

# Aboriginal Rights in Canada's Courts

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## *Calder v BC (Attorney General)*

- Made it to the Supreme Court in 1973
- 3-3 decision technically a “loss”
- But 3 of Canada's most heralded Supreme Court Justices – Emmet Hall, Wishart Spence and Bora Laskin – said that the Nisga'a had Aboriginal Title and that it had never been extinguished
- Beginning of the contemporary rights era

## Contemporary Aboriginal Rights

- Indigenous peoples initially were independent entities in int'l law, but over centuries became “protected” nations under the suzerainty of the Crown
- Legal scholars such as John Borrows reject this framework as colonial self-interest; accepting Crown sovereignty immediately makes Indigenous law subservient/inferior

## Honour of the Crown

- Aboriginal rights might have been subject to Parliamentary paramountcy were it not for two imperial/constitutional authorities
  - *Royal Proclamation of 1763*
  - Section 35(1) of the *Constitution Act, 1982*
- Especially the latter (in the contemporary context) made “the honour of the Crown” a presumptive foundation for adjudication

## *Guerin (1984)*

- In 1957, Musqueam agreed to lease land for golf club, specified terms
- Indian Agent did sweetheart deal and agreed to cheaper terms for 75 years
- Musqueam sought copy of lease; took 12 years until Delbert had the opportunity
- Sued feds for breach of trust

## *Guerin (1984)*

- Federal government argued they had no legal responsibility to band, only political
- Supreme Court agreed with Musqueam and awarded \$10 Million
- Arises from *Royal Proclamation* that asserts Aboriginal title and means of surrender through government
- This confers fiduciary obligation on govt

## *Constitution Act, 1982*

- Recognition of “existing” Aboriginal rights:
  - “35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”
- But what are these?
- A series of three constitutional meetings was held in order to give life to that constitutional phrase

## CBC - 1983



## CBC - 1987



## *Constitution Act, 1982*

- Mandated Constitutional talks ended in failure
- After 5 years, issues became justiciable
- Theories of legal assertion of rights
  - “brick by brick”
  - “ball of wax”
- First case was *R. v. Sparrow* from BC

### *R. v. Sparrow (1990)*

- Ron Sparrow of Musqueam charged with using a drift net longer than permitted
- Mr Sparrow acknowledges that to be the case, but says he has an Aboriginal right to fish and that net restriction is inconsistent with Sec. 35(1)
- Supreme Court deals for first time with issues of how to deal with such claims

### *R. v. Sparrow (1990)*

- Crown argues that if there ever was a right, it was implicitly extinguished by the fishery and licensing that is incompatible with Aboriginal rights
- Also makes the “real Indians don’t eat pizza” argument, i.e., rights are limited to what they were and how they were exercised at contact

## 4-step test

1. Is there an existing inherent right protected by section 35 (1) of the Constitution Act, 1982? (Onus of proof on the First Nation claiming the right)
  - Must identify specific right
  - Satisfy “integral to distinctive culture” test
  - Practice must predate arrival of Europeans
  - Must be continuity of practice
  - Documentation need not be written

## 4-step test

2. Has the inherent right claimed been extinguished prior to the enactment of section 35 (1) of the *Constitution Act*, 1982? (Onus of proof on the Crown)
  - Prior to 35(1) extinguishment could occur via surrender, Constitutional enactment, or validly enacted federal legislation
  - Must be “clear and plain intention” to extinguish
  - Legislation inconsistent not sufficient

## 4-step test

3. Has the inherent right been infringed by federal or provincial legislation? (Onus of proof on First Nation claiming the right)
  - Rights can be infringed, not absolute
  - Court must consider
    - » Is the limitation unreasonable?
    - » Does the regulation impose undue hardship?
    - » Does the regulation deny to the holders of the right their preferred means of exercising that right?

