

The Royal Proclamation of 1763 and the Constitution of Canada

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I want to thank the Land Claims Agreements Coalition for inviting me to participate in this event, and I would like to acknowledge the Algonquins for welcoming us to their traditional territory today.

My objective this morning is to discuss the constitutional status of the provisions found within the Royal Proclamation of 1763 that address the rights of Aboriginal peoples. It is perhaps helpful to begin by recalling that law exists, in one sense, in the form of a 'scratch of a pen' on parchment—to use the phrase Colin Calloway invokes—or, we might say, as digital impressions appearing on computer screens.

But the letter of the law is frequently in tension with law's ambitions for itself as a system of justice. Indeed, the conception of law as the command of the sovereign promulgated by some written text, and the competing conception of law as the instantiation in legal form of principles of political morality to which a community is committed, engage together in a dynamic process of connection and disconnection, of productive synthesis and destructive fragmentation, over time.

In terms of old charters—whether the Magna Carta of 1215 or the Indian Magna Carta of 1763, as the judges used to call the Royal Proclamation—this means, paradoxically, that law can be both dead and alive. An old instrument may be dead as a command of law scratched on a parchment, but the ethic of an instrument may be very much alive and integrated into our broader sense of legality and constitutionalism.

The possibility that the Proclamation's ethic finds legal expression beyond its formal text is, for me, captured most vividly by something I saw when visiting the Museum of Anthropology at the University of British Columbia a number of years ago with my two daughters, who were then about 3 and 7 years old. There we found a new sculpture by Gitksan artist Eric Robertson, completed in 2000, consisting of two large cedar poles that may be turned by pushing carved wooden hands that extend from each pole. Wrapped around one pole was a copper plate covered in small, antique lettering. Those who stop to read the plate will find at the top the words, "A Proclamation...George the Third, by the Grace of God, King of England", and, at the end, after a

long passage of legal language, the words, “Given by my hand at St. James Palace, October 7th, 1763.”

The placement of this copper plate on the polished cedar wood was, I thought then, somewhat incongruous: the cold pomposity of colonial power contrasting starkly with the organic grain of the aboriginal carving. Visitors who had never heard of the Royal Proclamation of 1763 would no doubt be confused by the sculpture. But if they read the accompanying information, they would learn that the copper lettering reproduces a King’s promise to protect Indian land rights, and with that information the effect of the image is, I think, transformed completely.

The sculpture has the effect of upsetting preconceptions about power in colonial and post-colonial worlds. In this sculpture, the sovereign will of a long-dead European monarch comes alive as a bold, ironic assertion of modern aboriginal rights. The words of George the Third are worked into a piece of art that draws inspiration from a traditional aboriginal game involving outstretched hands, and the artist thus imagines—and asks us to imagine—the possibility that the words represent a transcendent voice of justice that is both aboriginal and non-aboriginal in essence.

Is it possible to link art and law in this way? I’ll return to this point in a moment. But, let’s proceed with a more orthodox legal analysis of the Proclamation’s status.

It is important to remember that the Proclamation was an omnibus constitutional instrument for British North America with different provisions for different purposes, and therefore different legal foundations depending upon which provisions we look at. The first question, then, is to ask whether an act of the King made on the advice of his Privy Council—i.e., an imperial order in council—could have accomplished so much. By this time the imperial Parliament at Westminster was seen the sovereign and supreme legislature, and although the Crown acting alone or in Council had certain inherent *executive* powers under the royal prerogative, the Crown did *not* have *legislative* powers, except in rare circumstances. To legislate, the Crown had to act on the advice and consent of the two houses of Parliament.

So, if the King in Council did not have legislative powers, what was the legal foundation for the Proclamation of 1763? Well, as Lord Mansfield explained in the famous 1774 case of *Campbell v. Hall*, the Crown could legislate without Parliament to establish new constitutions for conquered territories—though once the Crown introduced a representative legislature for a new colony, the Crown’s power to make further legislation for that colony without Parliament came to an end. It followed that the provisions in the Proclamation of 1763 establishing new colonial constitutions for

Quebec and East and West Florida, and Grenada, places Britain had recently acquired by conquest, were valid pieces of imperial legislation.

But of course the provisions of the Proclamation of 1763 dealing with Aboriginal nations extended generally and thus applied to, in addition to conquered territories, places that had not been acquired by conquest and places that, whether conquered originally or not, already had representative colonial institutions, and in either of these two latter cases, the Crown's power to legislate by prerogative instrument was questionable.

