at least two reasons. First, while Clark is correct that, at law, the *Quebec Act* (1774) did not nullify the *Proclamation*’s provisions with respect to Indian

¹⁵⁷ *Regina v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and Others* [1982] QB 892, [1988] 78 ILR 421 [*Indian Association of Alberta*] at p. 428.

¹⁵⁸ Bruce Allan Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 1990), 85 and 98.

¹⁵⁹ Clark, 85.

¹⁶⁰ Stoler, *Along the Archival Grain*, 3.

¹⁶¹ Clark, *Native Liberty*, 85.

¹⁶² The powers of reservation and disallowance and the requirement of Indian claims to be settled in consultation with the Imperial government would have been engaged had Britain not approved of the Dominion’s approach to treaty-making and policy in the North-West. Interestingly, the instructions to Governor General Lord Dufferin typically included a clause informing him to reserve bills inconsistent with British treaty relationships. See Barbara J. Messamore, “The line over which he must not pass: Defining the Office of the Governor General, 1878,” *Canadian Historical Review* 86, no. 3 (September 2005): 481. If the *Proclamation* was understood as a treaty (in tandem with the Treaty of Niagara) then Lord Dufferin would have been obligated to reserve legislation (such as the *Rupert’s Land Order* and later the *Indian Act*) that was inconsistent with British treaty relationships pursuant to the Treaty of Niagara.

land rights, this was not the view held by Canadian authorities at the time.¹⁶³ In the Ontario Superior Court of Justice in 1885, for example, in *R. v. St. Catharines Milling and Lumber Company*, Oliver Mowat—in his capacity as counsel for the Province of Ontario—described the *Proclamation* as “merely a provisional arrangement” that was “expressly repealed by the Quebec Act of 1774.”¹⁶⁴ This view was affirmed by the trial judge but rejected on appeal to the S.C.C. by Strong J. in his dissenting opinion.¹⁶⁵ Mowat—although prejudicial in this instance as counsel for Ontario—was an active participant in the drafting of the Quebec Resolutions that would form the *British North America Act*.¹⁶⁶ Further, between the first session of the first parliament of the Dominion of Canada in 1867 and the fourth session of the fourth parliament in 1877—by which time each of the southern Numbered Treaties were signed—the *Proclamation* is mentioned only once. The solitary reference to the *Proclamation* was made by Minister of the Interior David Laird who referred to it as “an old proclamation of the British Government” during a debate on a bill to amend and consolidate the laws respecting Indians (which eventually became the *Indian Act*).¹⁶⁷ That Laird described the *Proclamation* in this way does not suggest that it was an instrument with which those directly involved in the treaty-making process in the North-West were familiar. Clark, therefore, assumes a cognizance of the *Proclamation* by Dominion authorities that was non-existent.

Clark added that s. 129 of the *British North America Act* rendered the Dominion government incapable of changing “such [laws] as are enacted by or exist under Acts of the

¹⁶³ Clark, *Native Liberty*, 86-98.

¹⁶⁴ *R. v. St. Catharines Milling and Lumber Company*, 1885 CanLII 288 at p. 201 (ON SC) [*St. Catharines*, ON S.C.].

¹⁶⁵ *R. v. St. Catharines*, ON S.C. at p. 227; *St. Catharines Milling and Lumber Co. v. R.*, 1887 CanLII 3 at pp. 629-635 (SCC), 13 SCR 577 [*St. Catharines*, S.C.C.].

¹⁶⁶ See Gwyn, *Nation Maker*, 316 and 322.

¹⁶⁷ Canada, *House of Commons Debates: Third Session—Third Parliament*, March 28, 1876 (David Laird) (Ottawa: MacLean, Roger and Co., 1876), 872; *An Act to amend and consolidate all the laws concerning Indians*, SC 1876, c 18 [*Indian Act*].

Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland.”¹⁶⁸ In Clark’s quotation, ‘Acts’ is substituted for ‘laws’—the latter of which encompasses the *Proclamation* as a prerogative instrument under the Great Seal.¹⁶⁹ While the *Proclamation* assumes the character and status of a statute in the colonies, it is not technically speaking an Act and therefore does not fall within the scope of s. 129 of the *British North America Act*. Even if the *Proclamation* did fall within the scope of s. 129, the ability of the Dominion to legislate contrary to the *Proclamation* would not have been exhausted. David W. Elliott recognized that the *Proclamation* has the force of a statute and argued that it has “never been repealed by a Canadian statute.”¹⁷⁰ Similarly, Slattery found that without explicit or implied restrictions to the contrary “a colonial legislature empowered to make laws for the peace, order and good government of a colony, or at least to legislate regarding land and indigenous peoples”—both of which the Dominion possessed by virtue of s. 91 and s. 91(24) of the *British North America Act*—could “amend the Proclamation’s provisions with respect to Indian lands, and [had the authority] to modify the rights held thereunder.”¹⁷¹ Slattery added that if such an amendment threatened the imperial interests of Britain, the powers of reservation and disallowance would, theoretically, serve as a safeguard.¹⁷² This view was consistent with Lord Dufferin’s view of the governor general as “bound to watch over [Indians’] welfare and especial solitude.”¹⁷³ With this in mind, the wording of Schedule (A) of the *Rupert’s Land Order*

¹⁶⁸ Clark, *Native Liberty*, 106.

¹⁶⁹ In *British North America Act and Amendments: Together with Other Acts and Orders in Council Relating to the Constitution of Canada and of its Provinces: 1867-1943* (Ottawa: Edmond Cloutier, Printer to the King’s Most Excellent Majesty, 1943), 58; Slattery, “Land Rights of Indigenous Canadian Peoples,” 315.

¹⁷⁰ David W. Elliott, “Aboriginal Title,” in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, ed. Bradley W. Morse (Ottawa: Carleton University Press, 1989), 56.

¹⁷¹ See *British North America Act*, 50; Slattery, “Land Rights of Indigenous Canadian Peoples,” 315.

¹⁷² Slattery, “Land Rights of Indigenous Canadian Peoples,” 315.

¹⁷³ Asch, *Here to Stay*, 160.

discussed above constitutes a legitimate amendment (in this case, suspension) of the *Proclamation* in the geographical context of the southern Numbered Treaties.

In spite of Mowat's prejudice in the context of the *St. Catharines* case, there appears to be some truth to his argument that "this claim"—that the *Proclamation* recognized alienable property rights of Indians which were transferred to the Crown in Right of Canada after the signing of Treaty 3 in 1873—"of the defendants is a new one recently set up."¹⁷⁴ The *House of Commons Debates* and the *Sessional Papers* during the period in which the southern Numbered Treaties were negotiated demonstrate the near disappearance of the *Proclamation* from colonial common sense; rather than an implicit assumption of its contents. When Canadian authorities began to consider the *Proclamation* in more depth it was as a method of securing control of land against the interests of other parties (in this instance, the Province of Ontario). Indeed, the *Proclamation* re-emerged (however briefly) in the consciousnesses of Dominion authorities because it was in the Dominion's interests that it applied in the context of Treaty 3 (and presumably in general). When Dominion authorities thought about the rights conferred by the *Proclamation*, their conception of these rights were likely more in line with the J.C.P.C.'s description of them in *St. Catherine's* (1888) as "personal and usufructuary" rather than as an affirmation of Indigenous sovereignty as encapsulated in the Treaty of Niagara.¹⁷⁵

That the *Proclamation* has undergone a substantial transformation (or reinvention) since the Treaty of Niagara is evident in the historical record. Any contemporaneous debate over whether the *Proclamation* was a unilateral instrument or part of a broader treaty arrangement was promptly rendered irrelevant by the inability of Britain to enforce the *Proclamation*. After

¹⁷⁴ *St. Catharines*, ON S.C. at p. 201. For a discussion of the Dominion's argument in this case see Kent McNeil, *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (Vancouver: University of British Columbia Press, 2019), 29-43.

¹⁷⁵ *St. Catherine's*, J.C. in Olmsted, *Decisions of the J.C.P.C.*, I: 245.

the American Revolution (and especially after the War of 1812), British interest in applying the *Proclamation* dwindled severely with the exception of Dorchester's 1794 instructions. By the time of Confederation, the *Proclamation* had lapsed into obscurity. This was reflected by the near absence of discussion of it during the period of the southern Numbered Treaties. The historical record is unequivocal that the Dominion was compelled to negotiate these treaties by forces other than the *Proclamation*. An examination of these forces and the duress experienced by the Dominion in relation to them is undertaken in the next chapter.

Chapter 2: The Historical Context of the Southern Numbered Treaties

On September 22, 1877, the last of seven treaties between the First Nations of the North-West and the Crown was successfully negotiated—granting the Dominion of Canada secure access to the region.¹ By 1879, the decline of the bison at once strained the financial resources of the Dominion—responsible as it was for the administration of relief for First Nations—and severely limited the capacity of First Nations to hold the Dominion responsible for its obligations towards them.² In short, within a decade of the Dominion's purchase of Rupert's Land from the HBCo., it emerged as the dominant power in the North-West. Historians have the benefit of factoring this outcome into their analyses. The parties with a stake in the political circumstances of the North-West in the 1870s—namely, the Dominion, the First Nations, the British, the Americans, and the Fenians—were not similarly privileged. Accordingly, the courses of action pursued by each party were informed by the looming possibility of a war between and among each other. The conditions that prevailed in the years immediately after the negotiations of the southern Numbered Treaties are indicative of the security of the Dominion in the North-West in the post-treaty period. However, it was the *insecurity* of the Dominion in the North-West—rather than procedural obligations pursuant to the *Proclamation*—that brought the Crown to the negotiating table on its behalf and necessitated the entry of the Dominion and the First Nations of the North-West into reciprocal treaty relationships of a confederal nature.

The interested parties in the North-West in the 1870s co-existed and interacted with each other in ways that do not lend perfectly to a thematic analysis. However, the objective of this chapter is to demonstrate the duress under which the Dominion was operating. Accordingly, a

¹ Treaty 7 Elders and Tribal Council, et. al., *Treaty 7*, 247.

² See Daschuk, *Clearing the Plains*, 183-184.

thematic approach—examining the threat that each British disinterest, American annexationism and antipathy, Fenian aggression, and First Nations resistance had on the Dominion—ultimately allows for a greater analysis of each intersecting factor bearing on the Dominion’s duress than a traditional linear approach. Combined with the nascent Dominion’s own financial and military weakness, these factors removed any other course of action from the Dominion’s arsenal and compelled it to pursue treaty-making with the First Nations of the North-West.

The Dominion’s acquisition of the North-West has been framed by historians in terms of empire and colonial expansion.³ As Canadians were preparing to make their debut in the venture of colonial expansion, Britain was in the process of liquidating its own empire. In the same year that the terms of the Rupert’s Land transfer were clarified in the *Rupert’s Land Act* of 1868, the United Kingdom elected a Liberal majority of 387 (out of 658) under Prime Minister William Ewart Gladstone—who campaigned in favour of reducing Britain’s obligations in the realm of colonial defence.⁴ Historian Paul Knaplund argued that describing Gladstone as anti-colonial fails to capture the nuance of his views.⁵ Gladstone favoured a relaxation of the imperial tie between Britain and its colonies—at a time when Macdonald sought to strengthen it in order to preserve the Dominion in its infancy—but viewed the colonies as members of the Empire that would choose to associate with Britain if granted some level of independence and self-

³ Creighton described the North-West as the “new empire” in his biography of Macdonald. See Creighton, *The Old Chieftain*, 42. Chester Martin argued that the Dominion’s acquisition of Rupert’s Land transformed it “into a veritable empire in its own right.” See Chester Martin, *Dominion Lands Policy* (Toronto: McClelland and Stewart Limited, 1973), 9. Eysyllt W. Jones and Adele Perry characterized Confederation as “the end of Canada’s history as a British colony, but the beginning of its career as a colonizing force.” See Eysyllt W. Jones and Adele Perry, eds., *People’s Citizenship Guide: A Response to Conservative Canada* (Winnipeg: ARP, 2011), 24.

⁴ Philip Magnus, *Gladstone: A Biography* (New York: E.P. Dutton & Co., Inc., 1954), 193; F.W.S. Craig, ed., *British Electoral Facts, 1832-1987*, 5th ed. (Aldershot: Gower Publishing Company Limited, 1989), 10. On the limiting of colonial expenditures see Jonathan Parry, “Gladstone, Liberalism, and the Government of 1868-1874,” in *Gladstone Centenary Essays*, eds. David Bebbington and Roger Swift (Liverpool: Liverpool University Press, 2000), 97.

⁵ For an analysis of Knaplund’s interpretation see Peter Burroughs, *British Attitudes Towards Canada, 1822-1849* (Scarborough: Prentice-Hall of Canada, Ltd., 1971), 121.

government.⁶ On March 4, 1862 in a debate on colonial defence in the House of Commons, William Edward Baxter quoted Gladstone's opinion (as Chancellor of the Exchequer) that "no community which is not primarily charged with the ordinary business of its own defence is really, or can be, in the full sense of the word, a free Community."⁷

Arguments in favour of reducing the imperial connection between Britain and its colonies pervaded Georgian and Victorian political thought long before the electoral victory of the Gladstone Liberals in 1868. Shortly after the American Revolution, Adam Smith proposed that trade preferences in colonial markets inhibited the benefits to be accrued by the mother country.⁸ In the 1790s, Jeremy Bentham argued in favour of total liquidation of the Empire on the basis that Britain's colonial dependencies put it at perpetual risk of war.⁹ In 1836, Richard Cobden asked "[w]here is the *enemy* (?) that would be so good as to steal such *property* [the colonies]? We should consider it to be quite as necessary to arm in defence of our national debt!"¹⁰ In 1849, James Stephen, Permanent Under-Secretary of State for the Colonies, was of the opinion that it was up to "the Canadians to cut the last cable which anchors them to us" and thus bring to an end the imperial link which he viewed as a liability.¹¹ So pervasive was the notion that colonies were a burden on British taxpayers that by 1852 Benjamin Disraeli—who would reinvigorate the imperial idea in the 1870s and 1880s—could describe the colonies (in reference to the fisheries

⁶ Paul A. Knaplund, "Gladstone's Views on British Colonial Policy," *Canadian Historical Review* 4, no. 4 (December 1923): 311-312.

⁷ HC Deb 2 March 1862, vol 165, col 1046.

⁸ Adam Smith, *An inquiry into the nature and causes of the wealth of nations*, vol. II (London: W. Strahan and T. Cadell, 1776), 131.

⁹ See Jeremy Bentham, *Plan for an Universal and Perpetual Peace* (London: Sweet & Maxwell, 1927), 11-13.

¹⁰ Richard Cobden, *The Political Writings of Richard Cobden*, vol. I (London: T. Fisher Unwin, 1903), 243, emphasis in original.

¹¹ In Kenneth N. Bell and W.P. Morrell, eds., *Select Documents on British Colonial Policy, 1830-60* (Oxford: Clarendon Press, 1928), xxiv. See also Llewellyn Woodward, *The Age of Reform, 1815-1870*, 2nd ed. (Oxford: Clarendon Press, 1962), 367-368.

dispute between Canada and the US) as “millstones round our necks.”¹² Shortly before his death in 1865, Cobden welcomed the movement of Confederation of British North America as a step towards separation and the ending of the imperial tie to Britain.¹³

Members of Gladstone’s government that shared Cobden’s aspirations were several. John Bright assumed the presidency of the Board of Trade.¹⁴ Together Bright and Cobden had established the Anti-Corn Law League for the purpose of advocating for free trade.¹⁵ For Bright, the role of Britain in colonial affairs was to prepare the colonies for self-government in order to facilitate the elapsing of Britain’s financial obligations to the colonies.¹⁶ Bright was joined by Robert Lowe (as Chancellor of the Exchequer) and Lord Granville (as Secretary of State for the Colonies) as elements hostile to the colonies.¹⁷ When a loan for railway construction in Canada was debated in the House of Commons in 1867, Lowe opposed it because he “was quite willing to give my consent to the Act for the Confederation, because the people themselves wanted it” but believed British involvement ought to have ended there or else incur “a responsibility which we shall one day greatly rue.”¹⁸ According to C.P. Stacey, Granville gravitated closer to the ideas of colonial independence and separatism than any of his contemporaries.¹⁹ With respect to

¹² In William Flavelle Monypenny and George Earle Buckle, *The Life of Benjamin Disraeli: Earl of Beaconsfield*, vol. III (New York: The Macmillan Company, 1917), 385.

¹³ A.P. Thornton, *The Imperial Idea and Its Enemies: A Study in British Power* (New York: Anchor Books, 1968), 10. Cobden died in April 1865 in the midst of the Confederation movement in British North America. See John M. Brady, “Richard Cobden,” in *The Encyclopedia of Libertarianism*, eds. Ronald Hamowy, Jason Kuznicki, and Aaron Steelman (Thousand Oaks: SAGE Publications, Inc., 2008), 74.

¹⁴ Charles Anthony Vince explained that Bright accepted the presidency of the Board of Trade after initially refusing the position of Secretary of State for India. See Charles Anthony Vince, *John Bright* (London: Blackie & Son, 1898), 67.

¹⁵ Elie Halévy, *A History of the English People in the Nineteenth Century: The Triumph of Reform, 1830-1841*, 2nd rev. ed., vol. III (Rochester: Staples Press Limited, 1950), 333-334.

¹⁶ James L. Sturgis, *John Bright and the Empire* (London: University of London, the Athlone Press, 1969), 83-84.

¹⁷ Chris Cook and Brendan Keith, eds., *British Historical Facts, 1830-1900* (London: The Macmillan Press Ltd., 1975), 50 and 60. According to Edward Backhouse Eastwick, Lowe had viewed Canada as a weakness. See HC Deb 26 April 1870, vol 200, col 1837.

¹⁸ HC Deb 28 March 1867, vol 186, col 760.

¹⁹ C.P. Stacey, *Canada and the British Army, 1846-1871* (Toronto: University of Toronto Press, 2019), 205.

Canada, Granville believed that the best solution would be for the Dominion to “proclaim her independence.”²⁰

As Granville’s predecessor in the colonial portfolio, Edward Cardwell had a hand in both promoting and fostering Confederation. In contrast to Frederic Rogers (Permanent Under-Secretary) and Chichester Parkinson-Fortescue (Parliamentary Under-Secretary) who favoured the union of the maritime colonies and viewed the union of British North America with some hostility,²¹ Cardwell supported the initiative of Governor General Lord Monck of Canada to pursue Confederation in August 1864.²² Cardwell defended the Canadian scheme of British North American union against the criticisms of Lieutenant Governor Arthur Gordon of New Brunswick.²³ While in opposition in 1866, Cardwell supported the ratification of the Confederation Bill when his Conservative successor in the colonial portfolio, Lord Carnarvon, requested his help.²⁴ The next year, as Bright, Lowe, and J.A. Roebuck assailed the project of Confederation, Cardwell defended Confederation in the House of Lords.²⁵ So persuaded by the Canadian confederal scheme was Cardwell that in 1865 when Gladstone—to the consternation of Prime Minister Palmerston—pushed to reduce the colonial navy force by 500 and opposed the

²⁰ Quoted in Edmond Fitzmaurice, *The Life of Granville George Leveson Gower: Second Earl of Granville, K.G., 1815-1891*, vol. II (New York: Longmans, Green and Co., 1906), 22.

²¹ See Donald Creighton, *John A. Macdonald: The Young Politician* (Toronto: The Macmillan Company of Canada, 1956), 362; Arvel B. Erickson, *Edward T. Cardwell: Peelite* (Philadelphia: American Philosophical Society, 1959), 40.

²² Creighton, *The Young Politician*, 362.

²³ Creighton, 371. For an analysis of Cardwell’s approach to “handling” Gordon see Erickson, *Edward T. Cardwell*, 38-39.

²⁴ Creighton, *The Young Politician*, 445.

²⁵ Cardwell defended the Confederation bill in the House of Lords on its second reading on February 28, 1867. In the same debate, Bright objected to the bill on the basis that Nova Scotia was forced into Confederation against its will and feared that the Dominion would still be costly for British taxpayers. See HL Deb 28 February 1867, vol 185 and cols 1174-1180 and 1181-1185. In committee on March 4, 1867, Lowe objected, as he did the following year, to any commitments on the part of Britain for constructing the Intercolonial railway. In the same sitting, when Roebuck argued that the absence of a body to determine when the federal government’s actions were *ultra vires* was a defect, Cardwell countered that it was not a defect because the British North American delegates wished to leave the J.C.P.C.’s role as the final arbiter intact. See HL Deb 4 March 1867, vol 185, cols 1319-1320 and 1322.

fortification of Quebec, Cardwell postponed the resolution of Canadian defences until Confederation was realized.²⁶

When Cardwell entered Gladstone's cabinet as Secretary of State for War, it fell to him to formulate the solution to the problem of Canadian defence that he deferred as Colonial Secretary. The Cardwell Reforms involved a general restructuring of the British military in which the abolition of purchasable commissions loomed particularly large.²⁷ The most consequential of Cardwell's reforms from the perspective of the Dominion, however, was the proposed reduction of the colonial garrisons. In a memorandum to cabinet dated January 9, 1869, Cardwell proposed a reduction of the British troops in the colonies from 50,000 to 26,000 (including an estimated reduction in the Canadian forces from 16,185 to 6,249).²⁸ Gwyn contended that "[o]ver time, Cardwell's views on relations with the colonies had changed considerably."²⁹ While it is possible that his association with anti-colonial elements in Gladstone's cabinet altered Cardwell's thinking, historian Arvel B. Erickson observed that, as a Peelite free trader, Cardwell would have favoured the assumption of responsibility for defence by the colonies and believed that the union of British North America was conducive to this end.³⁰

While Gladstone favoured the reductions for reasons of economy and efficiency, Dominion leaders and their allies in Britain argued that the reductions would leave the colonies

²⁶ Creighton, *The Young Politician*, 405. In a letter to Queen Victoria dated January 20, 1865, Palmerston stated that "Mr. Gladstone has been as troublesome and wrong-headed as he often is upon subjects discussed in cabinet" in relation to Gladstone's proposal to reduce the navy by 500 personnel and his opposition to the fortifying of Quebec. In George Earle Buckle, ed., *The Letters of Queen Victoria: A Selection From Her Majesty's Correspondence and Journal Between the Years 1862 and 1878*, series 2, vol. I (London: John Murray: 1926), 248-249.

²⁷ For an analysis of the Cardwell Reforms and the controversy surrounding the ending of purchasable commissions see Brian Bond, "Edward Cardwell's Army Reforms, 1868-74," in *The British Army, 1815-1914*, ed. Harold E. Raugh (London: Routledge, 2006), 243-252.

²⁸ Robert Biddulph, *Lord Cardwell at the War Office: A History of His Administration, 1868-1874* (London: John Murray, 1904), 24-26; Stacey, *Canada and the British Army*, 212.

²⁹ Gwyn, *Nation Maker*, 83.

³⁰ Erickson, *Edward T. Cardwell*, 40.

defenceless.³¹ On April 14, 1870, Macdonald wrote to Carnarvon to express gratitude for his friendship and inform him that “we greatly distrust the men at the helm in England.” Macdonald added that Canadians believed that “Bright, Lowe and Gladstone (and may I add Lord Granville?) are not true exponents of the public opinion of England.”³² Later, on October 14, 1870, the *Weekly Globe* stated “[w]e do not think that the withdrawal of troops in Canada, with the exception of one regiment, was the act of men friendly to the colonial connexion.”³³ Cardwell countered that “[t]he true defence of our colonies is that they live under the aegis of the name of England”—implying that the colonies were protected because war with them meant war with England.³⁴ The retort from the colonies that their relationship with Britain encouraged attacks on their territory (especially by Fenians and Americans in Canada) apparently failed to persuade British authorities.³⁵ Cardwell continued to erode the colonial garrison in Canada. The number of troops to remain in Canada initially fell to 2,000 until in 1870 it was determined that all but a few troops (for training purposes) and the naval forces at Halifax would be withdrawn.³⁶

Of course, the reduction of the colonial garrisons was not pursued solely in the interest of the colonies’ own development. The patriation of British troops abroad would also alleviate the expense of maintaining them shouldered by the British government.³⁷ Events in European politics also made some elements in Britain anxious to have the bulk of the army at home.³⁸ The

³¹ Bond, “Cardwell’s Army Reforms,” 243.

³² Library and Archives Canada (LAC), MG26-A, vol. 517, Sir John A. Macdonald Fonds, Sir John A. Macdonald to Lord Carnarvon, April 14, 1870, 129-132.

