

# The life and times of the Royal Proclamation of 1763 in British Columbia

[The Royal Proclamation's] force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories. It follows, therefore, that the *Colonial Laws Validity Act* applied to make the Proclamation the law of British Columbia.

—Hall J, in *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313, at 395

This quotation from the dissenting opinion of Justice Emmett Hall in *Calder et al. v. Attorney-General of British Columbia* represents the high point of a long struggle by First Nations for recognition of the Royal Proclamation of 1763 as part of “the law of British Columbia.” For over 100 years the Proclamation has played an important, though hotly contested, role in what was known until recently as the “British Columbia Indian Land Question.”

## EARLY RECOGNITION

The history of the Proclamation in BC began shortly after confederation with Canada, when the Dominion government disallowed the new province's *Crown Lands Act*. In recommending this course of action, the Dominion minister of justice explicitly pointed out BC's failure, in direct violation of the policy set out in the Royal Proclamation, to protect or even to acknowledge Indian land rights in the legislation. A slightly amended version of the statute was approved, and the Dominion government declined to pursue the matter of the Proclamation's legal status in BC.

British Columbia's Aboriginal leaders became aware of the Proclamation early in the 20th century, and quickly grasped its significance. In an interview

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in June 1910, a reporter for the *Victoria Daily Colonist* asked some Nisga'a elders why they thought that their legal case for Aboriginal title was strong. There were many reasons, they said, and one of the most important was the Royal Proclamation of 1763. “[T]he King is on our side,” they said, and then quoted from the Proclamation, noting that it “had the effect and operation of a statute of the Imperial Parliament.” The astonished reporter asked how they knew all this when he, a white man, did not. One reason, they said, was that their lawyer was “the very best in Canada”—referring almost certainly to J.M. Clark, KC, of Toronto.

Therefore, it is hardly surprising that the Proclamation is quoted at length in the Cowichan Petition of 1909 and in the Nisga'a Petition of 1913, both of which were taken to the Privy Council

in England by Arthur E. O'Meara, a lawyer and Anglican priest who worked with Clark and eventually replaced him as counsel. The Proclamation continued to be cited and relied on for another 17 years in what amounted to a full-fledged campaign for Aboriginal title.

## DISMISSAL

Then, in 1927, a parliamentary committee dismissed the land claims of the Allied Indian Tribes of British Columbia and Parliament amended the *Indian Act* to make raising funds for this cause effectively illegal, actions that drove the campaign underground. The Great Depression and the Second World War ensured that the BC “Indian Land Question” stayed on the back burner. When Aboriginal veterans returned from the battlefields, the issue resurfaced, especially once the prohibition against funding was rescinded in 1951. Indeed, the Proclamation dominated the new campaign for title, which got under way in the late 1950s.

## RENEWAL

In the *White and Bob* case, Thomas Berger was the first lawyer to argue in court that the Proclamation applied to BC. In 1964, one Court of Appeal judge decided in favour of the Proclamation, one against, and the third did not mention it, leaving its status undecided. Berger repeated his arguments in 1973, this time before the Supreme Court of Canada in the *Calder* case. Three justices decided in favour of the Proclamation, and three against. Once again, its status remained in limbo. In many respects, the point became moot after the 1984 Supreme Court of Canada decision in the *Guerin* case, in which the court decided that Aboriginal title exists at common law, independently of the Proclamation. Ironically, this is a con-

The life and times, page 26

clusion that lawyers for the Nisga'a and the Allied Tribes had reached three-quarters of a century earlier. In fact, in 1909, even the lawyer retained by Ottawa in response to the Cowichan Petition was of this view. The wheels of justice grind exceedingly slow.

The fight did not end there, however. Many still believed that a favourable court decision had the potential to advance the cause of Aboriginal title in BC. In the 1991 trial decision in the *Delgamuukw* case, Chief Justice McEachern acknowledged that "[a] great deal of interesting evidence was adduced about this Proclamation and I estimate almost one-quarter of the arguments of counsel was devoted to this question." In the end, he concluded, "the Royal Proclamation, 1763 has never had any application or operation in British Columbia." On appeal, the Supreme Court of Canada declined to engage with the

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issue in its 1997 decision, merely noting that "although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples" (per Lamer CJ). That statement effectively ended the fight, leaving the legal status of the Proclamation in BC forever undecided.

### A NEW ROYAL PROCLAMATION?

The continuing symbolic power of the Proclamation was highlighted in 2009, when the provincial government of Premier Gordon Campbell and the First

Nations Leadership Council (composed of the BC Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs) retained a small team of historians and lawyers to draft a new Royal Proclamation to accompany proposed legislation recognizing Aboriginal title in the province. The new Proclamation was intended to supplement and complement the original one, and was to be proclaimed by BC's first Aboriginal lieutenant governor, Steven Point. Although this project did not come to pass, the story of the Proclamation in BC may not be over. 🍁

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