

## UNSETTLING THE ROYAL PROCLAMATION OF 1763: A SUBSTANTIVE ANALYSIS OF SECTION 25 OF THE *CHARTER*

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*The Canadian Charter of Rights and Freedoms has a significant impact on rights discourses in Canada. Section 25 of the Charter protects Aboriginal rights from infringements of the rights and freedoms endorsed elsewhere in the Charter. Section 25 also protects and codifies rights created by the Royal Proclamation of 1763. Despite this inclusion, Royal Proclamation rights have remained relatively undefined in the history of the Crown-Indigenous relationship. In this article, I investigate the content of Proclamation-based Aboriginal rights protected by section 25 by focusing on the Proclamation, the legislative development of section 25, and recent jurisprudence of section 25. I then take these insights and apply them to two recent Aboriginal rights cases: Rice v. Agence du revenu du Québec and Restoule v. Canada. In doing so, I problematize the argument of section 25 as a savings provision and argue that there is a disconnect created by section 25, as the legislative intent of these rights was for their content to be determined at a later date, and yet, they never were determined. Accordingly, if the settled interpretation of the Proclamation were to become unsettled, there could be an expansion of Aboriginal rights within Canada.*

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I. INTRODUCTION

The Royal Proclamation of 1763 is subject to many interpretations, cementing its role as a crucial, if not at times contradictory, document in the Crown-Indigenous relationship.<sup>1</sup> For the Crown, this document is often understood to be the British declaration of sovereignty over the lands that are now claimed by the Canadian State. It legitimates the Crown’s claim to authority. For many Indigenous claims, this document recognizes the nationhood and political authority of Indigenous peoples over their territories.<sup>2</sup> It sets out explicit parameters for the land, which without treaty or purchase by the Crown, was to remain in the possession of the relevant Indigenous nation.

The historical importance of the Royal Proclamation of 1763 on Aboriginal and treaty rights is therefore hard to understate.<sup>3</sup> The Royal Proclamation, however, is now hardly thought to determine Indigenous rights, with one legal scholar even saying it is “dead” as a matter of written law.<sup>4</sup> Meanwhile, Aboriginal rights in Canada have been consistently framed and interpreted in a limited manner, maintaining the colonial relationship between the Crown and Indigenous peoples. Successful court cases have often further entrenched notions of Crown sovereignty, title, and claims that Indigenous peoples and nations have sought to contest in the first place.<sup>5</sup> The bedrock of these contestations has been the constitutional guarantee of “aboriginal and treaty rights” in section 35, formed as a result of the *Constitution Act, 1982*.<sup>6</sup> These rights have attracted a host of jurisprudence, scholarly literature, and societal commentary; they are well-known to Indigenous nations and Canadian

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<sup>1</sup> George R. Proclamation, 7 October 1763, (3 Geo III), reprinted in RSC 1985, App II, No 1 [Proclamation]. Also referred to as the Royal Proclamation of 1763, Royal Proclamation, and Proclamation interchangeably in the text of this article.

<sup>2</sup> Throughout this article, I use Indigenous to signify a people or nation, as well as Indigenous peoples as a whole. I use Aboriginal to denote specific cases and the class of rights recognized by the Crown.

<sup>3</sup> I am grateful to an anonymous reviewer who brought to my attention the ways in which the Proclamation impacts both Aboriginal and treaty rights. The article’s main focus is on Aboriginal rights as they are recognized by the Crown, which certainly includes treaty rights. Where applicable, such as Part IV of the article, distinctions are made to recognize the different elements of Aboriginal and treaty rights. The distinction between these two sets of rights is a focus throughout the entire article.

<sup>4</sup> Mark Walters, “The Aboriginal Charter of Rights: The Royal Proclamation of 1763 and the Constitution of Canada” in Jim Aldridge & Terry Fenge, eds, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (Montreal: McGill-Queen’s University Press, 2015) 49 at 51, 67. Walters’ analysis of the Proclamation is the judiciary’s narrow modern reading of the Proclamation and could lead one to suggest that it is “a dead branch” on the living tree of the Constitution (Walters, *ibid* at 51). Walters’ own position is that “the Proclamation is largely dead as a direct source of written law” although “its unwritten ethic is very much alive and perhaps only just beginning to flourish in our law” given the beginning of what Walters sees as an intercultural commitment in Canadian law (Walters, *ibid* at 67).

<sup>5</sup> An example of how judicial engagements with the Constitution have further entrenched colonial systems and beliefs is provided in John Borrows, “Canada’s Colonial Constitution” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017). A case-by-case analysis of colonial narratives in recent jurisprudence is explored in Gordon Christie, “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*” (2005) 23:1 Windsor YB Access Justice 17.

<sup>6</sup> Being Schedule B to the *Canada Act 1982* (UK), 1982, ch 11. Section 35(1) reads “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” The section now includes three other parts, further defining the contents of these rights.

academics alike.<sup>7</sup> Less explored, however, is the interaction between Aboriginal rights and section 25 of the *Canadian Charter of Rights and Freedoms*,<sup>8</sup> which places the guarantees of the rights recognized by the Proclamation within the Constitution. The text of section 25 is as follows:

The guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.<sup>9</sup>

Despite the inclusion of the Proclamation, little scholarly attention has been spent on the content and extent of Royal Proclamation rights recognized in section 25(a).<sup>10</sup> Of the existing literature, there tends to be a focus on the saving provision aspect of section 25, to the exclusion of focusing on Royal Proclamation rights protected by section 25.

This investigation begins by asking what rights, based in the Royal Proclamation of 1763, are protected by section 25 of the *Charter*? In this article, I argue that the content of these rights was undetermined at the time of inclusion. The second part of this argument is that there is a “settled” judicial narrative around the Proclamation, that constrains these rights, and thus, requires *un-settling*. I expand notions of settled and unsettled narratives throughout the article, with a focus on the settled narrative as the current, static view of the Proclamation. I ground this argument in the context of the unjust relationship between Indigenous nations and the Crown, with a focus on the inconsistencies, contradictions, and tensions of the discourse surrounding Aboriginal rights in the Royal Proclamation.

I start this article with an analysis of the Royal Proclamation, focusing on the settled narrative and Indigenous perspectives of the Proclamation, with an emphasis on the Treaty of Niagara.<sup>11</sup> I then focus on the historical development of section 25, in order to show that the inclusion of Proclamation rights was undetermined at the time of inception. The third part

<sup>7</sup> For a collection of Indigenous and non-Indigenous perspectives on the effects of section 35, see Ardith Walker & Halie Bruce, eds, *Box of Treasures of Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003).

<sup>8</sup> Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982*, (UK), 1982, ch 11 [*Charter*].

<sup>9</sup> *Ibid* [emphasis added].

<sup>10</sup> The most noteworthy studies of section 25 include Bruce H Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988); William Pentney, “Part I: The Interpretive Prism of Section 25” (1988) 22:1 UBC L Rev 21; Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1982–1983) 8:1/2 Queen’s LJ.

<sup>11</sup> The Treaty of Niagara, as will be explored throughout the article, did not result in a written treaty as many of the succeeding Crown-Indigenous relations did. Instead, this was a conference between many Indigenous nations and the Crown that resulted in an alliance and agreement on how the Crown-Indigenous relationship was to proceed on Indigenous lands. It essentially legitimized the provisions laid out in the Royal Proclamation — itself proclaimed a year earlier — and explained by William Johnston on the King’s behalf with Indigenous nations. For a recreation of the wampum belt, see “Wampum Belt, 1764 Niagara Covenant Chain,” online: *Canadian Museum of History* [perma.cc/G2QW-YZWL] [Treaty of Niagara].

focuses on different interpretations of rights provisions provided by section 25. I then conclude in a fourth part with a consideration of judicial reconciliation, and a comparative look at two recent court cases. Unsettling the Proclamation would not just challenge numerous realities of the modern relationship between the Crown and Indigenous peoples; it would also directly challenge the *foundations* of this relationship. In doing so, Indigenous contestations of Crown authority become further illuminated, contextualized, and justified.

## II. THE ROYAL PROCLAMATION OF 1763

The Royal Proclamation of 1763, regardless of interpretation, is a remarkable document in the history of relations between Indigenous peoples and the Crown.<sup>12</sup> In 2013, Governor General David Johnston described the Proclamation as foundational to Canada and that its principles of partnership mean “it is one of Canada’s most unique and important contributions to the world.”<sup>13</sup> Johnston’s statement is a tribute to the tenets set out for peaceful relations between two disparate groups: Indigenous peoples and non-Indigenous settlers. Statements like this are common throughout Canadian history; however, they also reveal a thread of competing narratives.

There are, as I see it, two competing narratives of the Proclamation. One is the settled narrative which sees the Proclamation as part of a settled judicial narrative about how the Proclamation recognized existing Aboriginal rights. The second, notably influenced and led by Indigenous perspectives, is an emphasis on the Treaty of Niagara — marked by terms of mutuality, consent, and alliance. In this section, I will review each interpretation and its various implications for understanding the Proclamation rights protected by section 25.

### A. CONTEXT AND CONTENT

The Royal Proclamation of 1763 was proclaimed by King George III on 3 October 1763. The declaration was in response to the *Treaty of Paris*, itself a treaty sorting the recent British victory over the French Empire in the Seven Years War (1756–1763). In the context of what is now North America, the British Empire became the most powerful European actor and sought to assert its claims over large swaths of the territory previously claimed by the French.<sup>14</sup> The British, however, were keenly aware that their claims were not the only ones

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<sup>12</sup> The Proclamation has a lengthy history amongst Indigenous political organizing, something that will be explained throughout the article. One such example of the document’s importance is mentioned in the preamble of the Charter of the Assembly of First Nations: “THAT the Royal Proclamation of 7 October 1763 is binding on both the Crowns of the United Kingdom and of Canada,” (see *Charter of the Assembly of First Nations* (Ottawa: Assembly of First Nations, 2021), online: [perma.cc/FW6F-CSWW]). One other prominent example is Call to Action 45 of the Truth and Reconciliation Commission, which reads: “We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764 and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown.” The Call to Action also calls for (1) repudiating *terra nullius*; (2) adopting the United Nations Declaration on the Rights of Indigenous peoples; (3) renew and establish Treaty relationships; and (4) reconciling legal and political orders to include Indigenous nations in Confederation. See Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission: Calls to Action* (Ottawa: TRC, 2015) at 4.

<sup>13</sup> David Johnston, “Address by the Governor General of Canada” in Aldridge & Fenge, *supra* note 4, 7 at 8–9.

<sup>14</sup> *Treaty of Paris*, 10 February 1763 (London: Owen and Harrison, 1763). Article IV of the *Treaty of Paris* saw the French Empire cede its territorial claims to what is now Canada, transferring control to the British Empire.

over this land, and as a result, the Proclamation paid significant focus to the Indigenous nations of the territories the British were now claiming as a result of the war. The British knew the importance of alliances with Indigenous peoples because of the latter's involvement in the Seven Years War and their strong control over these lands the British now claimed.<sup>15</sup> Thus, the Proclamation at once acknowledged this alliance and sought to preserve the British alliances with Indigenous peoples. In no uncertain terms, it establishes the rules of settler interaction with Indigenous peoples.

One of the most significant elements of the Proclamation is the restrictions on the settlement and purchasing of Indigenous land. The Proclamation reaffirmed Indigenous possession of land, and strongly restricted settlers from interfering with these lands:

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.<sup>16</sup>

This restriction was backed up by a prohibition of settlement on unceded Indigenous land, which stipulated that: "We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements."<sup>17</sup> The main task of the Proclamation was to facilitate and regulate settlement in Indigenous territories, now co-inhabited by settlers. However, the Proclamation also recognized the political and legal autonomy inherent to Indigenous nations. The provisions concerning Indigenous peoples, as Brian Slattery writes, "contemplates a quasi-federal arrangement in which a protective cloak of imperial rule is thrown over a host of autonomous Indigenous nations, living within their own territories, with their own laws and constitutions."<sup>18</sup> The significance of the Proclamation to the two competing narratives is hard to overstate; with the basic context and content established, we can move to surveying each interpretation.

## 1. THE SETTLED NARRATIVE

The settled narrative interpretation rests on the idea that the Proclamation was a unilateral declaration of sovereignty by the Crown that did not take Indigenous perspectives into account, and eventually, evolving circumstances meant this document has ceased to matter.

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<sup>15</sup> See Kent McNeil, "Indigenous and Crown Sovereignty in Canada" in Michael Asch, James Tully & John Borrows, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 293 at 301 [McNeil, *Sovereignty*]. In terms of the actual lands "acquired" by the British conquest of the French Empire, we should be skeptical as to how much authority France actually exerted over these territories. These lands were mainly controlled by Indigenous nations, as "France [routinely] claimed sovereignty over much larger areas than it actually occupied and controlled" (McNeil, *ibid*).

<sup>16</sup> Proclamation, *supra* note 1 at para 12.

<sup>17</sup> *Ibid* at para 15.

<sup>18</sup> Brian Slattery, "The Royal Proclamation of 1763 and the Aboriginal Constitution" in Aldridge & Fenge, *supra* note 4, 14 at 22.

To understand the restricting nature of this interpretation, we need to survey three distinct elements in order to understand the basic elements of the settled narrative.