³³ In Stacey, *Canada and the British Army*, 247.

³⁴ HC Deb 11 March 1869, vol 194, col 1117.

³⁵ In the same letter to Carnarvon of April 14, 1870, Macdonald argued that “we are left the unaided victims of Irish discontent and American hostility caused entirely by our being a portion of the Empire.” LAC, MG26-A, vol. 517, Sir John A. Macdonald Fonds, Macdonald to Carnarvon, April 14, 1870. See also Thornton, *The Imperial Idea*, 28.

³⁶ Gwyn, *Nation Maker*, 85.

³⁷ The reduction of the colonial garrison was intended to limit the expenditures of the War Office without sacrificing the strength of the fighting force of the military. See Biddulph, *Cardwell at the War Office*, 26.

³⁸ Stacey, *Canada and the British Army*, 247-248.

defeat of France by Prussia (and consequent unification of Germany) in 1871 emboldened Russia to disregard the terms of the Treaty of Paris (1856) regarding the Black Sea.³⁹ Britain was suddenly confronted with the arrival of a new power in continental Europe and the prospect of war with Russia loomed. It was thought that the United States might take advantage of the situation by launching an attack on its North American colonies—in retribution for negligible British neutrality during the American Civil War. Accordingly, it became necessary not only to withdraw the bulk of the British forces from the colonies in the event of war with Russia but to facilitate a lasting peace with the United States in order to justify such a withdrawal.⁴⁰

Several historians have noted that in pursuit of Anglo-American peace, both contracting parties were aware that they could sacrifice Canadian interests.⁴¹ Some have gone so far as to argue that the British considered giving Canada to the United States to settle the *Alabama* claims.⁴² The idea had been floated among American authorities and US Secretary of State Hamilton Fish discussed the subject of Canada's annexation freely with British ambassador Edward Thornton on the eve of the Washington Treaty of 1871.⁴³ However, when the idea became known to the British press, the *Spectator* described it as “a gross attempt at plunder.”⁴⁴

³⁹ W.L. Morton, *The Critical Years: The Union of British North America, 1857-1873* (Toronto: McClelland and Stewart Limited, 1964), 250.

⁴⁰ Lucien Wolf, *Life of the First Marquess of Ripon*, vol. I (London: John Murray, 1921), 238-239.

⁴¹ See, for examples, Creighton, *The Old Chieftain*, 84; W.G. Hardy, *From Sea Unto Sea: The Road to Nationhood, 1850-1910* (Garden City: Doubleday & Company, Inc., 1960), 254-255; Morton *The Critical Years*, 252; Carl Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867-1914* (Toronto: University of Toronto Press, 1970), 63. On the *Alabama* claims see Maureen M. Robson, “The *Alabama* Claims and the Anglo-American Reconciliation, 1865-71,” *Canadian Historical Review* 42, no. 1 (March 1961).

⁴² See Gwyn, *Nation Maker*, 157-158.

⁴³ When Thornton countered Fish's proposal for the annexation of Canada with the condition that Canadians had to choose annexation freely (and the protest ensuing from the withdrawal of British troops did not indicate that they would do so), Fish claimed to have hundreds of letters from Canada asking for the American government to carry-out annexation. On such a basis, Fish claimed that Canada was “ripe for independence.” See Goldwin Smith, *The Treaty of Washington of 1871: A Study in Imperial History* (Ithica: Cornell University Press, 1941), 17.

⁴⁴ Quoted in Allan Nevins, *Hamilton Fish: The Inner History of the Grant Administration* (New York: Dodd, Mead, and Company, 1936), 122.

Further, after Fish proposed the cession of Canada to settle the *Alabama* claims to Lord de Grey in 1871, the latter replied that it was not in his instructions to negotiate such a proposal.⁴⁵ Despite the open suggestions and discussions of American annexation of Canada, British authorities such as former Governor General Monck and his successor Governor General Lisgar endeavoured to make it clear that if Canadian sovereignty was ever threatened, Britain would “defend every part of the Empire with all the resources at its command” even if British soldiers would not be in Canada in peacetime.⁴⁶ The appetite and capacity of Britain to respond to a war in which Canadian sovereignty in the North-West was threatened (whether by Americans, First Nations, or Fenians) were not obvious.

George Woodcock argued that Gladstone viewed the annexation of Canada by the United States as inevitable.⁴⁷ In fact, while reflecting on a speech at Newcastle given during the American Civil War, Gladstone confessed that while the American union persisted it was Britain’s honour—rather than its interest—that prevented Canada’s annexation.⁴⁸ Several others in Gladstone’s cabinet (to varying degrees) favoured Canadian independence which would invariably have led to annexation given the state of the Canadian economy and its military.⁴⁹ In 1874, an ostensibly friendlier government under Disraeli was elected. While imperialism was reshaped under Disraeli and the seeds of a stronger alliance between members of the commonwealth were planted, there is no indication in the actions or thoughts of the Disraeli

⁴⁵ John Morley, *The Life of William Ewart Gladstone*, vol. II (London: Macmillan and Co., Limited, 1903), 401.

⁴⁶ Gwyn, *Nation Maker*, 83-84.

⁴⁷ George Woodcock, *Who Killed the British Empire?* (New York: Quandrangle, New York Times Book Co., 1974), 200.

⁴⁸ Morley, *Life of Gladstone*, vol. II, 81-82.

⁴⁹ Lord Kimberley had noted that there were elements in Gladstone’s government that “made no secret of their opinion” that Britain should liquidate its colonies. Quoted in Creighton, *The Old Chieftain*, 126-127.

Conservatives between 1874 and 1880 that they were prepared to defend Canadian sovereignty.⁵⁰ In his first government in 1868, Disraeli ordered the return of two battalions from Canada.⁵¹ The garrisons that were withdrawn by Cardwell between 1868 and 1874 were never returned by Disraeli's second government. Thus, while the Dominion could look to a government in London that was generally more favourable to the idea of the British Empire, it would not find one willing to defend Canada's place within that empire.

The withdrawal of troops from Canada also limited the ability of the British to respond effectively to an attack on the Dominion—even if the possibility of an attack seemed increasingly remote. The only remaining centres of the British military presence in North America—at Halifax and Esquimalt—were merely naval bases largely devoted to repairing ships in the North Atlantic and Pacific Northwest respectively.⁵² The transportation of British troops into the interior of North America was seriously inhibited by the lack of military presence west of Nova Scotia and east of Vancouver Island. This weakness was aggravated by the absence of railway lines through Canadian territory that persisted until as early as 1885.⁵³ The defence policy of Britain with respect to Canada from 1868 until the end of the treaty-making period (insofar as such a policy can be said to have existed) was to weaken the imperial tie between

⁵⁰ On Disraeli's second government and the 'new imperialism' see Thornton, *The Imperial Idea*, 26 and 52; Richard Shannon, *The Crisis of Imperialism, 1865-1915* (Frogmore: Paladin, 1976), 101-141.

⁵¹ Stacey, *Canada and the British Army*, 201.

⁵² F.V. Langstaff, *Esquimalt Naval Base: A History of Its Work and Its Defences* (Vancouver: The Clarke and Stewart Co. Limited, 1941), 33; Gwyn, *Nation Maker*, 85; Roger Sarty, "A Navy of Necessity: Canadian Naval Forces, 1867-2014," *The Northern Mariner* 24, nos. 3 & 4 (2014): 34-35.

⁵³ The last spike of the Canadian Pacific Railway (CPR) was driven into the ground by Donald Smith on November 7, 1885—nearly 15 years after the first of the southern Numbered Treaties was negotiated in the summer of 1871. Even with the completion of the CPR's mainline, however, tributary or branch lines would not be acquired or constructed in the North-West until 1888 (from Lake Nipissing) and 1893 (from Moose Jaw to Pasqua and Dunmore to Lethbridge). Creighton, *The Old Chieftain*, 436; Harold A. Innis, *A History of the Canadian Pacific Railway* (Toronto: University of Toronto Press, 1971), 137 and 139.

Britain and the Dominion in order to remove sources of discontent with the US and facilitate the relaxation of American annexationist impulses.⁵⁴

That abandonment by Britain meant annexation by the US assumed the character of a fixed fact for Dominion authorities in the late 1860s and 1870s. Macdonald—commenting on the state of affairs in 1869—believed that Canada was too weak to stand on its own and would remain in that condition for the foreseeable future.⁵⁵ The words and actions of American authorities with respect to the North-West did little to assuage the worries of Macdonald and his contemporaries. In December 1867, for example, Senator Alexander Ramsey of Minnesota proposed to resume the reciprocity treaty with the Dominion on the same terms agreed to in 1854 in exchange for the relinquishing of all claims west of 90⁰ latitude. The HBCo. would be compensated for the forfeiture of its charter in the sum of \$6 million (equivalent to £1,237,113.40),⁵⁶ British Columbia's debt would be assumed by the federal government up to \$2 million, and the construction of the Northern Pacific to Puget Sound would be subsidized.⁵⁷ That Ramsey's proposal offered a legitimate alternative to British Columbia's entry into Canadian Confederation and the North-West's annexation by the Dominion is indicated by the political and economic context in which the proposal was made.

⁵⁴ Morton, *The Critical Years*, 257. American authorities had alluded to the irritation of its citizens by the British presence in North America. Annexationist elements suggested that the British flag should be removed throughout the continent and be replaced by the American flag. See Morley, *Life of Gladstone*, vol. II, 401.

⁵⁵ LAC, MG26-A, vol. 516, Sir John A. Macdonald Fonds, Macdonald to Dr. Carrall, September 29, 1869, 214. It may be prudent to recall Martin's argument that Macdonald was not in complete control of Canadian affairs. See Martin, "Understanding Macdonald," 420. In this instance, however, Macdonald was reflecting on the lack of control which his government (or Canadians generally) were able to exercise. For a contrasting opinion, consider Lord Monck's comment to Macdonald that he hoped his experience at the Washington Conference in 1871 would convince him that Canada was "nearly strong enough to walk alone." See Smith, *Washington Treaty*, 45.

⁵⁶ This conversion is based on the exchange rate of the American dollar to the British pound sterling in legislation from British Columbia set at \$4.85 to £1. *An Ordinance to render uniform the Laws establishing a Decimal System of Accounts, and regulating the Currency of the Colony*, s. 2, SBC 1867, c 60.

⁵⁷ *Senate Miscellaneous Documents*, 40 Cong., 2 sess., no. 4. See also Donald F. Warner, *The Idea of Continental Union: Agitation for the Annexation of Canada to the United States, 1849-1893* (Lexington: University of Kentucky Press, 1960), 110.

In 1863, the International Financial Society secured effective control over HBCo. operations and the objectives of the Company shifted from the preservation of the fur trade economy to real estate and economic development.⁵⁸ The changing priorities of the HBCo. were a response to a greater transition from mercantilism to capital accumulation. As Bryan D. Palmer explained, population growth in Canadian colonies encouraged industrial expansion—particularly in the railroad sector.⁵⁹ Thus, in the 1860s, it became advantageous for the HBCo. to turn away from the receding fur trade economy and secure a foothold in the burgeoning industrial one. On January 18, 1866, Alexander McEwen wrote to former HBCo. Governor (and former Governor General of Canada) Edmund Head asking whether or not the Company “is at liberty and is willing to dispose of its cultivable territory to a party of Anglo-American capitalists...”⁶⁰ HBCo. Secretary Thomas Fraser replied to McEwen on January 24 informing him that the Company would be “desirous of such organization by the exercise of any power which they lawfully possess.”⁶¹ Fraser admitted that because Rupert’s Land was a British colony, the consent of the British government was necessary but clarified that “the Governor and Committee see no reason to suppose that any obstacle would arise on this account.”⁶² The sincerity of Fraser’s response is not as clear as its content might suggest.

Historians J.S. Galbraith and Donald F. Warner each argued that the HBCo. replied to McEwen’s inquiry simply to pressure the Canadians into negotiating a satisfactory settlement.⁶³

⁵⁸ E.W. Watkin, *Canada and the States: Recollections, 1851-1886* (London: Ward, Lock and Co., 1887), 127; John S. Galbraith, “The Hudson’s Bay Company Land Controversy, 1863-1869,” *Mississippi Historical Review* 36, no. 3 (December 1949): 459.

⁵⁹ Bryan D. Palmer, “The Past Is Before Us: Capitalism, Colonialism, and Canada, 1500-2023,” *Labour* 93 (Spring 2024): 261-267.

⁶⁰ CSP, 1867-1868, “Report of Proceedings and Other Documents, in possession of the Government relative to the Hudson’s Bay Territory,” Paper no. 19, 3 (hereinafter CSP, “Hudson’s Bay Territory”).

⁶¹ CSP, “Hudson’s Bay Territory,” Paper no. 19, 4.

⁶² CSP, “Hudson’s Bay Territory,” Paper no. 19, 4.

⁶³ Galbraith, “Land Controversy,” 470; Warner, *Continental Union*, 103.

Galbraith pointed out that the Imperial government blocked the sale of Rupert's Land to any entity apart from the Canadian government.⁶⁴ However, in a letter to Head on February 20, 1866, E.E. Forster clarified (on behalf of Cardwell) that the Imperial government had already supported the Canadian proposal to buy-out the HBCo.'s interest in the North-West and stated that the government needed to keep this proposal in view "[u]ntil this engagement shall have been disposed of."⁶⁵ Therefore, Britain was not—as Galbraith suggested—entirely opposed to the sale of Rupert's Land (or parts thereof) to American business interests in favour of Canada. Instead, British authorities were keeping their word to support the Canadian proposal until the negotiations between Canada and the HBCo. were concluded (successfully or otherwise).

That the HBCo. was prejudicial to Canadian interests is highly unlikely. As Governor General of Canada in 1856, Head viewed the proposal of Lowe—that Canada be compensated with the annexation of Rupert's Land for financing the construction of the railway from Halifax to Quebec—with scepticism because he believed Canada was ill-prepared to govern such a vast territory.⁶⁶ Head also opposed the view that Rupert's Land rightfully belonged to Canada arguing that Canada did not “now govern the territory belonging to” it.⁶⁷ Members of the Reform Party and George Brown took this line of reasoning to its extreme limits in seeking to challenge the validity of the HBCo.'s charter—which would be the sole basis of the Company's monopoly upon the expiration of its trading license in 1859.⁶⁸ Brown and the Reform Party were supported

⁶⁴ Galbraith, “Land Controversy,” 470.

⁶⁵ CSP, “Hudson's Bay Territory,” Paper no. 19, 4.

⁶⁶ Donald G.G. Kerr, “Edmund Head, Robert Lowe, and Confederation,” *Canadian Historical Review* 20, no. 4 (December 1939): 417.

⁶⁷ Quoted in Kerr, “Head, Lowe, and Confederation,” 418.

⁶⁸ In 1850, Brown argued that the “time is nearly arrived when Canada should become a party to the demand from the Home Government for a stringent inquiry into the validity of the [HBCo.'s] charter.” For Brown it was “unpardonable that civilization should be excluded from half a continent, on at best a doubtful right of ownership, for the benefit of 232 shareholders.” “The Superior and Northern Country,” *Globe* (Toronto), November 12, 1850. See also J.M.S. Careless, *Brown of the Globe: The Voice of Upper Canada, 1818-1859*, vol. I (Toronto: The Macmillan Company of Canada Limited, 1959), 230. The foundations of the HBCo.'s monopoly were its 1670

in this campaign by Secretary of State for the Colonies Edward Bulwer-Lytton but opposed by the government then in power in Canada. The government of the day feared both the division between Upper and Lower Canada that the acquisition of the North-West would create and that a failed challenge of the Company's charter would force Canada to compensate the Company for Rupert's Land.⁶⁹ The extent of the territories encompassed by the HBCo.'s charter was also disputed against the claims of Canada pursuant to the extent of French territory in North America prior to its acquisition by Britain in 1763.⁷⁰ It is possible that the HBCo. leadership after 1863 would have been unaffected by the hostile actions of the Canadians but it still would have preferred a compensation offer closer to the requested sum of £1,000,000 than the £300,000 offered by Canada.⁷¹

With the exceptions of the Canada First party—elements of which were active in the North-West prior to the transfer of Rupert's Land—and the adherents of Thomas D'Arcy McGee,⁷² Canadian nationalism was enfeebled in the late 1860s and 1870s.⁷³ The attachments of British North Americans were primarily to Britain itself. Joseph Howe of Nova Scotia, for an extreme example, stated that to save England he would "blow up Nova Scotia into the air or scuttle her like an old ship."⁷⁴ In British Columbia, Canadian nationalism was non-existent and

charter which entitled it to "all the lands draining into the Hudson's Bay watershed" and trading licenses from the British government entitling the Company to operate beyond the lands granted in its charter. The license for the "Indian territory" lying west of Rupert's Land expired in 1859. McNeil, *Native Claims*, 2-3.

⁶⁹ Morton, *The Critical Years*, 35, 62 and 69-70.

⁷⁰ Select Committee on the Hudson's Bay Company, *Report of the Select Committee on the Hudson's Bay Company; Together with the Proceedings of the Committee, Minutes of Evidence, Appendix and Evidence* (HC 1857-07-08) para. 2523.

⁷¹ Galbraith, "Land Controversy," 463.

⁷² On the Canada First movement see Berger, *Sense of Power*, 49-77. On the nationalism of D'Arcy McGee see T.P. Slattery, *The Assassination of D'Arcy McGee* (Toronto: Doubleday Canada Limited, 1968), 137; Gwyn, *John A.*, 217.

⁷³ See P.B. Waite, *The Life and Times of Confederation, 1864-1867: Political Newspapers and the Union of British North America* (Toronto: University of Toronto Press, 1971), 328-329.

⁷⁴ Howe expressed this sentiment in explaining his opposition to Confederation to Sir John C.D. Hay on November 12, 1866. Quoted in Lawrence J. Burpee, ed., "Joseph Howe and the Anti-Confederate League," *Transactions of the Royal Society of Canada* 10, sec. 2, ser. 3 (March 1917): 437-439. See also J. Murray Beck,

the attachment to Britain was waning. The union of Vancouver Island and British Columbia had become the source of much discontent as the former's economic base (its free port at Victoria) was sacrificed and the latter fell into a Depression after the union.⁷⁵ The proposal of Ramsey to assume the colony's debt—which stood at \$1,045,000 in 1870—and that of Representative George F. Miller of Pennsylvania in November 1867 to annex British Columbia on terms mutually satisfactory to Britain and the US would have been looked upon favourably by many in British Columbia.⁷⁶ Several of those in favour of annexation were drawn to the idea not by sentiment but by economic pressures augmented by the proximity of American territories to the north and south.⁷⁷

Similar economic and political tensions were at play in the vicinity of Red River. Since the resumption of its monopoly with the amalgamation of the North West Company and HBCo. in 1821, the latter's economic control of the North-West was gradually eroded.⁷⁸ In 1846-47, Alexander Kennedy Isbister wrote the colonial office in Britain on behalf of the Métis requesting an exemption from the HBCo.'s trading monopoly by virtue of their status as a native people and as British subjects.⁷⁹ Isbister was rebuffed but within three years of the first petition the effective

Joseph Howe: The Briton Becomes Canadian, 1848-1873, vol. II (Montreal & Kingston: McGill-Queen's University Press, 1983), 210.

⁷⁵ Waite, *Life and Times of Confederation*, 315.

⁷⁶ On Miller's proposal see Warner, *Continental Union*, 134. On British Columbia's debt see Brian Smith, "The Confederation Delegation," in *British Columbia & Confederation*, ed. W. George Shelton (Victoria: University of Victoria, Morriss Printing Company Ltd., 1967), 204.

⁷⁷ See Waite, *Life and Times of Confederation*, 316. British Columbia was flanked by American territories to its north (Alaska was purchased from Russia in 1867) and its south (Oregon's boundary being [somewhat unsuccessfully] resolved by the Oregon Treaty of 1846). Walter N. Sage, "The Oregon Treaty of 1846," *Canadian Historical Review* 27, no. 4 (December 1946), 349. Lea A. Farrow, *Seward's Folly: A New Look at the Alaska Purchase* (Fairbanks: University of Alaska Press, 2016), 53. Two years prior to the Alaska Purchase, Russia offered to lease its North American territory to the HBCo. long-term but the Company declined owing to the uncertainty of the fur trade. See John S. Galbraith, *The Hudson's Bay Company as an Imperial Factor, 1821-1869* (Berkeley & Los Angeles: University of California Press, 1957), 172.

⁷⁸ "Extract from Hudson's Bay Company Minute Book, March 21, 1821; Proceedings at a General Court Relating to the Amalgamation with the North West Company," in W. Stewart Wallace, ed., *Documents Relating to the North West Company* (Toronto: The Champlain Society, 1934), 32.

⁷⁹ See Hamon, *Audacity of His Enterprise*, 51; "The humble Memorial of the undersigned Deputies from the Natives of Rupert's Land, North America," February 17, 1847, in *Hudson's Bay Company (Red River*

monopoly of the HBCo. collapsed after four Métis free traders walked free—including Pierre Guillaume Sayer who was found guilty—after being charged with violating the Company’s charter on May 17, 1849.⁸⁰ A decade later, the elapsing of its trading license brought the Company’s total monopoly to an end. As the HBCo.’s control of the North-West and Red River waned, the development of St. Paul, Minnesota drew the region’s economic activity south.⁸¹ Annexationist rhetoric and opinion accompanied the economic pull towards the United States on both sides of the international boundary. Joseph Rolette Jr. of Minnesota believed that the North-West could be settled more rapidly under American (rather than Canadian) control and consequently favoured annexation in order to profit from land speculation.⁸² American agents (including American Consul Oscar Malmros and Fenian leader W.E.B. O’Donoghue) were active in Red River.⁸³ Warner argued that some HBCo. men (in addition to a small group of Catholic priests) favoured American annexation over union with Canada.⁸⁴

Settlement): Return to an address of the House of Commons dated 9 February 1849 for copies of any memorials presented to the Colonial Office by inhabitants of the Red River Settlement, complaining of the government of the Hudson's Bay Company: Of the instructions given to the Governor-General of Canada for the investigation of those complaints: Of the reports of the officers appointed by Lord Elgin, or by the Colonial Office for the purposes of such investigation: And of any correspondence which has passed between the Colonial Office and the Hudson's Bay Company and the inhabitants of the Red River Settlement respectively upon the subject of the above memorial Address (HC 1849-04) (hereinafter HBCo. Return), 1-4.

⁸⁰ In his report to Earl Grey (then Colonial Secretary), J.H. Pelly argued that the “circumstances of their being born in the country may entitle them to call themselves natives, but it neither conveys to them any privileges belonging or supposed to belong to the aboriginal inhabitants, nor does it divest them of the character of British subjects, all of whom are precluded by the Company’s charter from trafficking in furs its limits without a license from the Company.” Pelly to Earl Grey, April 24, 1847, in *HBCo. Return*, 26. On the Sayer Trial see Friesen, *Canadian Prairies*, 100-101.

⁸¹ Warner, *Continental Union*, 100.

⁸² Donald F. Warner, “Drang Nach Norden: The United States and the Riel Rebellion,” *Mississippi Valley Historical Review* 39, no. 4 (March 1953): 698. During the Red River Resistance, Rolette had attempted to influence Riel and the Métis during his visits to Fort Garry. See W.L. Morton, ed., *Alexander Begg’s Red River Journal: and Other Papers Relative to the Red River Resistance of 1869-1870* (Toronto: The Champlain Society, 1956), 9-10 and 164-165.

⁸³ Begg wrote in his journal on December 26, 1869, that “Oscar Malmros (sic) the American Consul is mixing himself up with the French party much more than seems necessary.” A few days later on December 29, Begg wrote that “it is still suspected that [Malmros] is working a good deal with the French party.” In Morton, *Begg’s Journal*, 245 and 259. On Malmros’s annexationist activities see Creighton, *The Old Chieftain*, 45-46. For his part, O’Donoghue was given the position of treasurer in Riel’s provisional government. See Stanley, *Birth of Western Canada*, 164.

⁸⁴ Warner, *Continental Union*, 108.

