

The Impact of the Royal Proclamation of 1763 on Quebec: Then and Now

Presented by: Ghislain Otis, Professor Law and Canada Research Chair on Native Peoples and Legal Diversity, Faculty of Law, University of Ottawa

The Royal Proclamation was the first imperial constitutional instrument in Canada that brought within its fold the indigenous people, the French people of Canada, and the British. For the first time in Canada the question of the fate of the French and the aboriginal peoples in British North America was posed.

I want to frame my presentation within this foundational triangular or tripartite relationship, which was laid down in the Royal Proclamation and which substantially endures to this day, although it has very much evolved since then with the emergence of a strong multicultural dimension.

In discussing the impact of the Proclamation on Quebec, I will of course be talking about its impact on the people that occupied the territory before the British took over and called it “The Province of Quebec” for the very first time in 1763.

These people were the aboriginal peoples who occupied their traditional land and also some reserves created under the French regime and the French people of Canada who had been in the St-Lawrence Valley since the early 17th century. Of course, the territory of New France had been much larger than the tiny Province of Quebec created by the Proclamation but the majority of French settlers did live in that part of the territory claimed by France.

I will first briefly canvass the impact of the Proclamation on the French people which has not yet been addressed in detail today. I will also touch on the impact of the Proclamation on the relationship between the French people and indigenous peoples. I will then move on to its impact on indigenous peoples. Since this aspect has been extensively covered by other speakers, I will only add a few additional comments.

1. The Relationship between the British Crown and the French people of Canada: A Proclamation of Conquest

I use the phrase “French people of Canada” for the sake of convenience because the most exact expression would be “*les Canadiens*”/the Canadians. This is what the French people of Canada called themselves and that is what they were called by other people in 1763.

The impact of the Proclamation on the French people cannot be fully appreciated without a good understanding of the drama they had experienced in the war that had just ended in 1760 with the capitulation of Montréal.

The French people of Canada had been traumatised, impoverished and exhausted by the military invasion and conquest of what had been their homeland for 150 years. In the final year of the war, each village and hamlet in the St-Lawrence Valley had mobilised to repel the invaders, hundreds of men and boys ended up being killed, hundreds more were wounded and made prisoners.

During the siege of Quebec City, villages and crops were burned by the British troops, cattle were destroyed, whole communities were displaced. Women and children died in large numbers from the diseases and the deprivations caused by these displacements. The French military, administrative and commercial elites were sent to France or emigrated in substantial numbers.

Coming in the immediate aftermath of the Treaty of Paris, the Proclamation is the constitutional expression and institutional implementation of the conquest of the French people and their colony. It is therefore the constitution of defeat, the constitution that confirmed a dramatic reversal in status and fortune: from making colonial claims the French became a colonised people. This would change forever how they defined themselves and the way they saw their destiny in Canada.

Several aspects of the Proclamation were regarded as hostile or inimical to the French people in the colony of Quebec:

Religious exclusion: the Test Oath

The new British sovereign was in general hostile to Catholics. Practically all the French were Catholics and religion was a core element of their cultural and social fabric.

Although the British had no choice but to tolerate the presence of Catholics in the colony, the legal right of the Catholic Church to exist in Quebec was not formally recognised. Moreover, the French were denied any access to the colonial administration and judiciary as a result of the requirement that all public officials swear the Test Oath whereby they had to repudiate the central tenets of the Catholic religion.

As a result, the population of the colony was administered by a few English-speaking British officials and merchants.

Some exceptions were made by the governors, but the rule produced its systemic discriminatory effect until it was later abolished by the Quebec Act, 1774. Not surprisingly this led to alienation on a large scale and to pressing calls for an end to this discrimination.

No political representation

While other British colonies had been granted an elected legislative assembly, the people of the newly created colony of Quebec was not given any political representation in the colonial institutions. A non-elected legislative and executive council composed of British protestants was set up and no legislative assembly was summoned even if this was a possibility contemplated but not mandated by the Proclamation. If an assembly had been put in place, only protestants could have been elected because of the Test Oath. This would have been grossly unjust and would have made such an assembly unacceptable to the French people who also feared unjust taxation from this assembly.

The vast French majority was thus governed by a handful of unaccountable British administrators entrusted with all the power. This was certainly no improvement on the centralised French regime despite the propaganda about British liberties that pervaded official communications in the colony.

No representative assembly was created until 1791 and no truly democratic institutions until the middle of the 19th century.

Attempted Abrogation of French law

The Proclamation decreed that English law was introduced in the colony of Quebec. It stated that “ *Persons inhabiting in, or resorting to Our said Colonies, may confide in Our Royal Protection for the Enjoyment of the Benefit of the Laws of Our Realm of England*”

It consequently empowered the colonial government to create courts to deal with civil and criminal cases “*according to Law and Equity, and as near as may be agreeable to the Laws of England,* “. Accordingly, governor Murray issued an order pursuant to which civil and criminal courts were created and empowered to hear and decide all cases following English law.

Just like the new protestant rulers thought that their faith was more enlightened than that of so-called “popists”, they also assumed that English law was superior to French law and that its introduction would help the new subjects to appreciate the advantages of British civilisation.

