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### **Wampum at Niagara:**

### **The Royal Proclamation, Canadian Legal History, and Self-Government**

*John Borrows'*

The Royal Proclamation of 1763<sup>2</sup> is a 'fundamental document' in First Nations and Canadian legal history.<sup>3</sup> Yet, recent Canadian commentators<sup>4</sup> have often treated the Royal Proclamation of 1763 as a unilateral declaration of the Crown's will in its provisions relating to First Nations.<sup>5</sup> It is time that this misunderstanding was corrected. First Nations were not passive objects, but active participants, in the formulation and ratification of the Royal Proclamation.<sup>6</sup> In the colonial struggle for northern North America, and in the foundational development of principles to guide the relationship between First Nations and the British Crown, First Nations were not dependent victims of a greater power.<sup>7</sup> In these early confrontations with the Crown, First Nations possessed their own power and a range of choices to which they could bring their own considerations and alternatives. First Nations faced a pivotal period of choice and decision-making between 1760 and 1764,<sup>8</sup> after the British had asserted control over the French in North America.<sup>8</sup> The options then chosen are important today because the principles agreed upon form the foundation upon which the present First Nations/Crown relationship rests.

This article will show that the Royal Proclamation is part of a treaty between First Nations and the Crown which stands as a positive guarantee of First Nation self-government.<sup>9</sup> The other part of the treaty is contained in an agreement ratified at Niagara in 1764. Within this treaty are found conditions that underpin the Proclamation and that lie outside of the bare language of the document's words. The portion of the treaty confirmed at Niagara has often been overlooked, with the result that the manuscript of the Proclamation has not been integrated with First Nation understandings of this document. A reconstruction of the events and promises of 1763-4, which takes account of the treaty of Niagara, transforms conventional interpretations of colonialism which allow the Crown to ignore First Nations participation.<sup>10</sup> Through this re-evaluation of early

Canadian legal history, one is led to the conclusion that the Proclamation cannot be interpreted to undermine First Nations rights." As will be illustrated, Proclamation/Treaty of Niagara rights persisted throughout the early colonization of Canada. These Aboriginal rights survived to form and sustain the foundations of the First Nations/Crown relationship, and to inform Canada's subsequent treaty-making history. The approach developed in this paper will provide an example of the partiality of conventional ethnocentric colonial interpretations of Canadian legal history.<sup>12</sup>

### **Canadian Legal History from a First Nations Perspective**

In order to appreciate the meaning that the Royal Proclamation holds for First Nation peoples, one must first understand its historical context.<sup>13</sup> Contextualization of the Proclamation reveals that one cannot interpret its meaning using the written words of the document alone. To interpret the principles of the Proclamation using this procedure would conceal First Nations perspectives and inappropriately privilege one culture's practice over another.<sup>14</sup> First Nations chose to chronicle their perception of the Proclamation through other methods such as contemporaneous speeches, physical symbols, and subsequent conduct. First Nations perspectives about the Proclamation become more conspicuous when reconstructed using these different sources because this method respects the fact that literacy in First Nations was orally based.<sup>15</sup> The compilation of First Nations understanding about the Proclamation from various sources will form the substance of this paper.

### **Historical Background to the Royal Proclamation and the Treaty of Niagara**

The principles of the Proclamation found their genesis in the relationships between First Nations and colonial powers in the decades leading up to the 1760s. The interaction of Native and non-Native people during this period resulted in the formulation of principles to regulate the allocation of land, resources, and jurisdiction between them. These principles were developed through practised experience, war, and negotiation and, as such, were the product of both societies' precepts.

The traditional lifestyle of First Nations around the Great Lakes was altered after their first contact with non-Indigenous people in the early 1600s when the French intruded on Aboriginal territory.<sup>16</sup> The French established Jesuit missions near the shores of the Great Lakes and had contact with First Nations through exploration and trading.<sup>17</sup> At the same time, the Dutch, and later the British, were establishing settlements to the south of the Great Lakes along the Atlantic coast into the Appalachian Mountains.<sup>18</sup> The French and English were each seeking to establish

greater control over territories within North America, and they courted First Nation allies to solidify their interests.<sup>19</sup> Conflict between the French and English for the control of trade on the upper Great Lakes eventually led to the Seven Years' War.<sup>20</sup> A large proportion of First Nation people around the Great Lakes, with the notable exception of the Haudenoshonee, supported the French in their fight against the British for control of the region.<sup>21</sup> Despite the loss of the war by their French allies in 1760, First Nation peoples did not consider their sovereignty extinguished by this event. One British colonial official observed this to be the case when he wrote: 'The Six Nations, Western Indians [Anishnabe, etc.] & c. having never been conquered, Either by the English or French, nor subject to the Laws, consider themselves as free people.'<sup>22</sup>

A First Nations perspective reflecting the view that they were not conquered was made by Minavavana, an Ojibwa chief from west of Manitoulin at Michilimackinac. Minavavana declared:

Englishman, although you have conquered the French you have not yet conquered us! We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none. Your nation supposes that we, like the white people, cannot live without bread, and pork and beef! But, you ought to know, that He, the Great Spirit and Master of Life, has provided food for us, in these spacious lakes, and on these woody mountains.