The pattern of railway development was also helpful to the annexationist movement in the North-West. With respect to the Northern Pacific Railway alluded to by Ramsey in December 1867—after a slow beginning that mirrored, at least to an extent, the nascent years of the Canadian Pacific Railway in the succeeding decades—construction of the line began near Minnesota with the financial backing of Jay Cooke.⁸⁵ Cooke also provided financial support to the expansionist movement in the US. Warner argued that Cooke did so in order to prevent the acquisition of the North-West by a Canadian government hostile to an American railroad.⁸⁶ This explanation is supported by Cooke's belief that "the country belongs to us naturally, and should be brought over without violence or bloodshed."⁸⁷ This approach was characteristic of the nature of American annexationism in relation to Canada. That is, while Americans coveted Canada, they were not willing to go to war to attain it. Accordingly, when on April 22, 1870 Senator Zachariah Chandler of Michigan proclaimed that "[t]his continent is ours and we may well notify the world now as at any future time that we fight for our own if we must," he found weak support in Washington.⁸⁸ For his own part, Fish vetoed Malmros's proposal to capture Red River with American forces during the Red River Resistance.⁸⁹

The entry of Manitoba into Confederation in 1870 weakened the annexationist movement. Following the conclusion of the Red River Resistance, American authorities turned

⁸⁵ Like the Canadian Pacific Railway, the Northern Pacific Railway struggled in the years immediately after its charter in 1864. Construction did not begin until February 15, 1870 after Cooke had lent his financial support to the project. See Ellis Paxson Oberholtzer, *Jay Cooke: Financier of the Civil War*, vol. II (Philadelphia: George W. Jacobs and Co., 1907), 167; M. John Lubetkin, *Jay Cooke's Gamble: The Northern Pacific Railroad, the Sioux, and the Panic of 1873* (Norman: University of Oklahoma Press, 2006), 33. Both railways also saw Cooke's involvement as he had endeavoured to connect the Northern Pacific line with the prospective Canadian railway as part of a consortium that included George McMullen and Hugh Allan. The outcome of the consortium's activities was the Pacific Scandal of 1873. See Gwyn, *Nation Maker*, 181-183.

⁸⁶ Warner, *Continental Union*, 106.

⁸⁷ Quoted in Henrietta M. Larson, *Jay Cooke: Private Banker* (New York: Greenwood Press, Publishers, 1968), 337-338. See also A.W. Currie, *The Grand Trunk Railway of Canada* (Toronto: University of Toronto Press, 1957), 302.

⁸⁸ *Congressional Globe*, 41 Cong., 2 sess., no. 4; Warner, *Continental Union*, 122.

⁸⁹ Warner, 112.

inward as they confronted a post-Civil War economic depression.⁹⁰ As late as May 5, 1879, the *New York Times* wrote that Americans were too busy with their own domestic affairs to busy themselves with “the problem of Canadian independence and ultimate annexation.”⁹¹ In the intervening years between the *Manitoba Act* and this pronouncement of disinterest, American annexationist thought and action certainly declined but it was never completely extinguished. Indeed, in the early 1870s both were inflamed by the actions and inaction of the Dominion. When it became clear that a general amnesty would not be granted and the forces that arrived to claim the North-West for the Dominion perpetrated violence against the population at Red River,⁹² a group of Métis sent a memorial to President Grant on October 3, 1870 asking him “to intercede on our behalf, and to take all such steps as Your Excellency may deem appropriate and proper, to enable us to enjoy the blessings of life, liberty, property, and the pursuit of happiness under a Government of our choice.”⁹³

A similar series of events transpired in British Columbia when the keeping of the promise of a railway connecting it to the rest of the Dominion—through which the province was induced

⁹⁰ Warner, 143.

⁹¹ “Canada and Annexationism,” *New York Times* (New York), 5 May 1879.

⁹² A general amnesty had been granted to all involved except for Riel, O’Donoghue, and Ambroise Lépine in spite of the fact that the delegates sent to Ottawa on behalf of the provisional government had been made to believe that a universal amnesty was agreed to—an agreement that would have been politically disastrous for the Macdonald Liberal-Conservatives in Ontario following the execution of Thomas Scott by the Provisional Government at Red River. See Stanley, *Birth of Western Canada*, 144-174; Hamon, *Audacity of His Enterprise*, 265. When Canadian forces arrived in Red River following the resolution of the Resistance of 1869-70, they embarked on a campaign of violence against the Métis in the settlement known as the reign of terror. See Fred J. Shore, “The Emergence of the Metis Nation in Manitoba,” in *Metis Legacy: A Metis Historiography and Annotated Bibliography*, eds. Lawrence J. Barkwell, Leah Dorion, and Darren R. Prefontaine (Winnipeg: Pemmican Publications, 2001), 74-76.

⁹³ “The Memorial and Petition of the People of Rupert’s Land and North-West Territory, British North America to His Excellency U.S. Grant, President of the United States” was reproduced in “The Grievances of Manitoba,” *New York Times*, January 31, 1871. It has been argued that Riel was part of the committee that wrote the memorial. See George F.G. Stanley, “Riel’s Petition to the President of the United States 1870,” *Canadian Historical Review* 20, no. 4 (December 1939): 421. Riel later did write to Grant asking for assistance in 1875 but it did not approach the same level of allusion to possible union with the US. See “Memoir to Ulysses S. Grant,” in Gilles Martel, ed., *The Collected Writings of Louis Riel*, vol. II: December 8, 1875 to June 4, 1884 (Edmonton: University of Alberta Press, 1985), 2-003, 6-17.

into entering into Confederation—became a remote possibility.⁹⁴ Historians have given much attention to the promise of the Canadian delegates to construct the railway within ten years.⁹⁵ In fact, two delegates from British Columbia (Robert William Weir Carral and Joseph William Trutch) clarified in 1875 that the promise of ten years was interpreted as a promise to build the railway as soon as possible and that if the Canadians “had said twelve or eighteen years that time would have been accepted with equal readiness.”⁹⁶ However, the failure to keep the related promise of commencing construction within two years of the union drew the ire of the provincial government in British Columbia. On November 24, 1873, Trutch—who had been appointed Lieutenant Governor of British Columbia in 1871—reiterated a protest made against the Dominion government from July 24, 1872.⁹⁷ On February 9, 1874, the British Columbia legislature passed a resolution requesting the lieutenant governor to press the matter with the Dominion government in Ottawa and urge for the construction of the line to commence “early in the present year.”⁹⁸ On May 8, 1874, Secretary of State R.W. Scott informed Trutch that “until the location of the road was ascertained, it was impossible to commence construction.”⁹⁹

Frustration with the Dominion government’s inaction approached a breaking point. When

⁹⁴ See Innis, *Canadian Pacific Railway*, 83-86.

⁹⁵ See, for examples, Creighton, *The Old Chieftain*, 74; Tim Trousdell, “‘From Sea to Sea’—Negotiations Between Ottawa and London,” in *British Columbia and Confederation*, ed. W. George Shelton (Victoria: University of Victoria, Morriss Printing Company Ltd., 1967), 137-138; Jean Barman, *The West beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1991), 104; George Woodcock, *British Columbia: A History of the Province* (Vancouver: Douglas & McIntyre, 1990), 143-144; Gwyn, *Nation Maker*, 154; P.E. Bryden, *Canada: A Political Biography* (Don Mills: Oxford University Press, 2017), 41.

⁹⁶ CSP, 1875, “Correspondence which has taken place on the subject of the non-fulfillment of the terms of Union with the Province of British Columbia,” Paper no. 19, 25. See also Innis, *Canadian Pacific Railway*, 75n1.

⁹⁷ Joseph W. Trutch to the Hon. Secretary of State for Canada, November 24, 1873 in *Correspondence Respecting the Canadian Pacific Railway Act so far as Regards British Columbia* (HC/HL 1875-04) (hereinafter *Canadian Pacific Railway Correspondence*), 1. It has been speculated that Trutch was rewarded with the Lieutenant-Governorship of British Columbia in return for not insisting on the explicit terms of union concerning the construction of the railway. See Gwyn, *Nation Maker*, 154; Robin Fisher, “Trutch, Sir Joseph William,” *Dictionary of Canadian Biography*, 1994, https://www.biographi.ca/en/bio/trutch_joseph_william_13E.html.

⁹⁸ Extract from *Journals of the Legislature*, February 9, 1874 in *Canadian Pacific Railway Correspondence*, 58.

⁹⁹ R.W. Scott to Trutch, May 8, 1874 in *Canadian Pacific Railway Correspondence*, 60.

George A. Walkem was returned to power as premier in British Columbia in 1878—after four years in opposition—he put forward a resolution providing for his province’s secession if construction was not commenced by May 1879—a threat that was rescinded when Macdonald similarly returned to power in Ottawa in the election of 1878.¹⁰⁰

Throughout the 1870s, annexationist movements throughout the Dominion and in the US were sporadic and generally weak. An annexationist conference in Buffalo in 1875 was characterized by the *Globe* as “unserious.”¹⁰¹ Two years later, the same publication described annexationism generally as “without substance or future.”¹⁰² Threats, allusions, and campaigns for annexation persisted. On July 20, 1877, Senator James Gillespie Blaine of Maine proposed the peaceful annexation of Canada by the United States.¹⁰³ Two years later, Francis Hincks reported that Goldwyn Smith intended to start a newspaper (the *Bystander*) to promote the idea of Canada’s annexation.¹⁰⁴ Hincks also argued that Donald MacMaster—who had recently attended an annexationist meeting in Montreal—would “find so much opposition to the discussing of such a question [annexation] that he will, I doubt not, quietly drop all thoughts of it.”¹⁰⁵

¹⁰⁰ Walkem’s motion can be found in British Columbia, *Journals of the Legislative Assembly of the Province of British Columbia: First Session—Third Parliament* (Victoria: Richard Wolfenden, Government Printer, at the Government Printing Office, James Bay, 1878), 105-107 and 108-109. Hamar Foster, “Walkem, George Anthony,” *Dictionary of Canadian Biography*, 1994, https://www.biographi.ca/en/bio/walkem_george_anthony_13E.html.

¹⁰¹ “Canada and the United States,” *Globe*, 3 May 1875.

¹⁰² “Chicago Affairs,” *Globe*, 11 July 1877.

¹⁰³ In “Annexation with the States,” *Globe*, 20 July 1877.

¹⁰⁴ In “Opposed to Annexation,” *New York Herald* (New York), 29 December 1879.

¹⁰⁵ Hincks referred to “a young lawyer named McMaster, who has just been elected to represent the easternmost constituency of the Province of Ontario.” In “Opposed to Annexation,” *New York Herald*, 29 December 1879. Donald MacMaster was elected in the riding of Glengarry in the Ontario legislature in 1879. It does not appear that MacMaster pursued the cause of annexation long after his election. After sitting in the House of Commons for Glengarry from 1882 to 1887, MacMaster later immigrated to England where he became a Member of Parliament for Chertsey in 1910 and was created a baronet in 1921. See Henry James Morgan, ed., *The Canadian Men and Women of the Time: A Hand-book of Canadian Biography* (Toronto: William Briggs, 1898), 710-711; “Supplement to the *London Gazette*,” *London Gazette* (London), 1 January 1921; J.K. Johnson, ed., *The Canadian Directory of Parliament, 1867-1967* (Ottawa: Public Archives of Canada, 1968), 430.

That the annexationist movement never approached the stage of an armed takeover and that the annexationist movement weakened throughout the 1870s is inconsequential to an understanding of Canadian political calculations in the context of the southern Numbered Treaties. Threats to Canadian sovereignty by American annexationism—whether actual or perceived—conditioned the decisions made by Dominion authorities to facilitate the exercise of such sovereignty in the North-West. Indeed, the Dominion’s acquisition of the North-West was facilitated by the spectre of its annexation of the same by Americans. On March 27, 1865, Macdonald confessed to Edward Watkin that he “was quite willing, personally, to leave that country a wilderness for the next half century, but I fear if Englishmen do not go there Yankees will, and with that apprehension I would gladly see a Crown Colony established there.”¹⁰⁶ That the retention of the region was not similarly conditioned by the threat of American annexation is ill-supported by the historical record for without the North-West, the Dominion would be effectively cut-off from British Columbia and confined to a pocket of northeastern North America. As W.L. Morton has argued, the survival of the nascent Dominion depended on expansion to both the east and west.¹⁰⁷

As the political resources of the Dominion were strained to prevent annexation by the US in the North-West, the financial and military capacities of the Dominion were similarly strained by American inaction in suppressing Fenian activity in Canada. Almost from the outset of the Dominion’s bid to acquire the North-West, the Fenian threat informed the thinking of Macdonald. When Thomas Spence—the President of the Republic of Manitobah—insinuated that the people under his authority would have to invite the protection of the US if the Dominion

¹⁰⁶ LAC, MG26-A, vol. 511, Sir John A. Macdonald Fonds, Macdonald to Edward B. Watkin, March 27, 1865, 9.

¹⁰⁷ Morton, *The Critical Years*, 131 and 207.

failed to provide for the entry of the country into Confederation,¹⁰⁸ Macdonald warned him “not to make this declaration public, as it would certainly induce the Fenians to unite on your *Confines*, and when an opportunity was given, to raid your Territory, and for no other reason than to annoy the English and Canadian Governments.”¹⁰⁹ Macdonald further cautioned Spence against “any overt Act whereby the Yankees might be induced to Volunteer Assistance, before asked to do so.”¹¹⁰

Macdonald’s worries with respect to a Fenian invasion and the intercession of the US were informed by previous experience and vindicated by subsequent events. Fenian ranks were swelled after the American Civil War by veterans of the Union army following its liquidation.¹¹¹ While Irish freedom remained the principal objective of the Fenian movement, a growing number of adherents favoured launching attacks directly on Canada (or actively occupying it as a base of operations) given its relationship to Britain.¹¹² That common ground existed between the

¹⁰⁸ Thomas Spence to Angus Morrison, January 17, 1868 in *Red River: Copy of all Petitions that have been addressed to Her Majesty or to Her Majesty’s Government from the Inhabitants of the Red River District or other Settlements or Districts within the Boundaries of British Territories in North America from 1860 up to the present* (HC 1870-08-10), 10-11. Spence also sent a letter to the Secretary of State for Colonial Affairs asking for recognition of the Republic of Manitobah. When Spence was informed that his government was acting illegally in attempting to enforce laws on unwilling subjects in its claimed jurisdiction (and the government failed to enforce its will in a treason case against a shoemaker named McPherson), the government was dissolved. See Spence to Secretary of State for the Colonies, February 19, 1868 in Oliver, *Canadian North-West*, II: 873-874; T. Fred Elliott to Spence, 30 May 1868 in Oliver, *Canadian North-West*, II: 877-878; Robert B. Hill, *Manitoba: History of its Early Settlement, Development and Resources* (Toronto: William Briggs, 1890), 211-216 and 222. See also The Manitoba Library Association, *Pioneers and Early Citizens of Manitoba: A Dictionary of Manitoba Biography from the earliest times to 1920* (Winnipeg: Peguis Publishers Limited, 1971), 223-224; J.W. Chafe, *Extraordinary Tales from Manitoba History* (Toronto: McClelland and Stewart Limited, 1973), 83-85; J.M. Bumsted, ed., *Dictionary of Manitoba Biography* (Winnipeg: University of Manitoba Press, 1999), 236; Bruce Peel, “Spence, Thomas,” *Dictionary of Canadian Biography*, 2003, https://www.biographi.ca/en/bio/spence_thomas_1832_1900_12E.html.

¹⁰⁹ Morrison to Spence, April 4, 1868 in Oliver, *Canadian North-West*, II: 875.

¹¹⁰ Morrison to Spence, April 4, 1868 in Oliver, *Canadian North-West*, II: 875.

¹¹¹ *Proceedings of the Second National Congress of the Fenian Brotherhood Held in Cincinnati, Ohio, January 1865* (Philadelphia: James Gibbons, 1865), 6 and 13; Morton, *The Critical Years*, 183.

¹¹² John Savage, ed., *Fenian Heroes and Martyrs* (Boston: Patrick Donahoe, 1868), 81; *Official Report of Gen. John O’Neill, President of the Fenian Brotherhood; On the Attempt to Invade Canada, May 25th 1870; the preparations therefor, and the cause of its failure, with a sketch of his connection with the organization, and the motives which led him to join it; also a report of the battle of Ridgeway, Canada West, fought June 2d, 1866, by Colonel Booker, commanding the Queen’s own, and other Canadian troops, and Colonel John O’Neill, commanding the Fenians* (New York: John J. Foster, 1870), 4.

Fenians and mainstream Americans is beyond dispute. The *New York Herald* mused on March 15, 1866 that it would “only be necessary to utter a word of encouragement to the thousands of Fenians who are eagerly awaiting an invitation to invade Canada” if the impending confederation of British North America proved incompatible with American interests.¹¹³ The US government was conveniently lenient in enforcing neutrality with the Dominion. When Fenians congregated in New Brunswick in 1866, for example, the American military was persuaded to enforce neutrality laws only when a large British navy presence began patrolling the area.¹¹⁴ In June 1866, John O’Neill led a contingent of as many as 900 Fenians over Niagara to capture Fort Erie.¹¹⁵ O’Neill defeated a detachment of Canadian volunteers under Lieutenant-Colonel John Stoughton Dennis at the Battle of Ridgeway before evacuating from Canadian territory in the face of approaching British forces.¹¹⁶ O’Neill was arrested shortly thereafter by American authorities but was promptly released.¹¹⁷ A failed raid on Eccles Hill, Quebec in 1870 led to O’Neill’s arrest and sentencing to two years imprisonment and a “nominal... fine of ten dollars.”¹¹⁸ In October of the same year, O’Neill was pardoned by President Grant to the consternation of Dominion authorities who argued that O’Neill would be free to resume attacks

¹¹³ “Confederation in Canada,” *New York Herald*, 15 March 1866.

¹¹⁴ Waite, *Life and Times of Confederation*, 265-268. See also Robert L. Dallison, *Turning Back the Fenians: New Brunswick’s Last Colonial Campaign* (Fredericton: Goose Lane Editions, New Brunswick Military Heritage Project, 2006).

¹¹⁵ Hereward Senior, *The Last Invasion of Canada: The Fenian Raids, 1866-1870* (Toronto & Oxford: Dundurn Press, 1991), 68-70. John A. MacDonald placed the Fenian forces at 2,000. See John A. MacDonald, *Troublous Times in Canada: A History of the Fenian Raids of 1866 and 1870* (Toronto: W.S. Johnston and Co., 1910), 28.

¹¹⁶ Chas. S. Akers to unknown, June 7, 1866 in George T. Denison Jr., *History of the Fenian Raid on Fort Erie; with an account of the Battle of Ridgeway* (Toronto: Rollo & Adam, 1866), 84-87; Peter Vronsky, *Ridgeway: The American Fenian Invasion and the 1866 Battle That Made Canada* (Toronto: Allen Lane Canada, 2011), xxix.

¹¹⁷ Savage, *Fenian Heroes and Martyrs*, 392. O’Neill clarified that the failure of the raid was caused by a lack of reinforcements rather than the interference of the American government which allowed the Fenians three days before it was bound to enforce neutrality laws. See *Official Report of Gen. O’Neill*, 34.

¹¹⁸ *Official Report of Gen. O’Neill*, 62; W.S. Neidhardt, *Fenianism in North America* (University Park: Pennsylvania State University Press, 1975), 120-121.

on Canadian territory.¹¹⁹ Once more, on October 5, 1871, O'Neill (this time without the official support of the Fenian brotherhood) captured the HBCo.'s post at Pembina, was promptly arrested by American authorities, and no less swiftly discharged by an American court.¹²⁰

O'Neill's raid at Pembina—facilitated as it was by persistent American antipathy towards Canadian sovereignty—was the final invasion of Canada by the Fenians.¹²¹ Its suppression can be credited to neither American enforcement of neutrality laws nor to the ability of the Canadian military but to Louis Riel and the Métis. After fleeing Red River in advance of the arrival of the Wolseley Expedition in August 1870,¹²² Riel returned to St. Vital in 1871.¹²³ O'Donoghue, Riel's former treasurer in his provisional government, attempted to induce the Métis to lend support to O'Neill's Fenian invasion.¹²⁴ Instead, Riel wrote to Lieutenant Governor Adams G. Archibald to express the loyalty of the Métis and inform him that “[s]everal companies have already been organized, and others are in the process of formation.”¹²⁵ Archibald subsequently went to St. Boniface to thank the Métis and shake hands with those present—including Riel.¹²⁶ The Métis opposition to the Fenian invasion of October 1871 brought to an end neither the amnesty question surrounding Riel, Lépine, and O'Donoghue nor the anxiety of further Fenian incursions.¹²⁷ On October 8, Major Acheson Irvine reported that “there is no doubt the Fenians

¹¹⁹ LAC, MG26-A, vol. 517, Sir John A. Macdonald Fonds, Macdonald to Lord Lisgar, October 11, 1870, 300-307; Gwyn, *Nation Maker*, 144.

¹²⁰ C.P. Stacey, “O'Neill, John,” *Dictionary of Canadian Biography*, 1972, https://www.biographi.ca/en/bio/o_neill_john_10E.html; Neidhardt, *Fenianism*, 127.

¹²¹ Senior, *Last Invasion of Canada*, 186.

¹²² George F.G. Stanley, *Louis Riel* (Toronto: Ryerson Press, 1963), 134-156; Hamon, *Audacity of His Enterprise*, 223.

¹²³ Thomas Flanagan, *Louis 'David' Riel: Prophet of the New World*, rev. ed. (Toronto: University of Toronto Press, 1996), 38.

¹²⁴ Hamon, *Audacity of His Enterprise*, 229.

¹²⁵ Riel, Lépine, and Pierre X. Parenteau to Adams G. Archibald, October 7, 1871 in Stanley, *Birth of Western Canada*, 167.

¹²⁶ Gilbert McMicken, “The Abortive Fenian Raid on Manitoba: Account by one who knew its secret history,” *Historical Society of Manitoba Transactions*, no. 32 (1888): 10; Stanley, *Birth of Western Canada*, 167.

¹²⁷ On the failure of the actions of the Métis and Archibald to facilitate an amnesty see Hamon, *The Audacity of His Enterprise*, 231-232.

intend making a raid between this and to-morrow night... I shall require reinforcement *at once*; 150 men.”¹²⁸ The capacity of the Dominion to meet the requirements of suppressing potential future Fenian raids was doubtful given the complete withdrawal of the British garrison a month after O’Neill and O’Donoghue’s failed raid in Manitoba.¹²⁹ The burden for defence fell increasingly on an inexperienced, inefficient, and ill-equipped Canadian militia isolated from the North-West by the absence of a railway.

The position of the Dominion in the North-West in the 1870s (preyed upon by American annexationists and Fenians and abandoned by Britain) was precarious. The course of action adopted by the Dominion in its dealings with the First Nations of the region appears unbecoming of a state in its position. The course adopted—in its violations of Indigenous land rights—was suggestive of a state capable of imposing its will on weaker elements. The number of historians who have been misled by the Dominion’s actions at the outset of the treaty-making period is not insignificant.¹³⁰ Hall argued that the Dominion inherited the right to govern in the North-West when it purchased the region from the HBCo. The treaties, according to Hall, were not negotiated between equal and sovereign parties and “were not viewed as a necessary precursor to the exercise of Canada’s authority.”¹³¹ Alternatively, James Daschuk reasoned that the Dominion viewed the treaties as “a legal imperative, an obstacle to be overcome before settlement could proceed in earnest.”¹³² Neither characterization considers the practical utility of the treaty-making enterprise.

¹²⁸ Irvine to Archibald, 8 October 1871 in Stanley, *Birth of Western Canada*, 427n.66.

¹²⁹ Stacey, *Canada and the British Army*, 253. The withdrawal of troops was delayed until the fortifications of Quebec were completed. See Morton, *The Critical Years*, 261.

¹³⁰ The most frequently referenced example of this phenomenon is Stanley’s *Birth of Western Canada*. See Tobias, “Subjugation of the Plains Cree,” 519-520; Krasowski, *No Surrender*, 3. For other examples see Flanagan, *First Nations?* 144; J.R. Miller, *Skyscrapers Hide the Heavens: A History of Native-Newcomer Relations in Canada*, 4th ed. (Toronto: University of Toronto Press, 2018), 152-153.

¹³¹ Hall, *Treaties to Reserves*, 44.

¹³² Daschuk, *Clearing the Plains*, 79.

