# Aboriginal Rights. Justice. The Rule of Law. Each Forsaken.

The first principle of the rule of law in a constitutional democracy is constitutional supremacy: when in conflict with federal or provincial legislation constitutional legislation is paramount and the other legislation is void.

The *Royal Proclamation of 1763* is constitutional legislation. It has never been amended or repealed. It used to be that it could only be repealed by a statute of the United Kingdom. Now it can only be repealed in accordance with the amendment formula in the Canadian *Constitution Act, 1982*.

The proclamation provides that the Indian Nations live under our “Protection” and may not be “molested or disturbed” in the possession of any land whatever that has not been ceded by them to their trustee—now the federal government—by treaty. Crown Patents of unceded land made upon any Pretence whatever are forbidden.

Most determinatively section 109 of the *Constitution Act, 1867,* enacts that provincial Crown land in particular remains subject to this Indian interest in such land as remains unceded. Such as British Columbia, the Ottawa drainage basin and Eastern Canada.

This hierarchy is confirmed by the two leading aboriginal rights law precedents: *St. Catherines Milling and Lumber Company Ltd. v. The Queen* in 1888 in the Judicial Committee of the Privy Council; and secondly, *AG Ontario v. AG Canada: In re Indian Claims* in 1897 also in the Judicial Committee. At the time the Judicial Committee was the highest court of appeal in the British Empire, over and above the Supreme Court of Canada.

North American case law from 1704 until 1897 respected the paramountcy of unceded lands reserved for Indians over Crown government aspirations and pretences. But in the latter half of the 19th century lawyers commonly began certifying titles back to provincial land patents without searching behind the patents to ensure the presence of a valid treaty. Today it is the norm.

This practice succeeds because the lower courts—without performing their duty of giving reasons for judgment addressing the law—arbitrarily reject every case which is based upon the paramountcy of the proclamation's constitutional force over land patents.

The statutory test for granting leave to appeal to the Supreme Court—in an appeal based upon law alone—is whether the question of law is of public importance. No constitutional question can be as critical as the competition between provincial land granting statutes, and the constitutional *Royal Proclamation of 1763* and section 109.

Nevertheless the Supreme Court consistently and repeatedly denies leave to appeal to address this particular constitutional question.

The Supreme Court itself is situate upon unceded Indian land.

Ralph Waldo Emerson in his “Essay on Character” wrote, “Truth is the summit of being: justice is the application of it to affairs.”

The legal truth is that the settled constitutional aboriginal right is the power of veto over provincial development of crown land, based upon the *Royal Proclamation of 1763*, section 109 of the *Constitution Act, 1867*, and the leading precedents *St. Catherines Milling, 1888* and *In re Indian Claims, 1897*. The lie, recently invented by the Supreme Court of Canada in wilful blindness, is that the aboriginal right is no more than “the right to be consulted:” *Haida Nation v. British Columbia* in 2004; *R. v Van der Peet* in 1996; *Delgamuukw v British Columbia* in 1997; and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* in 2005. Each of these was in the Supreme Court of Canada.

In the course of inventing the right to be consulted in place and stead of the power of veto over land development, the Supreme Court ignored the previously established settled constitutional law, thereby reneging on the first principle: the supremacy of the constitution. The Court in effect adopted the ersatz political principle laid down by Canada's attorney general Edward Blake in 1875, the idea that since “Great inconvenience and confusion might result from disallowing” the British Columbia land legislation the settled constitutional power of veto should be ignored.

The history leading to the unconstitutional political power in effect to repeal the constitution, where obeying it would be politically inconvenient and confusing, began in 1874. Then, British Columbia enacted a *Crown Lands Act* that regarded all crown land, including land not yet “ceded to or purchased by” the crown from the Indians, as being free and clear of any Indian “interest” within the meaning of section 109 of *Constitution Act, 1867*. In other words the British Columbia statute proclaimed a tacit repeal of the proclamation of 1763 as well as section 109. In response, upon the recommendation of Canada's attorney General Telesphore Fournier, the Canadian Privy Council enacted an Order-in-Council in 1875 disallowing the British Columbia statute, which the Governor General duly did, later in that year.