Englishman, our Father, the king of France, employed our young men to make war upon your nation. In this warfare, many of them have been killed; and it is our custom to retaliate, until such time as the spirits of the slain are satisfied. But, the spirits of the slain are to be satisfied in either of two ways; the first is the spilling of the blood of the nation by which they fell; the other, by covering the bodies of the dead, and thus allaying the resentment of their relations. This is done by making presents.

Englishman, your king has never sent us any presents, nor entered into any treaty with us, wherefore he and we are still at war; and, until he does these things, we must consider that we have no other father or friend among the white man, than the king of France ...

You have ventured your life among us, in the expectation that we should not molest you. You do not come armed, with an intention to make war, you come in peace, to trade with us, to supply us with necessities, of which we are in much want. We shall regard you therefore as a brother; and you may sleep tranquilly, without fear of the Chipeways. As a token of our friendship we present you with this pipe, to smoke.<sup>23</sup>

This speech is notable in many respects as a statement of the government to government relationship which First Nation peoples were proposing to the British. Minavavana recounted some of the principles of peace and coexistence being formulated by First Nations. First, it is significant that the Ojibwa stated unequivocally that they were 'not yet conquered.' They considered their allegiance as being to the Great Spirit, and not to any European power. Second, it is important to note that the Ojibwa regarded themselves and the English as being reliant on one another for trade and peace, and therefore their power relationship as being parallel. Finally, the Ojibwa stated that the British had to fulfil certain obligations, such as the giving of gifts, in order to attain even a state of coexistence with them.

In the early stages of First Nation/settler association, the English failed to comprehend some of the diplomatic fundamentals that First Nations required in the definition of their Constitutional relationship. One example of the British failure in this regard concerned the presentation of gifts.<sup>24</sup> The French had followed the diplomatic formalities which formalized First Nation/settler relations and were thus able to maintain peace by supplying gifts to all their First Nation allies. When the British did not meet all the conditions that First Nations established for coexistence, conflict resulted.

Presents were important to First Nations because they were regarded as a necessary part of diplomacy which involved accepting gifts in return for others sharing their lands.<sup>25</sup> The cessation of presents caused some First Nations, led by an Odawa Indian named Pontiac,<sup>26</sup> to resume fighting the British again in 1764.<sup>27</sup> This continued aggression by First Nations against the British illustrates that First Nations used their sovereignty to uphold the official diplomatic conditions they imposed upon the British and to direct the structure of their relationship. The British later instituted the exchange and giving of gifts to First Nations to recognize and affirm their alliance with them.<sup>28</sup>

First Nations/settler policies constructing the foundational principles for their relationship were further developed through Articles of Capitulation drawn up at the end of the Seven Years War. The Articles were framed to insulate First Nations from British interference and they supported First Nations in their view about the unextinguished nature of their sovereignty. Despite the articles apparently being drafted without First Nation input, they reflected First Nations perspectives as much as if First Nations were present and in agreement at the signing because of the relative power possessed by First Nations in 1760.<sup>29</sup>

Article 40, agreed to by British Major-General Amherst and French Lieutenant-Governor the Marquis de Vaudreuil, demonstrates the awareness

of both the French and the English that First Nations were autonomous and independent. The article stated: 'The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit, if they chose to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion.'<sup>30</sup> This article verified French and English policy that First Nations should be maintained in their lands and not be molested in the use of their lands. The capitulation agreement represented the promise that First Nations territory was not to be reduced, nor was First Nations sovereignty to be subsumed, by alliance with either the French or the English. Both the French and the English wanted to maintain the cooperation of First Nations because of the military and economic power that First Nations continued to possess. There was a realization that non-interference with First Nations territory and jurisdiction was the best way for the colonies to benefit from the strong influence that First Nations could still exercise over colonial affairs.<sup>31</sup> As a result, until the early 1760s First Nations maintained much of their ability to determine their activities. First Nations control began to change with the introduction of the Royal Proclamation.

