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The Numbered Treaties and the Liberal Order Framework

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One of the most important ideologies prevalent within government circles during the late nineteenth century and into the twentieth was liberalism, a complex idea that manifested itself in various western countries in a variety of ways. In Canada, because of its dominance during the time the Numbered Treaties were negotiated, liberalism influenced not only non-Native government officials' understanding of the treaties themselves, but also how they were to be implemented. Space does not allow for a full discussion of liberalism, but an examination of some of its principal characteristics will demonstrate the presence of this ideology within the texts of the Numbered Treaties, and an examination of their implementation by non-Native agents will demonstrate how the liberal order framework that developed from the ideology came to pervade non-Native interpretations of the treaties. It must be pointed out, however, that there were other ideologies and views at work that limited liberalism's power; thus the liberal order framework in Canada had to be adaptive and at times even ambiguous in its application.

Liberalism, to quote Ian McKay, is "a project of rule," and, therefore, encompasses a broad spectrum of ideas, attitudes, and beliefs. McKay also argues that, in its essence, liberalism emphasizes individualism, property, and the rule of law.¹ Individualism as an idea was the belief that every individual had the right to choose his own course of action, providing he did not "harm" others in doing so. Liberals believed that all individuals had the right to as much freedom as possible, from the state and from others, and that all individuals should possess those freedoms in equal measure. Thus, equality of individuals was also an important idea in liberalism. In reality, each individual having ultimate freedom was impractical, as freedom for one could mean less freedom for another.² Thus, a balance had to be struck between individuals, and between individuals and the state. One way to maintain the balance was to ensure that no group was given more, or different, freedoms or protections than another. To liberals, guaranteeing a specific group protection from oppression was meaningless, as all individuals, including those within that group, would have the freedoms they needed already. If individuals were free, then they could not be oppressed.³

If the sanctity of individualism is applied to the Numbered Treaties, then they pose problems to the liberal state, as they could be interpreted as documents that give more freedom to one group within society, that is the signatory First Nations, than non-Natives. Consider the provisions for hunting and fishing rights, in which

First Nations are to have the freedom to hunt and fish over the tract surrendered, presumably free from state interference. That could mean, for example, that First Nations could hunt without having to buy licences, whereas other citizens of the country or province must do so. More importantly perhaps, First Nations could, at times, hunt out of season, with no limits placed on the amount of game they shot or fish they caught. These abilities placed First Nations in a position of greater freedom than non-Natives and, as such, from a liberal point of view, created an inequitable relationship between two groups within Canadian society.⁴ This “inequality” was the source of tension between the Department of Indian Affairs and other federal departments and between Indian Affairs and provincial legislatures.

Manitoba, for example, passed conservation laws in 1876, 1879, and 1883, which imposed closed seasons on certain game animals for all residents, thus limiting the ability of First Nations to hunt off-reserve. In 1884, Lawrence Vankoughnet, the deputy superintendent general of Indian affairs launched a protest against these interferences with treaty rights, writing to Manitoba’s minister of agriculture, statistics, and health, Joseph Da Rivierre. In the letter, Vankoughnet argued that although Treaties 1 and 2 did not contain specific hunting and fishing clauses

the Indians claim that they always had the right to hunt and fish over unoccupied portions of territories ceded under any of the treaties and it appears to me it would be advisable in the interests of the Indians and for the maintenance of peace and goodwill between them and the white portion of the population ... the privilege of killing any wild animals or birds for their use only ... should be extended to them.⁵

Vankoughnet was unpersuasive. Da Rivierre replied that, unlike the situation in the “older provinces of Canada,” he was determined to ensure that the game in Manitoba was not exterminated. He also pointed out that:

In Manitoba the laws respecting the protection of game were being consciously observed by nearly all the settlers, but many settlers complain that while they do all in their power to protect game in the close season they frequently find Indians trespassing and shooting at a period of the year where such privilege is denied to the settlers themselves.⁶

In other words, the settlers were complaining that Indians had privileges that they did not, something that the liberal ethic of the day would not sanction. As a result, Da Rivierre argued, if exceptions were to be made to Indians, it would be impossible to ensure compliance of the law by settlers. Numerous examples of this rhetoric of equality are found throughout the Numbered Treaties’ territory and history.

Another way in which the “sanctity” of individualism was manifest in the Numbered Treaties was in the land surrender clauses. In the late nineteenth century, prominent Ontario politicians took umbrage with what they deemed Prime Minister John A. Macdonald’s excessive and unreasonable use of the federal power of disallowance. Macdonald’s quest to build a nation from sea unto sea was interfering with Ontario’s quest to build a province out of the vast hinterlands to

the west and north. At the root of the conflict was which level of government had responsibility for, and therefore control over, these lands. It took several court cases, most notably the Manitoba/Ontario boundary dispute and the St. Catherine's Milling and Lumber Co. case, to resolve this conflict, with the courts generally ruling in favour of Ontario.⁷ The St. Catherine's Milling and Lumber Co. case was a dispute between the federal and Ontario governments over who controlled surrendered Indian lands within the Treaty 3 area or what became northwestern Ontario after the settlement of the Manitoba/Ontario boundary dispute.

