Indigenous Law

A. British Colonial Origins – Royal Proclamation of 1763

The Treaty of Paris was signed in 1763 to end the Seven Years' War between Britain and France. France ceded much of its North American possessions, making Britain the primary European power throughout much of North America. To demonstrate British authority, officials in London recommended that King George III officially issue a proclamation announcing the new administrative structure for British North America, as well as establish new procedures and protocols for future Indian relations.

The Proclamation has two significant parts. First, it defined the land west of the established colonies as "Indian Territories", where First Nations people "should not be molested or disturbed" by settlers and where the Indian Department would be the primary liaison between the Crown and First Nations people; and second, in order to prevent any future abuse, the Proclamation prohibited colonial governors from making any grants or taking any land cessions from First Nations people and established a set of protocols and procedures for the purchasing of First Nations land.

> *"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. . . ."*

The issuance of the Royal Proclamation and the accompanying promises made at Fort Niagara in 1764 laid the foundation for a constitutional recognition and protection of First Nations rights in Canada. The Royal Proclamation itself is referred to in the *Constitution Act 1982*, in section 25, which states:

> *"25. 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."*
>
> *— Constitution Act, 1982*

B. British Human Rights and Suffrage during early development of Indigenous Law

Limited Right to Vote

Statutes passed in 1430 and 1432, during the reign of Henry VI, standardised property qualifications for county voters. Under these Acts, all owners of freehold property or land worth at least forty shillings in a particular county were entitled to vote in that county. This requirement, known as the forty shilling freehold, was never adjusted for inflation of land value; thus the amount of land one had to own in order to vote gradually diminished over time. The franchise was restricted to males by custom rather than statute; on rare occasions women had been able to vote in parliamentary elections as a result of property ownership. Nevertheless, the vast majority of people were not entitled to vote; the size of the English county electorate in 1831 has been estimated at only 200,000. Furthermore, the sizes of the individual county constituencies varied significantly. The smallest counties, Rutland and Anglesey, had fewer than 1,000 voters each, while the largest county, Yorkshire, had more than 20,000. Those who owned property in multiple constituencies could vote multiple times. Not only was this typically legal (since there was usually no need for a property owner to live in a constituency in order to vote there) it was also feasible, even with the technology of the time, since polling was usually held over several days and rarely if ever did different constituencies vote on the same day.

In boroughs the franchise was far more varied. There were broadly six types of parliamentary boroughs, as defined by their franchise:

1. Boroughs in which freemen were electors;
2. Boroughs in which the franchise was restricted to those paying scot and lot, a form of municipal taxation;
3. Boroughs in which only the ownership of a burgage property qualified a person to vote;
4. Boroughs in which only members of the corporation were electors (such boroughs were perhaps in every case "pocket boroughs", because council members were usually "in the pocket" of a wealthy patron);
5. Boroughs in which male householders were electors (these were usually known as "potwalloper boroughs", as the usual definition of a householder was a person able to boil a pot on his/her own hearth);
6. Boroughs in which freeholders of land had the right to vote.

Some boroughs had a combination of these varying types of franchise, and most had special rules and exceptions, so many boroughs had a form of franchise that was unique to themselves.

The largest borough, Westminster, had about 12,000 voters, while many of the smallest, usually known as "rotten boroughs", had fewer than 100 each. The most famous rotten borough was Old Sarum, which had 13 burgage plots that could be used to "manufacture" electors if necessary—usually around half a dozen was thought sufficient. Other examples were Dunwich (32 voters), Camelford (25), and Gatton (7).

So that in 1831 out of 16.5 million in England, Wales and Scotland only 2.66% of the British population could vote.

C. Types of Indians under the Indian Act, blood quantum law and enfranchisement

We have seen that the intent of the Indian Act was, in the words of John A. MacDonald, "*to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion…".* In order to do away with the Tribal system and assimilate Indians the government used the Indian Act to deny the Indians the rights and privileges of citizenship. If you were an Indian, these rights were simply unobtainable.