The actions and inaction of the Dominion in the North-West in the 1870s gave little indication that they understood treaties as procedural agreements pursuant to either the *Proclamation* or any other authority. As early as 1859, William Buckingham and William Coldwell established an annexationist newspaper, *The Nor'Wester*, in Red River.¹³³ A decade later, Charles Mair and John Christian Schultz—founding members of the Canada Firsters—arrived in Red River.¹³⁴ In 1870, *The Manitoban* began a weekly publication.¹³⁵ Newspapers in the North-West prior to treaty-making were at once organs of the Canadian annexationist movement, and evidence (in their columns and in their very existence) of violations of the *Proclamation*'s prohibition against persons situated on lands where Indian title remained unextinguished. On April 15, 1861, *The Nor'Wester* published an “Indian Manifesto” warning non-Indigenous settlers that payment was required for the cultivation of First Nations land only a few years before the editors bemoaned being left “in the dark” on February 5, 1865 as negotiations between the HBCo. and the Imperial government over the transfer of Rupert's Land dragged on.¹³⁶ On November 5, 1870, *The Manitoban* noted the return of Adam McBeath and John McKay from the Prince Albert Mission on the Saskatchewan where “the Indians expressed great gratitude” for the services of “Rev. Mr. Nisbit and his fellow workers.”¹³⁷ Similarly on November 30, 1872, the *Winnipeg Free Press* reported on the experiences of Professor J. Macoun who wrote of his impressions of the North-West from Fort Edmonton on September 3,

¹³³ “The First Newspaper at Red River: Prospectus: The Nor-Wester,” *Nor'Wester* (Winnipeg), 22 August 1859. See also J.M.S. Careless, *Brown of the Globe: Statesman of Confederation, 1860-1880*, vol. II (Toronto: The Macmillan Company of Canada Limited, 1963), 7. Buckingham later felt that Canada would be overextended if it assumed control of the North-West. See Waite, *Life and Times of Confederation*, 307.

¹³⁴ Berger, *Sense of Power*, 56.

¹³⁵ “The Manitoban, A Weekly Journal,” *Manitoban* (Winnipeg), 15 October 1870.

¹³⁶ “Indian Manifesto,” *Nor'Wester*, 15 April 1861; “In the Dark,” *Nor'Wester*, 5 February 1865.

¹³⁷ “Arrivals from the Saskatchewan,” *Manitoban*, 5 November 1870.

1872.¹³⁸ The presence of ‘persons’ on unceded land constitutes a violation of the *Proclamation* whether those ‘persons’ were there to proselytize or as pioneers.¹³⁹

That the Dominion was aware of the presence of non-Indigenous people in unceded portions of the North-West seems certain. Archibald became aware of a notice signed by Chief Moosoos and posted in High Bluff on December 17, 1870 that forbid the taking of land and cutting of wood “by parties who have no right or title thereto.”¹⁴⁰ The month before, Archibald rejected the suggestion of Reverend William Fletcher to send troops to Portage la Prairie because it would give the First Nations there the impression that the Dominion intended to take the land by force. Archibald advised Fletcher that until a treaty could be negotiated “it will be the interests of the settlers to get along as peaceably as possible with the Indians” and he instructed Fletcher to use his influence “among the people to induce them to get along with the Indians till a

¹³⁸ “The Saskatchewan,” *Winnipeg Free Press* (Winnipeg), November 30, 1872.

¹³⁹ There is some confusion as to what classes of people fell within the definition of ‘person’ in the context of the *Proclamation* and the southern Numbered Treaties. If the term can be said to mean the same thing as ‘subjects’ then Indians (as subjects of the British Crown) would effectively have been prohibited from their own lands. For an example of Indians being referred to as subjects see Krasowski, *No Surrender*, 51. Alternatively, one might adopt the definition for eligible voters for Canada in 1867 and in Manitoba in 1870. The first federal election was governed by provincial electoral rules. Male Indians would have been eligible to vote if they satisfied requisite property requirements unless they were specifically barred from voting. See Lawrence Leduc and Jon H. Pammett with André Turcotte, *Dynasties and Interlude: Past and Present in Canadian Electoral Politics* (Toronto: Dundurn Press, 2016), 62. In the 1885 Franchise Bill, Macdonald proposed to extend the franchise to Indians of “the old provinces” without threat of enfranchisement. See Canada, *House of Commons Debates: Third Session—Fifth Parliament*, May 4, 1885 (John A. Macdonald) (Ottawa: Maclean, Roger & Co., 1885), 1574-1575. In Manitoba in 1870, male subjects of the Crown who owned property valued at least \$100 (or who rented property for at least \$25), were 21 years of age or older, and who lived in the province for at least one year were eligible to vote. *Manitoba Act, 1870*, s 17 in *British North America Act*, 182-183. Accordingly, many Cree and Saulteaux individuals were enfranchised in this context. See Gerald Friesen, *The Honourable John Norquay: Indigenous Premier, Canadian Statesman* (Winnipeg: University of Manitoba Press, 2024), 110. Therefore, if a ‘person’ is taken to mean an eligible voter, Indian men would also be similarly prohibited from their own lands. One possible way to construe ‘persons’ to the exclusion of Indians (or First Nations) would be along the lines of Pelly’s argument that the Aboriginal rights of the Métis pursuant to their status as ‘natives’ were precluded by their status as ‘subjects’ while (presumably) the Aboriginal rights of Indians were not similarly precluded on account of their not being ‘subjects’. See Pelly to Earl Grey, April 24, 1847 in *HBCo. Return*, 26. This construction is undercut by the mutual belief of Riel and Macdonald that the provisions of the *Manitoba Act* accounted for the Indian title of the Métis. See Canada, *House of Commons Debates: Third Session—First Parliament*, May 2, 1867 (John A. Macdonald) (Ottawa: Roger Duhamel, F.R.S.C., Queen’s Printer and Controller of Stationary, 1867), 1302; “Memoir to Ulysses S. Grant,” in Martel, *Collected Writings*, 2-003, 8.

¹⁴⁰ PAM, M1, Adams G. Archibald Fonds, “Notice” signed by Moosoos, witnessed by Fred A. Bird, December 17, 1870, 150.

Treaty is made.”¹⁴¹ In a letter to Archibald dated May 3, 1871, Abraham Cowley requested protection of First Nations lands from encroachments by non-Indigenous settlers.¹⁴² Thus, although he was aware that non-Indigenous settlers were situated on unceded lands and he gave some indication that treaties ought to be negotiated, it is not clear whether Archibald (or any representative of the Dominion or Crown) understood the extinguishment of Indian title to be a pre-requisite to settlement.

J.W. Wright wrote to Archibald on November 10 inquiring into the feasibility of a free grant of 50,000 acres for a settlement of European immigrants in the vicinity of Red River or elsewhere in the North-West.¹⁴³ Archibald informed Wright on November 27 that, although his inquiry would be better directed towards the Dominion government, a “preliminary difficulty which meets us in dealing with the lands of this country, is the necessity of first extinguishing the Indian title”—which Archibald was unable to accomplish due to the disarray he found Manitoba in when he arrived the previous year.¹⁴⁴ On this basis alone it might be argued that the Dominion was cognizant of the fact that the extinguishment of Indian title was a pre-requisite to settlement even if its enforcement in practice left much to be desired. This line of reasoning is severely weakened by Archibald’s correspondence with W.J. Christie regarding the desire of the Métis in the Prince Albert settlement to have their land claims there confirmed. Archibald informed Christie on January 11, 1872 that “it is only as settlers that any indulgences can be shown” to the Métis and that “no man located there can be disturbed, and any settler there has the same right whether White, Halfbreed or Indian.” Archibald added that “Anybody who goes to the

¹⁴¹ PAM, M1, Adams G. Archibald Fonds, Adams G. Archibald to Reverend William Fletcher, November 5, 1870, 81.

¹⁴² PAM, M2, Adams G. Archibald Fonds, Abraham Cowley to Archibald, May 3, 1871, 281.

¹⁴³ PAM, M1, Adams G. Archibald Fonds, J.W. Wright to Archibald, November 10, 1870, 93.

¹⁴⁴ PAM, M1, Adams G. Archibald Fonds, Archibald to Wright, November 27, 1870, 114.

Saskatchewan to settle has just as much right to go there and enter on unoccupied land as those had who went before them” and confessed that he “shall not be sorry to see a goodly amount of immigration for settlement there next year.”¹⁴⁵

Perhaps Archibald’s views in January 1872 could be reconciled with those he held in late 1870 if he anticipated the conclusion of a treaty in either 1872 or 1873 with the First Nations of the Saskatchewan. On November 3, 1871, Wemyss M. Simpson—who served as the principal negotiator of Treaties 1 and 2 alongside Archibald—wrote to Secretary of State for the Provinces Joseph Howe, arguing that a treaty (or at least a promise of a treaty) in the Saskatchewan region was “essential to the peace, if not the actual retention of the country.”¹⁴⁶ Alexander Morris—who succeeded Archibald as Lieutenant Governor in December 1872—informed Alexander Campbell that he intended to meet with the western Plains Cree and Blackfoot according to a promise made to them by Archibald.¹⁴⁷ Campbell replied on July 10, 1873 that Archibald informed him that “he made no promise to Indians west of you that the treaties would be made with them this year.”¹⁴⁸ Archibald drafted a letter recounting his experiences with the First Nations of the North-West in which he denied promising to negotiate a treaty and argued that “the few white immigrants are too inconsiderable in number” west of Manitoba “to be considered as settlers or as interfering

¹⁴⁵ PAM, M1, Adams G. Archibald Fonds, Archibald to W.J. Christie, January 11, 1872, 559.

¹⁴⁶ Wemyss M. Simpson to the Secretary of State, November 3, 1871 in Morris, *Treaties of Canada*, 168. Howe was appointed to this position when he entered the Macdonald government after initially opposing it as an anti-confederate from Nova Scotia. See Gwyn, *Nation Maker*, 91.

¹⁴⁷ PAM, M134, Alexander Morris (Lieutenant-Governor’s collection) Fonds, Morris to Campbell (telegraph), June 27, 1873, 304. On Morris’s appointment as Lieutenant-Governor see Talbot, *Negotiating the Numbered Treaties*, 51.

¹⁴⁸ PAM, M134, Alexander Morris (Lieutenant-Governor’s collection) Fonds, Campbell to Morris (telegram), July 10, 1873, 325. Although Archibald denied making such promises, in 1876 a group of Blackfoot chiefs complained to Morris of non-Indigenous settlers taking up the best lands in their territories in spite of Archibald’s promise in 1871 that lands would not be taken without “a Council of Her Majesty’s Indian Commissioner and the Respective Chiefs of the Nation.” See PAM, M136, Alexander Morris (Lieutenant-Governor’s collection) Fonds, W.G. Irvine to Morris enclosing a petition of the Chokitapix or Blackfeet Indian Chiefs to Lieut.-Gov. Morris, June 12, 1876, 1265.

with the Indians” and serve as justification for negotiating a treaty.¹⁴⁹ With this in mind, Campbell thought it inadvisable to negotiate a treaty with the First Nations west of Manitoba since, in his view, those lands were not yet required for settlement and no promise of a treaty had been made by Archibald.¹⁵⁰ If Archibald did not intend for a treaty to be made with the First Nations west of Manitoba and favoured the immigration and settlement of the region, it is evident that neither the Crown nor the Dominion did not view Indian title as an impediment to settlement as established by the *Proclamation*.¹⁵¹

That the Crown or Dominion viewed the *Proclamation*’s provisions against surveys in advance of a treaty as anymore binding than its regulations against persons situated upon unceded land is doubtful. Canadian forays into the North-West were inaugurated by an exploratory expedition under former HBCo. officer George Gladman in 1857.¹⁵² Henry Youle Hind was attached to the Gladman Expedition as a geologist and the next year was given charge of his own expedition to Red River for the purpose of collecting all information respecting “the Geology, Natural History, Topography, and Meteorology” of the region.¹⁵³ Simon J. Dawson

¹⁴⁹ PAM, M134, Alexander Morris (Lieutenant-Governor’s collection) Fonds, Archibald to Campbell, July 5, 1873, 326.

¹⁵⁰ Campbell to Morris (telegram), July 10, 1873, 325; PAM, M134, Alexander Morris (Lieutenant-Governor’s collection) Fonds, Campbell to Morris, July 10, 1873, 326.

¹⁵¹ That Indian title was viewed as an impediment to other economic modes is doubtful. Christie noted the presence of miners in the Saskatchewan in 1871 and expressed fear that upon the discovery of gold more would follow with disastrous consequences. See Simpson to Secretary of State, November 3, 1871 in Morris, *Treaties of Canada*, 168. On July 11, 1873, J. Johnson (the Assistant Commissioner of Customs) informed William T. Urquhart (Clerk of the Council of the North West Territories) that “no Dominion law prevents men of any nationality from engaging in legitimate trade in any part of the Dominion” after Urquhart had inquired on behalf of E. Brokovski on the procedures necessary for American traders to operate in the North-West. PAM, M134, Alexander Morris (Lieutenant-Governor’s collection) Fonds, E. Brokovski to Urquhart, June 16, 1873, 275; PAM, M134, Alexander Morris (Lieutenant-Governor’s collection) Fonds, E.A. Meredith to Urquhart, June 30, 1873, 309; PAM, M134, Alexander Morris (Lieutenant-Governor’s collection) Fonds, J. Johnson to Urquhart, July 11, 1873, 328. See also PAM, M134, Alexander Morris (Lieutenant-Governor’s collection) Fonds, Howe to Morris, December 3, 1872, 19.

¹⁵² E. Parent to Gladman, July 22, 1857 in *Report on the Exploration of the Country between Lake Superior and the Red River Settlement* (LA-1858) (hereinafter *Gladman Expedition Report*), 5-9.

¹⁵³ Prior to Hind’s expedition to Red River, it was thought advisable to “dispense with the services of Mr. [George] Gladman”—a former HBCo. officer—“as its manager.” See T.J.J. Loranger to Hind, April 14, 1858 in Henry Youle Hind, *North-West Territory: reports of progress; together with a preliminary and general report on the*

served as the Gladman Expedition's surveyor and was tasked especially with surveying the route from Lake Superior to the Red River settlement.¹⁵⁴ The findings of the Hind Expedition (and the surveys of Dawson in particular) preceded later surveys by the Dominion following Confederation and its purchase of Rupert's Land.

In 1868, Dawson again surveyed the route between Lake Superior and Red River and argued that it was "of the highest importance to cultivate amicable relations" with the Saulteaux situated in the vicinity of Rainy River and Lake of the Woods.¹⁵⁵ The Geological Survey of Canada apparently did not heed closely to this opinion in the North-West interior at a time when the First Nations of the region were already suspicious of a Canadian-American alliance in the form of the International Boundary Commission.¹⁵⁶ In October 1873, Robert Bell of the Geological Survey reported to Morris that the First Nations in southern Saskatchewan threatened "to steal our horses and outfit and even to kill us all" before ordering Bell's crew to turn back.¹⁵⁷ In the same month, the Saulteaux near Fort Ellice petitioned Morris to suspend the surveys being undertaken there by A.H. Whitcher until their land rights were dealt with.¹⁵⁸ In 1876, Lawrence Clarke reported to Morris that construction of the Dominion telegraph line was obstructed south of Fort Pitt in the absence of a treaty or a promise of a treaty while the Geological Survey was turned away at the Elbow of the North Saskatchewan River.¹⁵⁹

Assiniboine and Saskatchewan exploring expedition, made under instructions from the provincial secretary, Canada (LA-1859), 1; Loranger to Hind, April 27, 1858 in Hind, *North-West Territory*, 2.

¹⁵⁴ E.P. Tache, "Instructions to S.J. Dawson, Esquire, to assist in the exploration of the country between the head of Lake Superior and the Red River Settlement in Gladman Expedition *Report*, 9-11.

¹⁵⁵ S.J. Dawson, *Report on the Line of Route between Lake Superior and the Red River Settlement* (HC-1869), 27.

¹⁵⁶ Morris reported on these suspicions shortly after his appointment as Lieutenant-Governor. See LAC, RG10, vol. 3586, file 1137, Morris to Secretary of State for the Provinces, December 13, 1872.

¹⁵⁷ Quoted in Daschuk, *Clearing the Plains*, 94.

¹⁵⁸ Quoted in Daschuk, 95.

¹⁵⁹ Ray, Miller, and Tough, *Bounty and Benevolence*, 104.

Such acts of resistance were mirrored throughout the North-West. In addition to the Indian Manifesto of 1861, the westward flow of settlement was suspended at Portage la Prairie in 1868 by the Saulteaux under Yellow Quill.¹⁶⁰ The Saulteaux of the North-West Angle threatened settlers with violence and demanded rents for the use of their lands.¹⁶¹ In 1869, the Riding Mountain band—subsequent signatories of Treaty 2—forbade the approach of outsiders and threatened violence until a treaty was concluded, while the Fairford band reiterated their commitment to treaty-making at the same time that they asked for protection of their lands from incursions by the HBCo. and other non-Indigenous settlers.¹⁶² In 1871, the First Nations at Portage la Prairie submitted a list of resolutions to Archibald including the imposition of a system of fines for the taking away of members of their communities by non-Indigenous settlers. The 73 signatories of the resolutions clarified that their actions were necessary because “we never have yet seen or received any treaty for the land and the woods that belong to us, and the settlers use it to enrich themselves.”¹⁶³ There is some evidence that Dominion or Crown authorities believed that Indian title had to be extinguished prior to settlement and survey and that they intended to pursue such extinguishment—including Archibald’s letter to Taylor in November 1870 and James McKay’s statement in *The Manitoban* following the negotiations of Treaties 1 and 2 in the summer of 1871 that treaties would be signed with the First Nations east of the Rocky Mountains “at some subsequent period.”¹⁶⁴ However, there is overwhelming evidence that the Dominion was forced into action by the resistance of First Nations to encroachments by the Dominion on their land rights.

¹⁶⁰ Simpson to Secretary of State for the Provinces, November 3, 1871 in Morris, *Treaties of Canada*, 37.

¹⁶¹ Tobias, “Subjugation of the Plains Cree,” 520.

¹⁶² PAM, M1, Adams G. Archibald Fonds, Indians of Fairford District to Archibald, January 1871, 164; Craft, *Stone Fort Treaty*, 43.

¹⁶³ PAM, M2, Adams G. Archibald Fonds, Resolution of Principal Indians at Portage la Prairie, May 30, 1871, 332.

¹⁶⁴ “Further Indian Treaties,” *Manitoban*, July 29, 1871.

In some respects, the historical process by which the Dominion was compelled to pursue treaty-making were presaged by the Red River Resistance of 1869-70. Indeed, the violence carried out against the Métis by the members of the Wolseley Expedition foreshadowed the treatment of First Nations treaty signatories following their subjugation in the post-treaty period.¹⁶⁵ As with the southern Numbered Treaties, the *Manitoba Act*—by which the Red River Resistance was concluded—was described by Dominion authorities in terms of extinguishing Indian title.¹⁶⁶ In reality, however, neither the southern Numbered Treaties nor the *Manitoba Act* were negotiated to satisfy procedural impediments to settlement (pursuant to the *Proclamation* or otherwise) but to allow the Dominion to exercise sovereignty in the North-West. In both cases, the agreements made with the Dominion were of a confederal nature made necessary by the resistance to encroachments on their lands by the Métis and First Nations of the North-West.

The actions of the Dominion in relation to the land rights of First Nations in the North-West in the 1870s were necessitated by the resistance of First Nations to encroachments on these land rights. The form which these actions took were shaped by the duress under which the Dominion and First Nations operated under. Significant attention within the historiography has been devoted to the duress of the First Nations involved in the treaty-making enterprise.¹⁶⁷ In extreme cases, focus on such duress has resulted in the portrayal of First Nations as being entirely devoid of agency.¹⁶⁸ That First Nations operated under duress is beyond doubt. While the bison economy would not collapse entirely until the extirpation of the herd in 1879, the effects of

¹⁶⁵ Tobias, "Subjugation of the Plains Cree," 536-548; Shore, "Metis Nation in Manitoba," 74-76.

¹⁶⁶ Canada, *House of Commons Debates: Third Session—First Parliament*, May 2, 1867 (John A. Macdonald), 1302.

¹⁶⁷ Daschuk, *Clearing the Plains*, 79-98; Hall, *Treaties to Reserves*, 12; Julie Jai, "Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties," in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, ed. John Borrows and Michael Coyle (Toronto: University of Toronto Press, 2017), 113-114.

¹⁶⁸ Stanley, *Birth of Western Canada*, 194-215; Lewis G. Thomas, ed., *The Prairie West to 1905: A Canadian Sourcebook* (Toronto: Oxford University Press, 1975), 81.

the herd's decline were felt much earlier.¹⁶⁹ The First Nations of the North-West interior were particularly affected by the ensuing hunger. By 1874, the Cree at Victoria (near the present-day Alberta-Saskatchewan provincial border) were reduced to eating their dogs, horses, and snowshoes.¹⁷⁰ In the same year, a dog of the Anglican missionary Joseph Reader was eaten at the negotiations of Treaty 4 at Fort Qu'Appelle.¹⁷¹ The hunger experienced in the region contributed to the prevalence of disease among the populations there. According to Daschuk, the Blackfoot Confederacy's leadership was severely shaken as several chiefs and elders succumbed to smallpox in the spring of 1869.¹⁷² To navigate these conditions, the First Nations of the North-West interior turned to agriculture and strategic alliances.

Accordingly, in the 1860s Chief Ahtahkakoop's band (later signatories of Treaty 6) began experimenting with farming (under the tutelage of Reverend John Hines) as a supplement to their hunting.¹⁷³ In 1871, after hearing of the Dominion's purchase of Rupert's Land—to which he expressed his opposition—Chief Sweetgrass requested “cattle, tools, agricultural implements, and assistance in everything” from the Dominion “when we come to settle.”¹⁷⁴ Sweetgrass had learned of the potential of agriculture years earlier from Father Albert Lacombe.¹⁷⁵ The adoption of agriculture by the Plains Cree was preceded by the same economic shift in Manitoba. Chief Peguis's band adopted agriculture with the assistance of Cowley—a development which

¹⁶⁹ See Frank Gilbert Roe, *The North American Buffalo: A critical study of the species in its wild state*, 2nd ed. (Toronto: University of Toronto Press, 1970), 467-488.

¹⁷⁰ LAC, RG 10, vol. 3609, file 3229, Charles Bell “Arguments”, March 23, 1874. See also Daschuk, *Clearing the Plains*, 101.

¹⁷¹ J.W. Daschuk, Paul Hackett, and Scott MacNeil, “Treaties and Tuberculosis: First Nations People in late 19th Century Western Canada, a Political and Economic Transformation,” *The Canadian Bulletin of Medical History* 23, no. 2 (2006): 31.

¹⁷² Daschuk, *Clearing the Plains*, 82.

¹⁷³ Deanna Christensen, *Ahtahkakoop: The Epic Account of a Plains Cree Head Chief, His People, and Their Struggle for Survival* (Shell Lake: Ahtahkakoop Publishing, 2000), 161.

¹⁷⁴ W.J. Christie to Archibald, April 13, 1871 in Morris, *Treaties of Canada*, 170-171.

¹⁷⁵ Krasowski, *No Surrender*, 189.

Krasowski observed Chief Henry Prince (Peguis's son) used to his advantage in the negotiations of Treaty 1.¹⁷⁶ In addition to agricultural experience, Prince could read and write in English and was cognizant of the military capacity of his band.¹⁷⁷ During the Red River Resistance, Prince intended to utilize this capacity on the side of the Dominion.¹⁷⁸ In an interview with Archibald on September 13, 1870, Prince declared that "before I would have consented to join those that made this great trouble in this country that I would have died."¹⁷⁹ Around the same time, in order to facilitate access to Red River to confront the resistance of the Métis, Crown negotiators had been induced to accept a right-of-way treaty with the Saulteaux at Fort Frances—who Dawson feared the Métis aspired to tamper with and therefore urged the retention of good relations with them.¹⁸⁰ Further west, Makaiysis of the Plains Cree counselled non-intervention in the Red River Resistance because he believed treaty negotiations were forthcoming but died before treaties were negotiated west of Manitoba.¹⁸¹

In addition to neutrality in the Red River Resistance, following the Battle of the Belly River in 1870—in which the Plains Cree suffered between 200 and 300 losses—the Iron Alliance (comprised of the Plains Cree, Saulteaux, Assiniboine, and Métis) concluded a peace treaty with the Blackfoot Confederacy in 1871.¹⁸² The adoption of Poundmaker—a Plains Cree leader (and

¹⁷⁶ F.A. Peake, "Cowley, Abraham," *Dictionary of Canadian Biography*, 2003, https://www.biographi.ca/en/bio/cowley_abraham_11E.html; Krasowski, *No Surrender*, 52 and 61-63.

¹⁷⁷ Krasowski, 63.

¹⁷⁸ Stanley, *Birth of Western Canada*, 81.

