The Royal Proclamation of 1763: Roots and Branches

Presented by Brian Slattery, *Professor of Law, Osgoode Hall Law School, York University*

A Living Tree

In 1698, the Onondaga sachem, Sadeganaktie, stated in the course of negotiations with the English at Albany:

> … all of us sit under the shadow of that great Tree, which is full of Leaves, and whose roots and branches extend not only to the Places and Houses where we reside, but also to the utmost limits of our great King's dominion of this Continent of America, which Tree is now become a Tree of Welfare and Peace, and our living under it for the time to come will make us enjoy more ease, and live with greater advantage that we have done for several years past.[1]

It is important to note that the great Tree of Welfare and Peace envisaged here is neither Indigenous nor English, but a joint creation, which encompasses both Indigenous and British territories. It is, if you wish, the outgrowth of inter-societal law.

It is a happy coincidence that in 1930 the Judicial Committee of the Privy Council, which was then the final court of appeal for Canada, employed a similar image in describing the Canadian Constitution:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention" …[2]

In effect, the Canadian Constitution is not forever frozen in the form it took when first enacted. It is a living organism, which interacts with its environment and grows and evolves to meet new circumstances and satisfy new needs. In a word, the Constitution is organic.

The image of a living tree, a tree of Welfare and Peace, is particularly apt for the Royal Proclamation of 1763. For the Proclamation envisages an overarching structure that shelters a

[1] Quoted in Donald A. Grinde J. and Bruce E. Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles, Calif.: University of California American Indian Studies Centre, 1991), pp. 11-12.
[2] *Edwards v. Canada* [1930] A.C. 124 at para. 44.

variety of nations and peoples, both Indigenous and Newcomer, under its protective canopy. As part of the Canadian Constitution, it is capable of growth and change.

This point requires emphasis. Because – let us be clear-eyed about this – the Royal Proclamation of 1763 was at its inception an Imperial instrument, framed in a colonial context and designed in part to further British imperial ambitions. But that does not mean that the Proclamation operates as an imperial instrument today, any more than the British North America Act of 1867, although passed by the British Parliament, maintains Canada as a colony under the imperial thumb.

For Canada is, of course, no longer a British colony but an independent multi-national federation, encompassing within its fold a wide variety of nations and peoples, both Indigenous and non-Indigenous. Just as the way we interpret the British North America Act today is profoundly affected by that fundamental shift, so also our constitutional perspective on the Proclamation of 1763 is altered by the demise of the imperial framework in which it was conceived as well as by the recognition and affirmation of aboriginal and treaty rights in section 35 of the Constitution Act, 1982.

Roots and Branches

The Proclamation of 1763 was drafted to deal with the situation flowing from the formal close of the Seven Years War and the cession of the French colony of New France to the British Crown.[3] It is a complex instrument, which addresses a number of distinct matters, ranging from the boundaries and constitutions of several new colonies to land grants to disbanded soldiers. However, for our purposes, the most important of its provisions come in the final portion of the Proclamation, which deals with Indigenous peoples and their lands. So, for convenience's sake, whenever I speak about the Proclamation here, I am referring exclusively to that final part.

Like a living tree, the Indian provisions of the Proclamation of 1763 have several important roots and a number of significant branches.

The roots are four in number, extending outward in the major directions: east, south, north and west.

[3] For a detailed examination of the Proclamation, its history, scope and legal status, see: Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (D.Phil. thesis, Oxford University, 1979; reprint available at the Native Law Centre, University of Saskatchewan), pp. 191-361.

The first root stretches eastward across the sea to Great Britain, where the terms of the Proclamation were formally drafted and where the basic ideas and conceptions reflected in its terms first took shape.

A second major root of the Proclamation extends southward, to the Thirteen British Colonies that were spread along the Atlantic seaboard and to the network of Indigenous nations that had been linked by treaty and trade to these colonies for more than a century, giving rise to a more or less settled body of inter-societal custom and practice.