The first element of this narrative is the Proclamation's establishment of peace, order, and good government — the Canadian state's governing ethos. The Proclamation states that it authorizes power to Governors of colonies "to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and Good Government."<sup>19</sup> This phrase would be codified as the spirit of Canadian governance in the *Constitution Act, 1867*.<sup>20</sup> For our purposes, this is an example of how the Royal Proclamation provides a link with governance in Canada, providing the first foundation for a declaration of Crown sovereignty backed by legislative authority. This idea is supported in Supreme Court of Canada cases as early as 1887 with *St. Catharines Milling and Lumber Co. v. R.*, the first landmark case in Aboriginal rights jurisprudence.<sup>21</sup> Indeed, this case in part led to the infamous conclusion in *R. v. Sparrow* that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."<sup>22</sup> We can then establish that jurisprudence explains that the Proclamation was the start of Crown sovereignty and legislative power over Indigenous peoples.

The second element of the narrative is the geographic application of the Proclamation. While some have argued for an expansive view of the application of the Proclamation,<sup>23</sup> jurisprudence has not. The most prominent example of this contestation is *Calder v. Attorney-General of British Columbia*.<sup>24</sup> Here, the Nisga'a argued for Aboriginal title over their lands, based partly on an appeal to the Royal Proclamation. The Supreme Court was split, with half finding that the Royal Proclamation did not apply to British Columbia, and the other half dissenting with the claim that Aboriginal title does find its origins in the Proclamation and that it did apply in British Columbia.<sup>25</sup> The Supreme Court found that Aboriginal title did exist as a result of the historic occupation of traditional territories. This ruling also shifted Parliament's approach to land claims, creating renewed energy to address

<sup>19</sup> Proclamation, *supra* note 1 at para 8.

<sup>20</sup> See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, which introduces the federal powers of Parliament, and authorizes the Queen to make laws with the advice of the House of Commons and the Senate to "make Laws for the Peace, Order and good Government in Canada." The Peace, Order, and Good Government doctrine (POGG) is a recurring theme throughout political and legal studies of Canadian federalism.

<sup>21</sup> *St. Catharines Milling and Lumber Co v R.*, [1887] 13 SCR 577. Although much of the direct impact of this ruling has been nullified, its impact has been explored in setting the path for future jurisprudence. Perhaps the most important part of this ruling was the idea that Aboriginal title exists at the "good will" of the Sovereign — an idea that, while impactful, would later be disavowed by Canadian courts. See especially Karen Drake, "The Impact of St. Catherine's Milling" in *Special Lectures 2017: Canada at 150: The Charter and the Constitution* (Toronto: Irwin Law and the Law Society of Upper Canada, 2017).

<sup>22</sup> *R v Sparrow*, [1990] 1 SCR 1075 at 1103 [*Sparrow*].

<sup>23</sup> See generally Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32:2 Am J Comp L 361 at 372.

<sup>24</sup> [1973] SCR 313 [*Calder*].

<sup>25</sup> *Ibid.* The three judges (Martland, Judson, and Ritchie) claiming against the application of the Proclamation in British Columbia is at *ibid* at 314 while the three judge (Hall, Spence, and Laskin) support for the Proclamation in British Columbia is at *ibid* 315. The former set of judges claim Crown sovereignty was established through the Treaty of Oregon in 1846, and hence the Proclamation did not apply. For a critique of tying Crown sovereignty to the Treaty of Oregon, see McNeil, *Sovereignty*, *supra* note 15 at 300–303.

and settle land claims with Indigenous peoples.<sup>26</sup> The need to settle these claims was especially pertinent with the majority of British Columbia, Quebec, and the northern territories, all not covered by treaties and therefore breaking the intentions of the Proclamation. While the geographic application of the Proclamation may remain up for debate, its formal recognition of Aboriginal title for Indigenous peoples within Canada is established and acknowledged.

The third element is the actual relevance of the Proclamation, which through judicial debates over the Proclamation, would largely subside as a result of first *Calder* and then later *Guerin v. The Queen*.<sup>27</sup> In this latter case, Musqueam First Nation petitioned the exclusion of their nation from terms of a land deal involving a golf club and the federal government.<sup>28</sup> The Supreme Court found that the Musqueam did have a right to these lands as a result of their Aboriginal title. Most important for our study, the Supreme Court found that this right exists independent of the Royal Proclamation.<sup>29</sup> As a result, the understanding of the rights of the Royal Proclamation significantly shifted in later cases. This is most evident in *Delgamuukw v. British Columbia*,<sup>30</sup> where the Supreme Court clarified the extent and scope of Aboriginal title. In doing so, it directly addressed the relationship between the Royal Proclamation and Aboriginal title, the latter of which was only said to recognize the former and not created by it.<sup>31</sup> This significance would effectively shift Indigenous legal claims away from the Royal Proclamation and toward Aboriginal title as an existing right in and of itself. The interpretation of the Royal Proclamation then becomes a mere recognition of existing Aboriginal rights, creating a situation in which Proclamation rights continue to exist ill-defined. One could presume that this means section 25 rights are the same as section 35 rights — but do they exist separately? Moreover, narratives of the Proclamation as a mere recognition of existing rights overlook the influential role of Indigenous nations in determining and solidifying alliances; to understand the latter, we must turn to a different narrative.

## B. THE TREATY OF NIAGARA

From an Indigenous perspective, the Royal Proclamation of 1763 typically focuses less on assertions of sovereignty and rights, and instead on mutuality, consent, and the

<sup>26</sup> This significance is noted in *Sparrow*, *supra* note 22 at 1103–104, when Chief Justice Dickson and Justice Laforest cite Jean Chrétien’s 1973 statement on Indigenous claims. In that document, the position of the government on the Royal Proclamation is noted as: “The Government sees its position in this regard as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people’s interests in land in this country” (see Jean Chrétien, *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People* (Ottawa: Indian and Northern Affairs, 1973) at 2).

<sup>27</sup> [1984] 2 SCR 335 [*Guerin*].

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at 336. In their reasons, Justices Dickson, Beetz, Chouinard, and Lamer found that “The Indians’ interest in their land is a pre-existing legal right not created by the Royal Proclamation of 1763, by s. 18(1) of the Indian Act, or by any other executive order or legislative provision.”

<sup>30</sup> [1997] 3 SCR 1010 [*Delgamuukw*].

<sup>31</sup> *Ibid.* at para 114. The shift is noted by Chief Justice Lamer who wrote in dissent: “[I]t is now clear that although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples.”

recognition of Indigenous nationhood.<sup>32</sup> All three of these principles are represented by the Treaty of Niagara.<sup>33</sup> The Treaty of Niagara was a gathering held between various Indigenous nations and the Crown in 1764. The Crown, represented on its behalf by Sir William Johnson, sought to affirm the claims and principles of the British mentioned in the Royal Proclamation. Peter Russell explains that Sir William Johnson's methods were to recognize Indigenous autonomy and traditions, to have the Treaty of Niagara adopt the same methods that led to the Haudenosaunee Confederacy to ally themselves with the British in the war against the French: "[R]espect for Indian land rights, fair and consistent regulation of the fur trade, gift-giving as a way of showing mutual respect and support, and the honouring of treaties with nations who were allies, not subjects of the British Crown."<sup>34</sup>

The Treaty of Niagara challenges assumptions that the Royal Proclamation was a unilateral declaration of sovereignty. While the Proclamation was indeed a declaration of sovereignty over territories the Crown had little felt presence in, Niagara sheds light on how the implementation of this document happened along mutual lines, not unilateral ones. John Borrows writes that the unclear nature of autonomy and jurisdiction for First Nations in the Proclamation can be explained through reference to Sir William Johnson observing Wampum belts and other Indigenous traditions; it becomes clear that the Treaty of Niagara interrupts the judicial narrative of the Royal Proclamation as a unilateral declaration.<sup>35</sup> Instead, the Treaty of Niagara, as an event, presents a far more mutual establishment of political authority between the Crown and Indigenous peoples, which as Borrows writes, "discredits the claims of the Crown to exercise sovereignty *over* First Nations."<sup>36</sup> The Treaty of Niagara can help us establish a more expansive understanding of the Royal Proclamation and its effects on Aboriginal rights in Canada.

Proponents of explaining the Proclamation through the Treaty of Niagara are likely to point to the recognition of Indigenous nationhood in the Proclamation. Recall that Indigenous provisions in the Proclamation are addressed to "the several Nations or Tribes of Indians, with whom We are connected."<sup>37</sup> Peter Russell, for example, argues that "[t]he key difference between the Royal Proclamation on its own and [the] acceptable terms of peace with the Indian nations is that the Indians would never have accepted British sovereignty over them."<sup>38</sup> This squares well with the Treaty federalism school of thought, which holds that treaties form the bedrock of Canadian federalism, guaranteeing Indigenous self-determination and political authority.<sup>39</sup> These considerations implore us to reconsider the

<sup>32</sup> John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28:1 UBC L Rev 1; James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241; Sharon Venne "Understanding Treaty Six" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) 190.

<sup>33</sup> Treaty of Niagara, *supra* note 11.

<sup>34</sup> Peter Russell, "The Founding Treaty with Native Peoples" in *Canada's Odyssey* (Toronto: University of Toronto Press, 2017) at 43.

<sup>35</sup> John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self Government" in Asch, *supra* note 39, 155 at 161.

<sup>36</sup> *Ibid* at 164 [emphasis added].

<sup>37</sup> Proclamation, *supra* note 1 at 12.

<sup>38</sup> Russell, *supra* note 34 at 50. Russell further notes that such notions of sovereignty would not have been accepted at Niagara, where it was agreed that the Crown-Indigenous relationship would be "based on consent, rather than on force" (Russell, *ibid* at 51).

<sup>39</sup> See e.g. Henderson, *supra* note 32 at 256. Henderson's argument is that: "These terms in the treaties illustrate the process of Aboriginal autonomy and choice in determining their political status. These indispensable acknowledgments are crucial to understanding the context of Aboriginal self-determination and their terms of the treaties." See also the definition of "Partners in Confederation"



origins of the Proclamation. Instead of solely as a unilateral declaration, we can explore Indigenous visions of the Proclamation's recognition of Indigenous nationhood by the Crown, Indigenous nations recognizing one another, Indigenous recognition of the Crown, and ultimately, the origins of Treaty federalism in Canada.

The final insight from the Treaty of Niagara is the emphasis on mutuality and consent by Indigenous nations for a relationship with the Crown. These two terms show that while unilateral colonial authority may have come to be a part of it, it was not in the origins of the relationship.<sup>40</sup> Instead, Indigenous accounts of the Treaty of Niagara place a great emphasis on mutuality and consent. Using the example of later meetings between the Crown and Indigenous peoples, Borrows argues that "subsequent conduct illustrates First Nations perspectives toward the Proclamation and demonstrates that Native consent was required to any alteration of First Nation land use and governance."<sup>41</sup> The idea of consent has long been central to Indigenous arguments for self-determination and political authority. For example, in 1983, the Standing Committee on Indian Affairs and Northern Development met to discuss the *Constitutional Amendment Proclamation, 1983*.<sup>42</sup> One witness, Wallace Manyfingers of the Kainai Nation, remarked to the Committee on the importance of seeing the Proclamation through terms of mutuality and consent:

Fundamental to the relations between the Indian nations and the Crown has been this idea of *mutuality*. The goal has been *consent* ... [it] has been co-existence and mutual respect. The treaties, the proclamation, and all that are based on the notion of consent.<sup>43</sup>

Manyfingers presents an alternate narrative to unilaterality, one where the early colonial government was consented to by Indigenous peoples because it respected mutual political relations. Without this mutuality, we are left with nothing more than colonial structures. Manyfingers concluded his presentation with the following important intervention:

If Parliament and the Crown colonies claim that they can arbitrarily make Indians citizens without their consent, is there any difference between them and any conquered people being made citizens by a newly colonizing country?<sup>44</sup>

Ideas of mutuality and consent interrupt the idea that the Royal Proclamation was a unilateral setting of terms for relations and governance. Instead, we can turn to the Royal Proclamation as a moment of mutuality and consent, principles that have not always been honoured, but that hold potential for a different relationship.

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based on Treaty federalism in Kiera Ladner, "Visions of Neo-Colonialism? Renewing the Relationship with Aboriginal Peoples" (2001) 21:1 Can J Native Studies 105.

<sup>40</sup> See Joshua Ben David Nichols, "Pre-Confederation to the *Indian Act* of 1876" in *A Reconciliation without Reconciliation? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020). This shift is described as the move from "imperial federalism" to "imperial civilizing."

<sup>41</sup> Borrows, *supra* note 35 at 165.

<sup>42</sup> *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, 32-1, No 70 (28 June 1983).

<sup>43</sup> *Ibid* at 25 [emphasis added].

<sup>44</sup> *Ibid* at 26.

One narrative of the Proclamation is overtly practical and technical, explaining that the Crown made concessions to secure its claims with existing Indigenous populations. This explanation does importantly state that Aboriginal rights exist independent of the Proclamation, but in discounting the Proclamation, struggles to explain what the content of these rights is. The second narrative focuses instead on the Treaty of Niagara and how it sought a course of highly mutual and consensual governing relations, if relatively undefined, between the Crown and various Indigenous nations. For clarity on the Proclamation and the specific rights that it entails, we must turn to the various constitutional developments of the late twentieth century and the creation of section 25 of the *Charter*.

### III. THE DEVELOPMENT OF SECTION 25

The extent of section 25 rights has been discussed before. The standard scholarly interpretation is that section 25 is a savings provision — it is not meant to create rights, but rather only to protect existing rights from *Charter*-based challenges. This interpretation squares with the general sections of the *Charter*, which include interpretative clauses regarding existing rights, multicultural heritage, and gender equality. However, we are still left with a disconnect: what are the Proclamation rights section 25 set out to protect?

