BROKEN COVENANT?

The Royal Proclamation of 1763 as Instrument for the Emancipation of Indigenous Peoples and the Liberation of Canada

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This article is a companion piece to the Broken Covenant video and discussion guide exploring the ongoing significance of the Royal Proclamation of 1763 for all Canadians.

For the video, see www.mennonitechurch.ca/tiny/2374
For the guide, see www.mennonitechurch.ca/tiny/2375

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Canada's Affirmation of Aboriginal and Treaty Rights

Many aspects of the world that we are inheriting from our ancestors, and are passing along to posterity, go back to the trajectory of colonial history initiated in 1492 with Christopher Columbus' trans-Atlantic voyage. The seizure by European powers of imperial control in the Americas initiated a process that continues to divide humanity. On one side of the divide are those on the delivering end of colonizing processes that have never really ended. On the imploding side of colonization's expansionary frontier are the Indigenous; peoples and nations who are on the receiving end of an ongoing saga of dispossession, disempowerment and marginalization.

Proof of the continuing nature of this oppressive process is all too evident in the statistics of suicide, domestic violence, incarceration, unemployment, poverty, addictions and the like. These statistics continue to demonstrate, unfortunately, that Canada is not a country of decency and equity where human rights are respected and protected from wholesale violation. Indigenous peoples in Canada are overwhelmingly overrepresented on the negative side of virtually every major index of morbidity, illness, and socio-economic status.

The Indigenous are suffering because of a centuries-old crime wave directed their way. Often these crimes are sanctioned or actually committed by governments and police forces in Canada and its ten provinces. This crime wave systematically violates Canada's highest law. Canada claims to be a country with a constitution which both recognizes and affirms "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada" (sec. 35, Constitution Act, 1982). Yet that declaration is

turning out to be a lie, nothing but more broken promises to First Nations.

When it comes to testing the meaning of this constitutional law, lawyers acting for the government consistently mount arguments whose effect is to deny and negate rather than recognize and affirm the existence of Aboriginal and treaty rights. The proof of the unbroken urge to push Indigenous peoples aside in the name of a very distorted and ethnocentric vision of progress lies in the grotesque rate of Indigenous overrepresentation in jails, in police reports, in the hordes of the homeless blighting Canada's major urban centres, in unemployment lines, and in morgues.

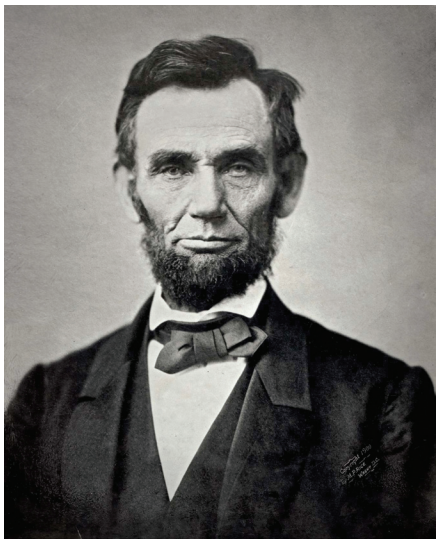
The Emancipation Proclamation of 1863 and the Royal Proclamation of 1763

Indigenous peoples are not the only groups to have felt the whip of injustice in a colour-coded trajectory of colonization that still continues. The slave trade, which reduced human beings to property, brought violently uprooted Africans from their ancestral lands and transported them against their will to the Americas where they were sold into regimes of forced labour, mostly on huge agricultural plantations.

Narratives of the trans-Atlantic slave trade often extend to accounts of the freeing of the slaves. In the United States, this history lesson often culminates in the story of how President Abraham Lincoln ended slavery in the course of the American Civil War; Lincoln changed history with his Gettysburg Address followed by the Emancipation Proclamation of 1863.

Generally speaking, the history of the dispossession and subjugation of Indigenous peoples does not receive the same kind of attention as the story of slavery in America because there has never been a significant reversal to the centuries-old theft of their lands, resources and life chances. There is seemingly no equivalent for Indigenous peoples of the Emancipation Proclamation to give their narrative some kind of happy ending, however limited, provisional or contrived.

In the northern part of North America, however, we have it in our power to bring out from obscurity a constitutional instrument somewhat like the Emancipation Proclamation of 1863. Exactly 100 years before President Lincoln set the slaves free, King George III instituted a colonial law that would have afforded Indigenous peoples some protections to fend off the



Above: Abraham Lincoln, 1863

Opposite: Columbus' First Landing 1492 San Salvador (Dióscoro Teófilo Puebla Tolín, 1862)

King George III in coronation robes
(Allan Ramsay, 1762)

land theft and vigilante violence that had long characterized the frontier regions of Anglo-America.

King George drew on the advice of Sir William Johnson, who had long represented the British imperial government in the old Covenant Chain of Crown treaty diplomacy with the Six Nations Iroquois. This Covenant Chain drew, in turn, on the world-famous Indigenous constitution of the Six Nations Longhouse Confederacy. In the Mohawk tongue this celebrated Confederacy was known as the League of the Haudonosaunee.[1]

An experienced participant in the decision-making rituals of the Longhouse League and the British King's primary polisher of the metaphorical silver links in the treaty diplomacy of the Covenant Chain, Sir William Johnson brought his depth of experience to the process of drafting the Royal Proclamation of 1763. The "Indian provisions" in the Royal Proclamation were aimed at persuading Indigenous peoples to join the British Empire on the understanding that there would be constitutional protections for their persons, their families, their nations and confederacies of nations, as well as for their titles to their ancestral lands and waters.