A third root stretches northward, to the former French colony of New France, centred on the major settlements at Montréal and Québec in the St. Lawrence Valley, and to the extensive web of relationships between the French and their Indigenous partners and allies, both near at hand, as with the Hurons of Lorette, and farther afield, as with the nations located around the Great Lakes. The practice of the French was well-described in the case of *Connolly v. Woolrich*, decided in 1867.[4] Speaking of the French colonists, Justice Monk observed:

> They entered into treaties with the Indian tribes and nations, and carried on a lucrative and extensive fur trade with the natives. Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usage of the aboriginal tribes, except where they had established colonies and permanent settlements, and, then only by persuasion …

The British were well aware of the character of French relations with its Indigenous allies and concerned at how those allies would view the withdrawal of the French Crown and the arrival of the British Crown to replace it.

This brings us to the fourth root of the Proclamation which extends westward, to the Indigenous nations located in the American interior, which had in the spring of 1763 launched the great war called Pontiac's War, which quickly spread across an enormous territory from the Great Lakes south to the Ohio Valley and involved attacks on virtually every British fort in the interior, threatening the peace and prosperity of the English colonies – a war triggered in large part by the British defeat of the French and Indigenous fears of British intentions.

I leave to other speakers the detailed discussion of these historical roots of the Proclamation.

For it is my task now to look upward, to the great living canopy of the Royal Proclamation, and to identify its major branches, which are four in number and deal with these subjects:

[4] (1867) 17 R.J.R.Q. 75 (Quebec Superior Court)

- Federalism
- Land rights
- Treaties
- Economic participation

Federalism: Autonomy, Connection, and Protection

The Indian provisions of the Proclamation open with this ringing declaration:

> And 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, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; …

This key passage gives rise to a number of important points.

First, the Proclamation applied to all Indigenous nations and peoples living in the North American territories claimed by the British Crown in 1763 – both those located within the boundaries of existing colonies, such as Nova Scotia, Newfoundland, Quebec, Rupert's Land, and the Thirteen Colonies, and also those Indigenous nations living beyond those colonial boundaries, in the so-called "unorganized territories" lying to the north and west.[5]

This point is worth stressing, because it is sometimes thought that the Proclamation applied only to Indigenous Nations and lands located within the "Indian Territory", an area described in a later paragraph of the Proclamation. Much ink has been wasted in debating the exact boundaries of the Indian Territory. Roughly speaking, the Proclamation drew a line southward along the Appalachian mountain chain, reserving lands to the west to the Indians, and confining settlers to the English colonies along the Atlantic seaboard, from Nova Scotia in the north to Florida in the south.[6] But the fact is that the Indian Territory was a temporary expedient, designed to provide a provisional barrier to the westward expansion of settlement, until a more precise line could be drawn by treaties with the Indigenous nations concerned – a line that was actually drawn over the next decade or so, most notably at the Treaty of Fort Stanwix in 1768.

[5] For detailed discussion of this point, see Slattery, *The Land Rights of Indigenous Canadian Peoples*, footnote 3, above, pp. 191-282.
[6] See discussion in Slattery, *Land Rights of Indigenous Canadian Peoples*, footnote 3, above, pp. 268-282.

In short order, of course, the conflagration ignited by the American Revolution in 1776 set this treaty line ablaze like so much straw.

But, as the preamble makes clear, the scope of the Proclamation's provisions was much wider than the Indian Territory and encompassed the full extent of American territories claimed by the British Crown in 1763, whether inside or outside the Indian Territory, including lands falling within the boundaries of colonies such as Quebec, Nova Scotia and Rupert's Land.

There is a second point that needs to be stressed in considering the wording of the preamble. Like other important constitutional instruments, the Proclamation does not speak only once, rather it continues to speak.[7] So, as the British Crown expanded westward and northward in the next century and a half, it established relations with a number of new Indigenous nations and peoples. As Justice Hall of the Supreme Court noted in the famous *Calder* case,[8] the Proclamation followed the Crown, such that these newly connected nations and peoples also fell within the protective scope of the Proclamation's provisions:

> Its 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.[9]

Thus, for example, the Indigenous peoples of British Columbia stand to benefit as much from its terms as the Mi'kmaq and Abenaki of the East.