### **The Royal Proclamation**

A principal incident concerning First Nation rights after the Articles of Capitulation was the promulgation of the Royal Proclamation of 1763<sup>32</sup> and the associated Treaty of Niagara. Immediately prior to the Proclamation, First Nation land in the Ohio valley, and elsewhere in the West, had been increasingly threatened by European speculation and settlement.<sup>33</sup> As a result of rapid European settlement on the eastern seaboard of the North American continent,<sup>34</sup> First Nation peoples in the southern Great Lakes region began to feel pressures to leave their traditional homelands and resettle west of the Mississippi River.<sup>35</sup> Often, both First Nations and settlers used crass power and force to confront these difficulties.<sup>36</sup>

Proclamation does this by implying that no lands would be taken from First Nation peoples without their consent.<sup>40</sup> However, in order to consolidate the Crown's position in North America, words were also placed in the Proclamation which did not accord with First Nations viewpoints of the parties' relationship to one another and to the land. For example, the British inserted statements in the Proclamation that claimed 'dominion' and 'sovereignty' over the territories that First Nations occupied. In placing these divergent notions within the Proclamation, the British were trying to convince Native people that there was nothing to fear from the colonists, while at the same time trying to increase political and economic power relative to First Nations and other European powers. The British perceptively realized that alleviating First Nations' 'discontent'<sup>41</sup> required that Native people believe that their jurisdiction and territory were protected; however, the British also realized that the colonial enterprise required an expansion of the Crown's sovereignty and dominion over the 'Indian' lands. Thus, while the Proclamation seemingly reinforced First Nation preferences that First Nation territories remain free from European settlement or imposition, it also opened the door to the erosion of these same preferences.

The Proclamation uncomfortably straddled the contradictory aspirations of the Crown and First Nations when its wording recognized Aboriginal rights to land by outlining a policy that was designed to extinguish these rights. These rights and their potential removal were affirmed by three principles or procedures: 1) colonial governments were forbidden to survey or grant any unceded lands; 2) colonial governments were forbidden to allow British subjects to settle on Indian lands or to allow private individuals to purchase them; and 3) there was an official system of public purchases developed in order to extinguish Indian title.<sup>42</sup> In implementing these principles an area of land was designated as First Nation territory. The boundaries were determined by past cessions and existing First Nation possessions.<sup>43</sup> These principles codified pre-existing First Nation/colonial practice and reflected some First Nation preferences in maintaining territorial integrity and decision-making power over their lands.<sup>44</sup> These principles simultaneously worked against First Nation preferences by enabling the Crown to enlarge its powers by creating a process to take land away from First Nations.

The implications of this policy were that First Nations, for the most part, would not be integrated with the European population, as immigration would be directed to the south and the east where First Nations had already ceded their lands.<sup>45</sup> While the Proclamation did make provision for future surrenders of land,<sup>46</sup> the wording of the document made it unclear as to whether First Nations would have the political power

required to exercise autonomy through their own sovereignty or under British jurisdiction. The document's equivocation between Aboriginal sovereignty and subordination is evidenced in the Proclamation's description of 'Nations or Tribes with whom we are connected, and who live under our protection.'<sup>47</sup> The status of First Nation/Crown jurisdiction was also confused in the Proclamation by the implication that British civil<sup>48</sup> and criminal<sup>49</sup> jurisdiction would not be administered on First Nation lands, while at the same time the Proclamation allowed for people to be charged with British offences committed in Indian territory.<sup>50</sup> Therefore, the Proclamation illustrates the British government's attempt to exercise sovereignty over First Nations while simultaneously trying to convince First Nations that they would remain separate from European settlers and have their jurisdiction preserved.<sup>51</sup>

The different objectives that First Nations and the Crown had in the formulation of the principles surrounding the Proclamation is the reason for the different visions embedded within its text. Britain was attempting to secure territory and jurisdiction through the Proclamation, while First Nations were concerned with preserving their lands and sovereignty. Paradoxically, at the same time that the Crown was trying to reassure First Nations that their communities would be undisturbed, many First Nations were inviting colonial assistance to gain military and economic advantages. These competing policies between and within the parties' objectives were not resolved in the wording of the Proclamation because the Crown privileged its understanding of how land would be allocated. The effect of this privileging was to limit First Nations' ability to freely determine their land use, despite Aboriginal non-agreement with such a result, as evidenced by the Treaty of Niagara.