Envisaging the negotiations of future Crown-Aboriginal treaties in a well-regulated and orderly westward expansion of Euro-Americans, King George III incorporated the fur-trade territory of French-Aboriginal Canada into British North America with this Royal Proclamation. Another feature of this constitutional instrument was its creation of the new British colony of Quebec, including provisions to accommodate the Roman-Catholic attributes of the new jurisdiction's French-speaking majority, the former colonists of New France.

The Royal Proclamation initiated a process of negotiating Crown-Aboriginal treaties with First Nations that continues in British Columbia to this day. Moreover, Canada's Constitution Act (1982) specifically acknowledges the Royal Proclamation (sec. 25). Unfortunately, the recognition and affirmation of existing Aboriginal and treaty rights in the 1982 document has not been interpreted in the courts in a way that renews the emancipating possibilities of the Royal Proclamation.

So far this possibility has been sabotaged primarily by powerful corporate interests given broad license to direct Ministry of

1 In 1987 the US Congress passed a statute acknowledging that the US federal system is to some extent modelled on this Longhouse League. This League, whose original seat of government was under the Great White Pine of Peace in Onondaga territory of what is now New York state, has attracted the rapt attention of many prominent social theorists including Benjamin Franklin and Karl Marx.

Justice lawyers on the arguments they bring into court cases that test the legal meaning of the constitutional recognition and affirmation of existing Aboriginal and treaty rights. The outgrowth of this natural tendency of governments to favour the interests of political cronies over respect for the rule of law is that Her Majesty's own lawyers too often end up denying and negating the existence of these rights.

King George III Prohibits the Expansion of Euro-American Settlements in North America Through Conquest

The Royal Proclamation of 1763 was and is integral to a legal and moral tradition concerning the transfer of lands and resources to non-Indigenous individuals and corporations based on principles of the need for mutual consent. The prohibition on the incursions of conquest to expand the area of Euro-American settlements in North America is a landmark of constitutional history and international law. Too often the doctrine of "discovery", or the doctrine that the laws of Christian imperial powers immediately preempt the laws of non-Christian polities, have been deployed to give the veneer of law to genocidal displacements and eliminations of Indigenous peoples.

The Royal Proclamation was the chosen instrument whereby the British imperial government of King George III incorporated Canada into Britain's thirteen Anglo-American colonies after the Seven Years' War. It was an effort to incorporate the peoples of French-Aboriginal Canada into British North America on the basis of law and consent rather than coercion. A vital part of this proclamation is its recognition of an enormous Indian reserve. This reserve extended throughout the eastern half of the Mississippi Valley and north of the Great Lakes up to the beginning of the Arctic watershed. These were "lands reserved to the Indians for their hunting grounds."

Here are two excerpts from the Proclamation that acknowledge some form of Aboriginal title to these territories:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

Sir William Johnson
(Spooner, 1756)

And We do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any Lands within the Countries above described or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

In describing these "lands reserved to the Indians," the British monarch and his advisers lodged a very consequential phrase into the origins of British imperial Canada establishing the basis of many constitutional controversies to come. The divergent interpretations of the Royal Proclamation—the document forming Canada's constitutional foundation—would be tested, for instance, in the 1880s when the government of Ontario took the government of Canada to court in the notorious case St. Catherine's Milling v. The Queen.

The Canadian government and First Nations were weakened significantly because the provincial government of Ontario Premier Oliver Mowat won the case. No Indian people were allowed to represent themselves directly in this matter that worked its way through to the highest court in the British Empire. Where the Canadian government advanced a very expansive interpretation of the phrase, "lands reserved to the Indians," the Ontario government went in the opposite direction. It drew on a series of precedents going back to the Crusades. The provincialists argued that when in direct contact the laws of a Christian monarch always subordinate the laws of non-Christian "infidels."

Extending the Need for Consent, the Core Principle of Democracy, to Indigenous Peoples

The drafters of the Royal Proclamation envisaged a gradual and orderly process for the westward expansion of Euro-American settlers into the vast Indian reserve created by the British imperial government. To ensure the orderly conduct of westward expansion, the Crown stipulated,

If at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians.

A key to unlocking the importance of this provision in the Royal Proclamation lies in its reference to the inclination of Indian groups to agreements changing the terms of their legal relationship to their ancestral lands. The British imperial government thereby embedded in its own constitution the need to obtain Indigenous consent for the westward expansion of Euro-American settlement.

This historic innovation gave host peoples the prospect of exercising some considerable bargaining power in helping to chart the future of British North America. It gave Indigenous peoples some leverage to negotiate settlements that would afford them a measure of security in their home communities and some ability to set in motion strategies of economic adaptation in altered landscapes.

