BRIEF FOR THE FOREIGN AND COMMONWEALTH AFFAIRS COMMITTEE OF THE BRITISH HOUSE OF COMMONS

In asserting authority over the lands of Canada, British Imperial officials dealt with leaders of the Aboriginal peoples recognizing them as able to represent their people. Relations between colonial officials and the Aboriginal leaders were formalized in treaties which dealt with a range of issues, some typical of international treaties - peace, political relations, territoriality - and some reflecting the new inter-relationship of aboriginal and European peoples that was being established. [1]

The major legal definition of the principles of colonial-aboriginal relations is found in the Royal Proclamation of 1763. The Proclamation was enacted by George III employing a Crown prerogative power to legislate directly for the colonies. The Proclamation was the first written constitutional document for Canada (beyond instructions to Governors). The provisions in the Royal Proclamation in relation to aboriginal peoples are of a constitutional character and are still in effect in Canada by virtue of their original enactment (not having been re-enacted either in the United Kingdom or Canada).[2] The Proclamation describes the Aboriginal groups as "the several Nations or Tribes of Indians with whom we are connected and who live under our Protection." The national or political character of the Aboriginal groups was recognized. The special relationship between the Tribes and the Imperial Crown, in general, was described as a protectorate relationship, familiar to international law. To both the British authorities and the Aboriginal leaders, Aboriginal self-government was to continue on the lands held by the Aboriginal peoples.

.../2

The political character of the relationship between Great Britain and the Aboriginal nations or tribes was emphasized in the treaty procedure set out in the proclamation. It was made clear, expressly, that treaty relationships were to occur only between representatives of the Crown and leaders of the Aboriginal nations. Private dealings were prohibited. Unless lands were acquired by treaties, they remained under Aboriginal political and legal control. The treaty procedure of the Royal Proclamation of 1763 remains in force in Canada and continues to be the only general procedure for adjusting aboriginal-white relations.

The Imperial Crown took on a basic obligation to protect the Aboriginal Nations or Tribes. This is stated in the Royal Proclamation and restated in the report of the Select Committee of the British House of Commons on Aborigines (British Settlements) in 1837. This is not a unilateral obligation, but a basic part of the understandings between Great Britain and the tribes. The Aboriginal peoples accepted a special relationship with the Imperial Crown, which gave Britain the right to acquire lands in Canada and expand its colonial jurisdiction there. In return Great Britain pledged protection to the tribes and recognized that change should only occur by negotiation and agreement (that is by treaties). Great Britain acted on these understandings to her benefit as a nation and to the benefit of many of her subjects. The obligations taken on in this manner cannot now be lightly disregarded without a basic breach of faith.

.../3

In the Royal Proclamation of 1763 the Imperial Crown authorized the governors or commanders in chief of the colonial governments in North America to negotiate treaties with the Tribes on behalf of the Imperial Crown. Treaties had been negotiated and signed before 1763. From 1763 until Canadian confederation in 1867, hundreds of treaties were negotiated in what is now southern Ontario. From 1867 to 1956 treaties were entered into with major tribes in western Canada. The sole authority for all these treaties lay in the prerogative powers of the Imperial Crown and in the Royal Proclamation of 1763.[3] Section 91 (24) of the British North America Act of 1867 (giving the Parliament of Canada responsibility in relation to "Indians, and Lands reserved for the Indians") did not give authority to the government of Canada to negotiate treaties with the Aboriginal tribes. Indeed Canada was incapable of negotiating treaties at the time of confederation. Its power to negotiate treaties was clearly established only in the Stature of Westminister of 1931. No piece of legislation in Canada, either before or after confederation, gave authorization to any Canadian officials to negotiate treaties with the Aboriginal nations. The sole authority for all Aboriginal treaties, on the part of the governments of Canada and the United Kingdom, has been the Imperial prerogative and Royal Proclamation of 1763. The treaties, then, were negotiated on behalf of the Imperial Crown (and not on behalf of the Crown in the right of Canada or the government of Canada). The only supplementary provisions dealing with these questions are of the Imperial government: in the Imperial order-in-council transferring

.../4

Rupert's Land and the Northwestern Territory to Canada in 1870 and in the Metis land rights provisions of the Manitoba Act which were confirmed by the British North America Act of 1871.

The Lieutenant-Governors and other representatives who negotiated the treaties in the Canadian west (where the best records survive of the actual negotiations), consistently asserted that they were acting for the Imperial Crown. Their own records of the negotiations indicate that they did not refer to the Government of Canada, the Prime Minister of Canada or the Crown in the right of Canada.[4]

Have the obligations under the treaties and the responsibilities under the Royal Proclamation of 1763 been transferred to Canada?