¹⁷⁹ PAM, M1, Adams G. Archibald Fonds, "Notes of interview between the Lieutenant-Governor of Manitoba and Henry Prince," September 13, 1870, 22.

¹⁸⁰ PAM, M1, Adams G. Archibald Fonds, Dawson to Howe, December 17, 1869, 1; Wayne E. Daugherty, "Treaty Research Report: Treaty Three" (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1986), 12.

¹⁸¹ John L. Tobias, "The Government of Canada and the Ochapowace Band, 1870-1933" (unpublished manuscript, April 26 1974), typescript, 1.

¹⁸² On the Battle of Belly River see A. Johnston, *The Battle at Belly River: Stories of the Last Great Indian Battle* (Lethbridge: Lethbridge Branch, Historical Society of Alberta, 1966); John Sheridan Milloy, "The Plains Cree: A Preliminary Trade and Treaty Chronology," (MA thesis, Carleton University, 1972), 258-260; D.B. Sealey, "Potts, Jerry," *Dictionary of Canadian Biography*, 1990, https://www.biographi.ca/en/bio/potts_jerry_12E.html. On

later chief) whose influence would grow remarkably after the negotiation of Treaty 6—by Chief Crowfoot of the Blackfoot Confederacy in 1873 was symbolic of the peace effected in 1871.¹⁸³ In March 1876, Charles Bell (who reported the conditions of the Cree near Victoria) argued that failing to place relations with First Nations on a better footing before the arrival of troops into the North-West interior would encourage settlers to encroach on the territories in the vicinity of the Bow River and ultimately lead to war in which “united, the plains tribes would fight it out to the last.”¹⁸⁴ The threat which this alliance posed to the Dominion in the North-West interior was exasperated by the arrival of the Sioux chief Sitting Bull at Cypress Hills in May 1877 who began to make overtures—including naming his son after Crowfoot and presenting “a gift of tobacco and other articles”—towards the Blackfoot Confederacy.¹⁸⁵ A year earlier in June 1876, a force of Sioux, Cheyenne, and Arapaho under Sitting Bull defeated the U.S. 7th Calvary led by Lieutenant-Colonel George Armstrong Custer at the Battle of Little Bighorn.¹⁸⁶ Later that Fall, Father Constantine Scollen reported that the Sioux had “sent a message to the Blackfeet tribes, asking them to make an alliance offensive and defensive against all white people in the country.”¹⁸⁷ The greatest fear of Hind—a general alliance between First Nations in the North-West and the Sioux—appeared to be in formation and the military success of the Indigenous

the Iron Alliance see Innes, *Elder Brother*, 43-69. In his address to Archibald, Sweetgrass made mention of the peace made with the Blackfoot. See Christie to Archibald, April 13, 1871.

¹⁸³ Treaty 7 Elders and Tribal Council et. al., *Treaty 7*, 9.

¹⁸⁴ Charles Bell “Arguments”, March 23, 1876.

¹⁸⁵ It was also reported that with the Sioux, the First Nations in what became Treaty 7 territory “will have everything their own way, as they will probably be over ten thousand strong, while the whites will number only half as many hundreds. “The Storm Brewing,” *Fort Benton Record* (Fort Benton), August 24, 1877. See also Garrett Wilson, *Frontier Farewell: The 1870s and the End of the Old West*, new ed. (Regina: University of Regina Press, 2014), 176.

¹⁸⁶ See Debra Bucholtz, *The Battle of Greasy Grass/Little Bighorn: Custer’s Last Stand in Memory, History and Popular Culture* (New York: Routledge, 2012), 36-71.

¹⁸⁷ Constantine Scollen to His Excellency the Governor of Manitoba, September 8, 1876 in Morris, *Treaties of Canada*, 249.

peoples at Little Bighorn served only to aggravate this fear in the minds of Dominion authorities.¹⁸⁸

In the event of such an alliance and an ensuing Indian war, Hind predicted that “open war with the Sioux, Assiniboines, Plains Crees, or Blackfeet, might render a vast area of prairie country unapproachable for many years, and expose the settlers to constant alarms and depredations.”¹⁸⁹ HBCo. trader Richard Hardisty argued that “the Country will be embroiled in Indian troubles which none of us may live to see the end of” if law enforcement did not accompany non-Indigenous settlement.¹⁹⁰ Christie wrote in April 1871 that had he not satisfied the First Nations that visited him “I have no doubt that they would have proceeded to acts of violence, and once that had commenced, there would have been the beginning of an Indian war, which it is difficult to say when it would have ended.”¹⁹¹ In May 1871, Christie reiterated that it was unclear “how long, life and property may be safe” and that “[i]f order is not established here soon, it may cost the Canadian Government a much larger expenditure hereafter.”¹⁹² In 1873, Patrick Robertson-Ross reported that “the white men dwelling in the Saskatchewan are at this moment living by sufferance, as it were, entirely at the mercy of the Indians.”¹⁹³ That August, Morris reported that a force of 5,000 “well armed”—due to the acquisition of repeating rifles—mounted warriors could be mobilized on the Plains west of Fort Ellice.¹⁹⁴

¹⁸⁸ See Ray, Miller, and Tough, *Bounty and Benevolence*, 96-98.

¹⁸⁹ Henry Youle Hind, *Narrative of the Canadian Red River Exploring Expedition of 1857 and of the Assiniboine and Saskatchewan Exploring Expedition of 1858*, vol. II (London: Longman, Green, Longman, and Roberts, 1860), 168.

¹⁹⁰ Richard Hardisty to Christie, December 28, 1870 in Ray, Miller, and Tough, *Bounty and Benevolence*, 98-99.

¹⁹¹ Christie to Archibald, April 13, 1871.

¹⁹² PAM, M2, Adams G. Archibald Fonds, Christie to George W. Hill, May 15, 1871, 299.

¹⁹³ Patrick Robertson-Ross, *Report of Colonel Robertson-Ross, Adj.-General of Militia, on the North-West Provinces and Territories of the Dominion* (Ottawa: 1872), 27.

¹⁹⁴ PAM, M134, Alexander Morris (Lieutenant-Governor's collection) Fonds, Morris to Campbell (telegram), August 2, 1873, 371; Ray, Miller, and Tough, *Bounty and Benevolence*, 100-101.

To counteract the military capacity of First Nations on the Plains, Morris requested a police force to be augmented by a military force of 500 on the basis that “the Indian tribes have formed a very low estimate of the Military power of Canada, and believe that about 3,000 warriors could drive the Canadians from the country.”¹⁹⁵ That the First Nations underestimated the Dominion’s military capacity is not supported by the historical record. On the contrary, the Canadian military was drastically underfunded. When the United States was spending \$20 million annually on Indian Wars—many of which were not won decisively and some of which were categorically unsuccessful—the Dominion’s entire budget was only \$19 million.¹⁹⁶

Although operating with a much larger estimate of 60,000 First Nations in the North-West who he described as being of “predatory habits, semi-warlike and barbarous in their nature”—Major General E. Selby Smyth argued in the *Annual Report on the State of the Militia for 1874* that “neither the work of war, nor even the subduing of a street riot could be confided with any safety to the efforts of undisciplined bodies of men” who Smyth claimed others were content with relying upon in the event that the Dominion’s sovereignty was threatened.¹⁹⁷ In 1874, the Canadian military numbered 700,000—655,000 of which were in the reserves.¹⁹⁸ The military presence in the North-West in 1874 was not recorded by Smyth but the previous year it numbered 344—among them three horses, eight buglers, and four staff.¹⁹⁹ The military detachment at Fort Garry was augmented in 1874 with the arrival of 300 North-West Mounted Police (NWMP) personnel.²⁰⁰

¹⁹⁵ Morris to Campbell (telegram), August 2, 1873.

¹⁹⁶ Asch, *Here to Stay*, 155. On the American Indian Wars see Dee Brown, *Bury My Heart At Wounded Knee: An Indian History of the American West* (New York: Holt, Rinehart & Winston, 1970).

¹⁹⁷ CSP, 1875, *Annual Report on the State of the Militia for 1874*, Paper no. 6 (hereinafter *CSP, Militia Report 1874*), viii-ix.

¹⁹⁸ *CSP, Militia Report 1874*, xiii.

¹⁹⁹ CSP, 1874, *Annual Report on the State of the Militia for 1873*, Paper no. 7, xi.

²⁰⁰ See R.C. Macleod, *The North-West Mounted Police and Law Enforcement, 1873-1905* (Toronto: University of Toronto Press, 1976), 16-18.

The arrival of the NWMP in the North-West did little to change the conditions that prevailed in the region. However, the circumstances that led to the force's formation and "march west" are a microcosm of the historical process that played out in the region in the 1870s. On June 1, 1873, an Assiniboine camp was destroyed and at least 20 people were killed when a group of American wolfers attacked them at the Cypress Hills massacre.²⁰¹ Daschuk noted that a year earlier, the men responsible for the Cypress Hills massacre—the Spitzee Cavalry—had also perpetrated the Sweet Grass Hills massacre.²⁰² Although the NWMP had been legislated into existence scarcely a week earlier,²⁰³ the inability of the Dominion to exercise sovereignty and hold the American traders accountable gave urgency to the formation of the NWMP.²⁰⁴ Further, the prospect of violence against American traders by First Nations would also threaten the Dominion's control of the region. Thus, the NWMP's entry into the North-West was brought to fruition by the need for the Dominion to enforce its claim to the region against encroachments by Americans and in the midst of British disinterest and the prospect of First Nations resistance.²⁰⁵

In the years after the treaty-making period, officials within the Department of Indian Affairs pushed for the NWMP to be used as a subjugating force against First Nations.²⁰⁶ Their

²⁰¹ P. Goldring, "The Cypress Hills Massacre—A Century's Retrospect," *Saskatchewan History* 26, no. 3 (Autumn 1973): 81.

²⁰² Daschuk, *Clearing the Plains*, 81.

²⁰³ *An Act respecting the Administration of Justice, and for the establishment of a Police Force in the North West Territories*, SC 1873, c 35; John Peter Turner, *The North-West Mounted Police, 1873-1893*, vol. 1 (Ottawa: Edmond Cloutier, King's Printer and Controller of Stationery, 1950), 87.

²⁰⁴ Goldring, "Cypress Hills Massacre," 81.

²⁰⁵ Upon learning of the Cypress Hills massacre, Macdonald argued that the massacre "shows the necessity of our losing no time in organizing the mounted police." LAC, MG26-A, vol. 523, Sir John A. Macdonald Fonds, Macdonald to Dufferin, September 9, 1873. Macdonald reiterated this opinion to Lord Dufferin a few weeks later when he informed him that "Morris is getting very uneasy in the north west. The massacre of the Indians by the Americans has greatly excited the red men there." Accordingly, Macdonald argued that the NWMP would have to forego further training and be sent west before the close of navigation. LAC, MG26-A, vol. 523, Sir John A. Macdonald Fonds, Macdonald to Dufferin, September 24, 1873.

²⁰⁶ Noel Evan Dyck, "The Administration of Federal Indian Aid in the North-West Territories, 1879-1885" (MA thesis, University of Saskatchewan, 1970), 10-11 and 84n.30. In the years after the treaty-making period, the NWMP was at times hesitant to enforce tenets of Canadian Indian policy such as the pass system. See Sarah Carter, "Controlling Indian Movement: The Pass System," *NeWest Review* (May 1985): 9.

initial presence, however, was characterized by law enforcement and a dependence on the good will of First Nations.²⁰⁷ In the event of an outbreak of an Indian war, the ability of the NWMP to act as an effective force against the First Nations—even with the support of the Fort Garry detachment—would have been limited. Even after Dominion authority in the North-West became a fixed fact in the years after 1879, the NWMP struggled to enforce the law against the wishes of First Nations on the Plains.²⁰⁸ In 1880, for example, the NWMP were unable to exert control over a riot at Fort Walsh in the midst of the government’s stringent rations policy.²⁰⁹ Similarly, Assistant Indian Commissioner Hayter Reed was compelled to issue rations to a group of First Nations that seized the storehouse on the Sakimay Reserve in 1884 after the NWMP failed to make arrests.²¹⁰

In explaining his deviation from departmental policy to his superiors, Reed observed that the First Nations that participated in what became known as the Yellow Calf Incident “knew that the White mans (sic) iron horse is useless when the rails on which it travels have been torn up.”²¹¹ The iron horse which Reed alluded to was not even under construction in the 1870s let alone incomplete.²¹² In the event that the Dominion attempted to quell an uprising or take First Nations lands by force—as Archibald feared giving the impression of at Portage la Prairie—the

²⁰⁷ R.C. Macleod, “Canadianizing the West: The North-West Mounted Police as Agents of the National Policy, 1873-1905,” in *The Prairie West: Historical Readings*, 2nd ed. (Edmonton: Pica Pica Press, University of Alberta Press, 1992), 227.

²⁰⁸ This is not to say that this authority was completely secure or without attacks on or efforts undermining it. The North-West Resistance of 1885 stands out as a prominent example of resistance to Canadian authority after the collapse of the bison. Similarly, the evading of the NWMP by Almighty Voice from October 1895 to May 1897 and by Charcoal in 1896—whose affliction with tuberculosis prevented him from ascending the gallows upon his capture—illustrated the incompetence of the NWMP. See Blair Stonechild and Bill Waiser, *Loyal till Death: Indians and the North-West Rebellion* (Calgary: Fifth House Publishers, 1997); Daschuk, *Clearing the Plains*, 179; Bill Waiser, *In Search of Almighty Voice: Resistance & Reconciliation* (Markham: Fifth House Publishers, 2021).

²⁰⁹ Tobias, “Subjugation of the Plains Cree,” 528.

²¹⁰ See Carter, *Lost Harvests*, 121.

²¹¹ Quoted in Isabel Andrews, “Indian Protest Against Starvation: The Yellow Calf Incident of 1884,” *Saskatchewan History* 28, no. 2 (Spring 1975): 47.

²¹² The contract allowing for construction of the railway to begin in earnest was signed on October 21, 1880. See Innis, *Canadian Pacific Railway*, 96.

troops stationed east of Fort Garry would have been subjected to the same deprivations as the NWMP during its infamous March West without a railroad to the North-West.²¹³ Given the conditions that prevailed in the North-West in the 1870s, Chief John Snow's evaluation that "[i]f the various tribes of the western plains and the Rocky Mountain region had confederated at this point in history, they would have had enough strength and more than enough warriors to wipe out all the white settlers then in the area" is by no means hyperbolic.²¹⁴

Hall's evaluation of Snow's analysis that "[a]ny Indian victory would be Pyrrhic, and would in the long run bring down the wrath of the whites, who then would dictate the terms of the future relationship" can find support in the historical record only if the whites to which he refers are the Americans that coveted the North-West.²¹⁵ The Canadians did not have the capacity for retaliation that Hall suggested they did. Simpson's fear that treaties were necessary for the Dominion's retention of the Saskatchewan region applies to the North-West as a whole—for throughout the region, the Dominion proved incapable of exercising its sovereignty with any effect. When Hardisty confronted American fur traders in the vicinity of Edmonton about their illegal trading practices in 1872, "they coolly told him that they knew it [that they were breaking the law] very well, but he had no force to prevent it, so they would do just as they liked."²¹⁶ If the Dominion could not exercise control in the North-West with any consequence, it is unclear how this control would have been established after they had been cast out of the region entirely.

If the Dominion lost access to, and failed to secure control of, the North-West, it would have been confined to northeastern North America and subject to annexationist forces in the US.

²¹³ On the experiences of the NWMP on their trek through the North-West see Jack F. Dunn, *The North-West Mounted Police, 1873-1885* (self-pub., 2017), 95-152.

²¹⁴ Chief John Snow, *These Mountains Are Our Sacred Places: The Story of the Stoney People* (Calgary: Fifth House Books, 2005), 66.

²¹⁵ Hall, *Treaties to Reserves*, 70-71.

²¹⁶ Quoted in Daschuk, *Clearing the Plains*, 83.

Without effective support from the British, the Dominion was in jeopardy of losing the region to the Americans. For their part, the only interest in the region for the British was the potential access to the markets in Asia through the transcontinental railway.²¹⁷ The sacrificing of Canadian interests at the Treaty of Washington in 1871 gave little confidence that the British would defend the North-West against American annexationism if the Dominion proved incapable of securing the region. The fiscal and military limitations of the nascent Dominion exasperated the duress that British abandonment and American annexationism inflicted upon the Dominion. Accordingly, the only possible recourse to First Nations resistance in the North-West was for Crown negotiators to meet their First Nations counterparts in good faith.

The historical record is unequivocal that the Dominion (through its Crown negotiators) did not pursue treaty-making pursuant to the *Proclamation* or even for the purposes of extinguishing Indian title at all. On the contrary, forces beyond the control of the Dominion that had brought its constituent members together in Confederation in the previous decade—namely the decline of the British Empire, the threat of American annexationism, Fenian incursions, First Nations resistance, and their own fiscal and military insecurity—compelled the Dominion to pursue treaty-making with the First Nations of the North-West. The context in which the Dominion was forced to negotiate (and the absence of the *Proclamation* in this context) imbues the southern Numbered Treaties with the same confederal qualities present in the *British North America Act* and *Manitoba Act*. The confederal *nature* of these treaties, however, can be discerned in the negotiations of the treaties themselves as Chapter 3 will examine.

²¹⁷ Gwyn, *Nation Maker*, 76.

Chapter 3: The Confederal Nature of the Southern Numbered Treaties

That there has been a breakdown in the treaty relationship entered into by the First Nations of the North-West and the Crown since the signing of the southern Numbered Treaties in the 1870s is undeniable. Within a decade of their negotiations, the Dominion government—through the Department of Indian Affairs—admitted to a failure to fulfill the written obligations of the treaty relationship (and relied on oral testimony from First Nations in correcting this failure) even as it maintained that the written terms of the treaty constituted the entirety of the treaty relationship—a view that is buttressed by the failure of historians to refute the role of the *Proclamation* in the southern Numbered Treaties.¹ A variety of diagnoses have been put forward to explain the breakdown of the treaty relationship. These diagnoses are dwarfed only by the remedies proposed to restore the treaty relationship.² Among these remedies, treaty federalism has declined in popularity since the era of mega-constitutional politics and Aboriginal self-government movements.³ The confederal analogy—which it will be recalled is a variant of the treaty federalism model—better accounts for the nature and content of the treaty relationship established by the southern Numbered Treaties from both historical and present perspectives than other proposed remedies which have emerged.

The consistency of the confederal analogy with the historical record pertaining to the circumstances under which the southern Numbered Treaties were negotiated has been discussed in Chapter 2. That the content of the treaty relationship can be explained best by the confederal

¹ See Derek Whitehouse-Strong, “‘Everything Promised Had Been Included in the Writing’: Indian Reserve Farming and the Spirit and Intent of Treaty 6 Reconsidered,” *Great Plains Quarterly* 27 (Winter 2007): 33-34.

² See, for examples, the varied contributions in John Borrows and Michael Coyle, eds., *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017).

³ On treaty federalism, see Youngblood, “Empowering Treaty Federalism”; Papillon, “Treaty Federalism.”

analogy is a distinct claim that requires further analysis. Before such an analysis can be undertaken it is necessary to describe the limitations of other characterizations of the treaty relationship. This chapter will test the prevailing, often *Proclamation*-centric, ways of thinking of the treaty relationship against the historical record and the conditions presently bearing upon that treaty relationship (such as the role of the Crown and its representatives). The analysis in this chapter demonstrates that the confederal analogy is not only consistent with the historical record but also best accounts for the jurisprudential and constitutional factors that concern the treaty relationship pursuant to the southern Numbered Treaties.

That the southern Numbered Treaties were “first and foremost land-surrender agreements”—to take Flanagan’s description—is a characterization that relies too heavily on the written text of the treaty.⁴ In the first place, the relative weakness of the Dominion in the North-West and the history of treaty-making among and between First Nations prior to the southern Numbered Treaties (which was conducted orally) do not justify the prioritization of the written record over the oral record.⁵ Krasowski and Brian Titley each noted the tendency of Crown negotiators to downplay the surrender clause as part of their negotiation tactics.⁶ Oral testimony from First Nations elders affirms the fact that a surrender was not discussed. Cree, Saulteaux, and Assiniboine elders stated with respect to Treaty 4 that “[t]he Indian nations agreed with Her

⁴ Flanagan, *First Nations?* 146.

⁵ On treaty-making between and among the First Nations of the North-West prior to the southern Numbered Treaties see Milloy, *The Plains Cree*, 88; Daniel Voth, “Invitations from the land and waters: Lessons from the Peace of Fort Garry,” *Canadian Journal of Urban Research* 29, no. 1 (Summer 2020): 98-99. There is some support for this idea at common law. Although the case involved the Douglas Treaties on Vancouver Island, in *R. v. Morris and Olsen*, 2006 SCC 59 at para. 24, the Court found that treaties could be “concluded orally and subsequently reduced to writing.”

⁶ Brian Titley, *The Indian Commissioners: Agents of the State and Indian Policy in Canada’s Prairie West, 1873-1932* (Edmonton: University of Alberta Press, 2009), 51; Krasowski, *No Surrender*, 272.

Majesty[,] the treaty is a peace alliance for agriculture only. The depth of a plow share.”⁷ Elder Jimmy A. Beardy of York Factory (Treaty 5) struck a similar note in stating, “[o]ur Elders weren’t stupid. No one was stupid enough to say ‘you can have this land’. What they were saying is ‘you can use it, the areas that we’re not using’. You can’t give away land.”⁸ Such oral history is in tension with the idea that the written terms alone constitute the treaty relationship.

When historians began to account for the discord between the written record and the First Nations understandings of the treaty relationship, their conclusions were drawn along the lines of critical linguistic and cultural misunderstandings between the negotiating parties.⁹ There is some value to Hall’s argument that the centuries preceding the southern Numbered Treaties are not the proper context for understanding the treaty relationship.¹⁰ However, in the 200 years between the granting of the HBCo. charter in 1670 and the negotiation of Treaties 1 and 2 in 1871, First Nations and British authorities likely became accustomed (at least to an extent) to each other’s cultural patterns, languages, and worldviews.¹¹ Further to this point, many of the chiefs who signed Treaties 1 and 4 were descendants of signatories of the Selkirk Treaty of 1817—testifying to the intergenerational nature of treaty-making between Britain/Canada and First Nations in the North-West.¹²

⁷ “Elder’s document on Treaty 4 by the Saulteaux, Cree and Assiniboine Nations,” transcribed by Joanne Greenwood, n.d., transcript disc 67, transcript and recording, Office of Specific Claims and Research, IH-347, Canadian Plains Research Centre, University of Regina Press.

⁸ Quoted in York Factory First Nation, *Kipekiskwaywinan (Our Voices): York Factory First Nation Speaks About the Keeyask Generational Project* (2012), 48.

⁹ Consider, for examples, Stanley, *Birth of Western Canada*, 213; Taylor, “Treaties Six and Seven,” 42.

¹⁰ Hall, *Treaties to Reserves*, 21.

¹¹ Miller argued that the same process of cultural interaction that occurred elsewhere in Canada also occurred in Western Canada—only over a shorter span of time. See Miller, *Skyscrapers Hide the Heavens*, 125.

¹² Peguis’s son, Henry Prince, was a signatory of Treaty 1 while Chief Le Sonnant’s son, Kahkawistahaw, and grandsons (through Makaiysis), Okanese and Pasquah, signed Treaty 4. Additionally, Chief Mekis and Chief Keeseekoowenin (Treaty 2) and Chief Louis O’Soup (Treaty 4) were the sons of Michael Cardinal (Okanese or Little Bone)—a prominent chief in the North-West. See Sarah A. Carter, “Kā-Kīwistāhāw (Kahkewistahaw),” *Dictionary of Canadian Biography*, 1994, https://www.biographi.ca/en/bio/ka_kiwistahaw_13E.html; Peter Lorenz Neufeld, “Keeseekoowenin (Kesekein, Kitche kah me win), baptized Moses Burns,” *Dictionary of Canadian Biography*, 1994, https://www.biographi.ca/en/bio/keeseekoowenin_13E.html; Krasowski, *No Surrender*, 64.