To understand this disconnect, I will first consider the standard interpretation of section 25 as a savings provision. I will then explore how this understanding is inextricably connected to a Canada-wide movement to ensure that Indigenous voices were heard (Constitution Express) and the legislative development of the *Constitution Act, 1867*. Through these two events, we can gain further insights into the content of Proclamation rights.

#### A. THE SAVING PROVISION

Section 25 was designed to protect existing Indigenous rights. Scholarly interpretations have varied on the relevance and usefulness of section 25. Of the existing literature — which is limited compared to that which surrounds section 35 — there is a consensus on the savings provision and interpretive nature of section 25.

The group of scholarly works that stress the saving provision focuses on how section 25 does not generate new rights, it merely recognizes existing rights. The first interpretations of section 25 were that it existed solely to protect the collective rights enjoyed by Indigenous peoples from the individual rights guarantees of the *Charter*. Brian Slattery's 1982 analysis of section 25 notes its broad wording and "catch-all" phrasing are designed to protect "any rights whatever that aboriginal peoples enjoy by virtue of their distinctive status."<sup>45</sup> Slattery makes clear his position on section 25 not generating rights, arguing instead that "it places limits on rights set out elsewhere in the Charter."<sup>46</sup> Noel Lyon's section 25 opines that it is "clear that s. 25 creates no new rights... s. 25 does not set out any substantive rights or freedoms. It simply enacts protection of all rights that pertain to Aboriginal Peoples against the inference that their non-inclusion in the Charter indicates an intention to abrogate

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<sup>45</sup> Slattery, *supra* note 10 at 237.

<sup>46</sup> *Ibid* at 240.

them.”<sup>47</sup> Similarly, Bruce Wildsmith summarizes the saving provision position in writing that section 25 does not generate any new rights, rather it firmly establishes that existing Aboriginal rights are unaffected by the *Charter*. In a case where there is a challenge between *Charter* rights and Aboriginal rights, then “section 25 rights and freedoms prevail.”<sup>48</sup> These three interpretations lead to the conclusion that section 25 did not generate new rights; it merely recognizes existing ones.

The contest between *Charter* challenges and Aboriginal rights means that the latter requires interpretation in order to prevail. Peter Hogg and Wade Wright describe section 25 as an “interpretive position” to ensure *Charter* rights do not infringe on Aboriginal rights.<sup>49</sup> Hogg and Wright’s view, interestingly, is that “the class of rights saved by s. 25 is probably wider than the class of rights guaranteed by s. 35” because of the reference to “other” rights and freedoms and the explicit reference to Royal Proclamation of 1763.<sup>50</sup> Patrick Macklem similarly argues that while section 25 does not create any new rights, it does create an interpretive mandate for the courts. In the face of *Charter* challenges, section 25 “provides an interpretive instruction to the judiciary in its task of infusing vague *Charter* guarantees with determinate meaning.”<sup>51</sup>

Section 25’s role as an interpretive clause is not unique, playing a similar role to sections 26 through 31, ranging in their protections of existing rights and freedoms to gender equality. Section 25, however, does have a unique role in providing group-based rights protections to Indigenous peoples. William Pentney notes this duty, writing on section 25’s unique application and how it should be understood as an “interpretive prism” for Aboriginal rights.<sup>52</sup> Pentney argues that Section 25 is intended to prevent any “diminution, impairment, or infringement” of guaranteed Aboriginal rights or freedoms.<sup>53</sup> The prism then works to modify the usual parameters of a savings provision, instead working “to preserve and protect the particular aboriginal, treaty, or other rights which would otherwise be impinged upon.”<sup>54</sup> It is in this way that section 25 surpasses the normal expectations of a rights guarantee, and instead relies on the court’s interpretation to substantially protect the rights afforded to Indigenous peoples. Timothy Dickson outlines this position by calling for an Arendtian “intercultural judgment” that “requires mainstream judges to expand the horizons of their own cultural contexts.”<sup>55</sup> This position holds that in section 25 cases, judges must opt for an

<sup>47</sup> Noel Lyon, “Constitution Issues in Native Law” in Bradford Morse, ed, *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1985) 408 at 423. Lyon also suggests that Aboriginal rights could be affected by the inclusion of section 25 given that it “suggest they are of a fundamental character” as opposed to “ordinary legal rights.”

<sup>48</sup> Wildsmith, *supra* note 10 at 23, 25. Wildsmith further notes that there are likely two limits on section 25 rights and freedoms. The first is section 28 of the *Charter*, the clause ensuring the *Charter* is guaranteed equally to male and female persons. Second, these rights would be limited to “reasonable limits” like the *Canadian Bill of Rights* was.

<sup>49</sup> Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson Reuters/Carswell, 2021) at 28.41 [Hogg & Wright, *Constitutional Law*].

<sup>50</sup> *Ibid* at 28.41.

<sup>51</sup> Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, 2nd ed (Toronto: University of Toronto Press, 2018) at 222.

<sup>52</sup> Pentney, *supra* note 10.

<sup>53</sup> *Ibid* at 29.

<sup>54</sup> *Ibid* at 57. It is worth noting that Pentney is rare in considering the implications of including the Proclamation. Pentney notes that the Proclamation itself suggests a broad interpretation, concluding that “the merit of the argument in favour of an expansive interpretation of the rights recognized by the Royal Proclamation must ultimately be resolved by administrators and courts” (*ibid* at 53).

<sup>55</sup> Timothy Dickson, “Section 25 and Intercultural Judgment” (2003) 61:2 *UT Fac L Rev* 141 at 160.

enlarged mentality that accommodates the experiences of those who are bringing the cases forward — namely, Indigenous nations and peoples. Subsequently, courts will be able to better hear Indigenous cases while listening to their perspectives, engaging in intercultural judgment in an ethically and empirically sound way.<sup>56</sup>

The interpretive position, and the potential for Canadian courts to accommodate Indigenous perspectives, carries its fair share of critiques as well. The central critique is that non-Indigenous judges will be adjudicating claims made by Indigenous peoples, in a highly unfair, colonial, and hostile environment. The power imbalance between a state that sought to usurp the political legitimacy, authority, and autonomy of Indigenous nations is obvious. However, it is worth stating that even if Royal Proclamation rights can be proven to be far more expansive than previously established, this does not resolve the underlying tension of the presumed authority of Canadian courts. The interpretive nature of section 25, however, is not devoid of potential either. Gordon Christie argues that section 25 must be understood as an aspirational “tool of decolonization” in which section 25 has “an integral role in the physical decolonization of Aboriginal peoples and communities, assisting in the deconstruction and removal of hierarchical and unjust power structures.”<sup>57</sup> Christie suggests that section 25 should work as a saving provision to ensure Indigenous political authority is unencumbered by the *Charter* while allowing for *Charter* challenges to be made by members of the community.<sup>58</sup> In sum, the interpretive clause has the potential for either continued legal domination by the Canadian state or ensuring the self-determining authority of Indigenous peoples through ensuring their practices are protected by their own laws, unencumbered by the Canadian State. I believe both challenges can be properly elucidated under an expansive view of the Proclamation, provided by section 25 rights. To expand on this position, we must turn to the two sources of section 25 development: the Constitution Express and the legislative development of the constitution.

## B. PATRIATION OF THE CONSTITUTION AND THE CONSTITUTION EXPRESS

The development of section 25 must first be traced to the patriation process of the *Constitution Act, 1867*, which created the section. The Canadian state received, for almost all matters, full autonomy from the United Kingdom with the *Statute of Westminster, 1931*.<sup>59</sup> While Canada was able to develop as an internationally recognized sovereign state, it still needed British parliamentary approval to amend its constitution. After a few failed attempts to amend the Constitution, 1980 brought a renewed commitment to the process of

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<sup>56</sup> *Ibid* at 161–64.

<sup>57</sup> Gordon Christie, “Aboriginal Citizenship: Sections 35, 25 and 15 of Canada’s Constitution Act, 1982” (2003) 7:4 *Citizenship Studies* 481 at 491.

<sup>58</sup> *Ibid*. The latter suggestion by Christie speaks to whether section 25 could be challenged by community members who are excluded by the governance of the nation or community. Christie notes this is needed because of the imposed structures on Indigenous peoples as a legacy of colonization, writing that “in the absence of viable community-based alternative governing structures grounded in traditional principles and values, it would not protect Aboriginal governments from member-initiated challenges based on *Charter* principles, as these sorts of challenges would be necessary to break down colonial structures, to begin the work of clearing away non-Aboriginal power structures imposed on Aboriginal communities.” For an example of such an imposed colonial structure — institutionalized patriarchy through devices such as the *Indian Act*, RSC, 1985, c 1-5 — see Joyce Green, “Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government” (1993) 4:4 *Const Forum Const* 110.

<sup>59</sup> *Statute of Westminster, 1931* (UK), 22–23 *George V*, c 4.

“patriating” the Constitution and, as the saying goes, to “bring the constitution home.” This project was spearheaded by Prime Minister Pierre Trudeau who, after the inaugural First Minister’s Conference, remarked that it had become a “national disgrace” that Canada could not amend its own constitution, and that it was now time for Canada to rid itself of this “vestige of colonialism.”<sup>60</sup> The conference would be the start of the national effort to patriate the Constitution and ensure Canada had the final say over its own constitution.

Despite references to the Constitution’s British links representing colonialism, there was a severe lack of discussion around actual and ongoing colonialism in Canada. This would not go unnoticed by Indigenous peoples, who have long fought against colonial narratives and structures within Canada. By the 1980s, Indigenous political mobilizing had become skilled and efficient, emboldened by the successful fight against the implementation of the White Paper in 1969.<sup>61</sup> When the Canadian government announced its intentions for patriation — the Canadian word for bringing home the Constitution — Indigenous political actors were ready for the struggle to ensure the quest for full Canadian sovereignty did not exclude their rights and agreements with the Crown. This struggle largely took place through the Constitution Express.

The Constitution Express took aim at the exclusion of Indigenous political actors, leaders, and affected parties during the original rounds of patriation negotiations. Indigenous concerns with the proposed constitutional reform were various, but a central theme of the disparate concerns was the lack of Indigenous consent involved in modifying Canada’s Constitution.<sup>62</sup> The Constitution Express’ origins began when Indigenous political actors, notably the Union of British Columbia Indian Chiefs (UBCIC), would begin to hear conversations of constitutional reform without a consideration for Indigenous peoples.<sup>63</sup> This exclusion would result in Indigenous political mobilizing from coast to coast to coast, and eventually to the United Kingdom, in order to prevent patriation without Indigenous consent. The diverse political mobilizing, as a recent issue of *The British Columbian Quarterly* makes

<sup>60</sup> Pierre Trudeau, “Transcript of the Prime Minister’s Statement at the First Ministers Conference” in *Federal-Provincial Conference of First Ministers on the Constitution* (8–12 September 1980) (Ottawa: Library of Parliament, 1980) at 5.

<sup>61</sup> Jean Chrétien, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen’s Printer, 1969). In 1969, Pierre Trudeau’s government introduced the *Statement of the Government of Canada on Indian Policy, 1969* commonly known as the “White Paper.” This document proposed, among other things, eliminating both the *Indian Act*, *supra* note 58 and the Department of Indian Affairs and Northern Development. For Indigenous responses to the White Paper, see Indian Chiefs of Alberta, “Citizens Plus” (2011) 1:2 *Aboriginal Policy Studies* 188; The Union of BC Indian Chiefs, *A Declaration of Indian Rights: The BC Indian Position Paper* (Vancouver: UBCIC, 1970). The White Paper brought together various Indigenous political actors and gave rise to the codification of pan-Indigenous national organizations like the National Indian Brotherhood, the equivalent of today’s Assembly of First Nations that formed in 1982. Commentary on the pushback to the White Paper, however, should be framed as a moment when *already* existing Indigenous political mobilizing came together, rather than the moment that birthed Indigenous political mobilization. For critiques of White Paper interpretations and a clarification of this position, see Sarah Nickel, “Reconsidering 1969: The White Paper and the Making of the Modern Indigenous Rights Movement” (2019) 100:2 *Can Historical Rev* 223.

<sup>62</sup> For analyses of Indigenous political mobilizing during patriation, see Michael Woodward & Bruce George, “The Canadian Indian Lobby of Westminster 1979–1982” (1983) 18:3 *J Can Studies* 119; and Madeline Rose Knickerbocker & Sarah Nickel, “Negotiating Sovereignty: Indigenous Perspectives on the Patriation of a Settler Colonial Constitution, 1975–83” (2016) 190 *BC Studies* 67.

<sup>63</sup> Mildred Poplar, “2003, We Were Fighting for Nationhood Not Section 35” in Ardith Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003) 24 at 24.

clear, took its inspiration from a variety of sources including Indigenous feminism,<sup>64</sup> explicit global commitments to decolonization,<sup>65</sup> and international Indigenous struggles against colonialism and imperialism.<sup>66</sup>

As the Constitution Express grew in numbers, so too grew its popularity. The impact of the Constitution Express became undeniable to the Canadian state, and thus Indigenous peoples could no longer be ignored. In January 1981, section 34 was added to the patriation resolution.<sup>67</sup> This inclusion represented the effectiveness of the Constitution Express but also fell short of the stated aims of Indigenous self-determination and sovereignty within their territories. The later inclusion of the word “existing” in the section was deemed “unacceptable” by national Indigenous organizations,<sup>68</sup> and later led to litigation within English courts over the legality of the *Canada Act*’s provisions for Indigenous peoples.<sup>69</sup> The passage of the *Charter* did not reflect the demands of Indigenous nations within Canada; as Feltes and Coulthard note, the National Indian Brotherhood declared a day of mourning on April 17, 1982, the same day Trudeau celebrated “full and complete Canadian sovereignty.”<sup>70</sup> Nonetheless, the inclusion of Aboriginal rights provisions is still representative of the effectiveness of the Constitution Express. Not only did the Constitution Express gain sympathy amongst Canadian opposition parties, as well as legislators in the United Kingdom, as a movement, it set the context for the inclusion of section 25, as the government *had* to do something during patriation to respond to Indigenous demands. This context will be pivotal when looking toward the development of the section.