The Royal Proclamation of 1763 acknowledges the right of Indigenous Nations to negotiate places of security for themselves and for their own governments in the changing environment of ongoing colonization. A balancing corrective was thereby injected into the process of colonial expansion which, from its inception, has been overwhelmingly hostile to the right, titles, prerogatives and interests of the Indigenous.

The main problem at that time, no less than the main problem now, is that the democratic principles of the Royal Proclamation are only as good as the political will to enforce them. Similarly, Crown-Aboriginal treaties are pretty much farces facilitating legalized land theft unless their principles are enforced by police and subjected to interpretations that keep pace with the evolving political economy of Canada.

In order to be viable instruments of Canadian fairness and democracy, Crown-Aboriginal treaties must be seen as living agreements whose terms must constantly be re-considered in light of the changing

circumstances of a world in constant motion. Thus, Crown-Aboriginal treaties must be seen as being more like a verb than a noun, more like processes for negotiating and re-negotiating the terms of living relationships than like a particular category of yellowing documents gathering dust in the remote vaults of government archives.

Like the promise of the Emancipation Proclamation, the full promise of the Royal Proclamation was never fully realized, as evidenced most clearly by the disproportionate representation of Blacks and First Nations peoples in the bulging and overcrowded jails of North America. Nevertheless the Royal Proclamation, like the Emancipation Proclamation, embodies ideas that can inspire us yet.

The requirement to secure Indigenous consent as a condition for the expansion of Euro-American settlements and corporate resource extraction favoured the rule of law over the rule of force, and the rule of self-determination over the rule of arbitrary command. This innovation could have represented a substantial step away from the inequitable and unconscionable division of humanity into rights-bearing citizens and those considered too inferior for a democratic say in making their own history according to their own estimation of rights, interests, and priorities.

The Indian provisions of the Royal Proclamation introduced a whole new dynamic into the constitutional makeup of British North America. However limited and imperfect, the King's recognition that Indigenous peoples have the inherent human right to a say in determining their own destinies established a fundamental principle of international law that has yet to be fully embraced and applied even throughout Canada, let alone in larger theatres of global geopolitics.

To this very day, the need to obtain Indigenous consent is being expressed in the contemporary negotiation of Crown-Aboriginal treaties in Canada. This process is most elaborate and intense in British Columbia, Canada's western-most province, which is largely unceded. The current treaty-making negotiations in that territory are based on the cumulative efforts of activists, some of them Christian missionaries, who over generations politicized the failure of Crown officials to recognize Indian title in exploiting the abundant resources of the land and waters comprising Canada's part of the Pacific Rim.

With Thomas Berger as their lawyer, the Nisga'a Nation succeeded in 1973 in getting an answer from the Supreme Court of Canada on the Indian title question.[2] In the judges' ambivalent ruling on the Nisga'a case, the Court split three to three on whether Indian title was still embedded in the system of Crown land tenure in those parts of BC uncovered by treaties. The seventh judge had voted against the Nisga'a on a procedural point.

Building on the ruling in the Nisga'a case, the James Bay and Northern Quebec Agreement resuscitated the tradition of negotiating Crown-Aboriginal treaties in the constitutional tradition of the Royal Proclamation of 1763. That tradition had fallen dormant since 1929 when an adhesion to Treaty 9 had been negotiated at Big Trout Lake in the Arctic watershed of northern Ontario.

Treaty 9 is part of a series of eleven treaties known as the numbered treaties. The numbered treaties cover the largest part of the Dominion of Canada that had once been the subject of the Hudson's Bay Company's claims. The numbered treaties renewed the inheritance of the Royal Proclamation after Louis Riel and the Red River Metis demonstrated with the assertions of their provisional government that secret deal-making in London was no replacement for face-to-face treaty negotiations with Indigenous peoples (those most affected by Canada's westward and northward expansion).

The Royal Proclamation in the Founding and Defence of British Imperial Canada

The principles of the Royal Proclamation were

2 Of significance for Christian communities, the case brought forward by Berger was in its early stages financed by the Anglican Church of Canada.

Top: Tecumseh (artist unknown, 1812)

Bottom: Treaty Medal from one of the Numbered Treaties (1875)

Opposite: The Nisga'a had been defending their land rights since first contact. Here is the Land Committee in 1913.

brought forward to the members of the Indian Confederacy of Canada at an assembly which took place at Niagara Falls in the summer of 1764. At this assembly, Sir William Johnson represented the British imperial government. Following the protocol of treaty negotiations then practiced in the Indian Country of northeastern North America, Johnson presented a wampum belt whose pictorial representations outline that the King intended to protect his Indian allies in the interior of North America from the land hunger of the local settler population. The wampum belt was discussed in a very elaborate exchange embodying the nation-to-nation, sovereign-to-sovereign essence of a transaction giving birth to principles that were meant to last for as long as the sun shines, the grass grows, and the waters flow.

The Indigenous embrace of the Royal Proclamation is evidenced by the fact that many Indian groups, but especially Johnson's extended Mohawk family led by Molly Brant and her younger brother, Captain Joseph Brant, fought on the side of the British imperial government in the American Revolution. This Crown-Aboriginal alliance culminated with Tecumseh's mobilization of about 12,000 Indian soldiers in the War of 1812.