In this case, the Dominion government claimed that it had acquired title to the lands from the Saulteaux Ojibwa through their surrender of them in Treaty 3. In this view, the lands in question were Indian lands until ceded to the Dominion government by treaty, a position grounded in the Royal Proclamation of 1763. Ontario claimed that the lands were always Crown lands because Indians held no title in their land, only a lesser right to occupy and use the lands. According to its reasoning, the Dominion government had negotiated a treaty for political purposes, that is, to ensure "peace and goodwill" with the Indians. As a result, it had not, through any treaty, acquired a proprietary interest in the land because the Indians had no title to begin with.⁸ Thus when the Indians surrendered their lands through the treaties, Ontario acquired full title to those lands, not the federal government.

In the Exchequer Court, Chancellor Boyd's opinion was delivered on June 10, 1885, three weeks after the case was argued. According to Sidney Herring, Boyd relied entirely on the research and argument of Ontario in his judgment. He began by noting that the lands in Canada had been vested in the Crown by conquest and that the public lands in Ontario were transferred by statute from the Crown to the province in 1837. Then Boyd referred to the Indian title issues that underlay Ontario's claim. Labelling the Indians "heathen and barbarians," Boyd denied that "any legal ownership of the land was ever attributed to them."⁹ The Judicial Committee of the Privy Council largely upheld Boyd's ruling, but softened it by declaring that the Indians had a "usufructuary" interest in the land, which had to be cancelled by the Crown as an act of benevolence before settlement could take place.

Because title for surrendered Indian lands was now interpreted to belong to the province, the federal government was hampered in its ability to grant reserves to Indians out of those surrendered lands. As a result of this ruling and those of other federal/provincial disputes, the federal government negotiated a deal with Ontario in 1894 and then in 1902, in which the federal government agreed that any future reserves to be set aside for Indians would require the concurrence of Ontario.¹⁰ To insure such concurrence in Treaty 9, the federal government also agreed to have a provincial representative act as a treaty commissioner and that all reserves negotiated in the treaty would have to be accepted by the lieutenant-governor in council. This agreement was signed by both governments and appended to the Treaty 9 document.¹¹

What is significant about this case for this discussion is the championing of what Robert Vipond has called “legal liberalism” by Ontario to make its arguments that it was the rightful administrator of its hinterlands, which were also Aboriginal traditional lands. The legal liberal argument proposed that individuals had autonomy—that is, they had the right to choose their own course of action, as long as their decisions did not “harm” others. Individuals could be persons, businesses, and states. Ontario argued that as an individual, it had the right to choose how its lands would be developed and exploited, free from federal interference, that is, disallowance.¹²

There are further ramifications of this victory. The legal disputes and the subsequent agreements drawn up to accommodate the rulings arising out of them meant that Aboriginal lands were for all intents and purposes legally colonized. The Ontario government assumed administrative control over them and as a result of the recognition of the province’s “individual” rights, it was free to determine how those lands would be used or developed. The province chose to develop the land along industrial lines and to ensure that First Nations would not be a barrier to that development. This point demonstrates the fundamental link between liberalism and capitalism. To quote Kurt Korneski, liberalism was “the practical consciousness, or the theoretical legitimation, of the values and practices emanating from . . . market society.”¹³ The link between liberalism and capitalism is ably illustrated by the actions of Ontario’s Treaty 9 commissioner, Daniel MacMartin, during the treaty negotiations. He was to ensure that any reserves provided for in the treaty would not contain sites suitable for industrial, commercial, or agricultural development. Excerpts from his diary demonstrate that he took his role seriously. At Osnaburgh, as an example, he recorded that he examined the reserve “as carefully as time and circumstances permitted,” and confirmed “the information given by Mr. Williams, agent at the Post, that the timber is small and of little value, the land unfit for agricultural purposes.” It is also apparent that MacMartin provided information with respect to mineral and other resource potential in the area. He recorded in his trip diary evidence of “small quartz stringers thru the slate” on the lower Snake portage; some low rocky banks and sandy gravel on the north shore of Lake Makokibaton and “considerable feldspar . . . crystals” through the rock in “portage no. 2 on the route taken out of the said Lake.”¹⁴ Also, at Fort Hope, he reported:

This a.m. Mr. Richards called upon us at the H.B. Company residence, had a pleasant talk with regarding the capabilities of the country as regards to agriculture and timber lands, learning that the soil was poor, and that the only source from whom the Indians and he himself derived means of subsistence was from fish and rabbits.¹⁵

Because the provinces were accorded the proprietary interest in the surrendered lands, thanks to the *St. Catherine’s Milling* case, First Nations access to those lands was to be limited and subject to the principal of legal liberalism which extolled individualism and supported capitalism. It also extolled the belief in property, the second essential characteristic of liberalism identified by McKay, with private

property representing the highest form of civilized land tenure because of the complex legal and social relationships that needed to be developed in order to support such a system. Private property was also regarded as something that should be accessible to a broader range of individuals than had been the case under feudalism.¹⁶ Because liberal notions of land-holding were derived from liberal capitalism, they were separate from, and potentially antagonistic to, the idea of title to the land being vested in the Crown, and to it having the power to grant such land to its subjects.

Thus, again, in considering the Numbered Treaties, difficulties arose for liberals. The treaties involved land surrenders to the Crown, which then held certain pockets of that land in trust for the First Nations. These lands, that is, reserves, were occupied on a communal rather than an individual basis. Furthermore, Treaty Commissioner Alexander Morris, during the negotiations for Treaties 1 and 2 offered this explanation of reserves:

Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want ...