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<sup>64</sup> Sarah Nickel, “‘We’re Not Going to Stop for Anything’: Concerned Aboriginal Women and the Constitution Express” (2022) 212 BC Studies 41.

<sup>65</sup> Emma Feltes & Sharon Venne, “Decolonization, Not Patriation: The Constitution Express at the Russell Tribunal” (2022) 212 BC Studies 65.

<sup>66</sup> Emma Feltes & Glen Coulthard, “The Constitution Express Revisited” (2022) 212 BC Studies 13.

<sup>67</sup> This section looked nearly identical to what would become section 35 of the *Constitution Act, 1982*. Woodward & George, *supra* note 62 at 125.

<sup>68</sup> *Ibid* at 127.

<sup>69</sup> *R v Secretary of State for Foreign Affairs ex parte Indian Association of Alberta*, [1982] 2 All ER 122 at 74, 77. The *Canada Act* was the bill with the proposed constitution that had to first pass in the Parliament of the United Kingdom, in order to authorize the document and ensure Canada would no longer need Westminster’s permission for future constitutional amendments. The Indian Association of Alberta, building on their UK support from various British legislators, sought clarification from English courts over the legality of the *Canada Act* on the issue of the United Kingdom’s obligations to the Indigenous nations of what is now Canada. The United Kingdom Court of Appeal ruled that there was no such obligation, as Lord Denning explains: “the obligations to which the Crown bound itself in the Royal Proclamation of 1763 are now to be confined to the territories to which they related and binding only on the Crown in respect of those territories... None of them is any longer binding on the Crown in respect of the United Kingdom.” In particular, Lord Denning — as well as Lord Justice May’s concurring opinion — endorses the *Canada Act* and its provisions, boldly claiming “There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada.” The Proclamation weighs heavily throughout the ruling; future research aimed at understanding the contemporary implications of the Royal Proclamation should use this ruling as a useful starting point.

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Feltes & Coulthard, *supra* note 66 at 13.

### C. LEGISLATIVE DEVELOPMENT OF SECTION 25

Close examination of section 25's development, reveals several inconsistencies within the government's reasoning behind the section.<sup>71</sup> My analysis devotes specific attention to the proceedings of the Special Joint Committee on the Constitution of Canada (Committee), whose legislative mandate included exploring various provisions put forth during the debate on patriation. I will focus on how the Royal Proclamation and Aboriginal rights are discussed within the Committee and conclude with the constitutional developments after patriation.

The Committee repeatedly heard questions about the stated purpose for including section 25. Minister of Justice and Attorney General Jean Chrétien (as he then was) stated:

What we are trying to do in, I think it is Section 24 we want to protect all the rights of the natives ... the rights based on the treaty, the right that was given to the natives at the time of the Royal Proclamation of 1762 or 1763 by King George II and the instruction he gave to his colonies at this time to settle the rights of the natives, there is the question of the rights that have been either abandoned by some of them or have been taken away by different actions of governments in the past.<sup>72</sup>

In response to Member of Parliament James Manly questioning the exclusion of representatives from the three major Indigenous organizations, Chrétien reiterated that the Royal Proclamation was the source of Aboriginal rights, which would remain untouched by the *Charter*:

We say that there is nothing in this Charter that will infringe upon the rights of the Natives.... It is not a right that we are creating for them. They have rights. We say that their rights will not be infringed upon by the Constitution. The rights of the Natives are flowing from the treaty rights. That is a right; it is written in the 11 treaties that we have in Canada. Their rights are flowing from the Royal Proclamation of 1763. This is when the king at the time said no people shall move in the colonies and not settle the rights of the Natives when arriving, and it is based on those things that the rights of the Indians exist.<sup>73</sup>

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<sup>71</sup> It should be noted that section 25 was not always known by this name. During constitutional negotiations in the 1970s, section 25 was known as section 26 in Bill C-60 which first introduced a proposed Constitution to the House of Commons, see Bill C-60, *An Act to Amend the Constitution of Canada with Respect to Matters Coming Within the Legislative Authority of the Parliament of Canada, and to Approve and Authorize the Taking of Measures Necessary for the Amendment of the Constitution with Respect to Certain Other Matters*, 3rd Sess, 30th Parl, SC, 1978. This document would be analyzed by the Special Joint Committee on the Constitution of Canada who issued their report in October 1978. The report actually suggested dropping reference to Aboriginal rights: "[Section 26] might unintentionally restrict their rights by referring only to the rights and freedoms they may have acquired by virtue of The Royal Proclamation of October 7, 1763 ... it would be preferable to omit the reference to this particular document." See *Minutes of Proceedings and Evidence of the Standing Committee on the Special Joint Committee of the House of Commons and Senate on the Constitution of Canada*, 30-3 No 20 (10 October 1978) at 14. Later drafts of the proposed constitution would omit references to Aboriginal rights, but later include them again, Royal Proclamation rights were added back to the section in October 1980, see Canada, Parliament, "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" (6 October 1980) No 321-7/20. From October 1980 to February 1981 — which covers the bulk of Special Committee testimony, the section was numbered 24. The section would become 25 in the final days of constitutional negotiations, and by the time it was read in the House of Commons, it was read as section 25, *House of Commons Journals*, 32-1 1981 at 1255.

<sup>72</sup> *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 4 (12 November 1980) at 32–33 [*Minutes*, No 4].

<sup>73</sup> *Ibid* at 68.

When looking at these two statements, it becomes clear that Parliament respected the Proclamation and believed it to be the source of Aboriginal rights in Canada.<sup>74</sup> Upon closer examination, however, inconsistencies emerge in what these rights are and where they apply.

One continuous topic of the Royal Proclamation has been the location of its application, given that British influence and colonists would quickly expand beyond the described boundaries. Manly questioned the role of section 25 in enshrining the Proclamation, given the federal inconsistencies on rights in New Brunswick and Nova Scotia. Chrétien then defaulted to Assistant Deputy Minister Barry Lee Strayer from the Department of Justice, who doubted the application of the Proclamation in the Maritimes:

Well, on the particular point of the application of the Royal Proclamation to Nova Scotia, I think it has been our view that there is serious doubt that the Proclamation does apply there; but Section 25 does not really deal with that question as such, all Section 25 does is to say that if those rights exist, they continue to exist and that the Charter does not affect them. It is not prejudging whether they exist or they do not exist, it is just saying if they do, the Charter does not alter those rights in any way.<sup>75</sup>

Later in the discussion, Chrétien gives one of the few hints to how the government perceives these rights in response to questions about declaring the content of Aboriginal rights:

[I]f you decide to affirm what is an aboriginal right, what is an aboriginal right? If you take the traditional view of aboriginal rights, it is the right to sign a treaty with the Crown before the Crown takes over the land. So, from there we have the treaty rights. That is flowing from the Royal Proclamation, that was giving order to the settlers to settle first with the natives.<sup>76</sup>

This was part of a seemingly tense exchange in which Chrétien repeatedly questioned the merit of literal interpretations, in reply to questions of what Aboriginal rights exist.

The final inconsistency is that it appears there is no clear understanding of these rights by the government. Indeed, at one point, Chrétien appears to doubt if the Royal Proclamation is a part of the Constitution: “[B]ut why the Royal Proclamation is not there, it is because it is not really the Canadian Constitution, it is a right that was given to the natives before Confederation and these rights we say are still in existence and we refer to them in this Charter but they are pre-Confederation and they are still rights of the natives and the original people of Canada.”<sup>77</sup> It is unclear the amount of clarity of this statement — given the widely held notion that the Proclamation comprises a foundation of the Constitution — but either way, there is a hint of irony given that Chrétien’s government would be responsible for

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<sup>74</sup> This is, of course, is contested by Indigenous peoples who argue their rights are inherent, and not created by royal statute. See *ibid* at 8, or *Delgamuukw*, *supra* note 30, where jurisprudence would later change to explain that the Royal Proclamation did not generate rights, it recognized rights in accordance with the Honour of the Crown.

<sup>75</sup> *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 38 (15 January 1981) at 16 [*Minutes*, No 38]. As an anonymous reviewer reminds, Barry Lee Strayer later served on the Federal Court of Appeal.

<sup>76</sup> *Ibid* at 20.

<sup>77</sup> *Ibid* at 67–68.



putting the rights recognized by the Proclamation in the *Constitution Act, 1867*, by including section 25.

The unclear nature of section 25 was certainly not lost on those impacted the most — Indigenous peoples. The Committee heard from various Indigenous organizations representing First Nations, Non-Status, Métis, and Inuit peoples.<sup>78</sup>

Representing Non-Status and Métis individuals, the Association of Métis and Non-Status Indians of Saskatchewan (AMNSIS) showed great concern over the potential non-exclusion of Métis and Non-Status individuals due to the unclear nature of section 25. Their position was that two amendments were needed for section 25 to ensure there should be no modifications to Aboriginal rights without the explicit consent of the relevant people(s), and for there to be a clear definition of rights in case of future court cases.<sup>79</sup>

Representatives from the Inuit Tapirisat of Canada were far more direct in their criticism. Grounding their critique in the rights afforded them by the Royal Proclamation — rights of self-determination and nationhood — Co-Chairman Eric Tagoona explained: “Apart from the oblique reference to the rights or freedoms that pertain to the native peoples in Section 24, there is no indication in the resolution that the aboriginal peoples have an intrinsic right to their own identities within Canada.”<sup>80</sup>

Then-representative Mary Simon of the Inuit Committee on National Issues — and the current Governor General of Canada — then proceeded to explain proposed amendments for the *Charter* from the perspective of the Inuit Committee, notably petitioning for the inclusion of the Proclamation as Item 1A in the Schedule of the *Constitution Act, 1982*.<sup>81</sup> Simon recommended a detailed proposal in an “Aboriginal Rights and Freedoms” section which included an explicit detailing of rights of self-determination, economic development, and representation in Parliament, amongst others. Simon described this section “as a cornerstone or at least a beginning to an Aboriginal bill of rights.”<sup>82</sup> The detailed proposals laid out by the Inuit representatives stand in clear contrast to the limited explanations of section 25 given by Parliament.

Representatives of First Nations similarly derided the lack of clarity in section 25. Representing the Union of Nova Scotia Indians, Mi’kmaq Chief Stanley Johnson described the intentions of the constitution as an attempt to “readjust the legitimacy of Canadian sovereignty,” but one that was devoid of a connection to treaties and relationships with

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<sup>78</sup> For a full explanation of the numerous ways the federal government sought to take away status, as well as the sometimes-arbitrary nature of the status system, see generally Robert Joseph, *21 Things You May Not Know About the Indian Act* (Vancouver: Page Two Books, 2018). “Non-Status” persons refer to those who have First Nations identity, but for whatever reason do not have federally recognized Indian Status.

<sup>79</sup> *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 16 (9 December 1980) at 147, 152. Interestingly, the position of AMNSIS was that extinguishment would be necessary to define rights, this position would be contrasted by the National Indian Brotherhood in subsequent testimony on 16 December 1980.

<sup>80</sup> *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 16 (1 December 1980) at 6–7.

<sup>81</sup> *Ibid* at 16.

<sup>82</sup> *Ibid* at 13.

Indigenous nations.<sup>83</sup> Subsequently, Johnson argued that “the Canada Act, in frank violation of the laws of nations, attempts to abolish the significance of the Imperial compact with the nations and tribes of Indians” and that in no uncertain terms, “[a]bsolute legislative power over Indians is a Canadian usurpation of power based on racism.”<sup>84</sup> Johnson further questioned the potential of section 25, acknowledging that it recognizes rights but that: “We have had our rights for over two centuries, yet the federal government has refused to implement them. We are not a corporation existing solely in law, we are human beings attempting to forge a better society.”<sup>85</sup>

The National Indian Brotherhood (NIB), one of the most influential Indigenous organizations of the time, was similarly condemning in its attitudes toward section 25 and the proposed constitution. The bulk of the presentation was delivered by Vice-President Sykes Powderface of the Stoney Nation who began with the importance of the Royal Proclamation of 1763 and the differences in Canadian colonial policy from what was promised.<sup>86</sup> Powderface voiced the NIB’s disapproval of section 25 for a series of reasons, with a central concern being that it was “negative, not positive” and that the NIB had consistently worked toward a positive recognition of Aboriginal rights.<sup>87</sup> Accordingly, the NIB proposed a series of amendments — similar to that of the Inuit — that included a section 23<sup>88</sup> comprised of 8 subsections.<sup>89</sup>

In each of these four testimonies, the potential of section 25 was criticized, but also, each of the presentations focused on the potential of a renewed relationship based on the rights described in the Royal Proclamation. We are left with a critique from Indigenous leaders on the lack of clarity of the section, but also with an argument for the potential of greater rights provided by the Proclamation. Above all, the rights protected by section 25 seem unclear at best, and contradictory at worst.

There is, however, some merit in the position that the government thought these rights were unclear at the time of inclusion. For example, let us take the clearest statement of Parliament’s position on section 25. In response to Member of Parliament Robert Bockstael raising the concerns of Treaty First Nations’ about their rights, Chrétien explained: “[T]he rights of all the native Canadians, either flowing from Treaties or the Royal Proclamation, *are assured to remain as they are*, and not being changed by the adoption of this Charter of

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<sup>83</sup> *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 32 (6 January 1981) at 81.