Indeed, imperial officials appreciated the problem. When he outlined the case for a general imperial law addressing Indian affairs throughout British North America in 1755, Edmund Atkin, later Indian affairs superintendent for the southern district, had argued that because relations with Indian nations were treaty-based, or matters of state, the regulation of those relations fell within the Crown's royal prerogative, and were not matters for local colonial governments. But, in the end, Atkin sensed the potential legal frailty of any prerogative instrument dealing with Indian affairs and recommended that, if a general imperial law was to be made for Indian affairs throughout British North America, it was best for it to be made by Act of the imperial Parliament—then its legal foundations would be unassailable.

The political crisis that precipitated the issuing of the Proclamation did not allow time for an Act of Parliament. The Proclamation was issued, even though its provisions on Indian affairs were acknowledged to be incomplete. But the imperial government fully intended to replace this temporary prerogative instrument with a proper statute. Almost as soon as they had completed drafting the Proclamation, the Lords of Trade set about drafting a bill on Indian affairs to be put to Parliament. The result was the so-called the "Plan of 1764"

The Plan of 1764 is the Act of Parliament for Indian relations that might have been, but never was. The crisis over imperial-colonial relations that exploded with the Stamp Act of 1765 made enactment of this law practically impossible. The Royal Proclamation of 1763 provisions on Indian affairs, admittedly incomplete and temporary, became permanent. Their questionable legal foundations proved, however, to be a nightmare for officials like Sir William Johnson, who bombarded London with stories of how colonists laughed in his face when he told them to obey the Proclamation's rules protecting Indian land rights. Johnson pleaded for statutory powers, though whether colonists in the 13 colonies about to rebel would have had any greater respect for an Act of Parliament is a good question.

This story surrounding the Proclamation's legal basis helps, I think, to explain the position that the federal government has often put forward in modern litigation concerning the Proclamation—a position backed by Professor Paul McHugh from Cambridge University, who has served as an expert witness for the government on this point. That position is simply this: the Proclamation's provisions on Aboriginal rights never had the status of positive law binding on governmental officials; they were, at most, a set of personal royal directions to governors that could be set aside at any time. Although I have the greatest respect for Professor McHugh, and indeed count him as a friend, I don't agree with this argument. It is worth recalling that, as the Proclamation was being made, the case of *Mohegan Indians v. Connecticut* was still winding its way through the British judicial system some sixty years after it commenced—and if this confusing legal saga reveals anything it is that British lawyers and judges were willing to acknowledge that Aboriginal nations, even within colonial boundaries, held a special constitutional status separate from colonial legal orders and a special relationship with the imperial Crown—perhaps, in other words, the Crown in Council *did* have authority to issue legislative directions protecting autonomous Aboriginal nations in North America.

Certainly the idea that the Proclamation's provisions on aboriginal rights were *not* law cuts against the trend of judicial interpretation starting in the late 19th century. Even in the infamous case of *St. Catherine Milling* case in the 1880s, Lord Watson seemed to say that the Proclamation acknowledged Aboriginal nations as having *some* kind of legal entitlement, even if he thought it was a particularly flimsy one.

From this point on, however, the history of the Proclamation in Canadian law is a curious one. It operates as a kind of voice of conscience speaking, if only in a whisper, to lawyers and judges as they struggled over many decades to work out a defensible theory of aboriginal title to land in Canada. Every time it was said that the law did not recognize aboriginal title, and this was said often, the nagging question was raised: but, if so, what was the point of the Proclamation and the treaty-making process it mandated? Unless there was an underlying conception of aboriginal title in law, all of these instruments were a 'grotesque joke', as Justice Emmett Hall put it in the landmark 1973 decision of the Supreme Court of Canada in *Calder v. British Columbia*.

The general sense that had clearly emerged by the 1970s that the Proclamation had been, and remained, a significant part the Canadian legal landscape concerning Aboriginal rights was confirmed by the wording adopted by section 25 of the Constitution Act, 1982, which provides that the rights protected by the Canadian Charter of Rights and Freedoms are not to be interpreted so

as to derogate from “any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763”.

Surely, the incorporation of the Proclamation into the new written Constitution of Canada would reinforce the then emerging judicial narrative on the Proclamation. Indeed, that seemed to be Lord Denning’s assumption when, on the eve of the patriation of the Constitution in 1982, in a case that Aboriginal nations brought in the English courts to prevent patriation, he reassured them in this respect. True, he said, the Proclamation is “most difficult to apply so as to enable anyone to say what lands are reserved to the Indians and what are not. It contains general statements which are wanting in particularity. In this respect it is like other Bills of Rights. The details have to be worked out by the courts.”

Treat the Proclamation like a Bill of Rights, he seemed to say, and through interpretation over time its meaning will gain a rich normative sense compelling for Canadians today.

