

APSC 450 – THE EFFECT OF INDIGENOUS INTERESTS ON THE ENGINEERING PROFESSION

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HISTORY

1763 - Treaty of Paris – conclusion to the French and Indian War; France cedes its claims and settlements in North America to England

1763 - Royal Proclamation – King George III of England declares all lands west of the Appalachian Divide as reserved for Indigenous Nations.

Recognizes Indigenous populations as sovereign nations

Establishes government (Crown) exclusive right and obligation to negotiate taking up of lands through treaty negotiations with Indigenous Nations



Charles Kendall Adams, A History of the United States (Boston, MA: Allyn and Bacon, 1909) 87

French & Indian War AKA 7 Years War

- world war involving England, France, and Spain & their colonies. England defeated France and Spain
- Indigenous Nations were allies with and fought alongside England and France in North America
- INDIGENOUS Nations were not invited to Treaty negotiations

Royal Proclamation

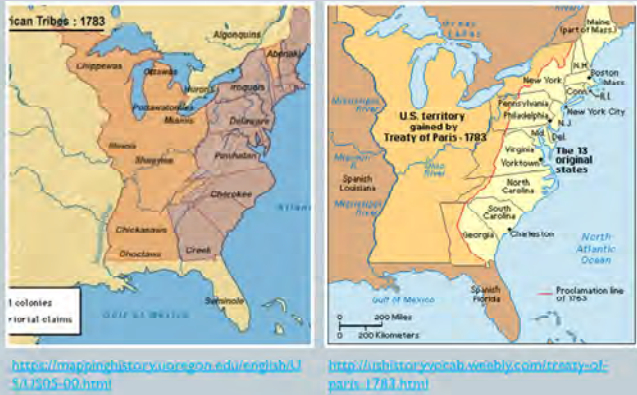
- Discontent and violence between colonists and Indigenous peoples after England gained control led to Royal Proclamation – Pontiacs Rebellion
- England (the Crown) moved immediately to negotiate treaties and take up lands for colonial settlements already established west of the Appalachias

American War of Independence

- Indigenous Nations traditionally aligned with the Crown of England fought on behalf of England in this war. As the losing combatants they were considered “defeated nations” by the new US Government. Many were displaced to Canada (Joseph Brandt, 6 Nations Reserve).
- Indigenous combatants were not invited to treaty negotiations

HISTORY

- 1784 - American War of Independence – England cedes Indigenous lands in the new United States to the USA



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HISTORY

- 1867 – Canadian Confederation
- The Indian Act and government policies
 - Registration of Indigenous people
 - Creation and confining to Reserves
 - No rights to vote or legal representation
 - Residential School system
 - Emancipation objective
- Negotiation of numbered Treaties in central Canada



HISTORY

- 1960 – Indigenous people gain right to vote in Canada
- 1982 – Constitution Act (Canada) incl. Sec. 35
 - 35(1) The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.
 - (2) In this Act, "Aboriginal Peoples of Canada" includes the Indian, Inuit, and Métis Peoples of Canada.
 - (3) For greater certainty, in subsection (1), "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
 - (4) Notwithstanding any other provision of this act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.



CASE LAW

- 1973 – *Calder*: Courts recognize that Aboriginal Title to land existed prior to colonization.
- 1990 – *Sparrow*: Reliance on Constitution Act Sec. 35 establishes harvesting (fishing) as a constitutionally protected Aboriginal right.
- 1997 – *Delgamuukw*: Recognizes Aboriginal rights includes rights to land and that the Crown has an obligation to consult.
- 2004 – *Haida & Taku*: Courts provide guidance on consultation requirements.
- 2014 – *Tsilqoht'in*: Courts establish guidance on determination of Aboriginal Title and rights and benefits conferred by such title.



Calder

- Nisga'a Nation on the West Coast of BC sued the BC government on the point of title to their land
- Courts acknowledged that Aboriginal title existed prior to the Royal Proclamation and was not derived from colonial law
- Split decision on the question of Nisga'a title, 3 for, 3 against, with the 7th judge dismissing the case on technicality

Sparrow

- A Musqueam man (*Sparrow*) was charged for fishing with a net longer than permitted by his food fishing licence
- Sparrow* argued in court that he had an aboriginal right to fish that was protected by his constitutional rights
- Courts found that
 - Sparrow* had an aboriginal right that had not been extinguished by any regulatory or policy regime of past governments (no treaty).
 - That right could not be infringed by government without justification
 - A restriction on the length of his net was not a justifiable infringement on his rights

- Established the Sparrow test
 - What is infringement:
 - Creates undue hardship
 - Considered by court to be unreasonable
 - Prevents rights holder from exercising his right
 - When is infringement of these rights justified?
 - When there is a valid legislative objective (ie conservation)
 - There must be as little infringement as possible
 - Compensation must be provided
 - First Nations must be consulted in advance

Delgamuukw

- Gitsxan hereditary Chief (Delgamuukw) took the province to court over the rights to territory
- Courts found
 - Oral testimony is legitimate form of legal evidence
 - Aboriginal title is a right to lands and resources from those lands
 - Aboriginal rights can be infringed by the Crown under certain circumstances