Your Great Mother, therefore, will lay aside for you “lots” of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.¹⁷

In this instance, Morris is agreeing to set aside reserves for the Indian people collectively, but suggesting the land be divided up into individual lots as a first step towards privatization.

So what were reserves: were they liberal “devices” or something different? I would suggest first of all that reserves were a form of property, a bounded piece of land, which, while not held in fee simple, like other private property, did apparently have the value of privacy assigned to it, in that, as according to the Treaty 9 commissioners (and others), “no white man could enter.”¹⁸ Reserves, as property, were subject to the laws of expropriation within the liberal order framework. If the Government of Canada or Ontario needed the lands or a portion of the lands within the reserves, then they could expropriate those lands after consultation over the amount of compensation the individuals and/or the band would get for their loss. However, reserves also represented an anomaly within the liberal order framework because expropriation of reserve land did not take place through the standard common law practices. The requirements for an expropriation included a negotiated agreement by the majority of the band members to surrender the land requested as per the Royal Proclamation of 1763. In this way, First Nations were part of legal liberalism and yet transcended it.

Reserves were also considered an act of generosity by the Ontario government. Embroiled in the dispute over the allocation of reserves in Treaty 3, Ontario

refused to acknowledge the reserves negotiated by the federal government with the Treaty 3 First Nations. It also threatened not to agree to grant reserves in the Treaty 9 area. This was suggested in a memo dated July 18, 1904, from Aubrey White, the assistant commissioner of Crown lands to his superior, the commissioner of Crown lands. White gave this opinion of the reserves clause in the proposed treaty:

Then we are asked to give Reserves. In the opinion of the undersigned, and he submits it with deference not being a lawyer, the Province is not bound to give any areas to Indian Reserves. Before Confederation, when the lands and Indian Affairs were under one Government there was no difficulty about that Government giving Indian Reserves wherever they chose in the back country, but now when the lands are the property of the Province and the Indians are under the control of the Dominion Government, a different state of affairs prevails and I do not think that the Province is bound to give lands, free of charge, to Indian Reserves.¹⁹

Later on in that memo, White recognized that granting reserves was a “matter of policy” and agreed to allow them as a provision of Treaty 9.²⁰ In doing so, he was recognizing both the need and desire on the part of the Crown to be generous and fair to its Aboriginal wards, a point that will be discussed further below.

Thus, the Numbered Treaties represented, in the minds of non-Native governments, the division of Aboriginal territory into Indian reserves and Crown lands. Behind this division rested the assumption that Indian lands, that is, reserves, were to be areas of land in which no industrial development would take place, whereas Crown lands were lands where that possibility could exist. Indian reserves were “special” categories of land representing the Crown’s generosity and fairness to the First Nations, to which the federal and provincial and territorial governments negotiated rights of access, with the federal government responsible for representing the interests of the First Nations, and the provincial and territorial governments responsible for representing the interests of their citizens.

The division of Aboriginal lands into Indian reserves and non-Indian Crown lands, with the Crown lands representing the larger share by far, was problematic for the First Nations to say the least. They argued that the treaty had established a relationship in which Aboriginal lands would be shared not divided, and did not appreciate the “liberal gift” of the reserve lands to the extent that the treaty commissioners thought they should. For First Nations, reserves were secondary to their interests in lands. Their principal concern, and the reason driving their demand for a treaty, was the need to secure their access to hunting, fishing, and trapping territories and resources. As Patrick Macklem explained with respect to Treaty 9:

In short, petitions made by aboriginal people living in northern Ontario at the turn-of-the-century indicate that aboriginal leaders generally desired to enter into treaty with the Crown to offset social and economic damage that had befallen their people. Railway construction, surveying activity, and an unprecedented rise in hunting, trapping, and fishing by non aboriginal people had increased aboriginal dependence upon Hudson’s Bay posts and made it increasingly difficult for aboriginal people to maintain their tradi-

tional ways of life. Agreement was sought with the Federal government to provide protection for aboriginal hunting, trapping, and fishing on ancestral lands in the face of economic and railway development. Financial aid was also sought to alleviate the economic suffering caused primarily by the depletion of game and fish.²¹

The third and final essential component of liberalism was the belief in the “rule of law,” which meant that conflicts were to be settled peacefully, through the courts and governments.²² It also meant that the rule of law included a belief in the supremacy of British justice, because of its “merciful” and “generous” qualities that sought to treat all citizens as equal, yet to look after the weaker and less fortunate members of society.²³

Under many of the Numbered Treaties and adhesions, the First Nations agreed to “solemnly promise and engage to strictly observe this Treaty;” to “obey and abide by the law;” and to “maintain peace and good order.”²⁴ What did all of this mean? Clearly, for the non-Native governments, “obeying and abiding by the law” had a lot to do with maintaining peaceful relations with non-Native settlers. The First Nations adherents were to maintain peace between themselves, other tribes of Indians, and “others of His Majesty’s subjects;” they were also not to “molest” any person or property, or prevent anyone from travelling through the country.²⁵