In the era leading up to the War of 1812, the principles of the Royal Proclamation had been built upon to support the geopolitical vision embraced in some imperial and Indigenous circles of an Indigenous Dominion with fixed boundaries along the Ohio River. The most visionary proponent of this concept was Tecumseh himself, the Shawnee sage, law giver, and General who traveled extensively in North America advocating the necessity of a broadly-based Indian Confederacy. Such a confederacy was needed, he argued, to gain standing at the high tables of international diplomacy where the so-called "White Nations" regularly carved up and apportioned sovereign authority over colonized portions of the planet.

The idea of a sovereign Indigenous Dominion within British North America was not achieved. But in attempting to realize this goal, the mobilized military forces of Tecumseh's Indian Confederacy did succeed in defending British imperial Canada from annexation by the United States. If the Indigenous army of the Indian Confederacy had not opposed the invading forces of the United States, Canada would today be under the Stars and Stripes because British regular forces were not in place to defend the frontier regions of what remained of British North America.

British regular forces were tied down in Europe in the war with the French imperial forces of Napoleon Bonaparte. The Indigenous defence of British Imperial Canada led by Tecumseh - who was martyred in the course of the conflict - embodies the most serious military check in the entire violent history of US westward expansion. This Indian defense of Canada makes it clear that not only are First Nations peoples in Canada unconquered, but they also prevented the annexation of Canada when it was most imperilled. In this sense, Tecumseh was very much a founder of Canada as significant in its growth and development as, say, Sir John A. Macdonald or Wilfrid Laurier.

The concept of an Indigenous Dominion was never implemented as Tecumseh had envisaged it. Nevertheless, this idea was absorbed into the structure of Canada along with the migration of many thousands of Indian refugees from the United States. Many of these refugees from the White settler republic to the south had been Indian soldiers who fought in the War of 1812 as allies of the British imperial government.

So what then of Tecumseh's dream? An adapted version of the Indigenous Dominion can yet spring forth in a country that still brandishes the identifying slogan that it recognizes and affirms the existence of Aboriginal and treaty rights. But it will take the political will of settler Canadians to make those promised dreams come true.

The Royal Proclamation in the Founding of the United States of America

The Royal Proclamation was considered an abomination by many Anglo-American frontiersmen. In the frontier region of Pennsylvania, for instance, many Scots-Irish Presbyterians considered it their God-given mission to settle land as squatters, an imagined right they believed had been confirmed by

Above: Pontiac–no known portraits of the Indian Confederacy's leader exist. (John Stanley, 19th century)

Opposite: Paxton Boys Conestoga massacre (1841)

the British victory in the French and Indian War (1754-1763). In the concluding phase of this conflict, an Indian group gathered in the spring of 1763 around the Ottawa law-giver Pontiac.

With Pontiac's guidance, this Indian Confederacy had mounted one more military stand to demonstrate to the British that although the French had been defeated, the Indian nations in North America's interior remained a viable military force capable of defending themselves and their ancestral lands. Tecumseh made it very clear that he considered Pontiac as one of the main sources of his strategy for the sovereign defence of the Indigenous peoples of Canada from the genocidal campaigns of US westward expansion.

News in Great Britain of the effectiveness of Pontiac's stand became an influential factor in the imperial government's drafting of the Royal Proclamation issued on October 7, 1763. When news of the Royal Proclamation reached the backwoods of Pennsylvania, a number of Scots-Irish frontiersmen went on a killing spree directed at the murder even of Christian pacifist Indians, slaughtered en masse in Conestoga. This group of vigilante killers became known as the Paxton Boys. Some of their members would become important military officers in the Continental Army that provided the seed of the US Armed Forces once placed under the Command of General George Washington.

The Paxton Boys saw their slaughter of Indians as the basis of a political statement directed not only at the British imperial government but at the Pennsylvania Quakers who often were advocates of friendly relations with the Indians through the negotiation of treaties. Sir William Johnson's contribution to the process of drafting the Royal Proclamation of 1763 was to some degree informed by what he had learned from pacifist Quakers, including Israel Pemberton, the so-called King of the Quakers.

Thomas Jefferson clearly gave voice to the anti-Royal Proclamation position of the Paxton Boys and others of their ilk. As the principle author of the original draft of the American Declaration of Independence and as the third US president, from 1801 and 1809, Jefferson wielded much influence over how the United States was founded and how it became a transcontinental power. While the Declaration of Independence begins with some ringing articulations of timeless and universal truths about human equality and the ideals of liberty, much of the document is constructed as an indictment of the alleged tyranny of King George. These provisions are meant to provide justification for taking up arms

against British imperial forces in North America, including those British soldiers charged to protect the lands reserved to the Indians as their hunting grounds.

It is instructive to compare the wording of the Indian provisions in the Royal Proclamation of 1763 with the Indian provisions of the American Declaration of Independence of 1776. The response of the founders of the United States to the wording of the Royal Proclamation reads as follows:

He [King George III] has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

The United States was thus founded on the explicit criminalization of those Indigenous peoples inhabiting the very lands that were slated to become the primal capital of the fledgling White settler state. This federal entity did not incorporate Black slaves or Indigenous peoples as rights-bearing citizens of the new republic. What had King George done to justify the perception that he had "brought on" those racially profiled as "merciless Indian savages?"