### **The Treaty of Niagara**

Since the wording of the Proclamation is unclear about the autonomy and jurisdiction of First Nations, and since the Proclamation was drafted under the control and preference of the colonial power,<sup>52</sup> the spirit and intent of the Royal Proclamation can best be discerned by reference to a treaty with First Nations representatives at Niagara in 1764.<sup>53</sup> At this gathering a nation-to-nation relationship between settler and First Nation peoples was renewed and extended,<sup>54</sup> and the Covenant Chain of Friendship,<sup>55</sup> a multinational alliance in which no member gave up their sovereignty,<sup>56</sup> was affirmed. The Royal Proclamation became a treaty<sup>57</sup> at Niagara because it was presented by the colonialists for affirmation, and was accepted by the First Nations.<sup>58</sup> However, when presenting the Proclamation, both parties made representations and promises through methods other than the written word, such as oral statements and belts of wampum.<sup>59</sup> It is significant

to note that Sir William Johnson, superintendent of Indian affairs, had earlier agreed to meet with the First Nations and reassert their mutual relationship through requirements prescribed by the Aboriginal peoples,<sup>60</sup> which involved the giving and receiving of wampum belts.<sup>61</sup> Some principles which were implicit in the written version of the Proclamation were made explicit to First Nations in these other communications. For example, First Nation peoples approved terms of the Proclamation which encompassed more than a system of land allotment, including express guarantees of First Nations sovereignty.

In the winter after the Royal Proclamation was issued, First Nation leaders throughout the northeast, mideast, and midwest of North America were invited to attend a conference to be held the following summer to discuss the formation of principles that would govern their relationship with the Crown. The people of the Algonquin and Nipissing nations met with the British superintendent of Indian affairs at Oswegatchie and were persuaded to be messengers in inviting other First Nations to attend a peace council at Niagara in the summer of 1764.<sup>62</sup> Representatives of these two nations travelled throughout the winter of 1763-4 with a printed copy of the Royal Proclamation, and with various strings of wampum, in order to summons the various First Nations to a council with the British.<sup>63</sup>

William Johnson described the purpose of the intended meeting at Niagara as a 'Treaty of Offensive and Defensive Alliance' that would include British promises to 'assure them of a Free Fair & open trade, at the principal Posts, & a free intercourse, & passage into our Country, That we will make no Settlements or Encroachments contrary to Treaty, or without their permission. That we will bring to justice any persons who commit Robberys or Murders on them & that we will protect & aid them against their & our Enemys, & duly observe our Engagements with them.'<sup>64</sup> It is clear that, in conjunction with their issuance of the Proclamation, the British proposed that a treaty be entered into to negotiate and formalize the principles upon which their relationship would be based. The invitation to treaty, with the accompanying promises that were to govern the parties' relationship, demonstrates the intent of the British to enter into momentous negotiations with the First Nations of North America. Johnson further proposed, on behalf of the British, that: 'at this treaty ... we should tie them down (in the Peace) according to their own forms of which they take the most notice, for example by exchanging a very large belt with some remarkable & intelligible figures thereon. Expressive of the occasion which should always be shown to remind them of their promises.'<sup>65</sup> Thus, the treaty at Niagara was to be recorded in the manner that the First Nations were familiar with. Wampum belts were to be exchanged

which would communicate the promises exchanged, and which would form the record of the agreement.

The treaty at Niagara was entered into in July and August 1764, and was regarded as 'the most widely representative gathering of American Indians ever assembled,'<sup>66</sup> as approximately two thousand chiefs attended the negotiations.<sup>67</sup> There were over twenty-four Nations gathered<sup>68</sup> with 'representative nations as far east as Nova Scotia, and as far west as Mississippi, and as far north as Hudson Bay.'<sup>69</sup> It is also possible that representatives from even further afield participated in the treaty as some records indicate that the Cree and Lakota (Sioux) nations were also present at this event.<sup>70</sup> It is obvious that a substantial number of First Nations people attended the gathering at Niagara. Aboriginal people throughout the Great Lakes and northern, eastern, and western colonial regions had travelled for weeks and months to attend this meeting.<sup>71</sup>

When everyone was assembled,<sup>72</sup> William Johnson presented 'the terms of what he hoped would prove a Pax Britannica for North America.'<sup>73</sup> Johnson read the terms of the Royal Proclamation to representatives of the nations<sup>74</sup> and a promise of peace was given by Aboriginal representatives and a state of mutual non-interference established.<sup>75</sup> Presents were exchanged to certify the binding nature of the promises being exchanged.<sup>76</sup> Johnson then presented the Covenant Chain and wampum belts and stated:

Brothers of the Western Nations, Sachems, Chiefs and Warriors;

You have now been here for several days, during which time we have frequently met to renew and Strengthen our Engagements and you have made so many Promises of your Friendship and Attachment to the English that there now remains for us only to exchange the great Belt of the Covenant Chain that we may not forget our mutual Engagements.