Here things take another curious turn. First, the relationship between the Proclamation and the Constitution of Canada is complicated. Yes, the Proclamation is mentioned in section 25 of the Charter. Yet it is not expressly listed among the 30 written instruments that are said, in section 52 of the Constitution Act, 1982, to be ‘included’ within the Constitution of Canada. Of course, this point is not determinative, since the Supreme Court of Canada has since ruled in the *Quebec Secession Reference* that the list of documents mentioned as forming the Constitution of Canada in section 52 is not exhaustive.

So, through judicial interpretation, might the Proclamation take its place as one of the texts that form part of the ‘living tree’, as judges call it, of our constitution? Have Canadian judges followed Lord Denning’s suggestion and begin to breathe life into the Proclamation’s text?

The short answer to this question is, no. Let me give three quick examples. First, the Ontario Court of Appeal held in 1984 and reaffirmed in 2001, that the aboriginal rights provisions in the Proclamation were actually repealed 11 years after they were made, by the Quebec Act of 1774, at least in those parts of Canada that fell within the expanded boundaries of Quebec established by that Act. This was an odd conclusion for the courts to reach, given that the purpose of repealing the Proclamation for Quebec was stated to be the fact that the Proclamation’s provisions on Quebec’s civil government, which included the introduction of English law, were unsuited for a French-Canadian population with its own laws. At no point in any of the discussions leading up to the Act, nor in the Act itself, was there any indication that the Indian land provisions in the Proclamation were to be repealed too. Of course, the Act placed a large part of the Indian Country that the

Proclamation temporarily excluded from settlement within the newly expanded boundaries of Quebec. But presumably that simply meant that the general provisions on how Indian lands were to be acquired within colonies open to settlement would have been triggered; there was no indication that Parliament was repudiating these rules, which, of course, still applied in other British North American colonies.

Or did they? The second example of narrow juridical reading of the Proclamation arises in relation to the question of how the Proclamation applied in established colonies where the purchase and then settlement of Indian lands was to be permitted—in particular, for our purposes, the colony of Quebec as originally defined in 1763 and in the old colony of Nova Scotia (i.e., the provinces of New Brunswick and Nova Scotia today). Here, in fact, a plain reading of the text of the Proclamation actually favours aboriginal nations. The Proclamation provides that lands possessed by Indian nations, not having been ceded to or purchased by the Crown, are “reserved” to them, until purchased in a public treaty. This seems to say that wherever Indian nations possessed lands, their title would be respected and private purchases prohibited and public treaties mandated.

Indeed, an opinion by the Attorney General of Quebec in 1766 confirmed this point in relation to the Innu peoples in the Sagnaey region of Quebec. Fast forward to 1996, however, and we find the Attorney General of Quebec arguing that, no, the Proclamation, properly interpreted, means not that lands possessed by Indians not yet purchased by the Crown are reserved to them, but that only lands possessed by Indians and not yet purchased by the Crown *and* specifically reserved to them by some *previous* solemn compact or treaty would be protected—and as there were no such treaties in Quebec the Proclamation did not protect aboriginal title in that province. This point was accepted by the Quebec Court of Appeal in the *Cote* case in 1996 and extended to Nova Scotia by the Court of Appeal in that province in the 2004 *Marshall* case. This conclusion is not only contrary to a plain reading of the text, but contrary, I think, to historical context.

Finally, I should refer briefly to the complex question of sovereignty and self-government. In the Supreme Court of Canada’s first decision on section 35 of the Constitution Act, 1982, *R v. Sparrow*, Chief Justice Brian Dickson and Justice Gerard La Forest quoted the passage from the Proclamation stating that Indian lands were reserved under the Crown’s “Sovereignty, Protection and Dominion”, and stated that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.” But in fact Sir William Johnson vehemently denied, in the years after 1763, that the Crown was sovereign over Indian nations. Indeed, the planned Act of Parliament—the Plan of 1764—the instrument that the Proclamation of 1763 would have been had the imperial government had more time—was

premised upon the assumption that Aboriginal nations were self-governing nations. The Plan assumed, as its drafters said, that “the manner in which the Indians regulate their civil Concerns will suffice to show that a steady and uniform attachment to, and Love of Justice and Equity is one of their first Principles of Government”. And a system of selecting chiefs would be implemented in the northern district only “as far as the Nature of the Civil Constitution of the Indians in this District...will admit.”