The King's supposed crime was to have attempted some accommodation of the most basic human rights of Indigenous peoples in the Royal Proclamation of 1763. The imperial government had sought to outlaw the unilateral displacement and dispossession of the First Nations. The imperial government had introduced the principle that the expansion of Euro-American settlements could not take place without Indian consent.

After the Treaty of Paris in 1783, the US government moved to replicate in the North West Ordinance some aspects of the Royal Proclamation in the new republic's basic governmental structures. By vesting the power to make treaties of peace with, or to conduct of wars of aggression on the Indigenous peoples on the western frontiers of US expansion, the architects of the federal system accelerated the transformation of the American earth into property. They invested the central government, which after 1800 was situated in Washington DC, with power over Indian Affairs and westward expansion in the attempt to elevate the federal authority as America's imperial centre, an attribute it would demonstrate globally in the years ahead.

The US government made about 400 treaties with Indigenous peoples over the first decades of its existence. The terms of every one of these Indians treaties has been notoriously violated by the government of a country known for its disregard of international agreements. Then, in 1871, Congress outlawed the making of further treaties with Indigenous peoples within the territorial outlines of the United States. The making of treaties, law makers argued, advanced the fiction that Indian nations were sovereign entities in international law.

The 1871 decision to end treaty negotiations meant that the US government's claim to sovereign jurisdiction in those parts of the country not covered by treaties rested on doctrines of conquest, the very doctrine that the Royal Proclamation of 1763 was created to preempt. This US dependence on the doctrine of conquest was confirmed in the ruling in 1955 of its Supreme Court in the case of Tee-Hit-Ton Indians versus the United States. The judges decided that the US claim to sovereignty in Alaska went back to the imagined conquest of the Indigenous peoples.

The timing of the US government's legislated abandonment of further treaty negotiations with Indigenous peoples is significant. In 1871, US federal authority had finally emerged as the indisputable winner in the conflict with the states' rights movement which supported the continuation of slavery in the American south. This contest had culminated in the federal victory in the American Civil War. Having established its predominance in the federal balance of power, the US central government no longer needed to demonstrate its superior authority over state governments by exercising federal power to make treaties with First Nations.

Interestingly, the US government abandoned treaty making with Indigenous peoples just as the government of the new Dominion of Canada embarked in 1871 on a new round of Crown-Aboriginal treaty negotiations in the vast swath of northern territories recently acquired through purchase from the Hudson's Bay Company in preparation for the building of the Canadian Pacific Railway (CPR). These agreements are generally described as the numbered treaties.

Although a small skirmish did break out in 1885, Canada by and large opted to renew the constitutional principles of the Royal Proclamation of 1763 rather than engage in Indian wars with the Indigenous peoples of western Canada. Where before 1871 the US government often negotiated treaties with Indigenous peoples after they had been defeated and disarmed by the US Armed Forces, in western Canada Crown-Aboriginal treaties were negotiated after 1871 in order to win from First Nations at least a begrudging acquiescence for the coming of the railway. The aim in Canada was to avert the expense and decimation of Indian wars.

The Pre-emption of the Constitutional Heritage of the Royal Proclamation by the Indian Act

The tradition of law encapsulated in the Parliament of Canada's Indian Act system has run against the principles of law invested in the constitutional heritage of the Royal Proclamation of 1763, the terms of about 90 Crown-Aboriginal treaties in Canada, and the provision in section 35 of Canada's

U.S. Military bury massacred Lakota in mass grave at Wounded Knee (1891)

Constitution Act (1982) affirming Aboriginal and treaty rights. The basic thrust of the Indian Act, which has been revised many times, was to transform the Crown's Indian allies into child-like wards of the federal state. As wards of the federal government, registered Indians were denied the right to vote or run in federal or provincial elections, to sign valid contracts, or to go to court to seek remedies for grievances, including the theft of land and resources.

The first major Indian Act was passed in 1857 by the legislature of the province of the united Canadas. The enactment was tellingly entitled an Act for the Gradual Civilization of the Indian Tribes in Canada. The passage of this legislation signalled that the local settler government was taking over jurisdiction from Great Britain for the conduct of so-called Indian affairs. The Indigenous peoples who were made subject to this transfer of power were not consulted. In fact, their political leadership organized a large assembly on the Six Nations reserve in Canada West to protest this transfer of power over their lives and over their remaining Indigenous lands without their consent (indeed, in the face of their explicitly-stated opposition).

Since 1763, the Royal Proclamation's requirement that Indian consent must be obtained for major transformations in the tenure of their ancestral lands has been violated again and again with impunity. Indian consent, for instance, was not obtained for the division in 1791 of Quebec into

Above: Hector Langevin, one of the first Minister's of Indian Affairs and an architect of Indian Residential Schools (1826-1906)

Upper and Lower Canada, for the unification in 1841 of Upper and Lower Canada into the Province of the United Canadas, for the transfer of power from Great Britain to its settler colonies in the name of so-called responsible government, for the Confederation of Ontario, Quebec, Nova Scotia and New Brunswick as the Dominion of Canada in British North America Act of 1867, for the transfer of title over Rupert's Land and the Northwest Territories from the Hudson's Bay Company to the Dominion of Canada in 1869-70, for the addition of British Columbia to Canada in 1871, and for the addition of Prince Edward Island, Newfoundland and the Arctic islands to Canada.