<sup>84</sup> *Ibid* at 82, 83.

<sup>85</sup> *Ibid* at 85.

<sup>86</sup> *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 27 (16 December 1980) at 78.

<sup>87</sup> *Ibid* at 85. It should be noted that as a result of Indigenous lobbying, section 35 was included as a positive recognition of Aboriginal rights in 1981. Section 35 does not resemble the comprehensive proposals made by the Inuit or First Nations representatives. For an analysis of the impact of this recognition, see generally Kent McNeil, “Has Constitutionalizing Aboriginal and Treaty Rights Made a Difference?” (2022) 212 *BC Studies* 137.

<sup>88</sup> It was section 23 at the time of Powderface’s suggestions, but the section being discussed would become section 25.

<sup>89</sup> *Ibid* at 87–88. The sections included adding the Proclamation to the Schedule of the *Constitution Act, 1982*, land and water rights, and rights afforded in relation to provincial assemblies. It should be noted that one of the amendments was explicitly banning the policy of extinguishment, contra the policy of the AMNSIS.

Rights, its clause 24.”<sup>90</sup> Thus, we have the “savings provision” discussed in the literature in clear view. There is, however, a greater insight to be pulled from the contradictions of the legislative discussions. That is that section 25 rights — including the Royal Proclamation — were, in fact, undetermined at the time of patriation. The goal was to, as Chrétien notes, include the rights before defining them: “I do think that it is the rational way to do it, before those rights are clearly defined, [is] to enshrine them in the Constitution before we can define them.”<sup>91</sup> How was this to be done? That would be through section 37 of the *Constitution Act, 1982* which stipulated:

(1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.<sup>92</sup>

Indeed, the inclusion of section 37 is justified by Chrétien as a reason why Aboriginal and treaty rights did not need to be defined by Chrétien, the government, or even the constitution:

[W]e have made sure that these rights exist and are recognized and the negotiations as to the definition of these rights and how they can be implemented will come at a future constitutional conference, and in the first one it will be one of the items on the agenda. That was promised by Mr. Trudeau and all the first ministers agreed.<sup>93</sup>

The conference should have then sorted out the ambiguity of section 25.

The constitutional conferences would proceed as a result of section 37, the first of which occurred on 15–16 March 1983. The conference itself was rife with disagreement and clashes over various concepts and frameworks.<sup>94</sup> Nonetheless, the 1983 conference altered the

<sup>90</sup> *Minutes*, No 4, *supra* note 72 at 84 [emphasis added].

<sup>91</sup> *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 3 (13 November 1980) at 14 [emphasis added] [*Minutes*, No 3].

<sup>92</sup> Part IV of the *Constitution Act, 1982*, s 37, being Schedule B to the *Canada Act 1982* (UK), 1982, ch 11 [repealed]. Section 37 was repealed in accordance with section 54 that provided for its repeal one year after the constitution came into force, with alignment of the timing of the constitutional conference. Section 37(2) is the most relevant for our purposes.

<sup>93</sup> *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32-1, No 37 (14 January 1981) at 27.

<sup>94</sup> See e.g. Maurice Bulbulian, Film, *Dancing Around the Table: Part One*, Film (Ottawa: National Film Board, 1987). One such example is the exchange between Pierre Trudeau and Bill Wilson. Trudeau questions the merit of historical claims to which Wilson implores the Prime Minister and the Premiers to stop judging Indigenous claims through the assumptions of the dominant society as this makes it less about discussion and more about power (*ibid* at 11:40–14:02). Another exchange between Wilson and Trudeau is included in the film and ends with Wilson suggesting the agreement must be political, to avoid endless legal battles and cumbersome legal bills. Wilson concludes by explaining that he has two daughters, both of whom want to be a lawyer and the Prime Minister — notably, one of these daughters is Jody Wilson-Raybould who became the first Indigenous Attorney General of Canada in 2015 (*ibid* at 25:28–26:14). An example from the conference’s transcript shows AFN National Chief David Ahenakew’s concluding remarks focused on how despite the positive inclusion of the AFN, there was no progress toward the goals of the AFN, namely: have a provincial commitment to negotiate and implement treaties, remove the “confusing” word of “existing” from section 35, and formal recognition of First Nations government at 311–13. *First Ministers’ Conference of First Ministers on Aboriginal*

constitutional provisions regarding “aboriginal and treaty rights” by removing section 25(b) and adding sections 35(3) and (4), resulting in the *Constitutional Amendment Proclamation, 1983*.<sup>95</sup> Notably, this proclamation included section 37.1, which codified the rule that amendments to sections 25, 35, or 91(24), would require a constitutional conference with Indigenous leaders, and an amendment to Section 37.1 that guaranteed at least two more constitutional conferences with Indigenous leaders.

As a result of the additions to section 37.1, another constitutional conference was held on 8–9 March 1984, once again with Prime Minister Trudeau as Chair. No resolutions were passed this time. The second constitutional conference was noted for its lack of progress in figuring out “aboriginal and treaty rights,” this time ending without a constitutional amendment or provision.<sup>96</sup> There would be two more conferences in 1985 and 1987, under new Progressive Conservative Party Prime Minister Brian Mulroney. These accords expired and the federal government turned to constitutional mega-politics in order to address other perceived shortcomings of the *Constitution Act, 1982*.<sup>97</sup> These accords, of course, were not dedicated solely to Indigenous rights or self-government, but did, at least partially, reflect the concerns heard in the previous constitutional conferences.

The first accord, Meech Lake, was first debated in 1987 and intended to “bring Quebec into the Constitution” through an acknowledgement of distinct society status. This, along with the relative exclusion of Indigenous rights and self-government, resulted in disapproval from Indigenous peoples and the eventual 1990 defeat of the Accord that was due, at least in part, to the actions of Manitoba’s first-ever Treaty Indigenous Member of the Legislative Assembly, Elijah Harper.<sup>98</sup>

The Charlottetown Accord would follow, directly addressing the exclusions of Meech Lake, such as the common perception that Meech Lake was the product of “eleven white

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*Constitutional Matters*, Verbatim Transcript (unverified and unofficial), Doc 800-17/046 (15–16 March 1983) (Ottawa: First Ministers’ Conference of First Ministers on Aboriginal Constitutional Matters, 1984).

<sup>95</sup> Section 25(b) was amended to instead read “(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired” and section 35 to include subsections 3) and 4) which created the provisions on treaty rights and gender rights, respectively. The amendment on gender equality was a result of the effective lobbying of the Native Women’s Association of Canada.

<sup>96</sup> *Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters*, Verbatim Transcript (unverified and unofficial), Doc 800-18/004 (8–9 March 1984) (Ottawa: Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters, 1984).

<sup>97</sup> For an insightful look into the “mega constitutional politics” of this era, see Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004).

<sup>98</sup> Elijah Harper led a filibuster against the Meech vote in the Manitoba Assembly on the grounds that First Nations organizations were not consulted. This would cause Premier Clyde Wells to cancel the vote in Newfoundland and Labrador, ensuring these two provinces prevented the unanimous consent needed to pass the Accord. For criticisms of the Meech Lake Accord, see Mary Ellen Turpel & Patricia Angus Monture, “Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake of the Meech Lake Accord” (1990) 15:2 *Queen’s LJ* 345; Louis Bruyere, “Aboriginal Peoples and the Meech Lake Accord” (1988) *Can Hum Rts YB* 49. Note that Bruyere documents the beginning of end of deciding on Aboriginal rights “sections 25 and 35 were never intended to stand on their own before the courts. The section 37 process was to complete the interim reforms accomplished in 1982 by articulating a more secure basis for aboriginal rights. By dropping all reference to this process, the Meech Lake Accord takes a step backwards to the pre-1982 status quo” (Bruyere, *ibid* at 63).

men in suits.”<sup>99</sup> Despite the efforts to expand the constitutional drafting process, Charlottetown failed in a 1992 national referendum with 54.97 percent of electors voting against it.<sup>100</sup> Notwithstanding the outcome, the significance of the proposed Charlottetown Accord and its potential to change the Crown-Indigenous relationship — on matters such as Indigenous self-government, proposing a Council of Elders, and creating a role for Indigenous nations in the amending formula — cannot be lost.<sup>101</sup>

After these two failed attempts, no further constitutional conferences were held on Aboriginal and treaty rights. The Canadian body politic moved on without significant constitutional reform. Today, we are left with ill-defined constitutional rights that were *meant* to be defined through a political process followed by constitutional amendments. Although these rights remain ill-defined, we are still left with the constitutional guarantee of Royal Proclamation rights. If these rights exist, albeit poorly if at all defined, what Royal Proclamation rights are protected by section 25?

#### IV. WHAT RIGHTS EXIST?

After the uncertainty provided by the legislative history of section 25, we are left with several possible interpretations. Much like the Royal Proclamation itself, the rights are subject to different understandings. This section will survey disparate possibilities of these rights in reference to scholarly understandings, jurisprudence, and legislative history.

##### A. THE “SHIELD” OF ABORIGINAL AND TREATY RIGHTS

For a long time, the Supreme Court of Canada did not hear a case that directly addressed the role of section 25. In 2008, this changed when the Supreme Court of Canada heard *R. v. Kapp*.<sup>102</sup> This case was an appeal of a British Columbia Court of Appeal case where the appellants claimed they were discriminated against by the Aboriginal Fisheries Strategy on the basis of race, as they were unable to apply for communal fishing licences granted to three First Nations — Musqueam, Tsleil-Waututh First Nation (Burrard Indian Band), and Tsawwassen.<sup>103</sup> In many ways, *R. v. Kapp* presents a direct confirmation of the savings provision literature: section 25 means that Aboriginal rights are protected in light of section 15 equality challenges, and that section 25 does not create any new rights.<sup>104</sup> *R. v. Kapp* also

<sup>99</sup> Jeremy Webber, “After Partition: Aboriginal Rights, Meech Lake, Charlottetown, 1982-1992” in *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Kingston: McGill-Queen’s University Press, 1994) at 152. For detailed studies of the evolution of Aboriginal rights in Meech Lake, and then the Charlottetown Accord, see Ian Peach, “The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada” (2011) 16:1 *Rev Const Stud* 1.

<sup>100</sup> For a comprehensive breakdown of the various Aboriginal rights provisions included in the Charlottetown Accord, see Mary Ellen Turpel, “The Charlottetown Discord and Aboriginal Peoples’ Struggle for Fundamental Political Change” in Kenneth McRoberts & Patrick Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993).

<sup>101</sup> See Government of Canada, *Consensus Report On the Constitution* (Charlottetown: Government of Canada, 1992).

<sup>102</sup> *R v Kapp*, 2008 SCC 41 [*Kapp SCC*].

<sup>103</sup> *R v Kapp*, 2006 BCCA 277. Throughout this decision, the three First Nations are referred to as MBT; this stands for Musqueam, Burrard (primarily known today as the Tsleil-Waututh), and Tsawwassen First Nations.

<sup>104</sup> *Kapp SCC*, *supra* note 102 at paras 3, 93.

confirms the judicial shift from Proclamation rights to pre-existing rights. Despite the Proclamation being mentioned directly in section 25, it holds little weight in *R. v. Kapp*.<sup>105</sup> In sum, *R. v. Kapp* confirms the benefits of section 25 in shielding Aboriginal rights and freedoms from *Charter*-based challenges.<sup>106</sup>

## B. INDIVIDUAL RIGHTS

The standard judicial interpretation of the Proclamation recognizing the inherent nature of Aboriginal rights relies on a consistency that is lost in the legislative history. For example, the legislative history struggles to answer the simple question: to whom do these rights apply? In response to questions about the application of rights of the Proclamation, Chrétien suggests that non-treaty Indigenous peoples still have rights afforded by the Proclamation: “Those who never had a treaty have a different kind of rights based on the Royal Proclamation and it is based on that, that we are sitting at this moment trying to make a deal with the Indians in the Yukon for example, who are not covered by any treaty.”<sup>107</sup> Chrétien gives two further examples of such applications. The first example is the Inuit, who Chrétien argues both have rights and that these rights are still to be determined through negotiation:

The Inuit people never signed a treaty with the Crown and we have entered into negotiation with them. We have recognized that they have aboriginal rights, and it is why we said in Section 24 [draft of Section 25] that rather than have a positive definition of their rights, they are better protected by Section 24 because the Indians have told us that they would like to work on some of their rights to clarify them, so while we are doing that, we are not diminishing their rights.<sup>108</sup>

The second is the case of Métis and Non-Status people. One day later, Member of Parliament David Crombie questions whether the government plans to constitutionalize the *Indian Act*.<sup>109</sup> This exchange pressed Chrétien’s understanding of Aboriginal rights and their contents:

**Mr. Chrétien:** We said that the question of the native rights in the Constitution is a special item to be debated among the provinces and the federal government and the natives ...

**Mr. Crombie:** Non-status and Métis, not Indian?

**Mr. Chrétien:** The rights that the Métis have flowing from the Royal Proclamation will remain the same. This charter will not affect those rights.

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<sup>105</sup> *Ibid* at para 63. The Supreme Court considers Aboriginal rights and freedoms and mentions the Proclamation once. Ultimately, it does not consider the content of Proclamation rights confirming the judicial shift away from determining Proclamation-based rights.