But this was a break with the principle of continuity usually applied to conquered colonies under imperial law and such an abrupt introduction of English law was controversial even among British officials. The French received this aspect of the Proclamation as a brutal attempt at doing away with the French legal tradition in Canada. There was a minor exception in the lower court of common pleas, where the application of French law between French parties was tolerated subject to public order but only for causes of action arising before October 4 1764. New causes of action were to be adjudicated in accordance with English law.

This was a shock to the French people because it was an attack on a vital aspect of their life and culture, on the way their economic and social institutions were organised. It threatened to create legal uncertainty and arbitrariness on a massive scale. It was also a legal marginalisation of the French language which was inseparable from the law. English law was alien, not accessible in French and applied by judges speaking an alien language.

So, as a result, the French people did their best to avoid the official British institutions and continued to apply the only law they knew in their private dealings and agreements. They settled their dispute through non judicial or informal means on the basis of French law whenever they could. But that was not always possible.

This official policy regarding the legal system created almost unanimous resistance and touched off countless demands for the reintroduction of French law. It was partially reversed by the Quebec Act, 1774.

Linguistic marginalisation

Although the most important official documents were translated into French out of sheer necessity, the French population did not have access to a French-speaking judiciary and the

ordinary business of the administration was conducted in the English language. The language issue was another reason why the French did not, on the whole, use the official justice system.

The experience of the Royal Proclamation has shaped the collective consciousness of the French people in Quebec up to this day. In 1763, they realised that their very survival as a distinct people in this country would become an issue. It marked the beginning of a long march toward some degree of respect, autonomy and cultural security on a primarily Anglo-American continent.

The French people have been struggling to get past the Royal Proclamation with some successes and several setbacks. In 1867, they secured for the first time control of democratic institutions in British North America. It took the Quebec people two centuries to move beyond the “culture of survival” (*la culture de la survivance*) which the Proclamation was strongly influential in creating. This did not happen until the so-called “quiet revolution” of the 1960’s.

But even more recently, it was no coincidence that the distinct society clause in the doomed Meech Lake Accord of 1987 mentioned the civil law system and the French language as two defining characteristics of Quebec. Is it not obvious that the memory of the Royal Proclamation is still alive?

This explains why, if we set aside here the aboriginal clauses, very few people in Quebec would want to celebrate the Royal Proclamation today. It was not the foundation of anything to be treasured or cherished by the French people today. Later constitutional developments redressed major wrongs inflicted by the Proclamation but the very fundamental question that arose on October 7th 1763 is still with us. This question is “what is the future of a distinctive Quebec in Canada?”

2. The Relationship between Aboriginal peoples and the French people: A Proclamation of Division

Another lasting heritage of the Proclamation in Quebec relates to its impact on the relationship between the French and aboriginal peoples.

The French Crown had not developed a formal policy of recognising indigenous title and rights nor the practice of signing territorial treaties with its indigenous allies. But the absence of such specific forms of recognition did not mean that the French considered the aboriginal to be

without any right. The French simply dealt with the matter differently from the British because the issue of extinguishment of aboriginal title –which had been key to British colonisation- was virtually non-existent in practical terms given the specific geographic, economic and political pattern of French settlement. The continuing presence of the French in North America depended heavily on their military and commercial alliances with the aboriginal peoples and their colony was never intensively settled the way the British colonies of the Atlantic seaboard were. Clashes over territory did exist but were much less frequent in the French colony, so the issue of coexistence on the land was settled on an ad hoc basis that did not entail a wholesale expropriation of indigenous peoples throughout the colony.

The Royal Proclamation confirms that the longstanding relationship and existing alliances between the French and the aboriginal peoples of Canada have ended. All the issues addressed in the Proclamation that are vitally important to aboriginal peoples are now firmly in the hands of the British Crown, that is, military matters, diplomacy, land rights, trade and European settlement.

From then on, the relationship between the French and the aboriginal peoples is fundamentally transformed and each people will gradually tend to define its interests separately from the other. Each will fight for its survival and its development.

3. The Relationship between the British Crown and Aboriginal peoples: A Proclamation of Discovery

Through the Proclamation, King George III exercised his new discovery authority over the former territory claimed by France. The sovereign solemnly claims in this instrument that Indians tribes and nations “*live under our protection*” and declares even the Indian country to be “*our dominions and territories*” even though the land had not yet been ceded or purchased by the Crown. This land is reserved “*under our sovereignty, protection and dominion*”. Aboriginal peoples retain limited rights of first occupants with respect to their land subject to the exclusive right of the Crown to acquire these rights through a public procedure laid down in the Proclamation. While their internal sovereignty or self-governing status may have survived (*Indian Nations*), they are not permitted to deal with any other European power than the British crown.

These elements of the Proclamation are nothing less than the King claiming his discovery title to all indigenous land, his right of pre-emption over this land and his duty to protect and civilise Indian people. This is a very formal unilateral assertion of sovereignty over Indigenous Canada and its land and resources based on the logic of *Terra Nullius*.