After Confederation, the Indian Act was made to apply to registered Indians throughout the Dominion of Canada. This Act has been revised many times, regulating more and more aspects of the lives of Indian people within the narrow confines of their reserves. This repressive trend eased up somewhat with the Indian Act revision of 1951.

The Indian Act and the system it creates make registered Indians subject to the power of the Minister of Indian Affairs and Northern Development.[3] This Minister is chosen by the Prime Minister from a pool of elected MPs representing the dominant political party. Accordingly, the Minister of Indian Affairs is not selected by Indigenous peoples nor is this Minister formally accountable to First Nations in any way. While registered Indians subject to the Indian Act have acquired some of the rights and responsibilities of Canadian citizenship since the 1960s, the Indian Act still is directed to the assimilation of Indigenous persons, their institutions and the remaining Aboriginal estate in Canada.

The Indian Act system's goals, for instance, still include the municipalization of Indian reserves, the privatization of Indian lands, and the termination of Indigenous Nations as distinct societies. This trend of termination extends to the denial of the inherent right of Indigenous peoples to take part directly in international relations through the medium of international law, including through the negotiation of international treaties. In this sense, the Indian Act runs against the recognition and affirmation of existing Aboriginal and treaty rights and is thus unconstitutional.

The Indian Act makes a mockery of the principles espoused by King George III in the Royal Proclamation of 1763 and

3 Recently, this Minister has been described publicly as the Minister of Aboriginal Affairs but he or she still carries the old label when referred to in legislation meant to apply specifically to registered Indians.

Left: Father (Quewich)with his three children at the Qu'appelle Residential School (c.1900)

the trajectory of Crown-Aboriginal treaties that flow from it. In Canada, Aboriginal rights have historically been recognized and affirmed through the negotiation of treaties. The time has come to recognize these founding principles and to implement the treaties in ways that make sense in twenty-first century Canada. Such implementation should extend to agreements for the sharing of jurisdiction over a range of fields, for the sharing of access to natural resources, and for the sharing of royalties derived from the exploitation of natural resources.

The Assembly of First Nations, The Indian Act, and the Constitutional Legacy of the Royal Proclamation of 1763

The conflict between the Indian Act system and the repressed system of Crown-Aboriginal treaties in Canada is well expressed in the crisis that has engulfed the Assembly of First Nations (AFN), Canada's most visible Indigenous organization. That crisis emanates from disagreements about a new Indian Act, Bill C-33, dealing with on-reserve schooling for registered Indian youths.

Bill C-33 addresses the very topic that was central to the negotiation of most Crown-Aboriginal treaties. Virtually all of these agreements highlighted Crown promises to provide the educational help that Indian youths would need to meet the coming changes in Canada's political economy. The preamble of Bill C-33 specifically refers to the failures of the federally-funded, Church-run Indian residential schools, where the abuses suffered by Indian youths epitomize the heritage of Canada's broken covenant with First Nations.

Above: Assembly of First Nations logo

In treaty after treaty, the need for education was discussed in the language of the times. In treaties 1-7, for instance, the Crown promised Cree, Blackfoot, Assiniboine, and Saulteaux peoples the help they would need to adapt to the end of the buffalo hunt and the coming of non-Indigenous farmers along with the building of the CPR. The introduction of the proposed new Indian Act to legislate a framework for on-reserve schooling raises the question of why this subject is not being addressed through some explicit reckoning with the constitutional heritage of the 1763 Royal Proclamation and those "treaty rights" referred to in section 35 of the Constitution Act.

The leadership of the AFN is naturally inclined to emphasize the nation-to-nation attributes of Canada's constitutional heritage in Crown-Aboriginal alliances.This propensity, however, runs against the structural reality that the AFN is an organization composed of 600 plus Indian chiefs elected and financed according to the terms of the Parliament of Canada's Indian Act system. With few exceptions, only those chiefs elected according to the Indian Act have a direct vote in choosing the National Chief of the Assembly of First Nations.

In order to address the challenges, the AFN would be in a stronger position if those who care about its future, including those that identify with the Idle No More movement, would meet the present crisis through a process of reorganization that better incorporates a more inclusive and broadly-based constituency not limited by federal definitions of Indian status. Moreover, the AFN could render itself stronger and more internally consistent if it could better reflect in its internal organization the existence of Crown-Aboriginal treaty areas as well as areas that remain outside the frontier of Crown-Aboriginal treaties. Such a reorganization of the AFN would help Canada and all Canadians to embrace more vigorously the deepest and best part of our country's constitutional heritage.

In spite of all the lapses of amnesia and the shortfalls in implementing Crown-Aboriginal treaties, the constitutional heritage of the Royal Proclamation makes Canada a much-more-well-adapted-and-indigenized North American polity than the ailing superpower to the south. The overextended and debt-plagued United States is foundering under the weight of the most massive military apparatus ever assembled in human history.