<sup>106</sup> See also Sonia Lawrence, “*R v Kapp*” (2018) 30:2 Can J Women & L 268–91. This rather straightforward explanation of *Kapp* SCC, *supra* note 102 is not to suggest this case should be accepted uncritically. As Sonia Lawrence’s excellent analysis makes clear, the Supreme Court of Canada did not effectively address the claims of the litigants who argued against “race-based” provisions. Lawrence argues that the Supreme Court’s ignorance of this point is akin to ignoring — and defending — the reality that the saving provision exists to protect the unique, significant historical conditions of Indigenous peoples in Canada and is not simply rights provided by way of ethnicity.

<sup>107</sup> *Minutes*, No 4, *supra* note 72 at 68–69.

<sup>108</sup> *Ibid* at 69.

<sup>109</sup> *Indian Act*, *supra* note 58.

**Mr. Crombie:** It will not increase them any.

**Mr. Chrétien:** It will not increase, it will not decrease, they will keep the same rights they had before.

**Mr. Crombie:** What are they?

**Mr. Chrétien:** Depending on the type of rights they have. If you are an Indian who is covered by a treaty, you have your treaty rights. If you are an Indian ...

**Mr. Crombie:** Not covered by that.

**Mr. Chrétien:** ... not covered by that, the Inuit, and so on, their rights are flowing from the Royal Proclamation of 1763. They remain the same.<sup>110</sup>

This exchange is significant for two distinct reasons. The first is that these categories could not have possibly been considered by the Proclamation, but Chrétien posits that these two groups do possess these rights. The second is that Chrétien's argument precedes jurisprudence — specifically *Daniels v. Canada (Indian Affairs and Northern Development)*<sup>111</sup> — by almost forty years. It would not be until 2016, and directly against the position of the Canadian government, that the Supreme Court of Canada would find that “non-status Indians and Métis are ‘Indians’ under s. 91(24) and it is the federal government to whom they can turn.”<sup>112</sup> Thus, in developing section 25, the reasoning is inconsistent in affording Proclamation rights to groups that government policy at that time did not even include. If we ascribe to the judicial narrative that the Proclamation merely recognized existing rights, we are still left with a void as to whom these rights apply.

### C. LAND RIGHTS

Land rights are, likely, the most contentious part of the Royal Proclamation. For Indigenous peoples, the Proclamation is a recognition that they are sovereign over their lands until reaching a treaty with the Crown.<sup>113</sup> For the Crown, these rights are constrained and limited, defined in diverse ways, but the rights never question the underlying sovereignty of the Crown. Land rights then form a severe contradiction to the Proclamation-based rights protected by section 25. For example, during the Committee meetings, Member of Parliament Warren Allmand questioned how Indigenous peoples are to trust this section, given the continuous erosion of their rights by federal and provincial governments in years past. To this, Chrétien claimed:

[T]his Charter of rights does not affect the rights that exist under either the treaties or the Royal Proclamation. I do think that these are the two sources of rights that exist for the natives in Canada. These remain. You say

<sup>110</sup> *Minutes*, No 3, *supra* note 91 at 10.

<sup>111</sup> 2016 SCC 12 [*Daniels*].

<sup>112</sup> *Ibid* at para 50. It should be noted, as a reviewer reminds me, that non-status and Métis organizations still were considered Aboriginal for the sake of funding purposes before *Daniels*, even if this understanding excluded them from section 91(24).

<sup>113</sup> See Henderson, *supra* note 32; Venne, *supra* note 32.

that the Parliament of Canada could decide some day that the Royal Proclamation will not affect Canada. *I do not think that we could.*<sup>114</sup>

This is a strong statement explaining that legislative authority cannot overturn the Royal Proclamation. However, upon further questioning from Allmand, we can see the limits of the approach. Allmand presses that Parliament, and the provinces, could continue to (which as Allmand mentions, they have done more often than not) pass oppressive legislation and section 25 would not prevent this. To this, Chrétien replies that:

I do not know if you are arguing that there is no possibility whatever for any government for example to expropriate any lands of the native people of Canada... If your view is that no laws could cover expropriate the land of any natives, I do not think that it is a proposition... *There [are] no circumstances under which some parts of Canada cannot be expropriated for the benefit of the totality of the nation.*<sup>115</sup>

Alas, the contradiction becomes quite clear. The position of the government is: (1) Indigenous peoples have rights recognized by the Royal Proclamation; (2) the Royal Proclamation cannot be revoked by the federal government; and (3) despite this, there is no situation in which the government could be prevented from taking Indigenous lands.<sup>116</sup> This is a confusing position given the land rights recognized by the Proclamation. It shows the inherent limits, and contradictions, of Proclamation-based land rights.

#### D. NATIONHOOD

The nationhood view of the Royal Proclamation is often adopted by Indigenous scholars.<sup>117</sup> This view does not uphold the assumptions of the settled narrative, instead believing that the Proclamation recognized Indigenous nationhood in a way that complicates today's notions of Crown sovereignty and title. This view finds its origins in the aforementioned recognition of "nations" in the Proclamation. Moreover, combined with narratives invoking treaties — especially that of the Treaty of Niagara — the Proclamation becomes less a unilateral assertion, and more a commitment to mutual governance and political consent between the Crown and Indigenous nations.

The position of Indigenous nationhood has been a common one throughout the history of Canada. For example, as early as 1913, Indigenous nations, like the Nisga'a, were crafting their positions in relation to the Proclamation: "We are not opposed to the coming of the white people into our territory, provided this be carried out justly and in accordance with the British principles embodied in the Royal Proclamation."<sup>118</sup> Other attempts at contesting the colonialism of the Canadian state similarly pointed to the long history of alliances with the

<sup>114</sup> *Minutes*, No 3, *supra* note 91 at 13 [emphasis added].

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.* Allmand does continue to press Chrétien on land rights as an example of how the government could continue to pass legislation and act in a manner harmful to Indigenous peoples. Chrétien challenges Allmand by inviting the committee to write in a land's protection clause, explicitly noting how this would enrage the provinces. Chrétien concludes that "we should be extremely careful" in invoking such a policy, given the majority of Crown land is now held by the provinces.

<sup>117</sup> See e.g. Henderson, *supra* note 32; Venne, *supra* note 32; Borrows, *supra* note 35.

<sup>118</sup> Edward Allen, "Letter from British Columbia: Reflections on the 40th Anniversary of the *Calder* Decision" Northern Public Affairs (September 2013) 14, cited in Feltes & Coulthard, *supra* note 66 at 22.



British. Chief Deskaheh petitioned the League of Nations in 1923 about the encroachment of the Canadian state on Haudenosaunee political authority and lands. This petition — while explicitly condemning the Canadian state — also made references to the history of the alliance between the British and Six Nations, the Covenant Chain, and the treaties between the two parties.<sup>119</sup> Another article by Deskaheh decries encroachment on the Haldimand Tract while affirming the sacred obligations of the British alliance with the Haudenosaunee, including the Covenant Chain formed with Sir William Johnson, the man tasked with ensuring the Proclamation was upheld in Canada.<sup>120</sup> Although Deskaheh's activism stands out for its international stage, scholars have argued that while Deskaheh was acknowledging Canadian authority, he was also explicitly calling for Indigenous sovereignty.<sup>121</sup> It is in this way that Indigenous nationhood accounts not only call for Indigenous sovereignty but also call for a fundamental revision of Crown sovereignty.<sup>122</sup> We are then left with a history of challenging the Proclamation narrative by pointing to its recognition of Indigenous nationhood.

The ideals of nationhood complicate the administrative apparatus of the Canadian state. There was no doubt that the original framers of the *Constitution Act, 1982* had these complications in mind. Chrétien was acutely aware that expansive Indigenous rights would change governance in Canada: “There was a long explanation this morning about the legal implications of a positive description at this time of aboriginal rights and so on which could lead to a lot of extreme complications in the administration—not my own administration, not our own problem here; but the administration of the land and resources in all the provinces of Canada.”<sup>123</sup> While the stance in 1982 was that of caution, we know now that section 35 has expanded Indigenous rights and governance in Canada. Large swaths of territory claimed by Canada now fall under governance agreements with First Nations, Métis, and Inuit, in a way that seems to contravene the wishes of Chrétien. However, despite the proliferation of Indigenous rights and governance agreements, scholars still argue that the content of Aboriginal rights remain frozen, “partial and incomplete.”<sup>124</sup>

The relevance of nationhood arguments in this disconnect is twofold. The first, is that attached to nations are certain principles of self-determination. As Paul Joffe and Mary Ellen

<sup>119</sup> Chief Deskaheh, *The Redman's Appeal for Justice* (Brantford: D Wilson Moore, 1924). The League of Nations did not act on the petition as they did not consider Indigenous nations eligible for League membership.

<sup>120</sup> Chief Deskaheh, “Chief Deskaheh Tells Us Why He is Over Here Again” in George P Decker, ed, *Special Collections* (New York: St. John Fisher College, Lavery Library, 1923). The encroachment of the Haldimand Tract continues to be protested by the Haudenosaunee, with the most recent protest being 1491 Land Back Lane that took place in 2020 and 2021.

<sup>121</sup> Yale Belanger, “The Six Nations of Grand River Territory’s: Attempts at Renewing International Political Relationships, 1921–1924” (2007) 13:3 *Can Foreign Policy J* 29. Belanger argues that that we should not be limited to the common portrayal of Deskaheh as someone who was trying to renew domestic relationships. Instead, Belanger argues that while Deskaheh did acknowledge Canadian sovereignty, his quest was ultimately one of fighting for international recognition of Six Nations sovereignty.

<sup>122</sup> In their study of Deskaheh, Margaret Franz argues we must pay attention not just to the demands of Deskaheh, but the means in which these were communicated. For Franz, these means — such as the centering of friendship and consent through the Two-Row Wampum — reveal Deskaheh’s attempts to not just be included in the political, but to fundamentally question what the political is in the first place. Margaret Franz, “Usurping the Contract: The Geneva Campaign (1923–1924) and the Refusal of Settler Sovereignty” (2019) 16:4 *Communication & Critical/Cultural Studies* 287.

<sup>123</sup> *Minutes*, No 38, *supra* note 75 at 71–72.

<sup>124</sup> John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1998) 22:1 *Am Indian L Rev* 37 at 63.

Turpel argue, these principles mean that there are “contending sovereignties” in Canada, between federal, provincial, and Indigenous authorities. These authors argue that, following principles of human rights and self-determination, Indigenous peoples have sovereignty. Subsequently, the contending sovereignties of Canada are “a necessary and positive dynamic in a federal state.... Recognition of Aboriginal sovereignty does not signify non-recognition of Canadian sovereignty, but it does reinforce the point that parliamentary sovereignty is a relative element in a federal state.”<sup>125</sup> To return to the debates about section 25, this position confirms Chrétien’s belief that Parliament cannot revoke the Royal Proclamation, but it would cast doubt on the claim that Parliament has the ability to expropriate Indigenous lands.

The second point of relevance is that nationhood brings with it elements of law and legal orders bestowed upon a nation. A brief example of the need to respect Indigenous law comes from Val Napoleon’s study of *Tsilhqot’in Nation v. British Columbia*.<sup>126</sup> Napoleon argues that while *Tsilhqot’in* peoples have respected Canadian law, the reverse has not been true — Canada needs to respect *Tsilhqot’in* law.<sup>127</sup> The acknowledgement of Indigenous nationhood should also include recognition of Indigenous political and legal structures. The rights protected through section 25 should also give credit to the recognition of Indigenous nationhood by the Crown in 1763. Recognition must be anchored in principles of self-determination, political structures, and legal orders — that which legitimated the Crown should also legitimate Indigenous structures.

## V. TWO DISSIMILAR CASES

The continued pursuit of reconciliation in light of colonial views, actions, and systems holds a prominent place in the sphere of law. Despite this pursuit, cases directly concerning Indigenous peoples and their customs, lives, and territories have often been devoid of Indigenous perspectives. Reconciliation must be predicated on hearing Indigenous perspectives. The greatest challenge is that while it may be easy to listen to complimentary perspectives, it is far harder to listen to perspectives that contest and challenge the settler-colonial system.

### A. JUDICIAL RECONCILIATION

Courts in Canada have often been directly implicated in, if not entirely supportive of, the colonial project; although, there is a growing awareness that courts need to change to better understand Indigenous peoples, perspectives, and legal orders.<sup>128</sup> Interestingly, in most of the

<sup>125</sup> Paul Joffe & Mary Ellen Turpel, *Extinguishment and the Rights of Aboriginal Peoples: Problems and Alternatives* (Ottawa: Royal Commission on Aboriginal Peoples, 1995) at 140.

<sup>126</sup> 2014 SCC 44 [*Tsilhqot’in*].

<sup>127</sup> Val Napoleon, “*Tsilhqot’in* Law of Consent?” (2015) 48:3 UBC LR 873 at 889–92.

<sup>128</sup> One of the most noted and cited examples of this conversation is former Chief Justice Lance Finch of the British Columbia Court of Appeal who presented a paper on the need to respect Indigenous legal orders in November 2012, see Justice Lance SG Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (Paper delivered at the Indigenous Legal Orders and the Common Law Conference of the Continuing Legal Education Society of British Columbia, Vancouver, November 2012) [unpublished]. For recent similar statements by high-ranking Canadian judges, Chief Justice Richard Wagner of the Supreme Court of Canada recently reiterated the need to “redouble” efforts of reconciliation and listen to Indigenous perspectives: Chief Justice Richard Wagner, “Ethical Principles and Cultural Competence: A Duty to Learn” (Ottawa, 6 May 2021), online: *Supreme Court of Canada* [perma.cc/3EFA-3Z94]. Chief Justice Robert Bowman of the British Columbia Court of Appeal “explained that the role of the judge is to ‘recognize the truth,’ accept the authority of Indigenous legal

positions advocating change, there is an explicit recognition that the courts have not done enough. Thus, there is a need for the courts to move forward in order to enable reconciliation in Canada.