There have been shifts in financial responsibility. The Imperial vote for Indians ended in 1860. There is no other significance to that act in 1860. No Imperial action has purported to transfer the corpus of Imperial obligations and responsibilities to Canada, Administrative and financial responsibilities have gradually been assumed in Canada and in 1867 the British North America Act determined that those functions would lie with the federal government. But, again, no Imperial action purported to transfer Imperial obligations and responsibilties to Canada. In 1931 the Statute of Westminister confirmed Canada's status as a self-governing dominion with an international personality. The Statute of Westminister made no reference to the Royal Proclamation of 1763 or to the treaties with Aboriginal nations. Treaties continued to be negotiated with the Aboriginal nations after 1931 in the same way as before 1931.

.../5

In general it is clear that the Statute of Westminister was not designed to enable Canada to amend its own constitution. That is clear for the British North America Act of 1867 by section 7 of the Statute of Westminister. The Royal Proclamation of 1763 continued to be an operative part of the constitution of Canada in 1931 and Canada was not given the power in the Statute of Westminister to amend or repeal the Royal Proclamation. Section 2 (2) of the Statute of Westminister provides the Canadian laws can alter any "law of England"[5] or any act of the Parliament of the United Kingdom (or any order, rule or regulation made under such an act). The Royal Proclamation, as a prerogative Imperial enactment relating to Canada and with no application within England, is neither a law of England or an act of the Parliament of the United Kingdom. The Royal Proclamation continued after 1931 as an Imperial law structuring the relationship of the Indian nations to the Imperial Crown and through the Imperial Crown of Canada.

Parallel to the arrangements embodied in the Statute of Westminister of 1931, there had developed a convention that the Government of the United Kingdom will not interfer in the internal affairs of the self-governing dominions.

That convention would, of course, have no application to matters that were not "internal" or "domestic" in character because they involved direct legal obligations and responsibilities between the Imperial Crown and the Aboriginal Nations.

.../6

For this reason we submit that the convention does not properly apply to the issues here raised. In another sense, as well, the convention is not an appropriate guide in this situation. The essential virtue of conventions as opposed to codified rules, is their flexibility and adaptability. They embody general principles but do not mandate rigid application of any rule in an inappropriate situation. The convention that the government of the United Kingdom should not interfere, in general, in the internal and domestic affairs of Canada need not be extended to prevent the Parliament of the United Kingdom from examining any Canadian proposal in the light of the rights and status of the Aboriginal nations, groups which the United Kingdom recognized and pledged to protect. No other grouping within Canada has an equivalent historical, legal and moral claim to the concern of the Parliament of the United Kingdom.

The last possible date on which the obligations and responsibilities of the United Kingdom could have been transfered to Canada is 1949, when the Imperial parliament gave the Parliament of Canada the power to amend the "Constitution of Canada." There has been uncertainty about the meaning and role of the 1949 amendment, but it is clear that it could not have given the Canadian Parliament the power to amend the Royal Proclamation, which has an Imperial and not simply a Canadian character.

In summary, the early pattern of direct Imperial prerogative responsibility for relations with the Aboriginal nations or tribes involves an obligation to protect the Aboriginal nations and involves a commitment to change through agreement.

.../7

The Imperial Crown obligations and responsibilities have never explicitly been transferred to Canada. The shifts of power that occured in 1860, 1867, 1931 and 1949 neither explicitly nor implicitly transfer the Imperial obligations and responsibilities to Canada.[6]

It follows then, that the act of "patriation" being requested by the government of Canada will shift those obligations and responsibilities to Canada. But those obligations and responsibilities are owed to the Aboriginal nations or tribes. The United Kingdom cannot legally substitute Canada for itself in its relationship with the Aboriginal nations, without the consent of those Aboriginal nations. This would be true of any treaty relationship. It is particularly obvious in this case because of the basic model of negotiation and consent in the treaty process prescribed by the Royal Proclamation of 1763.

There are great anomalies in the principles and conclusions asserted here. While the Aboriginal peoples of Canada retain a direct, protected, political link to the Imperial Crown, that legal reality has been denied, on a pervasive and continuing basis, by the governments of Canada and the United Kingdom and by the Crown and the Crown's direct representatives. Are we pursuing an elaborate lost cause? Are we, as we have been accused by some in Canada, the last of the old-fashioned imperialists? When there is a pervasive consensus in Canada that the constitution should be patriated, how can the Aboriginal peoples of Canada, the first victims of colonialism, be the only voice against the patriation?