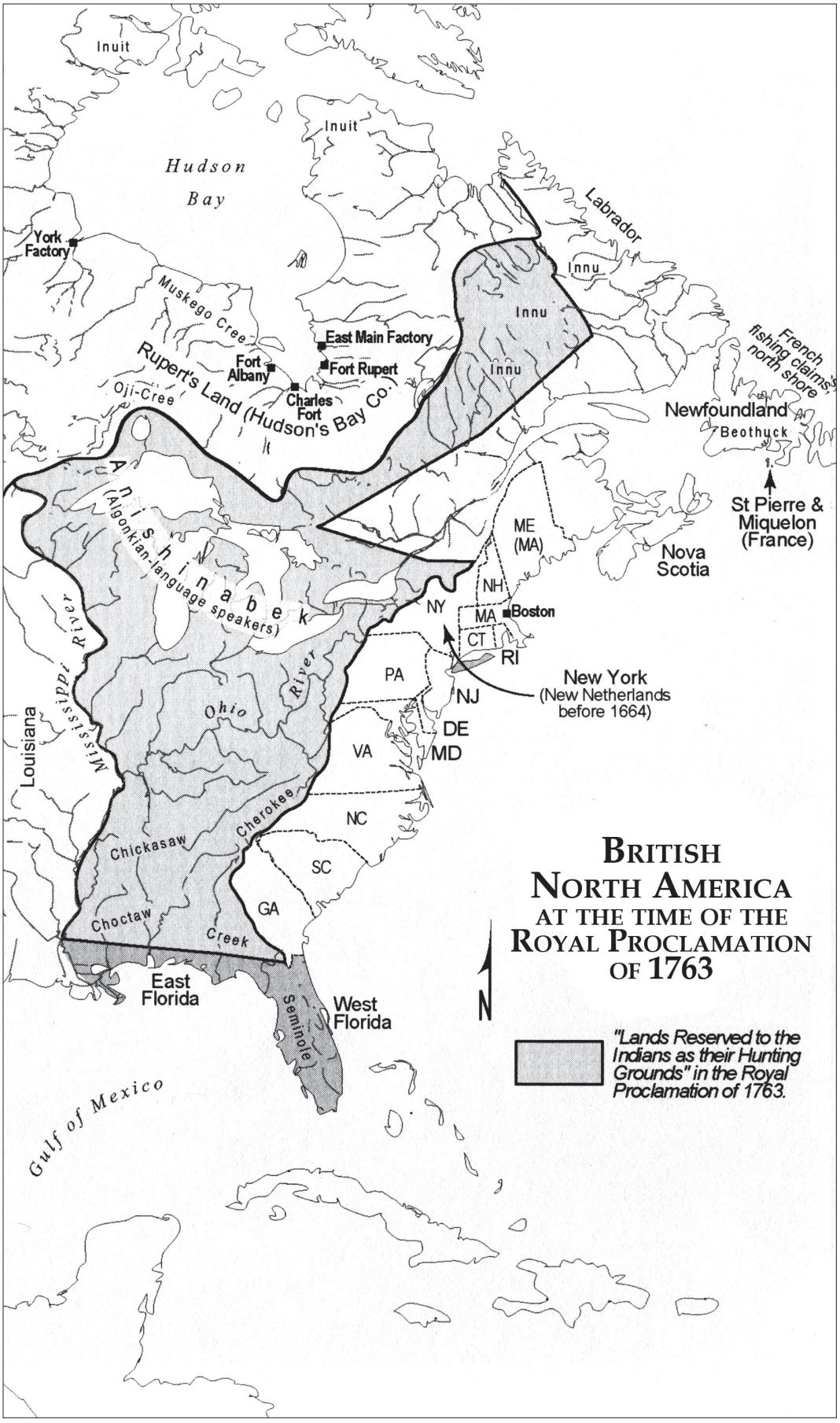
U.S. Military in Iraq on Operation Enduring Freedom (2001)

The huge compounding problems that the USA is encountering globally and at home are not aberrations leading away from the wisdom of its founders. Rather, they are the realization of the problems inherent in a polity created in a primal criminalization of Indigenous peoples as *"merciless Indian savages."* This feature, embedded in the founding manifesto of the country, is not some mere footnote to history but rather the basis of the US republic's inevitable downfall if its people and government do not reckon with this fundamental flaw, a flaw now on full public display in the Global War on Terror.