The government decided that if you were an educated Indian, then you really weren't an Indian anymore, and your Indian status was replaced through enfranchisement. Before the Bill C-31 amendments in 1985 took place, enfranchisement was the process that resulted in a person no longer being considered an Indian under the federal legislation.

Indians, who were enfranchised, were removed from their band lists. Indians also lost their Indian status if they were enfranchised after September 4, 1951. When a person was no longer considered an Indian (when that person was enfranchised), he or she lost all benefits associated with being on a band list (pre-1951) or being a status Indian (after 1951). Their descendants were not considered Indians, and they could not receive any related benefits. This impact is still felt by current generations. Before Bill C-31, there were three ways Indians could be enfranchised.

1. From 1869 to 1985, an Indian woman marrying a non-Indian man under section 12(1)(b) would be enfranchised. Their descendants would have no legal interest in their mother's community as they would be born as enfranchised citizens of Canada.

2. Previous Indian Acts (1876-1920) had enfranchisement provisions where individuals were removed from their band lists if they:

a. got a university degree and joined the medical or legal profession,
b. got any university degree and met the "fit" or "civilized" enfranchisement requirements,
c. became a priest or minister, or

3. From 1876 to 1985, individuals could submit an application to be enfranchised by showing they were "fit" for enfranchisement and entering Canadian society.

Ultimately this policy of extinction eventually led to the use of a mathematical formula to determine eligibility for Indian status. This is the same philosophy of eugenics through mathematics and science that were considered in Module #5 The Indian Act, d. Historical Precedent for Ahnenerbe and Apartheid. The effects of this racist and misogynist legislation are still felt today. At Musqueam we inherit equally from both our parents. The Indian Act does not allow this through the blood quantum provisions of the Indian Act. My mother was 12(1)(b), so I was not legally an Indian until 1985, when I became an Indian under Bill C-31, which although it made me an Indian, simply moves the Blood Quantum bar. Many people are in the same situation. If we C – 31 marry a non-Indian our children do not have legal rights in the community of their birth and ancestors.

D. Extension of the Political Franchise

The 1876 *Indian Act* consolidated laws affecting Indians. Section 86(1) introduced compulsory enfranchisement, if an Indian received a university degree or became a medical doctor, lawyer, or clergyman, they were automatically enfranchised. If you were enfranchised you could vote. If not, no vote. The Canadian Encyclopaedia web site provided most of the following information. It can be read in full at:

https://www.thecanadianencyclopedia.ca/en/article/indigenous-suffrage

In the spring of 1885, Prime Minister Sir John A. Macdonald introduced the *Electoral Franchise Act*., after the North-West Resistance, the legislation was amended to exclude all Indian peoples resident in "*Manitoba, British Columbia, Keewatin, and the North-West Territories, and any Indian on any reserve elsewhere in Canada who is not in possession and occupation of a separate and distinct tract of land in such reserve, and whose improvements on such separate tract are not of the value of at least one hundred and fifty dollars*." These arrangements remained in effect until 1898, when the Liberal government of Wilfrid Laurier, fearing the vote of Tory Indians (those who supported the Conservative party), reverted to the arrangements that existed before the *Electoral Franchise Act* and took their vote away.

With the outbreak of the First World War in 1914, many Indigenous peoples volunteered for military service in Canada and overseas. Under the provisions of the *Military Voters Act* of 1917, Indians serving in the armed forces could vote in federal elections until they were demobilized. There was little pressure on the federal government, either from the general public or Indigenous peoples, to extend the franchise. This situation remained unchanged through the Great Depression.

In 1942, the federal government established a House of Commons Special Committee on Post-War Reconstruction and Re-establishment. The Committee determined that the most neglected social group in Canadian society was Indigenous peoples. Indigenous veterans of the Second World War, who served in the Canadian armed forces with distinction and received the federal franchise during the war as a result, returned to Canada seeking social and political change. Some sought to extend the right to vote to all Indigenous peoples.