The need to maintain peace was often the justification given for negotiating a treaty at a particular time; it was suggested that the First Nations were acting aggressively against settlers or state agents such as telegraph surveyors, thus threatening the peace. For example, in 1875, George McDougall, a missionary to the western Cree, reported to Alexander Morris that

the Crees and Plain Assiniboines were united on two points: 1st That they would not receive any presents from Government until a definite time for treaty was stated. 2nd Though they deplored the necessity of resorting to extreme measures, yet they were unanimous in their determination to oppose the running of line, or the making of roads through their country, until a settlement between the Government and them had been effected. I was further informed that the danger of a collision with the whites was likely to arise from the officious conduct of minor Chiefs who were anxious to make themselves conspicuous, the principal men of the large camps being much more moderate in their demands.²⁶

This report and others persuaded the federal government that the time to negotiate treaties with the prairie First Nations was imminent.²⁷ In 1901, Chief Louis Espagnol in northern Ontario delivered a speech to Samuel Stewart of the Indian Department. He reminded him of an earlier petition he had sent to the government and reiterated that his people north of the height of land were still interested in negotiating a treaty and argued that the government’s inaction in this regard represented a breach of a promise that had been made to his people by William Robinson fifty years earlier.²⁸ Then, in the summer of 1903, Chief Kitchipines of the Crane First Nation stopped a federal survey party from exploring north of Osaburg House. In this instance, the members of the party were intimidated into returning from whence they had come.²⁹ In all of these meetings, the First Nations expressed their dissatisfaction with the intrusion of non-Natives into their

territories and although they did not resort to violence, the government recognized that their peaceful relationship with the First Nations was in danger. As a result, the federal government began to plan for the negotiation of a treaty with the Cree and Anishnabe. This was in keeping with the liberal belief that disputes between groups of people were to be settled peacefully.³⁰ This was particularly important for Canada. As Sidney Herring explains:

Liberal treatment also implicitly meant “non-violent,” in reference (and in deliberate contrast) to the United States and its violent Indian policy. Chancellor Boyd, in his *St Catharine’s Milling and Company* ruling referred to a legal policy that promoted the immigration of Europeans in such a way so that “their contact in the interior might not become collision.” Canadians were committed to a frontier without the kind of warfare that they saw just below the border.³¹

These clauses and justifications demonstrate the importance of liberalism in shaping the treaty. While the federal and provincial governments were interested in developing the “frontier” and ensuring its progress, they wished to do so peacefully and with the goodwill of the First Nations.

Obedying and abiding by the law also meant that federal and provincial authorities could now exert their authority over social and cultural activities of the First Nations. D. C. Scott, the very long serving and authoritative official within the Department of Indian Affairs, in his article “The Last of the Indian Treaties,” seemed almost smug when recounting the distrustful attitude of the First Nations people to the Dominion police who accompanied the commissioners on their tour. At one point, he explained that “the glory of their uniforms and a wholesome fear of the white man’s law which they inspired spread down the river, in advance and reached James Bay before the commission.”³² Also, at their first stop in Lac Seul, they were greeted by the sound of distant drumming. Upon investigation, it was learned that a shaman was holding a white dog feast down the river, away from the Hudson’s Bay Company post. The commissioners believed it was necessary to stop this activity because parts of it contravened the law, so they went to visit the shaman. While impressed with his power of intelligence, the commissioners hoped that he was equally impressed with their own power, that is, the power of the law and its ability to punish people who contravened it.³³ As Samuel Stewart explained:

Accompanied by the Chief and Mr. McKenzie we left about noon for the reserve and arrived there about 1 pm. Our approach to the reserve created no little excitement among the Indians who were assembled on a hill overlooking the lake. This excitement was to a great extent occasioned by seeing the two policemen in uniform in the canoes and also from the fact that we formed a rather large party evidently intent upon important business. On landing Mr. Scott speaking for the Commissioners demanded to see the Conjurer. For a time the Indians professed ignorance as to the whereabouts of this important personage but the Chief at last treated [?] him for us. He was a short stout built Indian and it was soon very evident that he had all the Indians well under his control ... [He] would not commit himself by a promise to discontinue the practice of conjuring ... We gave the Inds. a lecture on the folly of their conduct and told them that their actions for the future would be carefully watched.³⁴

Finally, the rule of law meant that all people would be treated equally by it. When Alexander Morris, the lieutenant-governor of Manitoba met with the First Nations at Lower Fort Garry to participate in the negotiation of Treaties 1 and 2, the Aboriginal leaders requested that four of their number presently in jail be released.³⁵ Morris responded:

I told the Indians that I could not listen to them if they made a demand for the release of the Indians as a matter of right; that every subject of the Queen, whether Indian, half-breed or white, was equal in the eye of the law; that every offender against the law must be punished, whatever race he belonged to ... He would however be willing to release them to demonstrate Her Majesty's "grace" and "favour."³⁶

Similar statements were made during negotiations for the other Numbered Treaties. For Treaty 8, the commissioners reported that they informed the Indians that

the law was designed for the protection of all, and must be respected by all the inhabitants of the country, irrespective of colour or origin; and that, in requiring them to live at peace with white men who came into the country, and not to molest them in person or in property, it only required them to do what white men were required to do as to the Indians.³⁷

In these examples, we have exhibited the underlying cultural constructs of the law. Its purpose in regards to the treaty was to keep the peace but to also, as defined by the non-Native governments, subsume the First Nations within the legal regime of the Canadian state and prevent them from carrying out what, to the liberal state, would be considered inappropriate activities. Additionally, the law was to create and ensure equality of all individuals, whether "white" or "red." In this way, the principles of British justice would be upheld, especially when given an opportunity to be generous and kind.