I now therefore present you the great Belt by which I bind all your Western Nations together with the English, and I desire that you will take fast hold of the same, and never let it slip, to which end I desire that after you have shewn this Belt to all Nations you will fix one end of it with the Chipeweighs at St. Marys [Michilimackinac] whilst the other end remains at my house, and moreover I desire that you will never listen to any news which comes to any other Quarter. If you do it, it may shake the Belt.<sup>77</sup>

By this speech, and an exchange of presents and wampum, a treaty of alliance and peace was established between the parties. When Johnson had finished speaking, a two-row wampum belt was used by First Nation peoples to reflect their understanding of the treaty of Niagara and the words of the Royal Proclamation.<sup>78</sup>

The two-row wampum belt reflects a diplomatic convention that recognizes interaction and separation of settler and First Nation societies. This agreement was first struck by the Haudenosaunee (Iroquois) upon contact with the Europeans, and the principles it represents were renewed in 1764.<sup>79</sup> The symbolism of the two-row wampum belt has been commented on by a leading Native legal academic, Robert A. Williams, Jr.:

When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and theirs laws, their customs, and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.<sup>80</sup>

The two-row wampum belt illustrates a First Nation/Crown relationship that is founded on peace, friendship, and respect, where each nation will not interfere with the internal affairs of the other. An interpretation of the Proclamation using the Treaty of Niagara discredits the claims of the Crown to exercise sovereignty over First Nations. In fact, Sir William Johnson indicated as much when he commented on a questionable treaty in 1865:

These people had subscribed to a Treaty with me at Niagara in August last, but by the present Treaty I find, they make expressions of subjection, which must either have arisen from the ignorance of the Interpreter, or from some mistake; for I am well convinced, they never mean or intend anything like it, and that they can not be brought under our laws, for some Centuries, neither have they any word which can convey the most distant idea of subjection, and should it be fully explained to them, and the nature of subordination punishment etc [sic], defined, it might produce infinite harm ... and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principal causes of all our troubles.<sup>81</sup>

One can see that Sir William Johnson did not regard the extension of the Royal Proclamation and the Treaty at Niagara as an assertion of sovereignty over the First Nations. Records such as the two-row wampum belt, and

statements such as Johnson's, further allow First Nations to assert that their jurisdiction can not be molested or disturbed without Aboriginal consent.

The evidence surrounding the Treaty of Niagara demonstrates that the written text of the Proclamation, while it contains a partial understanding of the agreement at Niagara, does not fully reflect the consensus of the parties.<sup>82</sup> The concepts found in the Proclamation have different meanings when interpreted in accord with the wampum belt. For example, the belt's denotation of each nation pursuing its own path while living beside one another in peace and friendship casts new light on the Proclamation's wording 'the several Nations ... with whom we are connected ... should not be molested or disturbed.' These words, read in conjunction with the two-row wampum, demonstrate that the connection between the nations spoken of in the Proclamation is one that mandates colonial noninterference in the land use and governments of First Nations. Therefore, First Nations regarded the agreement, represented by the Proclamation and the two-row wampum, as one that affirmed their powers of self-determination in, among other things, allocating land. This agreement, at the start of the formal relationship between the British and the First Nations of Canada, demonstrates the foundation-building principles of peace, friendship, and respect agreed to between the parties.

### **Reading the Proclamation and the Treaty of Niagara Together: Subsequent Understandings**

A final point in determining First Nations understandings of the Royal Proclamation involves examining subsequent conduct relative to it. Since First Nations were likely to speak and act in accordance with their understandings of the Proclamation, subsequent conduct illustrates First Nations perspectives towards the Proclamation and demonstrates that Native consent was required to any alteration of First Nation land use and governance.<sup>83</sup> Over the years following the treaty of Niagara, including during the War of 1812, many Aboriginal people around the Great Lakes strengthened their alliance with the British in order to fight against the United States.<sup>84</sup> After the War of 1812, many Aboriginal people who resided in the growing American territories of Michigan, Wisconsin, and Ohio wanted to move from the United States because American policies endangered First Nations.<sup>85</sup> In this period Britain maintained its alliance and friendship with First Nations by making an annual distribution of presents<sup>86</sup> and by encouraging Native peoples residing on lands under American control to take up residence 'under their protection.'<sup>87</sup> In 1828 the British bestowal of presents to First Nations was moved from American-controlled Drummond Island to British-controlled Penetanguishine on Georgian Bay.<sup>88</sup>

Transcripts of a meeting in July 1818 at Drummond Island in Lake Huron to the west of Manitoulin between Anishnabe peoples and representatives of the British Crown contain articulate references to the Treaty of Niagara. An account of the meeting is as follows:

The Chiefs did de camp, laying down a broad Wampum Belt, made in 1764; one made in 1786; and one marked Lieutenant M'Dowal, Commanding Michilimackinac, with the pipe of peace marked on it.