Similarly in British Columbia the most decorated unit in the British Empire was composed of Chinese Canadians from BC who also could not vote. Given this circumstance it was much easier for their fellow veterans to advance the argument that Chinese Canadian should be allowed to vote, and when this was offered to the Chinese Canadian veterans they replied that they would accept that privilege if it was also extended to Indians, and so it was, Chinese and Indo-Canadians were allowed to vote provincially in 1947, and Indians under the Indian Act in 1949.

In 1950, the Inuit were officially qualified to vote in federal elections. However, most Inuit had no means to exercise the franchise because they lived in isolated communities. Until ballot boxes were placed in more Inuit communities in 1962, the Inuit were effectively unable to vote. For this reason, many cite 1962 as the first year in which Inuit gained the franchise. The Diefenbaker government passed voting rights legislation for Indians in 1960.

E. FIDUCIARY DUTY OF THE CROWN

Below is an excerpt from "*THE CROWN'S FIDUCIARY OBLIGATION TOWARD ABORIGINAL PEOPLES*", prepared by Maria Morellato, Blake, Cassels & Graydon, Vancouver, B.C. for a conference held by Pacific Business & Law Institute on September 23rd and 24th 1999, available in full at First Nation Governence.org website:

https://fngovernance.org/wp-content/uploads/2020/09/obligation.pdf

"THE GENESIS AND DEVELOPMENT OF THE CROWN'S LEGALLY ENFORCEABLE RESPONSIBILITIES TOWARD ABORIGINAL PEOPLE IN CANADIAN LAW

The Supreme Court of Canada first affirmed the existence of the Crown's legally enforceable fiduciary duty toward aboriginal peoples in the landmark Guerin decision.2 In Guerin, the Musqueam Band surrendered reserve lands to the Crown for lease purposes to a golf club. The lease terms obtained by the Crown were different from, and much less favourable than, those approved by the Band at the surrender meeting. The Supreme Court of Canada found that the Crown owed a fiduciary obligation to the Musqueam people with respect to the leased lands and reasoned that the sui generis nature of aboriginal title, coupled with the historic powers and responsibilities assumed by the Crown toward aboriginal peoples, constituted the source of such a fiduciary obligation."

In Ermineskin vs Canada the Court found that the Crown owes a duty to consult any First Nation whose Aboriginal rights might be adversely impacted by the Crown's decision. The duty to consult includes Indigenous groups who may lose economic benefits from a Project as a result of the Crown's deferral or rejection of a Project, not just those who might be adversely affected by the Project itself.

An Impact Assessment Agency of Canada, Ministry of Environment and Climate Change Panel determination in 2021 that Indigenous support for a project is often a necessary condition for project approval, but not sufficient on its own where the Crown has reason to independently determine that a project is likely to have significant adverse effects. Proponents often use Impact Benefit Agreements (IBA) to secure Indigenous support. Where IBAs are confidential, proponents need to find a way to explain the nature and scale of benefits, and how they addressed environmental concerns that the Indigenous group may have raised earlier in the course of a project's review.

The Province of British Columbia's "*Declaration on the Rights of Indigenous Peoples Act",* and the federal *"United Nations Declaration on the Rights of Indigenous Peoples Act*", are changing expectations around the basis of engagement between the Crown, Indigenous groups, and industry. Indigenous groups increasingly are rejecting "consultation" as insufficient, and seeking to be engaged as governments with jurisdiction and stewardship responsibilities throughout their territories. Private sector is increasing its attempts to pro-actively develop "partnership" based relationships with key Indigenous groups to facilitate project development.

In this evolving regulatory environment, the ability to adapt to uncertainty and innovate mutually beneficial agreements will become the essence of good environmental and social corporate governance. The fiduciary obligations of the Crown to benefit first nations through economic development has been in a sense download to the corporate sector. This is to the competitive advantage of a company with a detailed, measurable Reconciliation Action Plan.