Mistranslations and misunderstandings were not entirely absent from the negotiations. Famously, at the negotiations of Treaty 6 at Fort Pitt, Morris was led to believe that Big Bear feared being hanged by the Canadian state.¹³ However, such misunderstandings were mitigated by the presence of competent interpreters. The Anglican missionary Joseph Reader—who signed as a witness to Treaty 4—successfully translated the Holy Bible into the Cree language.¹⁴ Reader's colleague, Nakoda-Cree catechist Charles Pratt, served as an interpreter at Fort Qu'Appelle in 1874 and had a personal, vested interest in securing the successful negotiation of a treaty.¹⁵ Several Métis individuals served as interpreters and cultural brokers in the negotiations of the southern Numbered Treaties. Prominent among them was James McKay (fluent in English, French, Cree, Ojibwe and Sioux) who served as an interpreter at Treaties 1-3 and as a Crown negotiator at Treaties 5 and 6.¹⁶ Prior to serving as an interpreter on behalf of the Plains Cree at Treaty 6,¹⁷ Peter Erasmus (who spoke English, French, Plains and Swampy Cree, and Stoney (Assiniboine)) worked in a similar capacity on behalf of missionaries in the North-West and for the Palliser Expedition.¹⁸ Owing to the efforts and acumen of such interpreters,

¹³ Morris, *Treaties of Canada*, 192. See also Krasowski, *No Surrender*, 190.

¹⁴ Peter Dueck, "Reader, Joseph," *Dictionary of Canadian Biography*, 2005, https://www.biographi.ca/en/bio/reader_joseph_15E.html.

¹⁵ Winona Stevenson, "The Church Missionary Society Red River Mission and the Emergence of a Native Ministry, 1820-1860 with a Case Study of Charles Pratt of Touchwood Hills," (MA thesis, University of British Columbia, 1988), 156-157; Krasowski, *No Surrender*, 138.

¹⁶ Allyson Stevenson, "The Metis Cultural Brokers and the Western Numbered Treaties, 1869-1877," (MA thesis, University of Saskatchewan, 2004), 35 and 36. Stevenson described McKay as an interpreter at Treaty 5 but on the text of the treaty he is named as a commissioner. See Treaty 5 between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions (Queen's Printer, 1969).

¹⁷ An account of these negotiations is found in Peter Erasmus, as told to Henry Thompson, *Buffalo Days and Nights* (Calgary: Glenbow-Alberta Institute, 1976), 239.

¹⁸ Stevenson, "Metis Cultural Brokers," 56-58. Ray, Miller and Tough blamed Erasmus for the confusion between Big Bear and Morris at the Treaty 6 negotiations but Stonechild and Waiser pointed out that Erasmus was absent on the day that this interaction occurred. See Stonechild and Waiser, *Loyal Till Death*, 25-26; Ray, Miller, and Tough, *Bounty and Benevolence*, 142. Stevenson assigned the fault for the mistranslation to Reverend John McKay. Stevenson, "Metis Cultural Brokers," 140-141.

misunderstandings were confined to specific incidents rather than infecting the entire treaty-making process.

If linguistic misunderstandings were limited by the literacy of interpreters, it might have been the case that First Nations and Crown negotiators were unable to come to an agreement because the gap between their cultural worldviews could not be bridged. In this respect, John S. Milloy assumed an especially nihilistic posture in arguing that the views taken by the First Nations and Crown parties to the treaty relationship could never be reconciled. Milloy reasoned that Crown and First Nations negotiators could view the same physical features at Fort Qu'Appelle in 1874 but the symbolic systems of each "placed those men in different human landscapes and separate ontological sites."¹⁹ From Taylor's vantage, the Crown negotiators at Treaty 6 viewed the pipe-stem ceremony as little more than a "picturesque preliminary favoured by Indians."²⁰ Innes extended this line of reasoning in claiming that Morris failed to appreciate the significance of the pipe-stem at Treaty 3 and its absence at Treaty 4.²¹ Alternatively, Talbot observed that Morris was aware of the pipe-stem's significance in relations between the HBCo. and First Nations in the fur trade era and knew that he could not make promises that he did not intend to keep.²² At the Treaty 4 negotiations in 1874, First Nations negotiators rejected the reduction of a proposed payment every two years for 50 years from \$15 to \$5—a shrewdness which Krasowski argued testified to the First Nations negotiators' awareness and competence at the negotiations.²³ Similarly, Krasowski pointed out that the Blackfoot who negotiated Treaty 7 had experience negotiating treaties with European and American parties.²⁴ With respect to Treaty

¹⁹ John S. Milloy, "Tipahamatoowin or Treaty 4?: Speculations on Alternative Texts," *Native Studies Review* 18, no. 1 (2009): 93.

²⁰ Taylor, "Treaties 6 and 7," 18.

²¹ Innes, *Elder Brother*, 64.

²² Talbot, *Negotiating the Numbered Treaties*, 104-105.

²³ Krasowski, *No Surrender*, 156-157.

²⁴ Krasowski, 265.

2, Ray, Miller, and Tough noted that when the Crown negotiators arrived at Manitoba Post they found the First Nations there with a knowledge of the agreement made earlier that month at the Stone Fort. That the First Nations signatories of Treaty 2 would have learned of the content of the treaty relationship through Indigenous sources and that Simpson was saved from the labours of explaining the content of this relationship (as he did at Treaty 1) suggests that both parties agreed on the content of that relationship.²⁵

The effect of the misunderstanding hypothesis (in both its linguistic and cultural variants) is to provide a basis from which Canada can persist in its manipulation of the treaty relationship. The logic is not dissimilar from the fidelity of historians to the *Proclamation* itself nor to the tendency, observed by Jarvis (previously known as Robin) Brownlie and Mary-Ellen Kelm, of historians to use Indigenous agency to absolve Canada of its colonialist behaviour.²⁶ If the breakdown of the treaty relationship can be ascribed to misunderstandings between well-intentioned Crown and First Nations negotiators, Canada cannot be culpable (notwithstanding rules of interpretation with respect to treaties) for misrepresenting and failing to abide by the treaty relationship because it is not doing so wilfully.

These hypotheses might be salvaged as competent historical explanations if it can be proven that the Crown negotiators were intentionally deceptive. Claims of this nature may be made most potently against the negotiators of Treaty 1. In order to induce the First Nations to accept the treaty, the Crown negotiators agreed to provide cattle and agricultural implements. These provisions were recorded in a memorandum known as the 'Outside Promises'.²⁷ When

²⁵ Ray, Miller, and Tough, *Bounty and Benevolence*, 59. On 3 November 1871, Simpson reported that at Treaty 2, the First Nations gathered there already had "a knowledge of the former treaty" and the negotiations "therefore occupied little time." See Morris, *Treaties of Canada*, 41-42.

²⁶ Robin Brownlee and Mary-Ellen Kelm, "Desperately Seeking Absolution: Native Agency as Colonialist Alibi?" *Canadian Historical Review* 75, no. 4 (December 1994): 545.

²⁷ See Memorandum of things outside of the Treaty which were promised at the Treaty of the Lower Fort, signed the 3rd day of August, A.D. 1871 in Morris, *Treaties of Canada*, 126-127.

Simpson failed to attach the Outside Promises to his report on Treaties 1 and 2, First Nations signatories of these treaties began to impede the negotiations of subsequent treaties.²⁸ On November 5, 1873 (only months after being warned by a Saulteaux chief at Treaty 3 that “our hearts and brains are like paper, we never forget”),²⁹ Morris learned that Treaty 2 was not viewed as binding “by the great body of Indians” in the North-West.³⁰ When Morris attempted to negotiate Treaty 4 the following year, the Portage band (signatories of Treaty 1) “twice sent messengers with tobacco (the usual Indian credentials for such messengers) to Qu’Appelle to prevent the making of the treaty there” on the basis “that the white man had not kept his promises.”³¹ Before treaty-making could resume in earnest, the Outside Promises had to be renegotiated into the treaty—a task completed by Indian Commissioner J.A.N. Provencher with respect to Treaty 1 and by Morris and McKay with the Treaty 2 signatories at Manitoba Post in 1875.³² As a consequence of this experience, Crown negotiators knew—if they did not already—that promises made at the negotiations could not be made flippantly.

After the Outside Promises were renegotiated into Treaties 1 and 2, Morris and Laird (as Minister of the Interior) agreed that it was necessary to put the treaty relationship “on a better footing than at present existed.”³³ Morris’s fidelity to this belief prompted his severance from the administration of the treaties when Laird’s successor as Minister of the Interior, David Mills, found the expenses of administering the treaty relationship intolerable. In 1876, responsibility for administering the treaties was transferred to superintendents responsible to the Department rather

²⁸ See Craft, *Stone Fort Treaty*, 104.

²⁹ Morris, *Treaties of Canada*, 69.

³⁰ See Memorandum of things outside of the Treaty in Morris, *Treaties of Canada*, 126-127.

³¹ Morris, *Treaties of Canada*, 128 and 137.

³² Morris, 127-128. At Manitoba Post, Morris recorded a memorandum of the items left out of the text of the treaty that mirrored the terms of the Outside Promises. See PAM, P5283/3, Alexander Morris (Lieutenant-Governor’s Collection) Fonds, Notes taken at a meeting of Indians at Manitoba House, August 23, 1875, 1089.

³³ PAM, P5283/1, Alexander Morris (Lieutenant-Governor’s Collection) Fonds, Laird to Morris, July 8, 1875, 1034.

than to the governor general (as the lieutenant governor was).³⁴ Accordingly, when Laird (as Morris's successor as Lieutenant Governor) negotiated Treaty 7 in the autumn of 1877, he was constrained by a level of departmental oversight unknown to Morris during the negotiations of Treaties 3-6 and the renegotiations of Treaties 1 and 2.³⁵ That within two years Laird would have deviated from the views he shared with Morris in 1875 is a claim that is not supported by the extant historical evidence. As Talbot aptly put it in his biography of Morris, "[t]he tragedy of history does not lie in the treaties, but in Canada's failure to honour its promises."³⁶ In other words, the breakdown of the treaty relationship cannot be ascribed to deceit on the part of Crown negotiators but to the manipulation of that relationship by the Dominion government.

Beyond cultural and linguistic misunderstandings, descriptions of the treaty relationship have turned often to the theatres of international and contract law. Borrows argued (in relation to the *Proclamation*) that because treaties have been found to be *sui generis*, legal interpretations can only be made by analogy to international and contract law.³⁷ Brenda L. Gunn reasoned that Canadian law has failed to appreciate the potential international character of the Numbered Treaties pursuant to the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*).³⁸ Janine R. Seymour demonstrated how the negotiations of Treaty 3 were consistent with the provisions of the *Vienna Convention on the Law of Treaties*.³⁹ The merits of these arguments as a matter of legal theory lie beyond the scope of this analysis. It is only their ability

³⁴ Talbot, *Negotiating the Numbered Treaties*, 155.

³⁵ Morris, *Treaties of Canada*, 250.

³⁶ Talbot, *Negotiating the Numbered Treaties*, 159.

³⁷ Borrows, "Wampum at Niagara," 169.

³⁸ Brenda L. Gunn, "Exploring the International Character of Treaties 1-11 and the Legal Consequences," in *Reflections on Canada's Past, Present and Future in International Law*, eds. Oonagh E. Fitzgerald, Valerie Hughes, and Mark Jewett (Waterloo: Centre for International Governance Innovation, 2018), 112.

³⁹ Janine R. Seymour, "*Manitoo Maniza'igan: An Anishinaabe Legal Analysis of Treaty No. 3*," (LLM thesis, University of Manitoba, 2016), 53-58.

to account for the historical circumstances under which the treaty relationship was entered into that is of concern here.

To test the terms of the southern Numbered Treaties against the conditions set out in the *Vienna Convention* or *UNDRIP* would be to ignore the historical context in which these treaties were negotiated. It would have the effect of “re-educating the dead” insofar as it places the legitimacy of the treaties at the mercy of bodies of international law that were codified 102 and 136 years after the initiation of the treaty-making process in the North-West.⁴⁰ The status of the southern Numbered Treaties in international law is also complicated by Canadian domestic law in relation to the fulfillment of treaty obligations by the Dominion prior to the acquisition of the treaty-making power by the Dominion executive. Pursuant to s. 132 of the *British North America Act*, the Dominion was granted “all Powers necessary or proper” for the fulfillment of treaty obligations “as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries.”⁴¹ That First Nations would have fallen under the category of ‘Foreign Countries’ is unlikely. To the extent that First Nations were considered foreign, some appeal may be made to the dissenting opinion of Strong J. in the *St. Catharines* decision (S.C.C.). In this case, Strong J. referred to James Kent’s evaluation of *Cherokee Nation v. State of Georgia* (1831) where the Supreme Court of the United States described Indians as “domestic, dependent nations.”⁴² Strong J. tacitly accepted this framing when he questioned how

⁴⁰ It is similarly inappropriate to denigrate the treaties on the basis that they do not meet the standards of the *Vienna Convention*—as Flanagan attempted to do. See Flanagan, *First Nations?* 135. On “re-educating the dead” as a characteristic of presentist history see Jens Bartleson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), 57.

⁴¹ In *British North America Act*, 58. For an argument in favour of interpreting treaties with First Nations through s. 132 of the *British North America Act* see Elder Wayne Scott, Naazihkigaabow, “We Are All Treaty People,” in *Gakina Gidagwi’igoomin Anishinaabewiyang—We Are All Treaty People: Treaty Elders’ Teachings*, vol. 4, eds. James Cote, Elmer Courchene and William G. Lathlin with contributions by the Council of Elders (Winnipeg: Treaty Relations Commission of Manitoba, 2016), 66-67.

⁴² *St. Catharines*, S.C.C. at p. 610. See also James Kent, *Commentaries on American Law*, vol. III, 4th ed. (New York: E.B. Clayton, Printer, 1840), 382. On the idea of ‘domestic, dependent nations’ see Vine Deloria, Jr. and

it was possible “to suppose that the law can, or could have been, at the date of confederation, in a state any less favourable to the Indians whose lands were situated within the dominion of the British crown” than to the United States where the principles originally established by the former “were so carefully adhered to... from the days of the colonial governments?”⁴³ It is unlikely that Strong J.’s contemporaries would have taken issue with the framing of First Nations as “domestic” even if the actual state of affairs prior to the negotiations of the southern Numbered Treaties casts doubts upon their status as dependent.⁴⁴ That First Nations were thought of as ‘countries’ in the sense of being states is equally as unlikely. Unlike the interchangeable use of ‘Indian’ and ‘aborigines’ noted by McNeil in relation to the terms of the Rupert’s Land transfer, there is no interchangeable use of ‘Indians’ and ‘countries’ in the historical record.⁴⁵ Among the few references to the country of First Nations was Christie who alluded to “the poverty of their country” in his memo attached to the letter to Archibald from Sweetgrass and other Plains Cree chiefs in April 1871.⁴⁶ On a balance of probabilities, it is more likely that Christie was referring to the geographical space controlled by the Plains Cree rather than to a geopolitical unit. Thus, from the outset international law appears to be a poor mechanism for understanding the treaty relationship in historical context.

In a very literal sense, however, it is difficult to deny that the southern Numbered Treaties were (at least to some extent) international agreements. Crown negotiators referred to First Nations as ‘nations’ during the negotiations. At Treaty 7, for example, Laird expressed pleasure

Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon Books, 1984), 17.

⁴³ *St. Catharines*, S.C.C. at pp. 612-613.

⁴⁴ At this juncture, the difference between *de jure* and *de facto* sovereignty is critical. Even if the Dominion had the force of statute behind its claim to the North-West (as Hall noted), it was entirely unable to exert its influence in the region as *de facto* sovereignty was exercised by First Nations and Métis. See Hall, *Treaties to Reserves*, 21; Asch, *Here to Stay*, 32.

⁴⁵ See the discussion in Chapter 1 at pp. 63-64.

⁴⁶ Christie to Archibald, April 13, 1871 in Morris, *Treaties of Canada*, 169.

at the address from the “Chiefs of the great Blackfeet *nation*.”⁴⁷ At Treaty 3, Morris said to the Saulteaux that he wished “to treat with them as a *nation* and not as separate bands.”⁴⁸ In this respect, the Grand Council of the Anishinaabe had authority to negotiate the terms of the treaty at the North-West Angle in 1873.⁴⁹ However, it was on behalf of their bands (rather than on behalf of the Saulteaux generally) that the chiefs present signed Treaty 3.⁵⁰ Similarly, while some chiefs were more prominent than others at the negotiations,⁵¹ each chief entered into the treaty of their own band’s accord and in their own band’s interest.⁵² If it was not in a band’s interest to take treaty, their chiefs could (and did) refuse to do so. Big Bear, Piapot, and Little Pine each declined to enter into treaty and together had more than 50% of the First Nations population between Treaties 4 and 6 among their followers.⁵³ When their followers began to abandon them in order to receive rations from the Dominion government, each was induced to take treaty.⁵⁴ The expression of sovereignty at the band level (as opposed to the national level) does not derogate from the legitimacy of that sovereignty anymore than the fact that First Nations were not organized into states derogates from that sovereignty.⁵⁵ This is only to say that international law (and the rhetoric of ‘nation-to-nation’ agreements) does not account for the fact that the treaties were agreements between parties with distinct manifestations of sovereignty.

⁴⁷ Morris, *Treaties of Canada*, 274, emphasis added.

⁴⁸ Quoted in Grand Council Treaty #3, “Pazaga’owin Reclaiming Our Wings: Transition to Nationhood,” (unpublished manuscript, n.d.), 4.

⁴⁹ Seymour, “Treaty No. 3,” 56-57.

⁵⁰ Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions (Queen’s Printer, 1966).

⁵¹ Loud Voice (Treaty 4), Ahtahkakoop and Mistawasis (Treaty 6), and Crowfoot (Treaty 7) were each viewed as principal chiefs. See Morris to Secretary of State of Canada, October 17, 1874 in Morris, *Treaties of Canada*, 80; Dispatch by David Laird in Morris, *Treaties of Canada*, 251; Krasowski, *No Surrender*, 185.

⁵² On the authority of chiefs and their relationships to their bands see Venne, “Understanding Treaty 6,” 177-179.

⁵³ Tobias, “Plains Cree,” 525.

⁵⁴ Tobias, 527; Stonechild and Waiser, *Loyal Till Death*, 44-45 and 48.

⁵⁵ See Flanagan, *First Nations?* 6; Hall, *Treaties to Reserves*, 11.

That “treaties are analogous to contracts, albeit of a very special and solemn public nature” is an established component of Aboriginal law as it relates to treaty interpretation.⁵⁶ Through the logic of authority, viable legal interpretations must account for this precept.⁵⁷ That contract and international law have a monopoly on the legal interpretations that may be used to make legal sense of the treaty relationship, as Borrows suggested, is not a claim supported by existing jurisprudence. In *Simon v. The Queen*, the Court found that “[a]n Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.”⁵⁸ The Canadian judiciary, as in *R. v. Badger*, has resorted to contract law to make sense of the *sui generis* nature of the treaty relationship.⁵⁹ It has not, however, confined its analysis to the contract analogy. An especially pertinent example can be found in *Beckman v. Little Salmon/Carmacks First Nation* where the court identified the relationship “between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples” as one of three foundational compacts in Canada.⁶⁰

Aaron Mills has developed a powerful critique of the contract analogy on the basis that the Canadian judiciary (and the Crown) “are structurally committed to violence” through, *inter alia*, “their reduction of treaties to minor contracts within the prior and unquestioned social

⁵⁶ This idea was first articulated in the common law in *R. v. Badger*, 1996 CanLII 236 at para. 76 (SCC), [1996] 1 SCR 771 [*Badger*]. The idea has been re-affirmed—most recently in *Shot Both Sides v. Canada*, 2024 SCC 12 at para. 38. See also Asch, *Here to Stay*, 83-84; Nikita B. Rathwell and Thea B. Pearce, “The Application of Limitation Periods to Historical Aboriginal Law Cases: A Case Comment on *Shot Both Sides v. Canada*, 2024 SCC 12,” *McKercher LLP*, last updated February 3, 2025, <https://www.mckercher.ca/en/news/posts/the-application-of-limitation-periods-to-historical-aboriginal-law-claims-a-case-comment-on-shot-both-sides-v-canada-2024-scc-12>.

⁵⁷ The logic of authority (precedent) contrasts with the logic of evidence. The former is appealed to by lawyers in pursuit of legal remedies to contemporary issues while the latter is the concern of (legal) historians interested “in how the law was understood and applied in the past.” Kent McNeil, “Indigenous Rights Litigation, Legal history, and the Role of Experts,” in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, eds. John Borrows and Michael Coyle (Toronto: University of Toronto Press, 2017), 74. See also F.W. Maitland, “Why the History of English Law is not written,” in *The Collected Papers of Frederic William Maitland*, vol. I, ed. H.A.L. Fisher (Cambridge: Cambridge University Press, 1911), 491.

⁵⁸ *Simon v. the Queen*, 1985 CanLII 11 at para. 33 (SCC), [1985] 2 SCR 387.

⁵⁹ *Badger* at para. 76.

⁶⁰ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 103 at para. 97.

contract.”⁶¹ Beyond this critique, it is not necessary to dispense with contracts entirely when seeking to understand the treaty relationship. After all, the southern Numbered Treaties certainly “create enforceable obligations based on the mutual consent of the parties.”⁶² As Asch argued, though “they are certainly much more than that, treaties are also contracts.”⁶³

It is prudent to be wary of the analogy of contract when it is stretched beyond the parameters of the historical record. Borrows argued that the doctrine of contract law that allows implied terms to be read into an agreement ought to be employed to have the terms of the *Proclamation*/Treaty of Niagara read into the terms of subsequent treaties. The effect would be to create “national treaty standards” while allowing for specific variations at the local level.⁶⁴ Such an approach ignores the fact that the southern Numbered Treaties are exceptional among other treaties negotiated in Canada. The preceding chapters have demonstrated how the entirety of the *Proclamation* was not within the colonial common sense of British and Canadian authorities from as early as the 1770s to as late as 1876.⁶⁵ Accordingly, the terms of the *Proclamation* (even when read alongside those of the Treaty of Niagara) are an insertion into the historical record pertaining to the treaties negotiated during this period. To be sure, the Selkirk, Manitoulin Island, and Robinson Treaties each served as templates (at least with respect to the specific terms of the written agreement of the southern Numbered Treaties) and shared with the southern Numbered Treaties an absence of the *Proclamation* in the impetus for their negotiations.⁶⁶ This is the extent

⁶¹ Mills, “What is a Treaty?” 212.

⁶² *Badger* at para. 76.

⁶³ Asch, *Here to Stay*, 149.

⁶⁴ Borrows, “Wampum at Niagara,” 170.

⁶⁵ See the discussion in Chapter 1—especially pp. 48-63.

⁶⁶ After the negotiations of Treaties 1 and 2, Archibald came into the possession of notes on American treaties, notes on reports by the American Indian Commissioner from 1862 to 1866, treaties between Britain and the Mississaugas in 1806, 1818, and 1838, treaties between Britain and the Chippewa in 1818 and 1825, treaties between Great Britain and the Mohawks in 1835, and notes on the Selkirk Treaty of 1817. See PAM, M3, Adams G. Archibald Fonds, 790-801.

of the comparison between the Selkirk, Manitoulin Island, and Robinson Treaties and the southern Numbered Treaties for it is only in the absence of the latter that the very existence of Canada was imperilled. If the *Proclamation*/Treaty of Niagara is read into the southern Numbered Treaties, the meaning given to the treaty relationship pursuant to them by the context in which they were negotiated is vitiated and diminished by the proposed national treaty standards. In this framing, the contract analogy impairs a proper understanding of the treaty relationship.

The contract analogy distorts the historical record of the southern Numbered Treaties only under specific renderings. The description of the southern Numbered Treaties as merely a “particular kind of agreement between the Crown and some of its subjects” unequivocally distorts the historical record.⁶⁷ Hall has given voice to this rendering of the treaty in the historiography. His conflation of the Crown and the Dominion government places his portrayal of the treaty relationship near Pierre Trudeau’s description of the same as a treaty between one segment of society and another.⁶⁸ Hall’s failure to grasp the difference between the entities of the Crown and of the government is not an aberration within the historiography. Miller emphasized that even as Crown negotiators (and lieutenant governors in particular) portrayed themselves as representatives of the Crown, “they were appointed by and answerable to the federal government.”⁶⁹ While Miller does not say so outright, the implication is that—however earnestly the lieutenant governors believed they were representatives of the Crown—they were in fact federal officers.⁷⁰ This line of reasoning was extended by Krasowski who noted Macdonald’s

⁶⁷ Hall, *Treaties to Reserves*, 21.

⁶⁸ Hall, 46. On Trudeau’s understanding of treaties see Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968-1970* (Toronto: University of Toronto Press, 1981), 179.

⁶⁹ Miller, *Compact, Contract, Covenant*, 157.