## 4-step test

4. Can the infringement be justified? (Onus of proof on the Crown)
  - If an infringement, Crown must prove (a) that the infringement took place pursuant to a compelling and substantial objective and (b) that the infringement is consistent with the Crown's fiduciary obligation to First Nations
  - Valid objectives include conservation, pursuit of economic and regional fairness, recognition of the historical reliance upon, and participation in, fish and wildlife harvesting by non-Aboriginal groups

## 4-step test

- The following factors are also pertinent to the justification of inherent rights infringements:
  - Whether there has been as little infringement as possible;
  - Whether, in a situation of expropriation, fair compensation is available.
  - Whether the First Nation in question has been consulted with respect to conservation measures being implemented.

## ***R. v. Pamajewon (1996)***

- Shawanaga and Eagle Lake First Nations both passed by-laws dealing with lotteries
- Neither had provincial licence authorizing gambling operations, nor had they passed the by-laws via *Indian Act* requirements
- Shawanaga First Nation asserted inherent right to self-government
- Eagle Lake First Nation asserted right to be self-regulating in its economic activities

### ***R. v. Pamajewon (1996)***

- At issue was their right to regulate gambling activities on their respective reserve lands
- First case for Supreme Court to deal with stand-alone claim to self-government rights
- Perhaps not the best choice; shot down
- Court said Aboriginal rights must be looked at in light of specific case and specific history/culture of group claiming the right
- Evidence did not support idea that gambling was an “integral” part of pre-contact culture

### ***R. v. Van der Peet (1996)***

- Member of Sto:lo Nation was charged with selling fish she had lawfully caught
- Trial judge determined that Aboriginal right to fish for food and ceremonial purpose did not extend to sale
- Determined Sto:lo did not engage in commercial trade until after Hudson Bay post established
- Not part of their “distinctive culture” prior to contact

## **Title in BC**

- In 1872, when Aboriginal people outnumbered settlers, the new Province of BC denied Aboriginal people the vote
- Only whites were allowed to purchase fee-simple pre-empted land
- “Postage stamp” reserves established; refused to recognize Aboriginal title
- Federal govt subsequently made it illegal to raise land issues before the courts

## ***Delgamuukw v The Queen (1997)***

- Gitksan/Wet'suwet'en claimed Aboriginal title and jurisdiction in their traditional lands, never extinguished
- Longest trial ever held in Commonwealth; oral histories (*adaox*) revealed
- McEachern lambasted for racist decision
- Case goes to Supreme Court

C A N A D A ' S   N A T I O N A L   N E W S P A P E R

# THE GLOBE AND MAIL

Toronto, Friday, December 12, 1997      Cloud and sun. High near -1. Death, map, \$15.

## Natives win on land rights

Top court rules that oral history gives bands constitutional claim in absence of treaties

The Globe and Mail

Native people have a constitutional right to own their ancestral lands and to use them almost entirely as they wish, the Supreme Court of Canada ruled yesterday. The decision applies to natives who have not signed away their lands in treaties and so is especially explosive in parts of Atlantic Canada and most of British Columbia.

By ruling that aboriginal title to land has never been extinguished, the Supreme Court casts a thick

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cloud of uncertainty over the future of British Columbia's logging and mining industries.

In a unanimous decision released yesterday, a six-member panel of the Supreme Court overturned a ruling of a B.C. court that dismissed claims from the Gitksan and Wet'suwet'en First Nations to ownership of a

58,000-square-kilometre swath of land in northwest British Columbia.

The Supreme Court concluded that a new trial is necessary. The trial judge erred by not taking into account oral histories of the natives presented to the court to establish their occupation and use of the land, the court found.

"Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different," stated Chief Justice Antonio

Lamer, who wrote the decision.

However, Chief Justice Lamer also stated that the court was not necessarily encouraging the natives to return to litigation to settle their dispute. Rather, he encouraged them to negotiate a settlement with the federal and provincial governments.

Ultimately it is through negotiated settlements, based on good faith and reinforced by the Court's ruling, that a reconciliation between native societies and the rest of Canada will be achieved, he

wrote. "Let us face it, we are all here to stay."

Both the federal and provincial governments expressed a willingness yesterday to negotiate a settlement.