But what of the First Nations? How did they interpret the rule of law? I can only speculate that they too were interested in maintaining peaceful relations, but as between peoples or states, not as subjects or subordinates. It is curious that the treaty only calls upon First Nations to obey the law and the treaty, but I also believe that in agreeing to maintain the rule of law, that is the treaty, the First Nations also expected that the federal and provincial governments would too. At the very least, the First Nations used the treaty to defend their own interpretation of it with respect to hunting and fishing rights. As Peter Sutherland, a member of the New Post First Nation in northern Ontario explained:

Some of the game wardens bothered us a lot. I recall one time when a game warden took away my net when I had it set in a lake while I was trapping. I had set it in the lake, not the river, so I would not be seen, but the warden was spying on me with binoculars. When he came to get the net, he asked me what I had a gun for, and who had caught the pike ... I told him I knew I had a right to do that but he took my net. I told him I was going to keep on fighting to know more about my rights for hunting and fishing. Four days after he took my net, I got word from him saying he was sorry, they had made a mistake in taking my net, and then they shipped it back to me. This incident made me feel very hurt, because I was being stopped from living as an Indian.³⁸

Additionally, however, the rule of law for First Nations as represented by the treaties meant that they were to receive the queen's or king's generosity and protection. As Fred Mark, a spokesperson for the Moose Factory First Nations people, stated during the Treaty 9 negotiations:

That they had long wished to enter into treaty, that they concurred in all that had been said that it was right and reasonable, that they were satisfied that they would be better cared for and protected by the King, that they would obey his laws and be good and dutiful subjects, that under the laws their children would be protected and properly educated, that they thanked the King for the present offered as they were sure it would help them.³⁹

The discussion and examples given above should demonstrate the pervasiveness of the liberal ideology, as defined by Ian McKay, in the treaty texts and in their interpretations. Establishing the liberal order framework within Native/settler relations, however, was not an easy task. Because liberalism was a project of rule, decisions had to be made within the context of power relations in the political, economic, and social spheres. As a result, despite protestations of equality and justice, liberalism was unable to completely realize these ideals for various reasons. Liberalism was, for example, patriarchal. Therefore, while it professed to allow all individuals to choose their own course of action, women were excluded from participating fully in the economic and political life of the country during the nineteenth century.⁴⁰ Also, while it professed to treat all citizens as equal before the law, it excluded many individuals from being citizens. Members of minorities, whether Chinese, black, or “heathen,” were consistently denied citizenship and others, such as First Nations, were rendered “minors” in law and therefore not capable of acting either as individuals or as citizens.⁴¹ Thus liberalism, as a result of its exclusionary practices, had a dark side: liberalism was also, as it turned out, patriarchal, racist, and colonialist.⁴²

Colonialism, as historical geographer Cole Harris explains, was “a culture of domination—a set of values that infused European thought and letters; led Europeans confidently out into the world; stereotyped non-Europeans as the obverse, the negative counterpart of civilized Europeans; and created moral justification for appropriating non-European lands and reshaping non-European cultures.”⁴³

In the late nineteenth century, with the popularity of social Darwinism among the elite classes, colonialism was given an added virulence, as Native peoples were seen by many within settler society to occupy an inferior position on the evolutionary plane. American historian Francis Parkman, who wrote about the Seven Years' War and Pontiac's “conspiracy,” was very popular in Ontario, at least partly because he portrayed the First Nations as “backward races bound to succumb to Anglo-Saxon superiority.” Like Parkman's works, much of the literature in English Canada, by the end of the nineteenth century, justified Canadian expansion into the West, and either directly or indirectly denigrated the First Nations of the prairies and their ways of life in the process.⁴⁴ When Canadians of the late nineteenth century viewed the West, they saw it as, to invoke the old

cliché, “a land of opportunity” where settlers could transform the prairie wasteland into a Garden of Eden. According to George Colpitts, “Canadians were confident in the region’s potential for improvement because of ideas associated with mid-Victorian liberalism.”⁴⁵ Those ideas, based on the belief in progress, included the notion that individuals could improve a region’s productivity “through enterprise and initiative,” and were bolstered by the likes of John Stuart Mill, who regarded the Canadian frontier as an ideal location for his yeoman farmers and individual effort. The expansionists’ views were contrary to the fur traders’ approach to the West and their concomitant experience with limited food supplies. As George Brown, a leading force in the acquisition of Rupert’s Land and father of Confederation, declared, the resources of the western interior were of vast importance to the nations, and Canadians should take up the higher task of bringing them into the limits of civilization.⁴⁶

Alexander Morris, the treaty commissioner referred to previously, was also an expansionist. He told audiences in Montreal in 1859 that the assaults of civilization had commenced simultaneously from the east and west, and that farmers were now turning their ploughs toward the interior lands, thereby allowing the “rapid planting of Anglo-Saxon civilization on their virgin soil.” The inferences in these statements are that the First Nations had not used the prairie lands to the best of their ability and should, therefore, make way for the advance of the settlers. This is further demonstrated by the following quote from Senator Alexander in 1888:

When the white man first appeared he found them [First Nations] scattered over those broad prairies—prairies covered with the buffalo, their rivers teeming with fish—their forests abounding with moose and other large animals constituting abundance of food for them, and we may add, that the position of the red man before the advent of the white, was a happy one. The Indian had no ambition beyond obtaining his daily food; of course the territory must be used for the white races of the earth, coming like a torrent to supplant the poor red man, and to disturb all his hunting ground—disturb his paradise upon earth.⁴⁷

As is well known, the federal government regarded treaties as the vehicle by which the “red man” would be supplanted.