⁷⁰ Descriptions of lieutenant governors as anything other than federal officers tends to invite criticism. See Ronald I. Cheffins, “The Royal Prerogative and the Office of Lieutenant Governor,” *Canadian Parliamentary*

criticism to Morris: “You style yourself the Representative of the Queen—you are only immediately so. You are the representative of the Governor-General who is the representative of The Queen.”⁷¹ From this, Krasowski deduced that Morris thereafter believed that “his government represented the monarchy.”⁷² Even as this line of reasoning may be prone to the same tendency of Macdonald’s biographers to view him as entirely in control, it fails to apprehend his understanding of the role of the lieutenant governor. In 1864, Macdonald argued that the “Lieutenant-Governor will be a very high officer. He should be independent of the Federal Government, except as to removal for cause...”⁷³ Macdonald did not correct Morris on the score that the latter was a representative of the federal government and not of the Queen but instead on the idea that he was only the Queen’s representative by one degree of separation as the direct representative of the governor general. The powers and role of the governor general were not proscribed to any degree until the letters patent of 1878.⁷⁴ Still, not even the harshest critics of the office of the governor general contended that they represented the federal government and certainly not that they were the same entity for practical purposes.⁷⁵

Even if the conception of lieutenant governors as federal officers is left intact, it is rather irrelevant to an understanding of the treaty relationship. As Sharon Venne noted, the Dominion did not have authority to negotiate treaties until the Statute of Westminster of 1931.⁷⁶ At this

Review (Spring 2000); David E. Smith, “Comment Re: The Royal Prerogative and the Office of Lieutenant Governor,” *Canadian Parliamentary Review* (Autumn 2000): 34.

⁷¹ Krasowski, *No Surrender*, 106. See also PAM, M140, Alexander Morris (Ketcheson collection) Fonds, Macdonald to Morris, February 18, 1873, 22.

⁷² Krasowski, *No Surrender*, 106-107.

⁷³ In G.P. Browne, ed., *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart Limited, 1969), 117.

⁷⁴ Messamore, “Defining the Office,” 455-456.

⁷⁵ On the contrary, Edward Blake opposed the power vested in the governor general precisely because of the office’s connection to imperial authority over the Dominion. See Barbara J. Messamore, *Canada’s Governors General: Biography and Constitutional Evolution* (Toronto: University of Toronto Press, 2006), 197.

⁷⁶ Venne, “Understanding Treaty 6,” Sharon H. Venne, “Treaties Made in Good Faith,” *Canadian Review of Comparative Literature* 34, no. 1 (2007): 8. Venne mistakenly dates the Statute of Westminster in 1932 rather than

point the prerogative power of treaty-making fell to the Dominion Executive (governor general) rather than to the federal government.⁷⁷ Though granted exclusive *legislative* authority over “Indians and Lands reserved for the Indians” pursuant to s. 91(24), the southern Numbered treaties were neither negotiated nor ratified by legislation.⁷⁸ On April 28, 1871, Howe accordingly stated in connection with the order-of-council appointing Simpson as Indian Commissioner that “it will add much to the usefulness of the Commissioner amongst the Indian tribes if he be allowed to wear an uniform without which they are slow to believe that anyone *having the Queen’s authority* can be sent to treat with them.”⁷⁹ To facilitate this, Simpson was appointed as a Lieutenant-Colonel of the Regimental Division of Algoma and instructed by Howe to “wear the uniform which you are entitled to wear as a Militia Officer of that rank.”⁸⁰ Without the ability of the Dominion Executive to negotiate treaties, the Crown negotiators necessarily represented the Queen (or Imperial Crown) directly. Simpson—the only principal negotiator who did not already occupy a vice-regal position—was styled as “having the Queen’s authority” and commissioned as a Militia Officer which officialized Simpson’s possession of such authority. At the negotiations of Treaty 1, Archibald informed the First Nations negotiators that “when you hear his [Simpson’s] voice, you are listening to your Great Mother the Queen.”⁸¹ That no objections were raised, nor clarifications offered, as to the role of Simpson as representing the Queen directly suggests that the Dominion authorities responsible for advising

1931. For a discussion of this statute and its complexities see K.C. Wheare, *The Statute of Westminster and Dominion Status*, 4th ed. (London: Oxford University Press, 1948); Waite, *R.B. Bennett*, 167-168.

⁷⁷ *A.-G. v. A.-G. Ont.*, (1888) A.C. 326 (J.C.) (*Labour Conventions*) [*Labour Conventions*] in Olmsted, *Decisions of the J.C.P.C.*: III, 204.

⁷⁸ See *British North America Act*, 50. Rather than being negotiated and ratified by legislation, treaties were done so by order-in-council. Wayne E. Daugherty, “Treaty Research Report: Treaty One and Treaty Two,” (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1983), 9; Krasowski, *No Surrender*, 10.

⁷⁹ PAM, M2, Adams G. Archibald Fonds, Howe to Archibald, April 28, 1871, 278.

⁸⁰ PAM, M2, Adams G. Archibald Fonds, Howe to Archibald, May 9, 1871, 289.

⁸¹ Craft, *Stone Fort Treaty*, 87.

the governor general on Simpson's commission accepted the fact that Simpson (like Morris and Laird) directly represented the Imperial Crown.

The ability of the Crown representatives to act with some independence from their official instructions (what may be called the Crown's structural agency) will be explored in greater detail when the confederal analogy is analyzed. It is important here to note that the Dominion government accepted the terms of the treaties agreed to by the Crown (at least with respect to the written terms) even when they were deemed disadvantageous.⁸² This provides further evidence that while the Crown's representatives could be appointed and deposed on the advice of the Dominion government, the Dominion government could not impinge on the authority of those representatives. While the written terms of the treaty and the oral agreement diverge on many points, they both recognize that the treaty was made between the particular First Nations involved on one hand and the Queen on the other.⁸³ To frame the treaty relationship merely as an agreement between two segments of the same society is to misapprehend the basic constitutional principles under which the Dominion of Canada operated at the time the treaty relationship was entered into.

⁸² The Dominion government scolded Morris for agreeing to terms at the negotiations of Treaty 6 that were deemed too liberal in the midst of an economic downturn. It did not, however, refuse to accept those terms. LAC, RG10, vol. 3636, file 6694-2, Indian Branch Memorandum, December 31, 1876; LAC, RG10, vol. 3636, file 6694-2, Department of the Interior to Morris, March 1, 1877; Miller, *Compact, Contract, Covenant*, 181. Talbot argued that Morris knew that the Dominion might not accept the terms of Treaty 6 if they could avoid doing so and accordingly sent the terms (which included novel provisions such as the famine and pestilence clause) via post in order to "force the government's hand." Talbot noted that in the Order-in-Council ratifying the treaty, the consequences of rejecting the treaty were believed to outweigh the costs associated with the terms of the treaty. See Talbot, *Negotiating the Numbered Treaties*, 151-152. See also LAC, RG10, vol. 3636, file 6694-2, Order-in-Council, February 10, 1877.

⁸³ The text of Treaty 1, for example, positions the treaty as between "Her Most Gracious Majesty the Queen of Great Britain and Ireland" and "the Chippewa and Swampy Cree Tribes of Indians." Treaties 1 and 2 Between Her Majesty The Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions (Queen's Printer and Controller of Stationery, 1957). Elder Scott (Treaty 1) framed the treaty relationship in similar terms. See Scott, "All Treaty People," 60-61.

If, indeed, the treaty relationship could reasonably be explained as an agreement between segments of the same society, the confederal analogy could be made with much less difficulty. Confederation, insofar as it is a compact among its constituent parts, is necessarily an agreement between sections of the same society. Fundamentally, the compact theory posits that the British North American colonies party to Confederation agreed to forfeit control over certain matters in order to create a central or federal government to deal with matters of a common interest.⁸⁴ Assailants of the compact theory have at times staked their arguments on the claim that Confederation amounts to nothing more than an agreement between sections of a society. Gwyn, for instance, contended that Confederation cannot be a compact pursuant to Macdonald's descriptions of the confederal agreement as treaty-like because the provinces (even as former colonies) could not negotiate treaties.⁸⁵ There is a level of truth to Gwyn's argument because the colonies that became provinces did not have the legal authority to negotiate treaties.⁸⁶ The Reciprocity Treaty of 1854-1866, for example, was negotiated on the behalf of the colonies by Governor General Elgin.⁸⁷ However, the compact theory does not assert that Confederation is, in fact and form, a treaty between its constituent parts but only that its constituent parts came to an agreement that was akin to a treaty. An analogy or theory need not be an exact explanation but

⁸⁴ See Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Ottawa: Queen's Printer for Canada, 1969), 15.

⁸⁵ Gwyn, *John A.*, 346; Gwyn, *Nation Maker*, 70. Gwyn also argued that because Ontario and Quebec did not exist at the time of Confederation, they could not have been party to the treaty. Such a statement operates similarly to the one that the provinces that came into existence after the southern Numbered Treaties were signed have no interest in the treaty relationship and is deficient for the same reasons. See pp. 140-141. For another critique of the argument against the compact theory see Peter H. Russell, *Constitutional Odyssey: Can Canadians be a Sovereign People?* (Toronto: University of Toronto Press, 1992), 17-18.

⁸⁶ Accordingly, in 1865, the British Minister in Washington—rather than colonial officials—was instructed to negotiate a renewal of the Reciprocity Treaty. “Copy of a Committee of the Honorable the Executive Council, approved by His Excellency the Governor General, in Council on the 15th July, 1865” in Confederate Council of the British North American Colonies, *Minutes of the Proceedings* (Quebec: 2-3 15 September – 18 September 1865) in Nova Scotia, “Reciprocity Treaty Correspondence,” (Appendix No. 7), *Journal and Proceedings of the House of Assembly of the Province of Nova Scotia, 1866*, 3.

⁸⁷ See Charles C. Tansill, *The Canadian Reciprocity Treaty of 1854* (Baltimore: The John Hopkins Press, 1922), 76.

only a viable way of thinking about a given event or phenomenon. With respect to the compact theory, Sébastien Grammond argued that its function is metaphorical or normative rather than technical.⁸⁸ Similarly, Peter H. Russell described the compact theory as a myth—the validity of which “depends not on its historical accuracy but on its capacity to serve as a set of ‘beliefs and notions that men hold, that they live by or live for’.”⁸⁹ Similarly, when the Canadian judiciary has found that treaties with Indigenous Peoples can be understood by reference to contracts, it described treaties not as contracts but as analogous to them.⁹⁰ Still, the technical grounds upon which Gwyn made his argument against the compact theory are not the only one’s utilized by the theory’s opponents.

Paul Romney argued with some persuasiveness that the revulsion towards the compact theory has persuaded both its adherents and its opponents that the idea (especially as it was articulated by the J.C.P.C.) constituted a manipulation of the intent of the Fathers of Confederation.⁹¹ Romney astutely observed that Creighton (writing at a time when the British connection to Canada was waning) portrayed proponents of the compact theory as abusers of history who were manipulating the intent of the Fathers of Confederation—Macdonald being central among them.⁹² That Macdonald favoured legislative union does not necessarily mean that he (and the others involved in the project of Confederation) relentlessly pursued that end. Again, it is prudent to note Martin’s observation that Macdonald was not in complete control of the affairs going on around him. While it is possible that Macdonald used the language of treaty to minimize debate on the Quebec Resolutions and the terms of union with British Columbia, it is

⁸⁸ Sébastien Grammond, “Compact is Back: The Supreme Court of Canada’s Revival of the Compact Theory of Confederation,” *Osgoode Hall Law Journal* 53, no. 3 (Summer 2016): 810-811.

⁸⁹ Russell, *Constitutional Odyssey*, 61.

⁹⁰ *Badger* at para. 76.

⁹¹ Paul Romney, *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999), 11-12.

⁹² Romney, *Getting it Wrong*, 7-10.

equally possible that he accepted the validity of those statements.⁹³ In fact, Macdonald had earlier described the union of the Canadas in 1840 as a “solemn contract” while in the throes of a debate on representation by population.⁹⁴ Macdonald was neither the sole nor most eloquent proponent of this compact theory. Stanley noted that while Confederation as a compact was initially a distinctly Canadian idea (not shared by even the most ardent pro-Confederation elements in the Maritime colonies),⁹⁵ it was an idea promoted by each Étienne-Paschal Taché, George-Étienne Cartier, William McDougall, George Brown, and D’Arcy McGee.⁹⁶ The lattermost argued that “for one party to alter a treaty is, of course, to destroy it.”⁹⁷

The unalterable nature of a treaty as described by McGee certainly contrasts sharply with the status of the treaty relationship pursuant to the southern Numbered Treaties in the centuries after their negotiations. Still, that both Crown and First Nations negotiators understood treaties in much the same way as McGee is beyond doubt. In *Treaty Elders of Saskatchewan*, Cardinal and Hildebrandt noted that the ceremonies and traditions conducted during the negotiations of the treaties “precluded change by any of the parties to the fundamental aspects of the treaty arrangements.”⁹⁸ Elder Jacob Bill of Pelican Lake First Nation in Treaty 6 said that sacred

⁹³ Gwyn argued along these lines. See Gwyn, *John A.*, 346; Gwyn, *Nation Maker*, 158

⁹⁴ George F.G. Stanley, “Act or Pact? Another Look at Confederation,” in *Confederation*, intro. Ramsay Cook (Toronto: University of Toronto Press, 1967), 102. Interestingly, Gwyn did not deny Macdonald’s sincerity in this case. See Gwyn, *John A.*, 326.

⁹⁵ Stanley, “Act or Pact?” 106.

⁹⁶ Stanley, 105.

⁹⁷ *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (LA 1865), 136. Confederation as an idea in Canada did not exist in a vacuum and it too—if only indirectly—was informed by Indigenous forms of confederal arrangements. As Jennifer Smith noted Canadian Confederation was influenced by the only readily available example of federalism in the United States. The American federalist model was informed, to a greater or lesser extent, by the Iroquois Confederacy. See Jennifer Smith, “Canadian Confederation and the Influence of American Federalism,” *Canadian Journal of Political Science* 21, no. 3 (1988): 444-446; Samuel B. Payne Jr., “The Iroquois League, the Articles of Confederation, and the Constitution,” *William and Mary Quarterly* 53, no. 3 (July 1996).

⁹⁸ Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000), 42.

promises to the Creator constitute an undertaking that “is to be feared in the event of a breach.”⁹⁹ Accordingly, Morris invoked the Great Spirit during the negotiations of each of the treaties he was directly involved in (with the exception of Treaty 5).¹⁰⁰ The prosaic promise that the treaties were to last “as long as that sun shines and yonder river flows” is testament to the perpetual and unalterable nature of the treaty relationship entered into.¹⁰¹

Gaudry has argued that the unalterable nature of the agreement between the Métis and the Dominion in 1869 is reflective of the treaty relationship created by that agreement. Further, Gaudry viewed the treaty relationship that exists between the Métis and the Dominion as distinct from the *Manitoba Act* which merely constituted the Dominion’s ratification of the original agreement.¹⁰² Since the agreement was still between the Métis and the Dominion government (rather than the Crown), it can be framed only as analogous to treaty for the same reason that the compact theory can only be analogous to treaty. Nonetheless, it is a persuasive analogy that finds some (if at times tangential) support in the historical record and in the common law. In the debate on the *Manitoba Act*, Macdonald argued that the 1.4 million acres to be reserved for the Métis were necessary to secure an extinguishment of their Indian title—the purported object of the southern Numbered Treaties.¹⁰³ Similarly, in his letter to Grant in 1866, Riel explained that the Métis had “entered the Canadian Confederation, on the faith of a *treaty* which, Canada, as one of

⁹⁹ In Cardinal and Hildebrandt, *Treaty Elders of Saskatchewan*, 38.

¹⁰⁰ Morris, *The Treaties of Canada*, 58, 90, 221. It is not known why Morris did not invoke the Great Spirit at the Treaty 5 negotiations. His record of these negotiations, however, is thin in comparison to those of the other treaties discussed in *The Treaties of Canada*. See Morris, *The Treaties of Canada*, 143-167.

¹⁰¹ Morris, 202.

¹⁰² Gaudry, “Are the Metis Treaty People?”

¹⁰³ Canada, *House of Commons Debates: Third Session—First Parliament*, 2 May 1870 (John A. Macdonald) (Ottawa: Roger Duhamel, F.R.S.C., Queen’s Printer and Controller of Stationery, 1867), 1302. This characterization figured into the decision in *Daniels* at para. 47 where the status of the Métis as “Indians” pursuant to s. 91(24) of the *British North America Act* was at issue. See also D’Arcy Vermette, “Racism, Canadian Jurisprudence, and the De-Peopling of the Métis in *Daniels*,” in *Daniels v. Canada: In and Beyond the Courts*, eds. Nathalie Kermoal and Chris Andersen (Winnipeg: University of Manitoba Press, 2021), 138.

the two contracting parties, does not fulfill.”¹⁰⁴ In *Manitoba Metis Federation*, the Court found that “[a]n analogy may be made between such constitutional obligations and a treaty promise.”¹⁰⁵ Although the agreement ratified by the *Manitoba Act* was made between the Métis and the Dominion government, the Court also stated that the principle of the honour of the Crown was engaged by s. 31 of the *Manitoba Act*.¹⁰⁶

The honour of the Crown constitutes one of three constituent parts of Slaterry’s framing of the “Aboriginal Constitution”—the others being the *Proclamation* and treaties. While this theory is not without its merits and constitutes an iteration of the confederal analogy—for Slaterry frames the Aboriginal Constitution as parallel to “the federal pact between the provinces in the *Constitution Act, 1867*”—it fails to account for the exceptionalism of the southern Numbered Treaties.¹⁰⁷ The inclusion of the *Proclamation* necessarily disqualifies the framework from encompassing the southern Numbered Treaties for much the same reason that Borrows’s conception of national treaty standards is found wanting. That is, by importing an instrument that had no direct influence upon the treaty-making process in the North-West in the 1870s, the meaning of those treaties is necessarily distorted. That the *Proclamation* applies to the context of the southern Numbered Treaties is a matter of fixed law and as such its inclusion is necessary to offer an exclusively *legal* framework as the common law exists today. The best theory for understanding the southern Numbered Treaties from an historical perspective, however, need not conform precisely to the state of the common law if it is in tension with the historical record.

¹⁰⁴ “Memoir to Ulysses S. Grant,” in Martel, *Collected Writings*, 2-003, 6, emphasis added.

¹⁰⁵ *Manitoba Metis Federation* at para. 71.

¹⁰⁶ *Manitoba Metis Federation* at para. 9.

¹⁰⁷ Brian Slaterry, “The Aboriginal Constitution,” *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 67 (2014): 319.

Similar conclusions may be drawn with respect to the honour of the Crown on the basis that it is a principle derivative of the Crown's assertion of sovereignty in the *Proclamation*.¹⁰⁸ At its core, this principle demands that the Crown must be held to a higher standard in its dealings with Indigenous Peoples and its promises must be construed to have been made in good faith.¹⁰⁹ In *Badger*, the Court articulated this principle as an intolerance for "sharp dealing" on the part of the Crown.¹¹⁰ There is nothing objectionable about this legal principle with respect to the southern Numbered Treaties. On the contrary, Crown negotiators alluded to the idea that the Crown was negotiating in good faith. At Fort Qu'Appelle in 1874, for example, Morris stated that "we are Chiefs; we have delivered the message of our great Queen, whose words never change, whose tongue and the tongues of whose messengers are never forked."¹¹¹ That the words of the Crown negotiators must be taken in good faith (regardless of whether they were being intentionally deceptive on an individual level or not) is, therefore, a precept that is not dependent on the common law principle of the honour of the Crown. While the *Proclamation* presents an obstacle to the incorporation of the southern Numbered Treaties into Slattery's conception of the Aboriginal Constitution, the honour of the Crown and the treaties themselves are entirely consistent with the confederal nature of those treaties.

If the parties to the treaty relationship can be found, even by analogy, to interact within a confederal relationship, who exactly is party to that relationship in both historical and present perspectives becomes a matter of primary importance. It is largely accepted that through the Imperial Conference of 1926 (codified by the Statute of Westminster), the division of the

¹⁰⁸ *Manitoba Metis Federation* at para. 66; Slattery, "Aboriginal Constitution," 322.

¹⁰⁹ *Sparrow* at pp. 1107 and 1109.

¹¹⁰ This idea was articulated earlier in *Regina v. Taylor and Williams*, 1981 CanLII 1657 (ON CA). See *Badger* at para. 41.

¹¹¹ Morris, *Treaties of Canada*, 109.

Imperial Crown into many localized Crowns across the British Empire transferred the obligations of the Imperial Crown pursuant to the southern Numbered Treaties to the Crown in right of Canada.¹¹² This was the conclusion arrived at by Lord Denning of the J.C.P.C. in *Indian Association of Alberta* on the basis that following the Imperial Conference, “the Crown was no longer single and indivisible. It was separate and divisible for each self-governing dominion, province, or territory.”¹¹³ Lord Denning found that the obligations held by the Imperial Crown pursuant to the treaties fell to the Crown in right of Canada.¹¹⁴ However, it is reasonable that as divisions of the Imperial Crown—and given Lord Denning’s specific reference to them—the provincial Crowns (or at least those whose territorial jurisdictions intersect with the territories covered by the treaties) would similarly have inherited the obligations of the Imperial Crown when it ceased to be indivisible. Further to this point, Lord Kerr found that a determination had to be made on the situs of the Crown’s obligations as either “in right or respect of the United Kingdom on the one hand or of the Dominion *or provinces* of Canada on the other.”¹¹⁵ In agreeing with Lords Denning and Kerr that the Crown in right of the United Kingdom owed no obligations to First Nations pursuant to treaties or the *Proclamation*, Lord May found that “[q]uite clearly, to the extent that these [obligations] still continue—and I think that it is clear

¹¹² Sharon H. Venne, “Treaty and Constitution in Canada: A View From Treaty 6,” in *Critical Issues in Native North America*, ed. Ward Churchill (Copenhagen: IWGIA Document 62, 1989/90), 105; Joshua Ben David Nichols, *A Reconciliation Without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020), 5n.7. Venne claimed that the J.C.P.C. could not determine the method or date by which the transfer of treaty obligations to the Crown in right of Canada was completed. The references of Lords Denning and Kerr to the Imperial Conference of 1926 and the Statute of Westminster of 1931 do not support this claim. See *Indian Association of Alberta* at pp. 431-432 and 440-442. Lord May stated that the Dominion and provinces of Canada attained increasing sovereignty by convention until the Statute of Westminster—at which point the Dominion “attained complete independence.” See *Indian Association of Alberta* at p. 448.

¹¹³ *Indian Association of Alberta* at p. 432.

¹¹⁴ *Indian Association of Alberta* at p. 434.

¹¹⁵ *Indian Association of Alberta* at p. 435, emphasis added.

that the Canadian courts have held that they do—they are owed by the Crown in right of the Dominion *or in right of the particular province*.”¹¹⁶

That the provincial Crowns might operate independently of the Dominion Crown is a notion entirely consistent with the compact theory, but which meets some opposition. In response to Ronald I. Cheffins’s argument that the lieutenant governors possessed the same prerogative powers as the governor general,¹¹⁷ David E. Smith argued that lieutenant governors remained federal officers because “a provision is obsolete only if all sides agree to it” and both the Dominion and the provinces chose not to alter the office of the lieutenant governor in 1982 when the constitution was patriated.¹¹⁸ It is not clear that the parties involved viewed the lieutenant governor as an agent of the federal government in the first place. Simply because the lieutenant governor is appointed by the governor general on the advice of the federal government and the lieutenant governors have exercised the prerogative powers against *ultra vires* provincial legislation does not absolutely render the lieutenant governors federal officers.¹¹⁹ On the contrary, before the divisibility of the Crown, the lieutenant governors were understood not as representatives (or officers) of the federal government but of the governor general and ultimately of the Imperial Crown (as was the view of Macdonald in his letter to Morris). While Smith elsewhere accused the J.C.P.C. of “pervert[ing] Macdonald’s centralist constitution,” it remains prudent to note that Court’s decision in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* [1892] A.C. 437 which bears upon his argument that lieutenant governors remain federal officers.¹²⁰ In that decision, Lord Watson stated that “a Lieutenant-

¹¹⁶ *Indian Association of Alberta* at p. 451, emphasis added.

¹¹⁷ Cheffins, “Office of Lieutenant Governor,” 15-16.

¹¹⁸ Smith, “Comment Re: Office of Lieutenant Governor,” 33-34.