.../8

Our nations have lost authority in two related ways. The colonial process gradually sapped our communities of the strength they needed to continue to be self-governing within the new state of Canada. We became dependent. In the last decades there has been a great rebuilding of our strength as Aboriginal nations. We are again claiming our birthright as peoples with rights of self-determination. Our cultures, our languages, our political ways have survived. But while we were weak, there was a gradual shift of control over our lives from the Imperial Crown to Canada. We could not resist that shift, but we never consented. Canada and the United Kingdom have assumed that the transfer was complete. It has occured in practice - but not in law. The obligations and responsibilities, in law, are with the Imperial Crown. Just as the indigenous people of Zimbawe called upon Imperial authority in their struggle against the white government of Rhodesia, we are calling upon the Imperial Crown under its historical obligations and responsibilities, to help us in our struggle to decolonize our relationship with Canada and with the United Kingdom.

What we are seeking is clear. We are seeking today to be self-governing nations within Canadian confederation. To ensure that we are self-governing, we want to maintain our special relationship to the Crown - a relationship parallel to that of the government of Canada and parallel to that of the governments of the Canadian provinces. We want this relationship in order to protect our rights of self-government. We want to re-establish the basic principle of the Royal Proclamation that changes in

.../9

our relations with the Imperial government and the Canadian government will be negotiated and will only proceed on the basis of consent. We are able to assert rights to protection, of self-government and of treaty relationships today because of the Imperial link. We have asserted these rights in Canada, without success. Now either the Imperial Crown must fulfill it's obligations and responsibilities itself - or ensure that these protections are explicitly entrenched in a new Canadian constitution (by refusing patriation to any proposal which ignores these matters). Otherwise the legal obligations and responsibilities assumed by the Imperial Crown will have been unilaterally denied by the United Kingdom. It would be a betrayal.

.../10

1. To the Aboriginal Peoples the treaties are clearly of an international law character. In English law they were treated as equal to international treaties, at least in the early period of treaty relations. Later the exact legal character of the treaties came to be described less clearly by governments and the courts. The Judicial Committee of the Privy Council ruled in Attorney General for Canada. Attorney General for Ontario (1897) A.C. 199, that they did not have to decide in the case whether a particular treaty with an Aboriginal Nation was a true international treaty. This question remains officially unresolved in Canadian law. Ontario District Court in 1978 in R. Batisse 84 D.L.R. (3d) 377 at 384 stated: "It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements." This is striking for it would appear to be in Canada's self-interest to define the treaties as purely domestic or private.

2. The Royal Proclamation of 1763 continues to be printed in the Appendix to the revised statutes of Canada in the series of constitutional documents that begin with the Royal Proclamation and include the British North America Act of 1867 and the Statute of Westminister of 1931. The statement of Exchequer Court of Canada in King v Lady McMaster (1926) Ex. C.R. 68, that the Royal Proclamation continues to have the force of law in Canada is a standard and accepted proposition.

3. The various Acts dealing with Aboriginal people that have been enacted in Canada, beginning in the early 19th century and continuing with the present federal Indian Act, have never dealt with the procedure for negotiating treaties, appointing commissioners or any other aspect of the treaty making process.

4. The primary source is Morris. Our treaties with the Indians of Manitoba and the Northwest, which was published in the late 19th century to defend the integrity of the treaty making process. The fact of consistent references to the Imperial Crown in the negotiations confirms the oral tradition of Aboriginal elders on the point.

5. The meaning of the phrase "law of England" is clear from the earlier issues that led to the Colonial Laws Validity Act. It was not law geographically originating in England but expressly applicable to Canada that were in issue, but domestic laws in England.

.../11

6. Mr. Feeland testified on November 12th that the United Kingdom had no remaining obligations under treaties with Indian nations, the responsibility having been transferred to Canada in 1867 or no later than 1931. In our submission that conclusion is legally incorrect. Mr. Feeland was asked whether his view had been challenged in the courts. He replied that it had not. In fact it has never been challenged or supported in the courts. Aboriginal people in Canada did not gain any degree of effective access to the regular political process or the courts in Canada until the 1960's. Many Canadian assumptions have been challenged in the last 20 years. The character of the treaties has been a major issue between the Aboriginal peoples and the Governments both of Canada and the United Kingdom. Reference should be had to the petition of the Canadian Chiefs to the Queen, the Government of the United Kingdom and the Imperial Parliament, submitted in July, 1979. These questions have not been resolved in the courts of either Canada or the United Kingdom.

7. There are many examples of the Canadian government and the Canadian courts denying or restricting Aboriginal rights. The Canadian government arbitrarily assumed the power to define who were "Indians" and who were not. The Royal Proclamation of 1763 involved the recognition of peoples who had their own established laws about citizenship. The Parliament of Canada has presumed, without authority, to redefine the terms of the British North America Act and the Royal Proclamation of 1763 and dictate to the Aboriginal people as to who they are. As well there have been illegal encroachments on Aboriginal lands and frequent denials of traditional rights to hunt, fish and trap.