

# Is the Royal Proclamation of 1763 a dead letter?

The Royal Proclamation is now 250 years old. Is it still relevant today? Arguably not. The document was drafted in London in the spring and summer of 1763 by a handful of bureaucrats and politicians. It was part of a project to enforce British imperial claims to a vast American territory from which France had recently withdrawn. Most of the territory was actually controlled by independent Indigenous nations—some of them former allies and trading partners of the French, many of them hostile to the incoming English or at best suspicious. The Proclamation was designed to allay those fears while at the same time further imperial ambitions. In effect, it was crafted to deal with a very specific situation—one that has long since passed into history.

In the past two and a half centuries, the territories to which the Proclamation applied have undergone sweeping and profound changes in every sector—political, legal, demographic, economic, social. Territories that were once in the exclusive possession of Aboriginal nations are now shared with people originating from every sector of the globe and ruled by governments elected by popular majorities. How can this ancient document speak to the modern position of Indigenous Canadian peoples? Isn't it just as obsolete as the schooners and barques that carried copies of the Proclamation to America?

In reality, the Proclamation is as relevant as it ever was—some would say more relevant. It embodies the fundamental legal principles that have informed relations between the Crown and Indigenous American peoples almost since the first British settlements were founded in America in the early 1600s. In the watershed *Calder* decision of 1973, Justice Emmett Hall of the Supreme Court of Canada described the Proclamation as akin to the Magna Carta—and the analogy is an appropriate one. While

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responding to a particular historical situation, the Proclamation, like the Magna Carta, sets out timeless legal principles. Changes in circumstances have altered the way in which these principles apply, but the principles themselves are as fresh and significant as ever. Three of these principles stand out.

### TIMELESS LEGAL PRINCIPLES

First, Indigenous Canadian peoples are autonomous nations that have ancient historical connections with the Crown, which stands as the guarantor of their autonomy and basic rights.

Second, these peoples hold legal title to their traditional territories, which cannot be settled or taken from them without their consent.

Third, any important matters that arise between Indigenous peoples and the Crown—such as the transfer or sharing of lands—are to be settled by binding treaties freely concluded between the Crown and the Aboriginal peoples concerned.

In modern times, all three principles have been recognized by the Supreme Court of Canada as part of the legal bedrock of modern Aboriginal and treaty rights, which are now guaranteed in section 35(1) of the *Constitution Act*,

1982. Unfortunately, as the court has noted, in the past these principles were often honoured as much in the breach as in the observance, giving rise to difficult questions as to how they may best be implemented in modern times and how past injustices may best be acknowledged and remedied.

### THE HONOUR OF THE CROWN

In grappling with these questions, 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—one that invigorates the jurisprudence on Aboriginal rights as a whole and acts as a touchstone for the reconciliation of those rights with those of the larger Canadian community.

In decisions such as *Haida Nation* (2004) and *Manitoba Metis Federation* (2013), the Supreme Court has held that the honour of the Crown requires that Aboriginal rights be determined, recognized, and respected. This process must observe the basic principles implicit in the Crown's historical relationships with Aboriginal peoples as well as fundamental principles of justice and human rights.

The honour of the Crown also infuses the processes of treaty-making and treaty interpretation, so that the Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing.” Where treaties remain to be concluded, it requires the Crown to engage in negotiations with Aboriginal peoples leading to a just settlement of Aboriginal claims.

Further, the honour of the Crown gives rise to a duty to consult with Aboriginal peoples and, where appropriate, to accommodate their claims, in instances when the Crown contemplates an action that will affect a claimed but as yet unproven Aboriginal interest.

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 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 advanc-

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ing 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*.

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 barom-

eter 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. 🍁



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