Then, Fournier was appointed to the Supreme Court and replaced as attorney general by Blake. British Columbia enacted a fresh *Crown Lands Act*, still in 1875, which new act repeated the ignoring of the constitutionally paramount Indian interest. Blake persuaded the cabinet not to disallow this new act. He explained to the Governor General the reason was “Great inconvenience and confusion might result from its disallowance.” The Governor General went along with this ascendancy of political expediency over constitutional supremacy, and neglected to disallow the fresh land act.

This is the reason that from 1875 to the present British Columbia and other provinces have been developed as if the power of veto had been repealed. But, as the *St. Catherines* and *In re Indian Claims* cases made apparent in 1888 and 1897 this political

"repeal" was of no force and effect. Those precedents settled the paramountcy of the power of veto and constitutionally are binding on the Supreme Court of Canada. Rather than give effect to the constitution as settled, however, the Supreme Court ignored the precedents and instead recently invented and applied the so-called "right to be consulted." By doing so the Court, as had Blake, backed off upholding constitutional supremacy in favour of political expediency.

Aboriginal rights, justice and the rule of law were forsaken. And they are forsaken for all purposes, not only in the racial context of Indian affairs.

The fraudulent evasion of the constitution had an early beginning being masterminded by the judiciary of Canada, in the quest for nation building. John Elmsley, Chief Justice of Upper Canada, "Report to the Executive Council of Upper Canada dated October 22, 1798, PAC, RG1, E1, V46, State Book 'B', pp. 210-14, recommended as follows:

> It is no secret to any person at all acquainted with the present state of Indian Affairs that the aborigines of this Part of His Majesty's American Dominions are beginning to appreciate their lands not so much by the use which they themselves make of them, as by the value at which they are estimated by those who purchase them, and either cultivate them, or dispose of them in their natural state. It is equally notorious, that if the Indians wanted penetration to make the discovery, there are a great many persons of European origin who have attached themselves to the several Tribes which surround us, and will not fail to inform them that the value of any article depends as much upon its importance to the purchaser, as on its usefulness to the present possessors.
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> But if this were doubtful now, when the lands purchased from the Indians are distributed among His Majesty's Subjects at a Fee hardly exceeding the prime cost of them, it cannot possibly remain so when the Indians discover as they unquestionably will, that the purchases made from them are to be converted into a source of Revenue to ourselves—slow as their progress is towards civilization they are perfectly apprised of the value of money and of its use in maintaining them in those habits of indolence and intemperance to which most of them are more or less inclined.
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> In order to therefore to exercise that foresight which our Indian neighbours are beginning to learn, and in which it certainly cannot be our interest to promote their improvement, we submit for your Honour's consideration the propriety of suspending the promulgation of the plan which has been laid down for us until we can make a purchase sufficiently large to secure for us the means of extending the population and encreasing the strength of the Provinces so far as to enable us before our stock is exhausted to dictate instead of soliciting the terms on which future acquisitions are to be made.

The constitution in the form of the proclamation of 1763 placed the Indians under the “Protection” of the crown, signifying the protection of the rule of law administered above all by the judiciary. Yet the Chief Justice  in 1798 laid down a formula for evading the fiduciary duty of the legislature. Rather than protection the formula was not how better to protect but rather how better to defraud.

Each generation of the domestic Canadian judiciary followed the same tacit understanding: that the abrogation of the rule of law by the executive and legislative branches of government to achieve the opposite of the constitution's intent would be backed by the judicial branch. Upon this basis A-G Blake engineered the enactment of the first *Indian Act* in 1876, inventing municipal Indian governments subject to federal and provincial laws of general application even on unceded Indian land, thereby in intent and effect abolishing the quasi-sovereign “several Nations or Tribes” whose “interest,” as confirmed by section 109 and the *St. Catherines* and *In re Indian Claims* precedents, precluded the nations or tribes being “molested or disturbed” in the “Possession” under the constitutional proclamation. This was accompanied by a century of Indian Residential Schools that kidnapped the Indian children from age 4 to age 16 and all but destroyed the Indian languages and economies. In every generation more and more molestations and disturbances under federal and provincial law were heaped upon the native culture in an unrelenting unconstitutional genocidal ethnic cleansing.

That was the simple plan. From then, until now. Now is the time to right that wrong.