Thus liberalism was invoked as the ideology of state formation, but harboured a dark side. With respect to First Nations, this dark side was colonialism, a policy that sought to exclude them from the nation-building project, denigrated their culture and ways of life, and appropriated their lands, when deemed necessary, for the growth of the state and the nation. First Nations, however, resisted both liberalism and colonialism, resisted efforts by the state to absorb them into their legal and administrative framework and leave them marginalized within their own lands.

Native resistance, though extremely important, was not the only factor at work in preventing the complete liberalization of Native peoples and their lands. Despite current historiographic fashion, I would argue that there were several limits imposed on the process of colonization. One limit was the traditional policy

of “bounty and benevolence” carried out by the imperial and later federal government. Because First Nations were considered less fortunate brethren, however that term was defined specifically, there was always an obligation of care on behalf of the state towards the Aboriginal peoples. Sidney Herring refers to this quality as “liberal treatment” which involved going against the liberal tenet of equal treatment and meant being generous and fair, to the supposed benefit of the First Nations. Liberal treatment involved the orderly purchase of Aboriginal lands, rather than lands being obtained through “frauds and abuses,” the provision of lands for the Aboriginal peoples themselves, the disbursement of presents as a sign of good faith and generosity, and the full application of legal rights and English and Canadian law.⁴⁸ For this last component, First Nations were not considered quite yet ready, but as the nineteenth century progressed, ideas of “developmental liberal democracy” came to the fore. Liberal treatment in the case of wards of the state and others who were considered not yet ready for citizenship involved “nurturing men and women so as to instill them with characteristics needed for success.” It became the state’s duty to “nurture and care for its citizens, so as to enable them to develop their human capacities.”⁴⁹ Thus First Nations, who were relegated to wardship status, could, it was believed, through state programs, realize their full potential and become worthy citizens in their own right. Admittedly, the attitudes and vocabulary were paternalistic at best, but the responsibility of care towards the First Nations meant that limits were placed on other liberal policies that could have sought their complete assimilation (i.e., treating everyone equally under one law), marginalization (privatizing all Indian lands, including reserves), or even annihilation.

Another aspect of nineteenth-century Canada that limited liberalism’s effects on First Nations was the presence of significant sectors of the Canadian population who were a-liberal in their approaches to social and political relations, including members of Parliament and Indian Affairs officials. The most notable group of a-liberals were conservatives.

Conservatives, put simply, believed in order, tradition, and the idea of diversity of peoples, as long as they were united in accomplishing a common goal. While order could include the “rule of law,” it was a broader term for maintaining peace and included *personal* relations between the Crown and its subjects and within communities.⁵⁰ Tradition stood in contrast to liberal beliefs in progress and was expressed in Canada through the desire to maintain and enhance the imperial connection, and support for diversity could lead to support for minority rights, which certainly placed it in opposition to individual rights.⁵¹ This is clearly demonstrated by the fact that conservatives could accept Indians as distinct (but often inferior) peoples, whereas liberals advocated assimilation and progress for them.⁵² While liberalism came to dominate in late-nineteenth- and early-twentieth-century Canada, conservatism was never a spent force. As a result, treaty-making, interpretation and implementation were the result of competing views of liberalism and conservatism, with aspects of each being utilized, when convenient or

necessary. An apt example of this comes with the use of the Crown in the treaty-making process.

According to James Morrison, William McDougall, who was appointed by John A. Macdonald to become the northwest's first lieutenant-governor and an ardent liberal, was determined to settle the northwest along egalitarian lines. He had worked long and hard to push for the acquisition of Rupert's Land by Canada, and was at the forefront of encouraging Canadian settlers to move west and take up homesteads. He was also opposed to granting "special privileges" to Catholic and French interests within the country. Needless to say, McDougall represented everything that was threatening to the First Nations and Métis of the prairies. The Métis resisted his arrival so successfully that, according to Morrison, McDougall—and all that he represented—was sent scurrying back to Ottawa. The federal government concluded that "it was time to bring in the Queen."⁵³ By this, Morrison is arguing that the First Nations would be more receptive to dealing with the British imperial authority, something with which they were familiar, rather than the new Canadian state, and that the Canadian government recognized the cachet the Queen had with them. As a result, treaty negotiations would thereafter become essentially a Tory exercise, which emphasized ritual and personal relationships between the Indian nations and the Queen, rather than the Canadian state.

For example, Alexander Morris, who has been quoted before to represent liberalism in action, understood well the value of tradition and ritual. As he reported his experiences of the Treaty 6 negotiations:

On my arrival the Union Jack was hoisted, and the Indians at once began to assemble, beating drums, discharging fire-arms, singing and dancing. In about half an hour they were ready to advance and meet me. This they did in a semicircle, having men on horseback galloping in circles, shouting, singing and discharging fire-arms.

They then performed the dance of the pipe stem; the stem was elevated to the north, south, west and east, a ceremonial dance was then performed by the Chiefs and head men, the Indian men and women shouting the while.