Haida & Taku

- Two cases; one involving the renewal and transfer of a Tree Farm Licence from one major corporation to another and the the other case involving ther permitting of a mine access road.
- In both the First Nations argued that the decision by the Province to allow these acitivities had a potential impact to their rights and as such, they should have been consulted by the Crown
- The Court found:
 - Asserted rights are enough to trigger a duty to consult (need not be proven)
 - Scope of duty to consult is proportionate to the potential impact; on a scale from advising to deep consultation
 - Duty of consultation rests solely with the Crown
 - Crown can delegate procedural aspects of consultation to a third party
 - Government can design consultation processes and decide how best to integrate aboriginal rights into the business of government
 - Duty of accommodation for rights infringement rests with the Crown

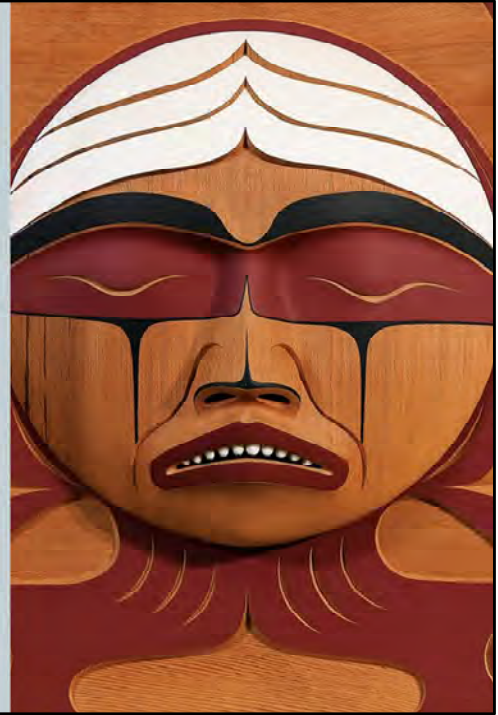
Tsilqoht'in

- Roger Williams (Tsilqoht'in Chief) took the Province to court over title to Indigneous Lands
- The Courts found that Indigenous title to a certain tract of land did exist based on:
 - Sufficient
 - Continuous
 - Exclusive occupation

- The benefits of title were concluded to be “ownership rights similar to those associated with fee simple: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”
- Indigenous title lands are subject to Crown laws and regulation provided they do not violate the tests laid out in Sparrow.

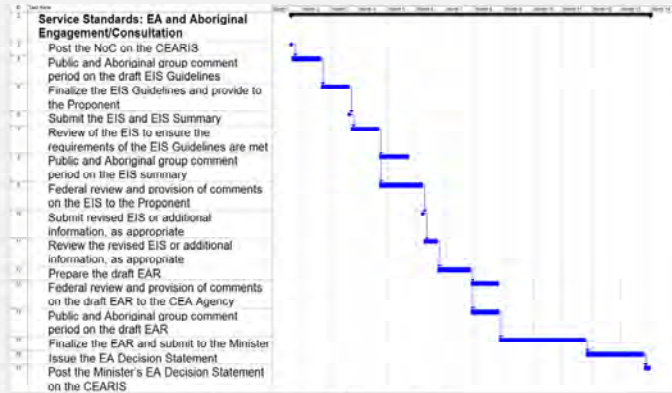
TODAY

- Truth and Reconciliation Commission – following and in depth review of residential school history, the TRC issues 94 “Calls to Action” for various sectors of Canadian society to advance reconciliation with Indigenous Nations.
- UN Declaration on the Rights of Indigenous Peoples (UNDRIP) – includes provisions for Indigenous peoples rights to enjoy and practice their cultures and customs, their religions, and their languages, and to develop and strengthen their economies and their social and political institutions. Includes a requirement for free, prior, and informed consent (FPIC) that affect them or their territories.



EFFECTS ON ENGINEERING PROFESSION

- Planning
 - Project design: Indigenous land use rights & heritage resources must be considered
 - Project timing: Requirements for consultation and accommodation of Indigenous nations affect timelines and complexity of achieving project approvals
- Costing
 - Development budgets must include consideration of design and timing issues examined during planning.



Gantt chart for Project Approval- Federal EA Blackwater Project

EFFECTS ON ENGINEERING PROFESSION

- Contracts
 - Certain commercial rights may be granted to Indigenous Nations as a component of accommodation for potential rights infringement (IBA). Potential effects to employment, subcontracting, training, etc.
- Business Development
 - Developing an engineering business may consider policy that adopts/reflects the TRC Calls to Action for business
- Professional Accreditation
 - APEGBC is implementing the TRC Call to Action, CPD programs are being offered



Signing of the Pretium Resources Impact Benefit Agreement with the Tahltan Nation, 2017.

Business Development & TRC:

- Hire Indigenous talent,
- train Indigenous students,
- diversify supply chain,
- cultural training for staff,
- consultation and relationship building in economic development,
- celebrate Indigenous Day,
- Territorial Acknowledgements where appropriate,