Orcarta [Anishnabe] speaker

Father, Your children now seated round you, salute you sincerely, they intend to talk to you a great deal, and beg you will listen to them with patience, for they intend to open their hearts to you ...

Holding the Belt of 1764 in his hand he said:

Father, This my ancestors received from our Father, Sir W. Johnson. You sent word to all your red children to assemble at the crooked place (Niagara). They heard your voice - obeyed the message - and the next summer met you at the place. You then laid this belt on a mat, and said - 'Children, you must all touch this Belt of Peace. I touch it myself, that we may all be brethren united, and hope our friendship will never cease. I will call you my children; will send warmth (presents) to your country; and your families shall never be in want. Look towards the rising sun. My Nation is as brilliant as it is, and its word cannot be violated.'

Father, Your words were true - all you promised came to pass. On giving us the Belt of Peace, you said - 'If you should ever require my assistance, send this Belt, and my hand will be immediately stretched forth to assist you.'

Here the speaker laid down the Belt.<sup>89</sup>

This speech is significant because it reveals that some fifty-four years after the treaty of Niagara, First Nations of northern Lake Huron maintained their recollection of the promises made there. In particular, the speaker made specific mention of the mutual obligations of peace and friendship, as found in the wampum belt. When considering these events from a First Nations perspective, it is remarkable to understand that these peoples viewed the Royal Proclamation as a treaty of peace and friendship. When one considers, in addition, that this treaty also contained an obligation for the Crown to sustain the welfare of First Nations, as found in the words 'If you should ever require my assistance, send this Belt, and my hand will be immediately stretched forth to assist you,' then one can better appreciate and perhaps reinterpret<sup>90</sup> the contemporary justification for the fiduciary relationship between First Nations and the Crown.

In 1836 the distribution of presents was moved to Manitoulin Island to promote it as a place for the settlement of the Crown's Aboriginal allies.<sup>91</sup> Observance of First Nations perspectives on the Treaty of Niagara and the Royal Proclamation is evidenced at the Manitoulin Island gatherings. One very strong endorsement of the Treaty of Niagara is found in the Manitoulin Island Treaty of 1836 between the Crown and First Nations of the upper Great Lakes.<sup>92</sup> First Nations present at the negotiations reminded Sir Francis Bond Head, lieutenant-governor of Upper Canada, that their relationship must be defined in terms agreed upon in the two-row wampum belt at the treaty of Niagara.<sup>93</sup> Assickinack, an Odawa chief resident at Manitoulin, gave a recitation and interpretation of the two-row wampum belt and the agreement at Niagara.<sup>94</sup> In his reply, Bond Head noted the principles agreed upon at Niagara by stating: 'Seventy snow seasons have now passed away since we met in council at the crooked place (Niagara) at which time your Great Father, the King and the Indians of North America tied their hands together by the wampum of friendship.'<sup>95</sup> The reminder by First Nations to the Crown of the relationship defined at Niagara, and the reaffirmation of that relationship as being one of solidarity and friendship in a very significant treaty, again suggests that the Treaty of Niagara significantly undermines the claims of British sovereignty over First Nations as found in the Proclamation. This understanding should be kept in mind when interpreting the subsequent treaties in Canada. The agreement at Niagara created specific guarantees to certain rights and, while these guarantees were sometimes made explicit in subsequent acts, they were certainly implied as they were woven through the negotiations, often forming the protocol by which decisions were made.<sup>96</sup>

Aside from preserving the agreement represented by the Royal Proclamation in wampum belts and oral recollections, First Nations also preserved copies of the Proclamation they received in 1764. Copies of the document were often brought forward to colonial officials when First Nations wanted to assert their perspective of what was written in the Proclamation.<sup>97</sup> Evidence of First Nation peoples' use of the Proclamation to convey their understanding of its principles is found in an 1847 colonial report. Commissioners of the colonial government spoke with many First Nation peoples to determine their views on a variety of matters. When views were solicited relative to the Proclamation, the commissioners were referred to the document, and First Nation peoples expressed their understanding of it. The commissioners wrote the following regarding First Nations' understanding: 'The subsequent proclamation of His Majesty George Third, issued in 1763, furnished them with a fresh guarantee for the possession of their hunting grounds and the protection of the crown. This document the Indians look upon as their charter. They

have preserved a copy of it to the present time, and have referred to it on several occasions in their representations to government.<sup>98</sup> This statement illustrates that First Nation peoples possessed copies of the Proclamation and presented the document to other governments to convey their perspective of what it contained. In the particular communications that these officials received, First Nation peoples expressed their conviction that the agreement represented by the Proclamation was their charter.