¹¹⁹ On the nature of the position of lieutenant governor see John T. Saywell, *The Office of Lieutenant-Governor: A Study in Canadian Government and Politics* (Toronto: University of Toronto Press, 1957), 3-30.

¹²⁰ David E. Smith, “Bagehot, the Crown, and Canadian Constitutionalism,” *Canadian Journal of Political Science* 28, no. 4 (December 1995): 634.

Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.”¹²¹ Notwithstanding this decision, it might be argued that the Crown is merely a symbolic factor within the constitutional structure of Canada.¹²² The Crown certainly serves a symbolic function but to view its prerogative power as defunct or entirely beholden to the will of the elected body is to hold an untenable position. As D. Michael Jackson noted, just because the prerogative powers of reservation and disallowance have not lately been exercised, does not mean that they automatically fall beyond the authority of the Crown’s representatives to exercise them.¹²³ Nor is it abundantly clear that these powers must be exercised only on the advice of the ministers with the authority to offer such advice. In 1961, for example, against the advice of his ministers and without the knowledge of the federal government, Lieutenant Governor Frank J. Bastedo of Saskatchewan reserved a bill on the grounds that he thought it might be *ultra vires*.¹²⁴ That the governor general gave royal assent to the bill on the advice of his ministers is beyond the point.¹²⁵ It is the ability of lieutenant governors and governors general to act outside the advice of their ministers (however rarely) that is of consequence. This point is especially significant given the view that the treaty relationship is primarily and directly between First

¹²¹ *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1892) A.C. 437 (J.C.) in Olmsted, *Decisions of the J.C.P.C.*: I, 270.

¹²² David E. Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1996), ix-x.

¹²³ Jackson, *Crown and Canadian Federalism*, 75.

¹²⁴ J.R. Mallory, “The Lieutenant-Governor’s Discretionary Powers: The Reservation of Bill 56,” *The Canadian Journal of Economics and Political Science* 27, no. 4 (November 1961); J.R. Mallory, “Canada,” in *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth*, eds. David Butler and D.A. Low (Hampshire and London: Macmillan, 1991), 45-46.

¹²⁵ Canada, *House of Commons Debates: Fourth Session—Twenty-Fourth Parliament*, 5 May 1961 (J. G. Diefenbaker) (Ottawa: Roger Duhamel, F.R.S.C., Queen’s Printer and Controller of Stationery, 1961), 4397. Although Prime Minister John Diefenbaker said that his government was considering drafting instructions to restrain lieutenant governors from reserving bills without conferring with the governor general, Mallory pointed out that the government neglected to issue these instructions. See Mallory, “Discretionary Powers,” 521.

Nations signatories and the Crown—itsself a structure that operates outside of the control of the structure of the government.¹²⁶

There is some support for the inclusion of provincial Crowns within the treaty relationship among First Nations treaty signatories. An unnamed informant in Treaty 4 territory reasoned that “the provinces can’t get away from the fact that they are all part of the Crown. So whether you’re provincial or federal (government) you’re still a Crown. And as a result of that you (will) still have (treaty) obligations to our people.”¹²⁷ Given the portrayal of provinces as antagonistic in their relations with Indigenous Peoples, the inclusion of the former within the treaty relationship is prone to various objections.¹²⁸ In the first place, it might be argued that treaty obligations fall exclusively to the Crown in right of Canada by virtue of s. 91(24) which vested control over “Indians and Lands reserved for the Indians” in the federal government.¹²⁹ Proponents of this view may appeal to the *St. Catharine’s* decision and the J.C.P.C.’s finding of the federal government’s “exclusive legislative authority” over Indians and lands reserved for them.¹³⁰ More support may be drawn from the Canadian judiciary which—after the patriation of the constitution and the incorporation of “existing Aboriginal and treaty rights” into the constitution via s. 35—found that the “*federal* legislative powers continue, including the right to legislate with respect to Indians.”¹³¹ The faultiness of this line of reasoning is to be found in the distinctions between legislative and executive authority. That is to say that while the Dominion can only pass legislation relating to Indians and lands reserved for them, the treaties were neither

¹²⁶ See Asch, *Here to Stay*, 160.

¹²⁷ George, “The Ochapowace Reserve,” 77.

¹²⁸ Borrows, “Canada’s Colonial Constitution,” 23-27.

¹²⁹ An argument of this nature was made by the Federation of Saskatchewan Indians in 1977. See Yale D. Belanger and David R. Newhouse, “Reconciling Solitudes: A Critical Analysis of the Self-Government Ideal,” in *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd ed., eds. Yale D. Belanger and David R. Newhouse (Saskatoon: Purich Publishing Limited, 2008), 7.

¹³⁰ *St. Catherine’s*, J.C. in Olmsted, *Decisions of the J.C.P.C.*: I, 238.

¹³¹ *Sparrow* at p. 1077.

negotiated through enabling legislation nor ratified by legislation. On the contrary, because treaty-making was beyond the authority of the Dominion government, the treaties were negotiated by representatives of the Crown and ratified by Order-in-Council. Therefore, the provincial Crowns, through the exercise of their prerogative powers, can act with respect to the southern Numbered Treaties.

It might similarly be argued that following the acquisition of the treaty-making power by Canada pursuant to the Imperial Conference of 1926 and the Statute of Westminster, the provincial Crowns fell out of the sphere of the treaties entered into by the Imperial Crown and the legislative authority of the federal government over the implementation of those treaties was reinforced. The J.C.P.C. offered some clarification of this matter in *A.-G. Can. v. A.-G. Ont.*, [1937] A.C. 326 (*Labour Conventions*) in its finding that the Dominion Executive may commit itself to treaties, but the Dominion Parliament could not exceed its legislative authority in the fulfillment of the terms of those treaties.¹³² This configuration has placed the Dominion in the uncomfortable position of not being able to compel provinces to implement terms of treaties which the Dominion is accountable for pursuant to the *Vienna Convention*.¹³³ Insofar as the southern Numbered Treaties are concerned, there may appear to be no tension between the Dominion's executive authority over treaties and its parliament's ability to legislate for the implementation of treaty terms. The *Indian Act* falls well within the scope of s. 91(24) even as its provisions are often discordant with the treaty relationship.¹³⁴ That the treaty relationship

¹³² *Labour Conventions* in Olmsted, *Decisions of the J.C.P.C.*: III, 204. See also G.P. Browne, *The Judicial Committee of the Privy Council and the British North America Act: An Analysis of the Interpretative Scheme for the Distribution of Legislative Powers* (Toronto: University of Toronto Press, 1967), 22.

¹³³ Laura Barnett, "Canada's Approach to the Treaty-Making Process," (Ottawa: Legal and Social Affairs Division, Parliamentary Information and Research Service, 2008), 7.

¹³⁴ On the *Indian Act* see Mary-Ellen Kelm and Keith D. Smith, eds., *Talking Back to the Indian Act: Critical Readings in Settler Colonial Histories* (Toronto: University of Toronto Press, 2018); Katie Carson, Sarah Kittlesen, and Sean Carleton, "Indian Act 150: An Introduction," *Active History: History Matters*, last updated January 16, 2026, <https://activehistory.ca/blog/2026/01/16/indian-act-150-an-introduction/#more-60789>.

established by the southern Numbered Treaties is exhausted by s. 91(24) is not obvious. As much as the treaty relationship engages the Dominion's legislative authority over "Indians and Lands reserved for the Indians," it might also engage "The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon" and "Property and Civil Rights in the Province" which fall under provincial legislative jurisdiction pursuant to ss. 92(5) and 92(13).¹³⁵ While no precedent for this exists, British Columbia's *Declaration on the Rights of Indigenous Peoples Act* (2019)—while not concerned with treaties—suggests that some tolerance exists for incursions into the Dominion's legislative authority pursuant to s. 91(24).¹³⁶

The last objection which may be made against the inclusion of the provinces within the gamut of the treaty relationship is that some of the provinces (primarily Alberta but also Saskatchewan in 1905) were carved out of territories comprised by the treaties after these treaties were already negotiated.¹³⁷ This line of reasoning is best dismissed by reference to Lord Denning's finding in *Indian Association of Alberta*. Although the Dominion Executive was devoid of the treaty-making power until 1931 and thus outside of the treaty relationship directly, it became a direct party to the treaty relationship when it acquired this power.¹³⁸ If the provinces are found to be parties to the treaty relationship through their legislative powers and the prerogative powers of their Crowns, the date at which they acquired those powers is of no consequence in much the same way that the legislative and prerogative powers vested in their

¹³⁵ In *British North America Act*, 51-52.

¹³⁶ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

¹³⁷ This argument has been made recently with respect to Alberta separatism. See Robert Hamilton, "Get the Province of Alberta In Line': Treaty Promises, Provincial Power, and the Role of Indigenous Nations in Discussions on Alberta Separation," *ABLawg*, May 30, 2025, <https://ablawg.ca/2025/05/30/get-the-province-of-alberta-in-line-treaty-promises-provincial-power-and-the-role-of-indigenous-nations-in-discussions-on-alberta-secession/>; Sheldon Sunshine, "A Sovereign Alberta is a Treaty Violation," *Maclean's*, September 9, 2025, <https://macleans.ca/politics/a-sovereign-alberta-is-a-treaty-violation/>.

¹³⁸ *Indian Association of Alberta* at pp. 432 and 434.

legislative and Crown bodies is no less legitimate than those provinces that entered Confederation before them.

The final element of the confederal analogy which requires clarification is the character and function of the analogy. As with the compact theory, the purpose of the confederal analogy is not to conform exactly to the current state or even the history of a given phenomenon (though the confederal analogy best accounts for the historical context in which the southern Numbered Treaties were negotiated). The southern Numbered Treaties have characteristics—including the process of negotiation and ratification—distinct from those of confederal agreements. The historical record cannot support a claim that the southern Numbered Treaties *are* confederal agreements anymore than it can support the claim that the *Proclamation* oriented or necessitated the negotiation of these treaties in the first place. Therefore, the argument is not that the southern Numbered Treaties are confederal agreements nor is it that historical actors involved in the treaty-making process absolutely understood the treaty relationship as a confederal agreement. Instead, the confederal analogy offers a way of thinking about the treaty relationship that accounts for both the historical context in which the southern Numbered Treaties were negotiated and the content of the treaty relationship at present.

Still, there is strong evidence that the negotiating parties could have thought of these treaties as confederal in nature. The Iron Alliance and the Blackfoot Confederacy testify to the capacity of some First Nations signatories to understand and operate within confederal arrangements.¹³⁹ Cardinal and Hildebrandt noted that the treaties had the effect of “expand[ing] the First Nations sovereign circle, bringing in and embracing the British Crown within their

¹³⁹ See Milloy, *The Plains Cree*, 117; Innes, *Elder Brother*, 43-69. Milloy noted with respect to the Blackfoot Confederacy that “even with dissension in its ranks, had been resolute, exchanging raid for raid” between 1850 and 1870—as the Plains Cree sought to expand into the territories controlled by the Confederacy.

sovereign circle.”¹⁴⁰ Morris touched on the confederal nature of the treaty relationship at the negotiations of Treaty 4 when he stated:

We have two nations here. We have the Crees, who were here first, and we have the Ojibbeways, who came from our country not many suns ago. We find them here; we won't say they stole the land and the stones and the trees; no, but we will say this, that we believe their brothers, the Crees, said to them when they came in here: "The land is wide, it is wide, it is big enough for us both; let us live here like brothers ;" and that is what you say, as you told us on Saturday, as to the Half-breeds that I see around. You say that you are one with them; now we want all to be one. We know no difference between Crees and Ojibbeways.¹⁴¹

It might be argued that Morris's concluding statement indicates a conception of a unitary state. That the terms of the treaties were offered to the First Nations at Fort Qu'Appelle "on top of that which you already have" and that the First Nations signatories promised to maintain "good Indian self-governments" militates against such an idea.¹⁴² Of greater relevance is Morris's conception of the Cree and Saulteaux (Ojibbeways) as brothers and the expression of the desire to be similarly conceived of in relation to the Cree and Saulteaux. In this way, the treaty relationship shares with Confederation the appeal to familial language to explain the nature of the relationship. Even Lower, among the most ardent opponents of the compact theory,¹⁴³ characterized confederation as a marriage between English- and French-Canadian elements.¹⁴⁴ Elder Danny Musqua of Keeseekoose First Nation in Treaty 4 explained that "we have a joint relationship with the Crown because the Queen is now our mother."¹⁴⁵ The description of the Queen as a mother to First Nations signatories has given rise to arguments that while First Nations viewed the mother-child relationship as one of protection and assistance,

¹⁴⁰ Cardinal and Hildebrandt, *Treaty Elders of Saskatchewan*, 41.

¹⁴¹ Morris, *Treaties of Canada*, 108.

¹⁴² "Elder's Document on Treaty 4."

¹⁴³ Romney, *Getting it Wrong*, 11.

¹⁴⁴ Lower, *Colony to Nation*, 333.

¹⁴⁵ In Cardinal and Hildebrandt, *Treaty Elders of Saskatchewan*, 34.

Crown negotiators viewed it as one of submission and obedience.¹⁴⁶ Insofar as the confederal analogy is concerned, this distinction is immaterial for the Crown negotiators explained to their First Nations counterparts that the Queen “cares as much for you as she does for her *white* children.”¹⁴⁷ First Nations were, therefore, not conceived of as subservient to Canadians but as equal members in a reciprocal relationship overseen by the Crown—a state of affairs consistent with Morris’s view of chiefs that were party to the treaty relationship as officers of the Crown.¹⁴⁸

The description of the treaty relationship that has unfolded above does not align with the state of the treaty relationship today. In spite of evidence and reasons to the contrary (including those which, at times, emanate from its own judiciary), Canada has chosen to perpetuate the view that the treaty relationship is confined to the written terms of the treaties (and thus constitutes a land surrender).¹⁴⁹ The complex nature of the treaty relationship pursuant to the southern Numbered Treaties has given rise to a multitude of prognoses and proposed remedies. Those which prevail have the effect of either providing justification for Canada’s manipulation of the treaty relationship (by explaining the disparity between the views of negotiating parties as consequences of mere misunderstandings) or distorting the historical context and nature of the treaty relationship (by attempting to force these treaties into a schema anchored in the *Proclamation*). Of all the theories and analogies proposed to explain and restore the treaty relationship, the confederal analogy best accounts for the historical context in which the southern Numbered Treaties were negotiated and the existing jurisprudential and constitutional circumstances that have a bearing upon the treaty relationship.

¹⁴⁶ Miller, *Compact, Contract, Covenant*, 184.

¹⁴⁷ Morris, *Treaties of Canada*, 94.

¹⁴⁸ Morris, 142 and 248.

¹⁴⁹ The Canadian government describes the Numbered Treaties as “[a]t their base... land surrenders on a huge scale.” See “The Numbered Treaties (1871-1921),” *Government of Canada*, last modified March 15, 2023, <https://www.rcaanc-cirnac.gc.ca/eng/1360948213124/1544620003549>.

Conclusion: The *Proclamation* Trap

It can be only a slight overstatement to say that the entire historiography of Canadian Indian policy in Western Canada is a footnote to Stanley's *Birth of Western Canada*. More than 80 years after its publication, historians still position their work against his—continuing a tradition of revision and rejection inaugurated by Taylor, Tobias, and Hall (among others) in the 1970s and 1980s. Over time, themes of Indigenous savagery, incivility, incompetence, and passivity have been eroded and largely fallen by the wayside. While the claims that First Nations agriculturalists were intrinsically opposed to farming and First Nations negotiators were merely observers of a sweeping societal change have been refuted outright, the view historians have of the *Proclamation* has only been modified from a tool of dispossession into a symbol of Indigenous sovereignty.¹ In the process, historians that persist in the belief that the *Proclamation* somehow anchored the treaty-making process in the North-West have ignored evidence to the contrary. The effect has been to obfuscate the true nature of the treaty relationship and manipulate that relationship to fit within the treaty-making tradition of the *Proclamation*.

The *Proclamation*—within the extant narratives of the treaty-making process—has remained constant across divergent historiographical schools of thought. This suggests that this phenomenon goes beyond simple mis-readings of the historical record. Rather, the persistence of the *Proclamation* within the historiography of the southern Numbered Treaties is at once a myth and an historiographical trap. McKay and Swift argued that commemoration of Canadian participation at Vimy Ridge—and Canadian war service generally—has ensnared its participants

¹ See Taylor, "Canadian North-West"; Noel Dyck, "An Opportunity Lost: The Initiative of the Reserve Agricultural Programme in the Prairie West," in *1885 and After: Native Society in Transition*, eds. F. Laurie Barron and James B. Waldram (Regina: University of Regina, Canadian Plains Research Centre, 1986); Carter, *Lost Harvests*.

(including producers and consumers of historical content) in a distorted view of the past which they identify as the “Vimy Trap.”² Romney’s observations with respect to the compact theory strike a similar note. In each case, idealized versions of the past are created and reinforced. The analyses of Swift and McKay and Romney find some application in relation to the *Proclamation*’s status as a myth (insofar as its whole application is concerned) within the historiography of the southern Numbered Treaties. Romney argued that the construction of myths was often not the work of a single author and that at times “two stories, quite distinct in nature, combine to form a single myth.”³ This analysis explains how the *Proclamation* has been both invented and re-invented by historians of the southern Numbered Treaties. In *No Surrender*, not only did Krasowski ignore evidence against the application of the *Proclamation*,⁴ but he also shared Stanley’s belief that the treaty-making process in the North-West was anchored in the *Proclamation*—even as he positioned his central argument against Stanley’s.⁵ Whereas the Vimy Trap and the assault on the compact theory ignore evidence and otherwise distort the historical record in order to limit historiographical contributions to a stable set of conclusions (that Canada’s war effort at Vimy Ridge paints a picture of Canadian national identity, and that the compact theory is a distortion of the original intent of the Fathers of Confederation), the myth of the *Proclamation*’s application in the context of the southern Numbered Treaties is propagated by historians with diametrically opposed views on the nature of those treaties.⁶

² Ian McKay and Jamie Swift, *The Vimy Trap: Or: How We Learned to Stop Worrying and Love the Greater War* (Toronto: Between the Lines, 2018), 7-12.

³ Romney, *Getting it Wrong*, 14.

⁴ In one instance Krasowski argued that the Liberals viewed treaty-making “as part of the government’s responsibilities under the Royal Proclamation of 1763” in spite of the fact that his source does not refer to the *Proclamation* at all. Krasowski, *No Surrender*, 137 and 297n28. See also PAM, M140, Alexander Morris (Ketcheson collection) Fonds, Mackenzie to Morris, December 6, 1873, 83.

⁵ Stanley, *Birth of Western Canada*, 206; Krasowski, *No Surrender*, 1-2, 4, and 25.

⁶ Romney, *Getting it Wrong*, 11-12; McKay and Swift, *The Vimy Trap*, 263-264.

Identifying and ultimately overcoming the ‘*Proclamation* Trap’ is more than an exercise in splitting historiographical hairs. Doing so facilitates the arrival at an understanding of the treaty relationship pursuant to the southern Numbered Treaties that is consistent with the historical context in which these treaties were negotiated. While many historians have opted to portray the *Proclamation* as a constant feature of the treaty-making tradition in Canada, others have ignored direct evidence and argument against its application. Craft, for example, cited the Indian Tribes of Manitoba’s *Wahbung: Our Tomorrows* but neglected to account for its observation that “the treaty negotiations began in the midst of a violation of the *Proclamation* itself, for settlers already lived on this land not yet ceded to nor purchased by the government.”⁷ The persistence of the *Proclamation* does not accord with the available evidence. Almost immediately after its promulgation and ratification, the *Proclamation* was either violated (as it was with respect to settlement beyond the Fort Stanwix line) or was used selectively or not at all (as it was in relation to the Schiefflen Purchase of 1783 and Manitoulin Island Treaty, for examples).⁸ Over the course of the nineteenth century, Crown treaty negotiators (on behalf of Britain and Canada) continued in their disregard for the *Proclamation* so that by the time the Dominion of Canada was confederated, awareness of the *Proclamation* was dismal if it existed at all. Without the *Proclamation* persisting as (at the very least) a procedural impediment to settlement, the Dominion was free to settle the North-West and Indigenous land claims as it saw fit (subject to the terms of the Rupert’s Land transfer). It was only when First Nations and Métis resistance prevented the Dominion from realizing its westward expansion that the Dominion entertained the prospect of negotiating treaties. Without the ability of subduing Indigenous

⁷ See Craft, *Stone Fort Treaty*, 60 and 132n53. See also Indian Tribes of Manitoba, *Wahbung: Our Tomorrows*, 40th anniversary ed. (Winnipeg: 2011), 48.

⁸ See Chapter 1 at pp. 48-49 and 53-55.

resistance by force of arms and thus securing the Dominion's sovereignty in the North-West, these treaties became a categorical necessity. Historians have preferred to view these treaties as agreements comparable to the Manitoulin Island and Robinson Treaties and as rooted in the *Proclamation*.⁹ The historical record indicates that these treaties align more closely with the fundamental confederal agreements that underpin the Canadian constitutional structure.

Much of this study has endeavoured to define the historical context of Canada's acquisition of the North-West (and the absence of the *Proclamation* in that narrative). However, this is neither the story of what Canada was nor what it became but of what it could be. One argument against Aboriginal self-government is that it facilitates incursions of provincial legislative powers under s. 92 of the *British North America Act*.¹⁰ This is to take a view of the division of powers that is discordant with the actual expression of legislative powers in Canada. Not only have jurisdictional lines blurred (as with education) and concurrent areas of jurisdiction persisted (such as immigration, agriculture, and old-age pensions),¹¹ but agreements between the provinces, the federal government, and First Nations have also facilitated the exercise of the latter's sovereignty.¹²

While the aforementioned argument poses no serious threat to the view of the southern Numbered Treaties as confederal in nature on these grounds, it need not be entertained in the first place. The logic in this argument assumes that the expression of First Nations sovereignty is to

⁹ See, for example, Talbot, *Negotiating the Numbered Treaties*, 65.

¹⁰ Belanger and Newhouse, "Reconciling Solitudes," 12.

¹¹ B.L. Strayer, "Federal-Provincial Conflicts of Jurisdiction," *Saskatchewan Bar Review* 29, no. 3 (1964): 120-121 and 123.

¹² The exercise of sovereignty over child welfare by Cowessess First Nation is an instructive example especially as the Canadian judiciary has reinforced the constitutionality of such an exercise. See "Cowessess First Nation signs \$39 million deal to implement child welfare system," *APTN National News*, July 6, 2021, <https://www.aptnnews.ca/national-news/cowessess-first-nation-signs-39m-deal-to-implement-child-welfare-system/>; *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 S.C.C. 5 (CanLII); "CFN Response to Supreme Court Unanimous Ruling on the Rights of the Child," *Cowessess First Nation*, February 9, 2024, <https://cowessessfn.com/cfn-response-to-supreme-court-unanimous-ruling-on-the-rights-of-the-child/>

be reconciled to the facts of federal and provincial sovereignty. The expression of these latter forms of sovereignty in what is now Western Canada, Manitoba, Alberta, and Saskatchewan are dependent on agreements of fundamental importance with the First Nations of the North-West. To treat the expression of First Nations sovereignty as an intolerable aberration from the enumerated division of powers is to create a false dilemma—for the orders of government it is supposedly in tension with are of tantamount importance in Canada's constitutional composition. The view of the southern Numbered Treaties as something entirely unique from other confederal agreements is one that is buttressed by the persistent presence of the *Proclamation* in the historiography and the public consciousness. When the *Proclamation* is removed from the analysis, this distorted view of the southern Numbered Treaties cannot be sustained.

The disavowal of the *Proclamation* (at least in relation to the southern Numbered Treaties) must not be confined to the subject's historiography. Public commemorations ought to account for the importance of the *Proclamation* in its historical context and in other treaty histories, its positive potential today in territories not covered by treaties, and its violation or disuse in relation to the southern Numbered Treaties. Doing so would thrust Canada towards a crossroads in its treaty relationship with the First Nations of the North-West. Asch captured the two courses available to Canadians well when he noted that if Canadians embrace their bad faith interpretation of the treaties "they become worthless pieces of paper and we are back to square one" but that if Canadians accept the true nature of the southern Numbered treaties "they become transformative, for through them we became permanent partners sharing the land."¹³ Thus, Canada can willingly proceed in its manipulation of the treaty relationship and consequently imperil the basis of its sovereignty in Western Canada, or it can recognize the true nature of the

¹³ Asch, *Here to Stay*, 99.

treaty relationship and accord its treaty partners the respect and dignity commensurate with those of parties to confederal agreements.

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