Negotiation is the preferred option of the federal government, Indian Affairs Minister Jane Stewart said yesterday. She called the judgment a "positive affirmation" of Ottawa's approach to land-claims issues.

PHOTOS BY NATHAN/A10  
JEFFREY SIMPSON/A20

## *Delgamuukw v The Queen (1997)*

- "Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be irreconcilable with the nature of the group's attachment to that land."

### ***Delgamuukw v The Queen (1997)***

- In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title.
- At sovereignty, occupation must have been exclusive. This requirement flows from the definition of aboriginal title itself, which is defined in terms of the right to exclusive use and occupation of land.

### ***Delgamuukw v The Queen (1997)***

- Interesting reaction; compare to gay and French language rights cases
- Feds/Prov took most narrow interpretation they could
- Said in effect, Aboriginal title exists, but we can ignore it until you prove you have it
- Haida took them up on it

***Haida v BC &  
Taku River Tlingit v BC (2004)***

- Three questions addressed in the preliminary case were:
  - Is there an enforceable duty to consult prior to the definitive proof of aboriginal or treaty rights?
  - Is there an enforceable duty to accommodate disputed aboriginal and treaty rights prior to definitive proof of such rights?
  - To what extent do any such duties apply to private parties?
- Answers were “Yes,” “Yes,” “No.”

***Haida v BC &  
Taku River Tlingit v BC (2004)***

- Affirmed “duty to consult” as part of the honour of the Crown where treaties have not yet been concluded
- The Crown, acting honourably, "cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof"
- Obligations of Crown vary depending on severity of infringement; Crown may (and sometimes must) balance societal interests

***Haida v BC &  
Taku River Tlingit v BC (2004)***

- Crown must bargain/consult in good faith and cannot be inflexible; must minimize infringement; must accommodate Aboriginal interest
- However, “hard bargaining” is OK and an agreement need not necessarily be reached (i.e., the standard is “consultation” rather than “consent”)

***Xeni Gwet'in First Nations v.  
British Columbia (2004)***

- The case the feds/prov wanted to get rid of because the onus came to be on them to prove title
- The Tsilqhot'in Nation asked for an all-or-none decision.
- Vickers at BC Supreme Court said that his hands were tied; could not give “all,” so must say “none”

## ***Xeni Gwet'in First Nations v. British Columbia (2004)***

- However, he also made clear that if he were to be asked to make a more specific declaration, he would have awarded about 50% -- 200,000 sq.km – way more than any treaty settlement would be
- Willing to negotiate, but lodged right to appeal just in case province got cold feet
- In process

## Aboriginal Rights in Canada

Aboriginal Rights					
Generic			Specific		
Aboriginal Title	Right of Self-Govt	Language Rights	Site-Specific Rights	Floating Rights	Cultural Rights

## Generic Rights

- Rights “of a standardized character held by all Aboriginal groups that satisfy certain criteria” (Slattery, p.211)
- Embodied in general principles of law, not in practices of specific group
- Example: Aboriginal title
- Might also be produced inductively via recognition of specific right across cases

## Specific Rights

- Distinctive to a particular Aboriginal group
- Adjudication will be grounded in consideration of customs, traditions and historic practices of that specific group
- Various types of rights depending on relation to land:
  - Site-specific rights (e.g., fishing area)
  - Floating rights (e.g., justice consideration)
  - Cultural rights (e.g., to songs)

## **Sovereignty's Alchemy**

- Court accepts Crown jurisdiction over Indigenous legal systems and thereby immediately subordinates them
- Regarding factual findings, Courts subject Aboriginal traditions to non-Aboriginal authentication
- Court's definition of Aboriginal title undermines Aboriginal land-use regimes

## **Sovereignty's Alchemy**

- Court's discussion of Aboriginal self-government holds Aboriginal assertions of sovereignty to stricter scrutiny and standards of proof than Crown
- Court vests federal Crown with the authority to extinguish Aboriginal rights in a manner contrary to the Constitution
- "Calling colonization 'infringement' is an understatement of immense proportions."