They then slowly advanced, the horsemen again preceding them on their approach to my tent. I advanced to meet them, accompanied by Messrs. Christie and McKay, when the pipe was presented to us and stroked by our hands.

After the stroking had been completed, the Indians sat down in front of the council tent, satisfied that in accordance with their custom we had accepted the friendship of the Cree nation.⁵⁴

In Treaty 4, Alexander Morris, acting again as the principal negotiator, invoked the ideas of the Queen's personal relationship with "her red children." He referred to the Queen as "the great mother of us all" and explained that he had arrived to "see the 'Queen's red children' as the Queen's servant." He also stated that "the Queen had personally chosen him as her personal representative to speak "Her own words" and that "he was charged to tell them words of truth."⁵⁵

By imbuing the negotiations with conservative rhetoric, the treaty commissioners emphasized certain qualities that would be attractive to First Nations, namely the continuance of a personal relationship between the Indians and the Queen, as well as between the Indians and Her Majesty's other subjects. The treaty commissioners on the prairies also invoked tradition and ritual—they continued the policy of negotiating with the First Nations for land surrenders as had been the practice earlier, offered to “look after” the First Nations in times of distress as the Hudson's Bay Company had done, offered to help the First Nations adapt to the settler economy, and, finally, wore their uniforms and participated in Indian rituals such as pipe-smoking to acknowledge the sacredness of the undertaking. While such approaches helped the Canadian state gain control of Aboriginal territories, it did set up tensions between the First Nations and the Department of Indian Affairs when it proceeded to implement liberal policies on the land and on the First Nations designed to promote the rule of Canadian law, individualism, and private property against coexistence, group rights, and communalism.

In conclusion, liberalism was an ideology that valued individualism, property, and the rule of law as a means of establishing and maintaining peace between peoples. It was linked to capitalism and could adapt to extend qualities of generosity and fairness to supposedly less fortunate people. It had its limits, however, which meant that the treaties and their implementation were instruments of tension between Native and non-Native and within non-Native society itself. Because of the treaties and the resistance of First Nations and others, the liberal order framework in Canada would fail to gain a complete foothold within government circles. The liberal order framework with respect to the Numbered Treaties would be an amalgam of liberalism, conservatism, colonialism, and First Nations resistance.

Endnotes

- 1 Ian McKay. "The Liberal Order Framework: A Prospectus for a Reconnaissance of Canadian History," in *Canadian Historical Review*, vol. 81, no. 4, December 2000. pp. 617–637.
- 2 Michael J. Moore. "Treaty Rights and Liberalism: Accommodating Self Determination Through Treaties." MA thesis, Carleton University, Ottawa, 1997, p. 94.
- 3 Moore, p. 5.
- 4 Moore, p. 37.
- 5 Jean Friesen. "Grant me wherewith to make my living," in *Aboriginal Resource Use in Canada*, Kerry Abel and Jean Friesen, eds. (Winnipeg: University of Manitoba Press, 1991), pp. 141–156, quote from p. 147.
- 6 Peter Naylor. "Governing by Necessity Protecting the Right of Aboriginal Peoples to Hunt and Fish," J. P. Morin collection, Treaty Policy Directorate, INAC, pp. 31–32.
- 7 Jean L. Manore. "From holistic to limited identities: Canadian Legislative and Judicial Interpretations of Aboriginal Rights and Title," in *Indigeneity: Constructions and Re/Presentations*. Patricia Sant and James Brown, eds. (Commack, NY: Nova Science Publishers, 1999), pp. 177–192.
- 8 Barry Cottam. "Indian Title as a 'Celestial Institution': David Mills and the *St. Catherine's Milling Case*," in *Aboriginal Resource Use in Canada*, Kerry Abel and Jean Friesen, eds. (Winnipeg: University of Manitoba Press, 1991), pp. 247–266.
- 9 Sidney Herring. *White Man's Law: Native People in Nineteenth Century Canadian Jurisprudence*. (Toronto: University of Toronto Press, 1998), p. 137.
- 10 Archives of Ontario, F 1027-1-3 North-West Angle Treaty #3. Agreement between T. Mayne Daly, Superintendent General of Indian Affairs, and J. M. Gibson, Secretary and Registrar of the Province of Ontario, April 16, 1894.
- 11 Jean L. Manore. "Provincial Involvement in Treaties 5, 6, 8, 9 and 10," research report prepared for Treaty Policy and Review Directorate, INAC, 1996. p. 53.
- 12 Robert Vipond. "The Provincial Rights Movement: Tensions in Liberty and Community in Legal Liberalism," in *Canada's Origins Liberal, Tory or Republican?* Janet Aizenstat and Peter J. Smith, eds. (Ottawa: Carleton University Press, 1995), pp. 233–262.
- 13 Kurt Korneski. "Reform and the Transformation of Liberal Canada in the Late 19th and Early 20th Centuries," CHA paper, York University, 2006. p. 38, 22.
- 14 Rhonda Telford. "The sound of the Rustling of the Gold is under my feet where we stand, We have a rich country:" A History of Aboriginal Mineral Resources in Ontario. PhD thesis, University of Toronto, 1996. p. 364.
- 15 Queen's University Archives. Diary of G. W. MacMartin, "Journey to N.W.T. in 1905 (re Indian treaty)."
- 16 Thomas Flanagan. *First Nations Second Thoughts*. (Montreal/Kingston: McGill-Queen's University Press, 2000), p. 119.
- 17 Alexander Morris. *The Treaties of Canada with The Indians*. (Toronto: Belfords, Clarke and Co. Publishers, 1880), pp. 28–29.
- 18 Diary of G. W. MacMartin, "Journey to N.W.T. in 1905 (re Indian treaty)."
- 19 Archives of Ontario, RG 4-32, File 1904, No. 680. A. White, Assistant Commissioner, Department of Crown Lands to Commissioner, Department of Crown Lands, July 18, 1904.
- 20 Ibid.
- 21 Patrick Macklem. "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario," in *Aboriginal and Treaty Rights in Canada*, Michael Asch, ed. (Vancouver: University of British Columbia Press, 1997), p. 102.
- 22 Herring, p. 12.
- 23 Jean Manore. "Treaty 9 and the borderland of northern Ontario: liberalism, colonialism and Native resistance to state expansion," CHA paper, Saskatoon, 2007. p. 5.