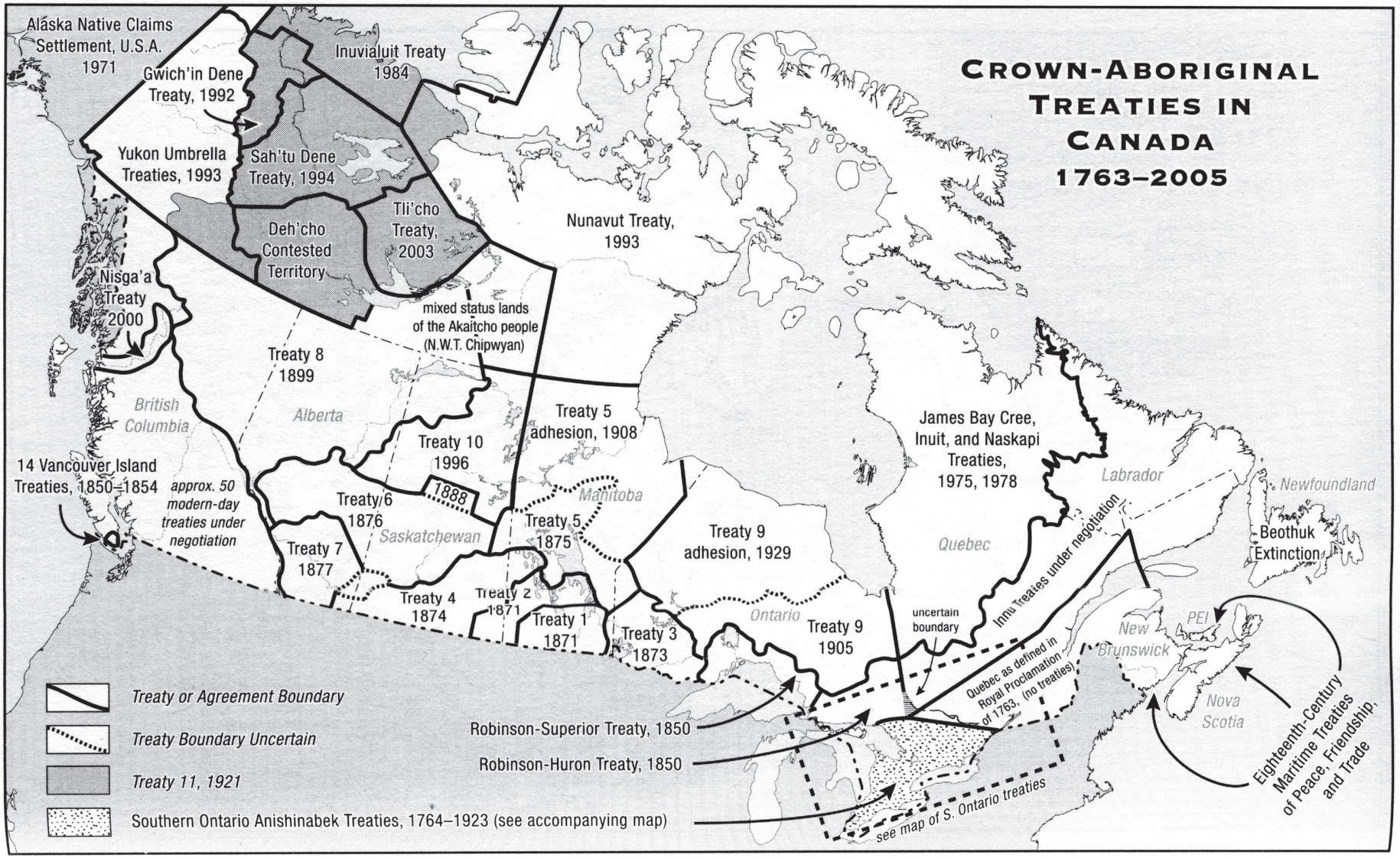
The best we can do as the northern neighbour of the US is to refuse to join its military incursions, adventures, and sabre-rattling threats, whether in Ukraine, Iraq or the next flavour-of-the-week site for invasion. It is not wise for Canada to continue as an obedient member of NATO, an organization that has strayed very far from its initial mission to defend the North Atlantic region from Soviet invasion.

Canada and Canadians would be much better served by cultivating "peace, order, and good government," the key phrase in the British North America Act whose deeper origins lie in the Royal Proclamation of 1763. Canada and Canadians would benefit by metaphorically polishing the silver links in an extended Covenant Chain reaching out to all the Indigenous peoples of Canada. We should refurbish the extended Covenant Chain flowing through the Royal Proclamation of 1763, and not allow those who are acting in our name to break more covenants with Canada's original title holders.

The successful return of Canada to its own constitutional heritage of Crown-Aboriginal alliances might well establish a beacon of sanity that could provide hope for so many menaced Indigenous peoples worldwide, including, for instance, the Kurds, Palestinians, Ogonis, Maoris, and Indigenous Tibetans. In a world of 6,000 distinct languages, most of them endangered Indigenous languages, the list is long of those distinct peoples awaiting some form of emancipation from the continuing oppressiveness of colonialism and neo-colonialism.



BRITISH NORTH AMERICA AT THE TIME OF THE ROYAL PROCLAMATION OF 1763



Credit: Anthony Hall, *The American Empire and the Fourth World,* (Montreal: McGill-Queen's University Press, 2005)

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Prof. Hall is author of *The American Empire and the Fourth World* (Vol.1) and *Earth into Property: Colonization, Decolonization and Capitalism* (Vol 2). Together, the two texts, published by McGill-Queen's University Press, constitute *The Bowl With One Spoon*. Prof. Hall has written for a range of periodicals, including the Globe and Mail, The Toronto Star, The Ottawa Citizen, Canadian Forum, The Phoenix, and Kainai News.

He is a former co-president of the Canadian Alliance in Solidarity with the Native Peoples. Professor Hall has been an expert witness in several Aboriginal rights cases in Canada and the United States. In the case of USA versus Pitawanakwat (2000) Judge Janice Stewart incorporated several aspects of Prof. Hall's expert report in her ruling on an extradition matter. The effect of her ruling is to have internationalized the issue of Aboriginal title in British Columbia.

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