Terra Nullius was the notion that countries inhabited by indigenous peoples could be deemed to be without a sovereign and thus unilaterally annexed through mere possession by European powers because indigenous political and legal systems were deemed too backward to require that a sovereign to sovereign relationship be established with them before occupying their territory.

The Proclamation was by no means the first British act of discovery in North America. It is how England claimed the land granted to the Hudson Bay's Company and British Columbia. It does not embody an absolutist application of *Terra Nullius* since the aboriginal people retain a limited right to own the land but they have been unilaterally deprived of their status as fully sovereign nations capable of entering into free relationships with other nations.

The Discovery doctrine figures prominently in numerous treaties that were signed in the following two hundred years. It is interesting to look, for example, at the preamble of the numbered treaties in which it is said that Her Majesty is dealing with "Her Indian subjects" and "Her Indian people", thus making clear that Crown sovereignty was the object under negotiation.

The logic of Discovery has remained to this day at the heart of state ideology in Canada which treats Crown sovereignty over aboriginal people as inherently valid and indefeasible, it is still shaping government policy –take for example the federal policy statement on the inherent right to self-government. Enduring adhesion to Discovery has also led to the adamant rejection by the Canadian government of any provision in the *UN Declaration on the Rights of Indigenous peoples* that would affirm a right to external self-determination.

It is still the very basis of the Supreme Court's jurisprudence regarding aboriginal rights and treaties in which the Court insists that s. 35 rights must be reconciled with Crown sovereignty. Indeed, I would argue that it is even expressed in s. 35 of the Constitution Act, 1982 which refers to the "aboriginal peoples of Canada" thus reaffirming the political incorporation of these people by the Canadian state.

This is a lasting legacy of the Royal proclamation.

Over time, the extent of the land rights granted to aboriginal peoples in the colony of Quebec by the Proclamation has become subject to both academic and legal debate. There has been general agreement that the Proclamation has granted rights to aboriginal peoples in that part of today's Quebec included in the "Indian Country" (Lands lying between the newly established border of Quebec and the border of the Hudson's Bay Company).

But the extent to which the Proclamation constitutes an independent legal basis for rights to ungranted land within the boundaries of the colony of Quebec has been the subject of much debate between historians and legal scholars. There is consensus that all existing Indian reserves within the colony were protected by the Proclamation and it would probably not be very controversial to state that lands reserved by treaty, if any, were also covered.

But does the Proclamation also grant an independent legal title to all the land traditionally possessed and used by the aboriginal people within the colony of Quebec but not formally incorporated into a reserve or set aside in a treaty? Conflicting answers have been offered by scholars and lawyers on the basis of various textual and contextual arguments.

The Quebec government has in the past taken the position that the Proclamation provides no independent title to unceded land not specifically reserved. One of the most controversial (and dubious) arguments put forward by the Crown in right of Quebec was that the Proclamation was not intended to create new rights and that since the French crown had extinguished aboriginal rights, the Proclamation could not recognize pre-existing rights that did not exist. This argument about the impact of French sovereignty was rejected by the Supreme court in *Côté*. The Court ruled that aboriginal rights on ancestral lands, are self-standing rights not dependent upon recognition by the Proclamation and that they have survived within the territory formerly claimed by the French wherever they have not been specifically and clearly extinguished. The court ruled quite rightly that the French had not effected a blanket extinguishment of all aboriginal rights and that such rights may thus be claimed to this day under s. 35 of the Constitution Act.

Thus, the controversy as to whether the Proclamation is an independent basis for title to traditional land within the former colony of Québec has to a substantial extent lost its practical legal interest. There is, in other words, no need to rely on the Proclamation as legal basis for a claim to land traditionally possessed by aboriginal people within the Québec colony of 1763 if the conditions laid down for the application of s. 35 are met. Section 35 provides a sufficient basis for such a claim and even a stronger one because it is constitutionally entrenched whereas the formal constitutional status of the Proclamation is not clear.

The Proclamation, however, might still be important in cases where an aboriginal people cannot make out a claim under s. 35 because the test developed by the courts for proving aboriginal rights or treaty rights cannot be met. This could be the case of some old reservations created under the French regime assuming it is arguable that no aboriginal or treaty right exist in some of these reserves.

Conclusion

I hope this presentation has helped to understand the very profound and lasting effect the Royal Proclamation has had on the relationship between the Crown, the aboriginal peoples and the people of Québec. Both the French and the aboriginal peoples found themselves under a new and alien imperial sovereign. The French had been conquered but not the aboriginal peoples who were nonetheless “discovered” and thus subjected to the British Crown’s affirmation of sovereignty. The French inhabiting Québec have been able to achieve some provincial autonomy in 1867 but most aboriginal peoples are still striving for a just relationship with Canada.

The Proclamation was the first act in an ongoing constitutional drama where decolonisation and reconciliation are at stake. The need for reconciliation with aboriginal peoples is increasingly recognised but the need to address Quebec’s longstanding constitutional concerns does not appear to be a priority. It remains to be seen how far we will have gone when the Proclamation turns three hundred.