That the Proclamation represented a charter for First Nations in the definition of their relationship with the Crown was observed by the commissioners' writing in another part of the report:

This public instrument [the Royal Proclamation] was formally communicated to the Indians of Canada, by the officer who had a few years before been appointed for their special superintendence; and that they have since regarded it as a solemn pledge of the King's protection of their interests, is proved by the claim of the Algonkians and Nippissing Indians, to be maintained in the possession of their remaining hunting grounds on the Ottawa River, which your excellency has referred to the Committee, and in support of which those tribes exhibited an authentic copy of this Royal Proclamation as promulgated to them in 1763 by the Superintendent General.<sup>99</sup>

These statements further reveal that First Nations continued to hold out the document of the Proclamation and the agreement it represented as an affirmation of their rights some eighty years after it was penned. They expected the Crown to protect their interests, and not allow them to be interfered with, especially with regard to their land use and means of livelihood. This demonstrates the strength with which First Nations must have expressed their views that they were to be 'maintained' and 'protected' in their 'interests.'<sup>100</sup> It further illustrates the fact that First Nations had a perspective of the document that contradicts claims to British sovereignty found in the Proclamation.

### Conclusion

The promises made at Niagara and echoed in the Royal Proclamation have never been abridged, repealed,<sup>101</sup> or rendered nugatory.<sup>102</sup> Since Aboriginal rights are presumed to continue until the contrary is proven,<sup>103</sup> the supposed 'increasing weight' of colonial history and its disregard of the Treaty of Niagara does not render void the Aboriginal rights under its protection.<sup>104</sup> Furthermore, since the Proclamation is not a 'unilateral declaration of the Crown,'<sup>105</sup> but part of a treaty into which First Nations had considerable input, it therefore must be interpreted as it would be 'naturally

understood' by them.<sup>106</sup> A 'natural understanding' of the Proclamation by First Nations prompts an interpretation that includes the promises made at Niagara. These promises are: a respect for the sovereignty of First Nations,<sup>107</sup> the creation of an alliance<sup>108</sup> ('the several Nations ... with whom we are connected'<sup>109</sup>), free and open trade and passage between the Crown and First Nations'<sup>110</sup> ('shall not be molested or disturbed'), permission or consent needed for settlement of First Nations territory'" ('same shall be purchased for use ... at some public meeting or assembly of Indians'), the English provision of presents to First Nations,<sup>112</sup> mutual peace, friendship, and respect<sup>113</sup> ('that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent'). The promises made at Niagara, and their solemnization in proclamation and treaty, demonstrate that there was from the outset considerable doubt<sup>114</sup> about the Crown's assertion of sovereignty and legislative power over Aboriginal rights.<sup>115</sup> The securing of these significant promises demonstrates that First Nations treated with the Crown as active and powerful partners in making provisions for the future relationship between the parties.

This article has also provided evidence that the Royal Proclamation of 1763 is not only a 'fundamental document'<sup>116</sup> but, along with the Treaty of Niagara, the most 'fundamental agreement' yet entered into between First Nations and the Crown, and much more than a unilateral declaration of the Crown's will. A significantly large and representative number of First Nations were present at the negotiations, and both parties have bound themselves to adhere to its terms through over 230 years of subsequent treaty-making.<sup>117</sup> From 1764 to 1994, principles derived from the Royal Proclamation have provided the procedural rules which govern the treaty-making enterprise in Canada.<sup>118</sup> As such, the express terms and promises made in the Proclamation and at Niagara may yet be found to form the underlying terms and conditions which should be implied in all subsequent and future treaties. This would provide First Nations treaty law with some universality and consistency which heretofore has been missing from the case-by-case, factually specific, judicial treatment of each agreement. The existence of the promises exchanged at Niagara demonstrates that the obligations undertaken by the Crown in subsequent treaties may be greater than formerly acknowledged. There may be important support at common law for this finding.