But Canadian judges have not paid attention to this part of legal history. Instead, to summarize, they say the Proclamation affirmed Crown sovereignty but that it is otherwise is a dead letter in the Maritimes, in Quebec, and in Ontario. The Proclamation, then, is, in one sense, a dead branch on the living tree Constitution. But this is only half the story. The Ontario Court of Appeal, after holding that the Proclamation had been repealed by the Quebec Act, turned around and held that the substance of the Proclamation—its rule that aboriginal land had to be purchased in public treaty council before being settled—had been embraced by the common law and was binding on governmental officials as such. And it is worth mentioning here that one of the judges at the Nova Scotia Court of Appeal who adopted a narrow reading of the Proclamation was Justice Thomas Cromwell, who of course now sits across the River in the Supreme Court of Canada; but in the same decision he articulated a theory of common law aboriginal title that was rich and compelling and largely consistent with a proper reading of the Proclamation.

The word of the Proclamation is largely dead, but its ethic is very much alive, though perhaps it is only just beginning to flourish, in our law. Indeed, the focus on the ethic rather than the text of the Proclamation may be a good thing for two reasons. First, it is possible, given the peculiarities of the Proclamation’s wording, that it simply never could have been a meaningful textual foundation for aboriginal rights in Canada today. Secondly, and more importantly, the meaning of the Proclamation in our law, like the interpretation of aboriginal and treaty rights generally, must take into account the aboriginal perspective. And, as John Borrows so effectively argues, the true normative life of the Proclamation is not found in the unilateral expression of sovereign will by a dead King, but in the way in which the general principles affirmed by the Proclamation were accepted by indigenous peoples at treaty council fires—like the famous covenant chain treaty council of 1764 at Niagara. The Proclamation’s status in Canadian constitutional law is best seen, I think, as the manifestation of an intercultural constitution formed over a long and hard history of nation-to-nation engagement. We need not get tripped up by the wording of its text. Its ethic is a part of the unwritten constitutional law of Canada, and it is an ethic that, in my opinion, is captured

by the image of intercultural synthesis, and, yes, irony, found in Eric Robertson's wonderful sculptural rendition of the Royal Proclamation of October 7th, 1763.

Thank you.

Further Notes From Mark Walters:

The objective of this presentation was to discuss the Constitutional status of the Royal Proclamation. Insofar as that the letters of the law are consistent with the interests of law itself, law, and the Royal Proclamation, can simultaneously be dead and alive. To demonstrate this metaphor, Eric Robertson's (Gitksan) "Shaking the Crowns Bones" – depicting the words of the Royal Proclamation – evoked. Walters interprets this work as the artist asking onlookers to imagine the words of the Royal Proclamation as a transcending work of justice since they are juxtaposed as an artificial text of metal onto an organic structure.

Since the Crown, in their drafting of the Royal Proclamation, did not consult with Parliament, the question of "Can the Crown legislate legitimately without consulting Parliament?" arises. Given the current relationship that the British had with First Nations in 1763, and the state of disarray that Britain was in financially at this time, the Crown did not have time to consolidate with Parliament prior to the drafting of the Royal Proclamation. One view to this question states that since the Royal Proclamation never had legal governance on the ground (ex. the 13 colonies were on the verge of rebellion), that the Royal Proclamation never had positively binding status (or statute). Regardless of if the Crown and Council did or did not have power to enforce the Royal Proclamation, *St. Catherine's Milling v. the Queen* (1888) evoked the conditions of the Royal Proclamation, even if flimsily, when referring to non-treatied territories under Indigenous title. Article 25 of the Constitution upholds the intent of the Royal Proclamation over that of the Charter of Rights and Freedom. Despite the inclusion of Article 25, Article 52, which outlines the composing documents of the Constitution, does not list the Royal Proclamation; although the list of documents in Article 52 is said to be non-inclusive.

A narrow judicial reading of the Royal Proclamation reveals three areas of importance relevant to the Constitution. The first, in 1774 the Royal Proclamation was repealed in Quebec and the boundaries of Quebec were established (at this time, this included the territories of southern Ontario) through. The second, with the establishment of Quebec and the colony of Nova Scotia (including New Brunswick), British territories were extended through relinquishment. The third area of importance, reinforced in *Sparrow v. the Queen* [1990] that upheld Indigenous rights and

the Crown's fiduciary responsibility to uphold these rights, was the [n/a] agreement of 1764 that upheld First Nations sovereignty.

The Royal Proclamation affirmed the sovereignty of the Crown. Judges in Quebec and the Maritimes have ruled the Royal Proclamation as 'dead'. Despite this, the ethic of the Royal Proclamation is alive whereas the text may not be. The living aspect of this ethic is positive since: 1) the wording has been used for judicial reasoning; and 2) the ethic takes into account Indigenous perspectives, such as the Covenant Chain. This manifestation of intercultural engagement is the foundation that is integral to relational ethic today.