In terms of the rights recognized by the Royal Proclamation, I suggest this move forward can come from two realities.<sup>129</sup> The first is that the Royal Proclamation came about through a pre-existing relationship between the Crown and Indigenous peoples based on mutuality and consent. The second is that the rights ascribed into the *Constitution Act, 1982*, are far from settled. These rights were to be worked out at a later date. However, as we know, the ensuing constitutional discussions, conferences, and proposals did address the rights recognized by the Royal Proclamation, but without reaching agreement. If the need today is to recalibrate the foundations of Canadian law, I see no reason why we cannot start with addressing the unfinished nature of constitutional guarantees of Aboriginal and treaty rights. It is worth noting that changing such foundations would likely be the product of sustained political discussions between appropriate representatives of the Crown and Indigenous peoples.<sup>130</sup> This shift seems like an unlikely one for a Canadian courtroom.<sup>131</sup> However, in this next section, I will examine two cases to show how a shift in interpretations of the Royal Proclamation is essential to judicial reconciliation.

## B. *RICE V. AGENCE DU REVENU DU QUÉBEC*

The second case, *Rice v. Agence du revenu du Québec*, comes from the Court of Appeal of Quebec and has direct implications for cases involving section 25 and the Royal Proclamation.<sup>132</sup> In the 1990s, the Kahnawake Reserve had several retailers who were selling gas to interested vendors, some who had Indian status, others who did not. Kahnawake retailers benefited from being exempt from certain taxes through their status, providing a commercial advantage compared to retailers outside of the reserve. In the spring of 1994, the Agence du Revenu Québec revoked several registration certificates based on a “belief that it was being deprived of significant tax revenue because of the appellants’ failure to collect and remit the various taxes.”<sup>133</sup> In response, the Kahnawake retailers filed against the department based in claims of Aboriginal rights deriving from the Royal Proclamation, section 25, and section 35.

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orders and laws, and finally, to understand not how to interpret Indigenous laws, but how to ‘braid these [legal] systems together.’” Nathan Afilalo, *Asserting Self-Governance* (Conference Report from the Canadian Institute for the Administration of Justice, Vancouver, 17–19 November 2021) [unpublished], online: [perma.cc/8JT7-NFCZ].

<sup>129</sup> I would like to note that this endorsement is not to suggest that I encapsulate an Indigenous position, this is not possible as I am not Indigenous. Rather, I am pointing to the work and views of Indigenous peoples in order to highlight the problematic assumptions and contradictions of judicial interpretations of the Royal Proclamation.

<sup>130</sup> As mentioned earlier, the Royal Proclamation did not make mention of Métis and Inuit nations. Given Chrétien’s comments on the expansive nature of the Proclamation, as well the decision of *Daniels*, *supra* note 111, Métis and Inuit nations must be represented in such discussions.

<sup>131</sup> For a critique of how Canadian concepts of law, politics, and sovereignty undermine Indigenous notions — and subsequently the need to listen to Indigenous peoples — see Dale Turner, “Indigenous Knowledge and the Reconciliation of Section 35(1)” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 164.

<sup>132</sup> *Rice v Agence du revenu du Québec*, 2016 QCCA 666 [*Rice*].

<sup>133</sup> *Ibid* at para 5.

The first part of the ruling considered whether there was a section 35 right to trade freely and whether the trial judge erred in ruling that there was not. The first, and larger component, of this claim focused on the longstanding practice of trading amongst the Kanien'kehá ka (Mohawk) people and if this could contribute to an Aboriginal right. The Court found that through jurisprudence, notably *R. v. Van der Peet*<sup>134</sup> and cases using the test established within that case, there was no right to trade freely. In *Van der Peet*, the Supreme Court of Canada ruled 7–2 in favour of protecting Aboriginal cultural practices in Aboriginal rights but ruled against the incorporation of commercial rights as Aboriginal rights.<sup>135</sup> That ruling contended that, “[e]ven if the object of an ancestral right can evolve over time, this does not mean it can be transformed into a completely different modern right.”<sup>136</sup> As a result, the *Rice* Court found that the trial judge did not err in judgment, that “the Court cannot make the *quantum leap* proposed by the Petitioners from the practice of exchanging spiritual ‘orenda’ artefacts to the practice of the commercial sale of fuels (regular, super, diesel), i.e. refined synthetic products supplied by petroleum companies, their suppliers.”<sup>137</sup>

It should be noted that the *Rice* decision directly recognizes the importance of section 25 for Aboriginal rights.<sup>138</sup> This position goes beyond the traditional interpretation of section 25 as a saving provision, and instead recognizes its importance in line with the need to unsettle the Proclamation narrative. The Kahnawake appellants held that the trial judge made two mistakes in not attributing constitutional status to the Royal Proclamation and ignoring commitments within that allow for Indigenous peoples to trade freely.<sup>139</sup> The Quebec Court of Appeal replied in its ruling that amongst the small jurisprudence and scholarly works on it, section 25 does not generate new rights and rather “the provision is interpretative, and is aimed at preventing contestation of Aboriginal rights based on other provisions of the Canadian Charter.”<sup>140</sup> As a result, the Court found that the right to trade freely from the Proclamation did not have constitutional status.

In its ruling, the Court continued to explore the right to trade freely, contemplating if it came from the Proclamation and whether it could be established as an existing Aboriginal right. The Court, despite finding that the appellants were correct in arguing the Proclamation “granted them significant rights,” was intensely critical of a right to trade.<sup>141</sup> The Court acknowledged the right to trade freely guaranteed in the Proclamation but clarified that this provision was designed to protect Indigenous peoples against commercial abuse by deceitful merchants. Accordingly, the Court concluded on the right to trade freely: “Nothing in the text of the Royal Proclamation or its historical context gives rise to the conclusion that [the] British Crown promised Aboriginals an unrestricted right to trade that was exempt from regulation of any kind.”<sup>142</sup> Ultimately, despite brief acknowledgement of a potential right to trade freely, this right was found to be highly limited.

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<sup>134</sup> [1996] 2 SCR 507 [*Van der Peet*].

<sup>135</sup> *Ibid.* For a useful questioning of the rights guaranteed in *Van der Peet*, see Hon Justice Douglas Lambert, “*Van der Peet* and *Delgamuukw*: Ten Unresolved Issues” (1998) 32:2 UBC L Rev 249.

<sup>136</sup> *Rice*, *supra* note 132 at para 42.

<sup>137</sup> *Ibid.*, citing *Leclair c Agence du revenu du Québec*, 2013 QCCS 6083 at para 180.

<sup>138</sup> *Rice*, *ibid* at para 51.

<sup>139</sup> *Ibid* at para 44.

<sup>140</sup> *Ibid* at para 50.

<sup>141</sup> *Ibid* at para 49.

<sup>142</sup> *Ibid* at para 63.

*Rice* creates three significant issues in dealing with the Royal Proclamation rights provided by section 25. The first issue is that the Court's understanding of the Proclamation remains tied to one of British supremacy, evident by the Court explicitly noting that the Proclamation "was not a treaty, but a unilateral declaration of the Imperial Crown."<sup>143</sup> This statement sheds the Proclamation of its Treaty of Niagara roots and instead posits the document as one that sought to do little more than ensure colonization.<sup>144</sup> Moreover, this interpretation ignores that the Proclamation was a response to the need to establish friendly relations with Indigenous peoples. Principles of mutuality and consent are removed if we presume the starting point was always a British one, and not a mutual one.

This starting point creates the context for the second issue; there is a significant deviation between the legislative intentions of section 25 and how the Court treats the appellants' section 25-based claim.<sup>145</sup> The Court's statement that section 25 is an interpretive provision is correct, and I agree that it did not create new rights in and of itself. However, this analysis overlooks two realities. The first, as explained by Chrétien, is that Parliament cannot overturn the Royal Proclamation even if it wanted to.<sup>146</sup> The fact that the drafters of the *Constitution Act, 1982* felt they could not remove Proclamation rights even if they wanted to surely indicates the importance of the Proclamation. The second is the constitutional status of section 25. While the Proclamation has been subject to debate over its constitutional status, it is clear that section 25 constitutionalizes the protection of the Proclamation. Moreover, the legislative history suggests that the content of Proclamation rights is not clear. There was an explicit intention to determine the rights at a later date, which as mentioned, turned into constitutional conferences, failed amendments, and ultimately, no agreement on the content of these rights. While the courts have further defined the content of these rights, this has essentially depoliticized a process that was supposed to be conducted *with* Indigenous peoples, not for them.

The final issue is the presumption of regulation. It is a debatable claim that the Proclamation did not guarantee unrestrained commercial activity by Indigenous peoples, although it did guarantee "that the Trade with the said Indians shall be free and open to all our Subjects whatever" requiring only a licence on the side of settlers.<sup>147</sup> However, beyond this debate, why should we presume that this guaranteed the ability of the Crown to regulate Indigenous commercial activity? It is probably worth turning to the section of the Proclamation that guarantees that Indigenous peoples "should not be molested or disturbed."<sup>148</sup> Certainly, there are grounds to argue that the Kahnawake retailers would be disturbed by Crown regulations on their commercial activity. The assumption of regulation

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<sup>143</sup> *Ibid* at para 55.

<sup>144</sup> It should be noted that while the Haudenosaunee Confederacy (which the Kanien'kehá ka are a member of) were present at the Treaty of Niagara, the Treaty was not necessarily directed at Crown-Haudenosaunee relations because they were already a member of the Covenant Chain. Indeed, the Treaty was meant to include other Indigenous nations that were not already aligned with the British.

<sup>145</sup> Hogg & Wright, *Constitutional Law*, *supra* note 49 at 60:4. As Hogg and Wright demonstrate, legislative history is directly relevant to considering constitutional rights. Hogg and Wright explain that the Special Joint Committee on the Constitution of Canada is admissible legislative history in constitutional cases. They also note this should be subject to 'progressive interpretation' in which legislative history and constitutional provisions are adapted to "new conditions and new ideas" (*ibid* at 60:6). An example of this would be the government's slated reconciliation with Indigenous peoples.

<sup>146</sup> *Minutes*, No 3, *supra* note 91 at 13.

<sup>147</sup> Proclamation, *supra* note 1 at para 15.

<sup>148</sup> *Ibid* at para 12.

is only made possible by the Court's unilateral starting place, free of Indigenous mutuality and consent. At the time of writing, an Indigenous dispensary, Spirit River Cannabis, has opened without provincial regulation in London, Ontario by members of Chippewa of the Thames First Nation on their traditional territory. This dispensary has a large sign near the entrance explaining that the store is "protected" by sections 25 and 35, signed by Hereditary Chief Del Riley who is explicitly mentioned as a negotiator of the *Constitution Act, 1982*.<sup>149</sup> The future of such commercial arguments through section 25 and the Royal Proclamation are yet to be seen, but represent a test of the economic guarantees of the Proclamation.

### C. *RESTOULE V. CANADA (A.G.)*

The recent case, *Restoule v. Canada (A.G.)*, represents one of the most expansive views of the Royal Proclamation and the Crown's duties arising from it.<sup>150</sup> In the trial court, the Ontario Superior Court considered the Robinson Treaties of 1850, in which the Anishinaabe of the upper Great Lakes claimed that Ontario and Canada had ignored specific increases in the treaty annuities clauses over the years. The Court found that the treaty annuities did require to be increased.<sup>151</sup> The Ontario Court of Appeal upheld the judgment, only differing from the trial judge on a few matters.<sup>152</sup>

The decision was significant for a few distinct reasons. The first is that the Court found that Canada's and Ontario's responsibilities toward Indigenous peoples stemmed from the Royal Proclamation and the Treaty of Niagara. Recall earlier, that the Proclamation has been used as a recognition of inherent Aboriginal rights, but this decision was different. While the Court did acknowledge that the Proclamation was a unilateral declaration of sovereignty for the Crown,<sup>153</sup> it also declared the Proclamation as a starting point for contextualizing the Robinson Treaties: "The motivation for and the fundamental concepts in the Robinson Treaties flow from the *Royal Proclamation*."<sup>154</sup>

The second point of significance is the Court's description of the connections between the Proclamation and the events of the Treaty of Niagara, noting how it was a "cross-cultural merging of diplomatic protocols and legal orders."<sup>155</sup> The Court noted the importance of the council at Niagara to extend the Covenant Chain Alliance to the Anishinaabe, and noted the expert testimony that the Anishinaabe "understood that they held title to their lands, maintained their autonomy, re-established fair trade relationships with the British, secured

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<sup>149</sup> Colin Butler, "This Indigenous Cannabis Shop in London, Ont., Could Be Major Test for Ontario's Pot Retail Laws," *CBC News* (8 December 2022) online: [perma.cc/82RS-L3BW].

<sup>150</sup> *Restoule v Canada (AG)*, 2021 ONCA 779 [*Restoule ONCA*].

<sup>151</sup> *Restoule v Canada (AG)*, 2018 ONSC 7701 [*Restoule ONSC*].

<sup>152</sup> *Restoule ONCA*, *supra* note 150 at para 87. The Court evaluated the trial judge's decision on ten matters ranging from treaty interpretation to fiduciary duties. Perhaps most significant was the unanimous decision that the Honour of the Crown is engaged in considering treaty annuities — all judges agreed the Crown must consider its treaty obligations.