A third point may be made. The preamble indicates that the Indigenous nations in question live under the protection of the Crown. In its recent decision in the *Manitoba Metis Federation* case,[10] the Supreme Court traced the modern concept of the "honour of the Crown" back to this feature of the Royal Proclamation. The Court went on to observe:

> This "Protection" … did not arise from a paternalistic desire to protect the Aboriginal peoples; rather it was a recognition of their strength.[11]

Overall, then, the preamble of the Proclamation envisages a complex array of autonomous Indigenous nations, living within their own territories, under their own laws and constitutions, all benefitting from the protection of the Crown.

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[7] For detailed discussion, see Slattery, *Land Rights of Indigenous Canadian Peoples*, footnote 3, above, at pp. 329-49.
[8] *Calder et al. v. Attorney-General of British Columbia* [1973] S.C.R. 313.
[9] At p. 395.
[10] *Manitoba Metis Federation Inc. v. Canada (Attorney General)* 2013 SCC 14, *per* McLachlin C.J. and Karakatsanis J. for the majority.
[11] At para. 66.

Thus our three key-words – autonomy, connection, and protection – which, taken together, amount to federalism.

Land Rights

The Proclamation formally recognizes – what was already recognized under inter-societal law and practice – that Indigenous nations held legal rights to all lands in their possession, unless those lands had been formally ceded or surrendered to the Crown.

As Chief Justice Dickson stated in the *Guerin* case,[12] the Indian interest in their lands "is a pre-existing legal right not created by Royal Proclamation … or by any other executive order or legislative provision."

Nevertheless, the Proclamation stands as an important witness to the existence of Indigenous land rights and to the character and scope of those rights.

First, as we have already noted in discussing the preamble, the Proclamation's recognition of Indian title is not confined to the "Indian territory" but extends to all territories claimed by the Crown, both inside and outside formal colonial boundaries.

But secondly, a reading of the Proclamation and the historical materials associated with its drafting and implementation makes it clear that Indigenous land rights were not confined to village sites, cultivated fields or other areas of intensive use and significance, they included all areas that were actually used and controlled by the Indigenous nations concerned.

Witness, for example, the letter sent in January 1763 by Lord Egremont, Secretary of State for the Southern Department, to Sir Jeffrey Amherst, Commander in Chief of British Forces in North America. Alluding to the danger of an Indian war, Lord Egremont explains that the King wished:

> to conciliate the Affection of the Indian Nations, by every Act of strict Justice, and by affording them His Royal Protection from any Incroachment on the Lands they have reserved to themselves, for their hunting Grounds, & for their own Support & Habitation.[13]

Treaties

[12] *Guerin v. Canada* [1984] 2 SCR 335 at para. 89.
[13] Quoted in Slattery, *Land Rights of Indigenous Canadian Peoples*, footnote 3, above, at p. 192.

The third major branch of the Proclamation reflects the long-established practice whereby relations between Indian nations and the English and French Crowns were carried on by way of treaties, which were concluded orally in joint council and sometimes reduced to writing by the European parties. Thus the Proclamation prohibits any private purchases of Indian lands and declares:

> if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that purpose by the Governor or Commander in Chief of our Colonies respectively …

This provision emphasizes both the consensual nature of treaty-making as well as its public nature, conducted in assembly with representatives of the Crown.

Economic Participation

The final major branch of the Proclamation is one that is often ignored but in fact is quite significant. In one of its closing paragraphs, the Crown sets out detailed provisions governing trade between Indians and settlers, declaring that the trade shall be open, but subject to licensing and regulations prescribed by the Crown.

What these provisions indicate, in effect, is that Indigenous nations were expected to continue to play an important part in the economic life of British territories in America, to be active and flourishing participants in that life. These expectations stand in stark contrast, then, to the policies of economic marginalization and exclusion that characterized a long series of Canadian governments in its administration of the reserve system under the Indian Act.

There is a good deal more to be said about all of these matters – but I wish to leave you only with one final thought. For all its faults, and for all its imperial trappings, the Royal Proclamation of 1763 still stands as a constitutional beacon, holding out the promise of harmony, cooperation, and mutual respect. It is a sobering but important fact that, even today, 250 years later, we have much to learn from its terms.