Since Canadian Indian treaties have been described as *sui generis*,<sup>119</sup> legal interpretations of treaties can only rely upon analogies to categories of contract and international law.<sup>120</sup> However, despite the potential uncertainty which may surround when to engage such analogies, it has been found that the basic analogy which Canadian jurists rely upon in *sui generis*

formulations of First Nations treaties is that of contract.<sup>121</sup> With contract as an analogy, as appropriate, the courts could view contractual doctrines governing the express terms of the Royal Proclamation/Treaty of Niagara as implied terms in later First Nation treaties.

The doctrine that allows for the placement of implied terms into contracts has been summarized in a leading text on contracts as follows:

The contents of a contract are not necessarily confined to those that appear on its face. The parties may have negotiated against a background of commercial or local usage whose implications they have tacitly assumed, and to concentrate solely on their express language may be to minimise or to distort the extent of the liabilities. Evidence of custom may thus have to be admitted. Additional consequences, moreover, may have been annexed by statute to particular contracts, which will operate despite the parties' ignorance or even contrary to their intention. Finally, the courts may read into a contract some further term which alone makes it effective, and which the parties may be taken to have omitted by pure inadvertence.<sup>122</sup>

Following such a course in First Nations jurisprudence would ensure that the express terms of the Proclamation and the Treaty of Niagara are implied in subsequent treaties between the Crown and First Nations. This would lead to the recognition of national treaty standards to protect the express promises made at Niagara, and would also allow for local variations in treaties as they dealt with local concerns.

For example, it is quite probable that the contents of each treaty signed after the Royal Proclamation/Treaty of Niagara have more to them than appears on their face.<sup>123</sup> The parties negotiated subsequent treaties against a background of Canadian Proclamation/Niagara usage (extending from the Maritimes to the foothills of the Rocky Mountains<sup>124</sup>), the implications of which both parties can be tacitly assumed to accept. The implied conditions each party would assume in subsequent treaties would be the promises spelled out in 1764, or those similar to them renewed at later meetings. As will be recalled, these were promises of a preservation of sovereignty, alliance, trade, consent to land surrender, and affirmations of peace, friendship, and respect. To concentrate solely on the express language of the subsequent treaties, without accounting for these promises, would minimize or distort the extent of the liabilities the Crown undertook in 1763-4. Since the terms of the Niagara agreement were often referred to in later treaties, but did not find their way into the text, evidence of custom may be admitted to demonstrate understanding of sovereignty,

alliance, free trade, gift giving, consent to surrender, and peace, friendship, and respect.<sup>125</sup>

The *sui generis* nature of treaty interpretation also increases the potential for additional matters to be annexed by statute to particular treaties. This addition can occur despite the parties' ignorance or even contrary to their intention because the Proclamation has the force of a statute. 'There is a well-established common law principle that instruments issued under the Royal Prerogative in British colonial possessions lacking legislative assemblies have the force of statutes in these areas.'<sup>126</sup> The Royal Proclamation, having the force of statute, would affix the promises made in the Proclamation/Treaty to the subsequent treaties, despite the parties' (usually the Crown's) disregard of the earlier agreement's intention. Thus, the courts may read into subsequent treaties some further specific terms that alone make the promises at Niagara effective.

An approach to treaty interpretation which followed contractual analogies in the manner just outlined would provide a more principled and consistent basis from which to understand these agreements. While the application of these principles would not be determinative because of their *sui generis* nature, they could prove to be very helpful analogies to make treaty interpretation more 'large, liberal and fair.' This would reduce some of the 'patchwork' of treatment now accorded to this area of the law.<sup>127</sup> An interpretation of treaties which recognized the general terms implied from the Treaty of Niagara, while accepting specific express terms in local negotiations, would both acknowledge the differences between the treaties and harmonize rights more equitably among First Nations. The acceptance of both the national and local character of treaties would allow the courts to interpret them according to the particular history, legend, politics, and moral obligations of an area, while also developing principles which would apply on a more global basis.<sup>128</sup> An understanding of First Nations rights as guaranteed by the Royal Proclamation/Treaty of Niagara would overcome much of the ethnocentrism that has informed colonial legal history in Canada. First Nations would then be regarded as active participants in the formulation and ratification of their rights in Canada. This would go a long way to dispelling notions found in Canadian legal and political discourse that regard First Nations as subservient to or dependant upon the Crown in pressing and preserving their rights. In light of the history and subsequent agreements in relation to the Treaty of Niagara, the Royal Proclamation can no longer be interpreted as a unilateral declaration of the Crown. As a result, the Royal Proclamation can no longer be interpreted as a document which undermines First Nations rights. Colonial interpretations of the Royal Proclamation should

be recognized for what they are - a discourse that dispossesses First Nations of their rights.