The Royal Proclamation—"The Indians' Magna Carta"?

PROTECTING ABORIGINAL RIGHTS?

Because its concluding paragraphs deal with First Nations and their lands, the Royal Proclamation of 1763 is sometimes referred to as "the Indians' Magna Carta." Many people regard George III's policy for the new territories the United Kingdom had acquired following the Seven Years' War as the guarantor of Aboriginal title law in Canada today. Its greatest champions argue that it is like the foundation of constitutional government and law in Britain, the document that the barons made King John sign in 1215.

Is the Royal Proclamation as central to Aboriginal rights in Canada as the Magna Carta is in the UK? Or have the so-called Indian clauses of the Royal Proclamation been a dud so far as First Nations' rights are concerned? Have Indigenous peoples not been systematically stripped of their traditional territories by rapacious settler societies that emerged in Canada as they did in other former British colonies of settlement?

As other essays in this collection demonstrate, the policy document for eastern North America that King George III issued in October 1763 certainly did not single out First Nations' rights for attention. Its first eleven paragraphs dealt with the boundaries of newly acquired territories and their institutions of governance and law. Only the last five paragraphs addressed First Nations' issues. First, the Proclamation recognized some sort of Indigenous right to possess territories that lay beyond existing colonial boundaries and the height of land to the west of the Thirteen Colonies. These lands, it said, were "reserved to the ... Indians." Then, the document specified the protocol by which these protected lands could legally be acquired. To discourage freelancing by land speculators, the Proclamation said that the reserved and protected lands could be obtained only by the Crown, acting through its appointed agents. These Crown agents could only negotiate for Native land "at some public meeting" called "for the Purpose by the Governor."

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FRAUD AND CONFLICT

These provisions aimed to prevent Britain being dragged into conflicts with First Nations. Before the 1760s, unscrupulous land speculators in the Thirteen Colonies had sometimes obtained a fraudulent deed from a Native American by bribery or alcohol, knowing that the putative vendor had no authority to surrender lands that belonged to his community. When innocent homesteaders who purchased lands from the speculator tried to establish farms in Indian territory, there was pushback from the Natives that sometimes resulted in warfare between First Nations and colonial troops. To end the conflict, the Proclamation closed the interior of the continent to settlement, regulated access to it by traders, and promulgated the rules for exclusive Crown purchase of Native lands.

In practice, the Proclamation was only partially successful in protecting First Nations' lands from fraud and conflict. Beginning in 1764, the custom of having British-appointed governors and Indian Department officials conduct negotiations for First Nations' lands evolved in what is now southern Ontario. Although irregularities occurred—the governor of the region twice had to issue ordinances reminding everyone of the rules—by the 1820s, a system of treaty-making for First Nations' lands was established. As direct control by Britain's Indian Department gave way in stages, between the 1840s and 1860s, to administration of Indian affairs by colonial governments dominated by settlers, the degree of loyalty to the Proclamation protocol for dealing with lands waned.

The staying power of Crown monopoly over negotiating for First Nations' land was illustrated in the 1870s. When the government of Sir John A. Macdonald had to devise a policy for dealing with the tens of thousands of First Nations who occupied the southern portions of the Hudson's Bay Company land in the West, it reached instinctively for the Proclamation-based protocol. In striking contrast to the practices of the American government, which was busy through the 1870s fighting bloody Indian wars in the West, Canada appointed Crown commissioners to negotiate with First Nations for peaceful access to lands for settlement. Quietly and quickly, seven territorial treaties were negotiated that provided for unopposed settlement of a vast inland empire. From 1899 until 1921 in the North, the Crown similarly negotiated another four territorial treaties that gave Canada uncontested access to an enormous storehouse of natural resources. As had been the case in the middle of the 19th century, though, as time went on and the

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Finally, as the Supreme Court has recently held, the honour of the Crown requires the Crown to fulfill its constitutional obligations to Aboriginal peoples in a diligent and purposive manner.

In a sense, these judicial developments are all prefigured in the words of the Royal Proclamation, penned two and a half centuries ago, where the Crown declares in resounding terms:

> 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, which whom We are connected, and who live under Our Protection, should not be molested or disturbed ...
>
> And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent ...

The Supreme Court has increasingly been drawn to the concept of the "honour of the Crown" as the overarching principle of Aboriginal and treaty rights.

The Crown goes on to enact specific measures to address these problems. But the Proclamation's work is not yet done. Today, 250 years later, "reasonable Cause of Discontent" remains.

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non-Native population outstripped the Indigenous, the government's adherence to Proclamation-based protocol weakened.

ABORIGINAL TITLE

The courts revived the Proclamation as a shield of First Nations' rights. The highest court in the British Empire in 1888 had ruled in *St. Catherine's Milling and Lumber Company v. The Queen* that the Proclamation recognized only "a possessory and usufructuary right dependent on the goodwill of the Sovereign." In other words, Indigenous people had a right of usage that Crown and Parliament could abridge or cancel. Beginning in the 1970s, the Supreme Court of Canada began to revise this view of the Proclamation and the law of Aboriginal title. First, in 1973 the *Calder* decision recognized that Aboriginal title existed in law, and could therefore presumably be enforced. Then, the same court in the 1997 *Delgamuukw* decision found that Aboriginal title was something substantive and robust. It was, the Supreme Court said, "a right to the land itself."

This rapid evolution of judicial interpretation was attributable to two things. First Nations were becoming increasingly assertive and effective in advancing their rights. Second, an energetic group of lawyers—Aboriginal and non-Aboriginal—fashioned an expansive understanding of Aboriginal rights in law. As well, when Canada's political leaders refashioned the country's Constitution in 1982, they referenced the Proclamation in the *Charter of Rights and Freedoms*.

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A quarter of a millennium after its promulgation, does the Royal Proclamation of 1763 stand as "the Indians' Magna Carta"? Perhaps, but never wholly, and largely belatedly. The Proclamation is better understood as a barometer of Native–newcomer relations in Canada. When non-Natives need First Nations, relations are harmonious. Proclamation principles are then respected. But when the relationship cools, usually because non-Natives no longer think they need Aboriginal people economically, the commitments concerning Aboriginal lands in the Proclamation are scouted by governments dominated by non-Natives. Whether Magna Carta or barometer of Native–newcomer relations, though, the Royal Proclamation is undoubtedly critically important to Indigenous affairs in Canada today.