- 24 Arthur Ray, et al. *Bounty and Benevolence*. (Montreal: McGill-Queen's University Press, 2000), p. 226.
- 25 Ray, p. 220.
- 26 Ray, p. 103.
- 27 Ray, p. 104.
- 28 Morrison, n.p.
- 29 Rhonda Telford. "The Sound of the Rustling of the Gold is under my feet where we stand, We have a rich country:" A History of Aboriginal Mineral Resources in Ontario. PhD thesis, University of Toronto, 1996.
- 30 Herring, pp. 16–23.
- 31 Herring, p. 12.
- 32 D. C. Scott. "The Last of the Indian Treaties," *Scribner's Magazine*, vol. XL: no.5, November 1906. pp. 573–583, 574.
- 33 LAC, RG 10, Vol. 11399, file 1. "The James Bay Treaty 9. Places visited by the Commissioners, Summer of 1905."
- 34 LAC, RG 10, Vol. 11399, file 1. "The James Bay Treaty 9. Places visited by the Commissioners, Summer of 1905."
- 35 Editor's note: Often these negotiations involved discussion of what are called "outside promises." These are promises not written into the treaty, but issues and commitments outside the document. This appears to be one of those issues.
- 36 Morris, pp. 33–34.
- 37 Canada Sessional Papers, No. 14, 63 Victoria 1900, Report of the Commissioners for Treaty No.8, September 22, 1899, p. xxxvi.
- 38 Jean L. Manore. "Indian Reserves v. Indian Lands: Reserves, Crown Lands, and Natural Resource Use in Northeastern Ontario," in *Ontario Since Confederation*, Edgar-Andre Montigny and Lori Chambers, eds. (Toronto: University of Toronto Press, 2000), pp. 195–213, 208.
- 39 Diary of G. W. MacMartin, "Journey to N.W.T. in 1905 (re Indian treaty)."
- 40 R. W. Sandwell. "The Limits of Liberalism: The Liberal Reconnaissance and the History of the Family in Canada," in the *Canadian Historical Review*, vol. 84, no. 3, September 2003. pp. 423–450, 433.
- 41 Sandwell, 434; Korneski, 4; Lesley Erickson, "Constructed and Contested Truths: Aboriginal Suicide, Law, and Colonialism in the Canadian West(s), 1823–1927," in *Canadian Historical Review*, vol. 86: no. 4, December 2005. pp. 595–618, 606.
- 42 One would think, therefore, that there would be a great deal of resistance to liberalism, but resisters existed not just because liberalism had excluded them but also because they consciously chose to accept a different code of values. Ruth Sandwell in her response to McKay's article offers rural communities as one example of "resisters," because they maintained family-based systems of work over individualized systems (Sandwell, p. 435). Farmers were accepted within the liberal order framework, and were, in fact, considered pivotal to the development of the country. Those farmers could have been part of the liberal order framework, but for various reasons chose to resist some of its tenets. There were also many women who accepted liberalism's values and fought for political participation, on the basis that patriarchy did give women a place in government, as they were the nurturers who were better suited to develop legislation that would look after the weak and inferior (Korneski, p. 35).
- 43 Erickson, p. 599
- 44 Patricia Jasen. *Wild Things: Nature, Culture, and Tourism in Ontario, 1790–1914*. (Toronto: University of Toronto Press, 1995), p. 19.
- 45 George Colpitts. *Game in the Garden. A Human History of Wildlife in Western Canada to 1940*. (Vancouver: University of British Columbia Press, 2002), p. 40.
- 46 Colpitts, p. 40.
- 47 Colpitts, p. 46.

- 48 Herring, p. 11.
- 49 Korneski, p. 34.
- 50 Paul Romney. *Getting it Wrong*. (Toronto: University of Toronto Press, 1999), p. 15.
- 51 Allan Smith. *Canada, An American Nation?* (Kingston: McGill-Queen's University Press, 1994), pp. 363–368.
- 52 James Morrison. "Shaking the Monarch's Hand: The Crown and the Numbered Treaties, 1871–1929," prepared for Treaty Policy and Review Directorate, (TPRD), Department of Indian Affairs and Northern Development (DIAND), no page number given.
- 53 Morrison, "Monarch's Hand," no page number given.
- 54 Morris, pp. 182–183.
- 55 Morrison, "Monarch's Hand," no page number given.