<sup>153</sup> *Restoule ONSC*, *supra* note 151 at para 73. The idea that Proclamation was both a unilateral declaration of sovereignty and an affirmation of Aboriginal title was upheld by the Court of Appeal (see *Restoule*, ONCA, *ibid* at para 12).

<sup>154</sup> *Restoule ONSC*, *ibid* at para 79.

<sup>155</sup> *Ibid* at para 89. This is not to suggest, however, that the Treaty of Niagara has not been considered by the Ontario courts before. For example, brief considerations of the Treaty of Niagara occur in cases such as *Chippewas of Sarnia Band v Canada (Attorney General)* (2000), 51 OR (3d) 641 (CA) or *Mississaugas of Scugog Island First Nation v. National Automobile Aerospace Transportation and General Workers Union of Canada (Caw-Canada)*, [2006] 3 CNLR 46.

themselves protection from unscrupulous traders, and secured a process for restitution of fraudulent land purchases.”<sup>156</sup> The starting point of Crown sovereignty remains, but there is a significant deviation in incorporating Indigenous perspectives into traditional understandings of the Royal Proclamation. As a result, the Proclamation becomes a unilateral document grounded in a multilateral reality. Without the latter, the Proclamation would have been devoid of real operative power.

Finally and most significantly, *Restoule* contains one of the most thorough engagements with Indigenous perspectives in recent jurisprudence. The Court took the crucial step of hearing from several experts, scholars, and community members, all of whom have some tie to Anishinaabe systems of politics, governance, and law. Doing so allowed the Court to move past abstract notions of “Aboriginal” and “Indigenous” and listen to the actual nation who is making the claim.<sup>157</sup> In this case, the trial judge directly considered Anishinaabe principles of respect, responsibility, reciprocity, and renewal.<sup>158</sup> The Court also travelled to three different Anishinaabe communities throughout the duration of the case. With sustained attention to Anishinaabe perspectives of the Treaties, Justice Hennessey could conclude “that the Treaties were not a bargain for a \$4 fixed amount; rather, they were future-oriented agreements situated within an ongoing relationship.”<sup>159</sup> In noting the *ongoing* nature of treaties, *Restoule* provides us with an example of not viewing Indigenous rights solely in terms of past infringement, but rather that treaties should continue to be observed, and a demonstrable commitment to the principle that “once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction.”<sup>160</sup>

*Restoule* stands out for its significant interpretation of the Royal Proclamation and the Treaty of Niagara. This is not to suggest, however, that the case is not without its flaws. As Heidi Stark writes, who was also an expert witness in the case representing Anishinaabe law, the issue with cases that deal with treaty infringements and rights disputes is that they constrain the ability for proper rectification. Put simply, narrow claims heard in court do not consider greater contexts of colonialism, such as the denial of Indigenous political and legal orders. As Stark writes, “[i]f we are going to take Indigenous assertions of sovereignty and nationhood seriously, as well as the laws and political traditions that give shape and meaning to Indigenous sovereignty and nationhood, we must also ask what treaty rights exist beyond the scope of hunting and fishing.”<sup>161</sup> I contend that the restrictions of *Restoule* come from the maintenance of a settled narrative of the Royal Proclamation. As we continue to view the Proclamation in non-contestable terms, so too do we constrain the document as one that ensures the Crown’s political and legal orders, without offering the same in kind for Indigenous nations. Thus, the need to *unsettle* the constitutional interpretation of the Royal Proclamation continues.

<sup>156</sup> *Restoule* ONSC, *supra* note 151 at para 88.

<sup>157</sup> A precedent for this was set in *Sparrow* when Chief Justice Dickson and Justice La Forest, on behalf of a unanimous Supreme Court, found that “it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of rights at stake” (see *Sparrow*, *supra* note 22 at 1078).

<sup>158</sup> *Restoule* ONSC, *supra* note 151 at paras 411–23.

<sup>159</sup> *Ibid* at para 576.

<sup>160</sup> *R v Sioui*, [1990] 1 SCR 1025.

<sup>161</sup> Heidi Kiiwetinepinesiik Stark, “Changing the Treaty Question: Remediating the Right(s) Relationship” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 273.

## D. JUDICIAL NARRATIVES OF PROCLAMATION

In this section, I reviewed two different cases. *Rice* embodied the settled narrative of the Proclamation and accordingly understood the Proclamation and section 25 rights in a highly constrained way. The arguments of the appellants, despite holding great promise for section 25 clarity given their provocative premise, have been dismissed for leave by the Supreme Court of Canada.<sup>162</sup> The second case, *Restoule*, gave tremendous credit to the Treaty of Niagara and the mutual roots of the Proclamation. Despite its issues, *Restoule* considered Anishinaabe perspectives and questioned the premise of Crown supremacy, finding that the Crown owes the Anishinaabe fair and changing annuities as a result of the Robinson Treaties. *Rice* and *Restoule* represent two directions for the courts in approaching the Proclamation narrative. It is worth asking: if the Robinson Treaties can be understood in a modern context, why not the rights recognized by the Proclamation and their constitutional guarantee in section 25? The test of whether courts will unsettle the Proclamation narrative will only continue as more and more recent cases invoke both the use of the Royal Proclamation and the Treaty of Niagara to stake their claims.<sup>163</sup> This test will involve moving outside the colonial structures of the courts and toward a mutual understanding.<sup>164</sup>

## VI. CONCLUSION

As the foundational document in the relationship between the Crown and Indigenous peoples, the Royal Proclamation remains relevant to the state of this relationship today. I set out to examine the content of the rights provided by the Proclamation guaranteed in section 25 of the *Charter*. These rights continued to be ill-defined, but I did find that there is a consensus about the savings provision this section creates, protecting Aboriginal rights from *Charter* challenges. I argue two things throughout this article. First, section 25 rights are ill-defined because they were ill-defined at conception. The inclusion of the section intended to figure out the content of these protected rights at a later time. In the words of Chrétien: “What we are trying to do in ... Section 24 [draft of 25] we want to protect all the rights of the natives.... Exactly the reason why we are doing that is to make sure that all the rights be protected because in Canada *we still need some clarification to come to an agreement about*

<sup>162</sup> *John Louis Steven Rice v Attorney General of Canada*, 2016 QCCA 666, leave to appeal to SCC refused, 37077 (22 December 2016) [*Rice* SCC Leave Application].

<sup>163</sup> See *Saugeen First Nation v The Attorney General of Canada*, 2021 ONSC 4181; *Iskatewizaagegan No 39 Independent First Nation v Winnipeg (City)*, 2021 ONSC 1209.

<sup>164</sup> I am thankful for an anonymous reviewer who demonstrated that the recent implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* in Canada as *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 has the potential to have a sizable impact on the rights discussed throughout the article. For example:

11. Whereas the Declaration emphasizes the urgent need to respect and promote the inherent rights of Indigenous peoples of the world which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories, philosophies and legal systems, especially their rights to their lands, territories and resources;

12. Whereas the Government of Canada recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government;

18. Whereas the Declaration is affirmed as a source for the interpretation of Canadian law.

*United Nations Declaration on the Rights of Indigenous Peoples*, 2007 adopted by the United Nations General Assembly on Thursday, 13 September 2007, Res 68, 61, UN Doc A/RES/61/295. The Declaration, as a source of interpretation for Canadian law, will likely impact many of the themes outlined in this article, such as land rights, economic rights, and self-determination. Nonetheless, a proper consideration of the Declaration remains outside the scope of the article.



*native rights*.”<sup>165</sup> The need for clarification resulted in a constitutional conference, the *Constitutional Amendment Proclamation, 1983*, more conferences, two failed constitutional amendments, and yet, no clarity on the content of Proclamation rights protected by section 25. Chrétien’s demand about the need for an agreement on Indigenous rights reads as true today as it did in 1982.

The second part of my argument has built on the notion that courts have largely determined the content of Aboriginal rights since the constitutional gridlock of the late twentieth century. Grounded in the context of our discussion, this reality is problematic as courts have overwhelmingly endorsed a static, unilateral narrative of the Royal Proclamation in a manner that constrains the importance given to these rights in section 25. As a result, I argue for an unsettling of this judicial narrative to better contextualize the Proclamation alongside themes of Indigenous mutuality and consent, largely based in the Treaty of Niagara. This imperative is supported with two cases, one complete with a static understanding of the Proclamation, and the other which gave credit to the Treaty of Niagara and worked to unsettle the dominant narrative. The latter case — *Restoule* — should be looked on as a path forward for judicial approaches to the Royal Proclamation, a vital task considering the amount of recent Aboriginal rights claims grounded in the Proclamation.<sup>166</sup>

In the context of Proclamation rights, we are left with several unexplored and unresolved issues. For land rights, there exists the question of whether courts can retroactively correct unsanctioned purchasing or settling on Indigenous lands — more aptly referred to as land theft — with the rights guaranteed by the Proclamation.<sup>167</sup> Another issue is whether the rights protected by the Proclamation could be subject to an originalist application. The troubling notion of originalism is that it could constrain modern applications of historical guarantees, much in the way that judges in the *Rice* decision did not find sufficient grounds for permitting contemporary economic activities.<sup>168</sup> Additionally, we are left with some confusion on the application of individual Aboriginal rights. As Justice Abella wrote in the unanimous Supreme Court of Canada ruling dismissing the *Behn v. Moulton Contracting Ltd.* appeal: “[I]t could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature.”<sup>169</sup> Proclamation rights, while addressed to Indigenous nations, seem to have an individual character, demonstrated when Chrétien stated that non-status Indigenous people have these rights.<sup>170</sup> Further investigation on the nature of collective versus individual Proclamation rights is therefore necessary.

I conclude by noting the limits of my argumentation. The most notable is that many Indigenous peoples do not want to engage with the Crown and its systems in a way that

<sup>165</sup> *Minutes*, No 4, *supra* note 72 at 32 [emphasis added].

<sup>166</sup> *Rice* SCC Leave Application, *supra* note 162.

<sup>167</sup> For an emblematic case of a land purchase in Ontario that violates the rules set out by the Royal Proclamation and the *Indian Act*, *supra* note 58, see Shiri Pasternak, Sue Collis & Tia Dafnos, “Criminalization at Tyendinaga: Securing Canada’s Colonial Property Regime through Specific Land Claims” (2013) 28:1 CJLS 65.

<sup>168</sup> For a study on originalist positions in Aboriginal rights cases, see John Borrows, “Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism” (2017) 98:1 Can Historical Rev 114.

<sup>169</sup> *Behn v Moulton Contracting Ltd*, [2013] 2 SCR 227 at para 35.

<sup>170</sup> Given that Chrétien did not suggest non-status people need a nation for Proclamation rights, it should be understood that these rights have an individual character.

unsettling this narrative would likely require.<sup>171</sup> Moreover, even sustained engagement could still fail to meet the demands for a nation-nation relationship; namely the demands of legal pluralism and the engagement of settlers with Indigenous laws, political orders, and legal orders.<sup>172</sup> The final contention is that the shortcomings of section 25 have been addressed, in part, by the inception of section 35, and the subsequent jurisprudence that has developed section 35 into the main guarantor of Aboriginal rights in Canada. The issue with this explanation is that section 35 rights have been, through cases like *Guerin* and *Delgamuukw*, moved away from the Royal Proclamation. As a result, there exists no recognized substantive Proclamation-based rights, despite the creation of section 25. These rights, as has been argued, could greatly expand legal protections of land rights and nation-based rights for Indigenous peoples. While section 35 and subsequent developments have been important, so too is the need to unsettle the interpretation of the Proclamation as dormant, in order to expand Aboriginal rights and return to the principles of mutuality and consent that the Crown-Indigenous relationship was founded on. The relatively open-ended nature of what unsettling requires is necessary to ensure that this process is conducted by and with Indigenous nations; such notions must run contrary to the history of the Crown's decidedly one-sided decision-making of the content of Aboriginal rights.

This article has worked from a position that the relationship between the Crown and Indigenous peoples is unjust. I have sought to investigate one element of the foundations of this relationship: the rights recognized by the Royal Proclamation of 1763. The inclusion of these rights in the *Charter*, through section 25, has not been the subject of large examination. Throughout this article, I have sought to highlight the inconsistencies and undetermined nature of the section. To conclude, we are left with a settled narrative of the Proclamation, but an unsettled state of section 25. Thus, we need to begin to see the Proclamation as unsettled to fully appreciate the inclusion of section 25 and the rights that it includes. In doing so, we can begin to unravel the tensions at the heart of the relationship between the Crown and Indigenous peoples. If done correctly, I believe it can help lead us to a place with more room for mutuality and consent, but only if we are ready to unsettle what we already know.

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<sup>171</sup> Leanne Betasamosake Simpson, "Indigenous Resurgence and Co-resistance" (2016) 2:2 *Critical Ethnic Studies* 19 at 34. This is perhaps best summarized by the Indigenous Resurgence school of thought, which typically criticizes sustained engagement with the state. This position is exemplified in Simpson's succinct argument that "[e]ngagement with the system changes Indigenous peoples more than it changes the system." Simpson's argument is a result of engaging with another leading text of Indigenous resurgence, for this text, see Glen Coulthard, *Red Skin, White Masks* (Minneapolis: University of Minneapolis Press, 2014).

<sup>172</sup> For an introduction to legal pluralist ideals, see Val Napoleon, "Ngā ture o ngā iwi taketake — Indigenous Law: Legal Pluralism and Reconciliation" (2019) *Māori L Rev* 1–22. For criticisms of the way liberal individualist ideals proliferate and constrain Indigenous legal orders, see Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 *McGill LJ* 847–84; Johnny Mack, "Hoquotist: Reorienting through Storied Practice" in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011).