**Calder Case**

**Calder v. Attorney-General of British Columbia [1973]**

In 1967, Frank Calder and other Nisga’a elders sued the provincial government of British Columbia, declaring that Nisga’a [title](http://indigenousfoundations.arts.ubc.ca/aboriginal_title) to their lands had never been lawfully extinguished through treaty or by any other means. While both the BC Supreme Court and the Court of Appeal rejected the claim, the Nisga’a appealed to the Supreme Court of Canada for recognition of their Aboriginal title to their traditional, ancestral and unceded lands. Their appeal was a landmark move that posed considerable risk not only to the Nisga’a, but to all Aboriginal peoples hoping to have their rights and title affirmed and recognized.

What the Supreme Court concluded was groundbreaking. While the lower levels of court had denied the existence of Aboriginal title, the Supreme Court ruled in 1973 that Aboriginal title had indeed existed at the time of the [Royal Proclamation of 1763](http://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763). The Supreme Court’s 1973 decision was the first time that the Canadian legal system acknowledged the existence of Aboriginal title to land and that such title existed outside of, and was not simply derived from, colonial law.

However, the Court was split on whether the Nisga’a’s claim to their lands was valid. Three judges ruled that while Aboriginal title may have existed at one point, it had since been extinguished by virtue of Confederation and colonial control over the land. Three other judges affirmed the Nisga’a’s Aboriginal title, arguing that it had never been extinguished through treaty or statute. The seventh judge dismissed the case on a technicality.

While the Nisga’a did not win their case and the ruling did not settle their land question, it did pave the way for the federal government’s Comprehensive land claims process, which sets up a process for Aboriginal groups to claim title to their territory. The province of British Columbia, however, refused to acknowledge Aboriginal title until 1990, when the British Columbia Claims Task Force was established. This would then lead to the B.C.  Treaty Process and the settling of the first modern land claim in British Columbian history, the Nisga’a Final Agreement in 1998. The Supreme Court’s acknowledgement of the existence of Aboriginal title also opened the door for other Aboriginal rights cases, most notably Delgamuukw v. British Columbia (1997), which further defined Aboriginal title. As a landmark case, the Calder decision continues to be cited in modern Aboriginal land claims across Canada, as well as internationally in Australia and New Zealand.

By Tanisha Salomons

From: <http://indigenousfoundations.arts.ubc.ca/calder_case/>

**Sparrow Case**

**R. v. Sparrow [1990]**

R v. Sparrow was a precedent-setting decision made by the Supreme Court of Canada that set out criteria to determine whether governmental infringement on [Aboriginal rights](http://indigenousfoundations.arts.ubc.ca/aboriginal_rights) was justifiable, providing that these rights were in existence at the time of the [Constitution Act, 1982](http://indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35). This criteria is known as “the Sparrow Test.”

**History of the Sparrow Case**

Musqueam have inhabited the Fraser River delta and neighbouring areas since time immemorial. As coastal peoples, the Musqueam have depended on this river and fishing for sustenance for generations. Following European settlement in the Lower Mainland, the Musqueam saw their rights to the land and its resources infringed upon as non-Aboriginal fishers took increasing control of the fishing industry. New regulations set up by the government introduced fishing licenses and restricted Aboriginal peoples to “food fishing,”– fishing strictly for their own personal consumption. Despite these restrictions, the Musqueam continued to exercise what they deemed to be their inherent and unextinguished right to maintain their culture and ways of life, particularly in relation to fishing.

In 1984, Musqueam band member Ronald Sparrow was arrested for fishing with a net longer than was permitted by his food fishing license. His arrest and subsequent court case led to one of the most defining decisions by the Supreme Court of Canada regarding [Aboriginal rights](http://indigenousfoundations.arts.ubc.ca/aboriginal_rights). Musqueam community members recognized Sparrow’s arrest as a threat to their collective rights, and to the rights of Aboriginal people across Canada. As such, the Musqueam band decided to defend to the charge against Sparrow. They outlined five main arguments:

* That the Musqueam retained the right to fish on the territories they had inhabited and fished on for centuries;
* That Musqueam’s rights to the land and its resources had never been extinguished by treaty;
* That [Section 35](http://indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35) of the 1982 Constitution Act reinforced Musqueam’s right to fish;
* That any infringement on Aboriginal fishing rights was invalid, as evidenced by Section 35, unless justified as being a necessary measure of conservation, and
* That a restriction on net length infringed on Musqueam’s fishing rights and was not justified by reason of conservation.1

The case was first heard in the British Columbia (BC) Provincial Court, which found Sparrow guilty of violating the terms of his fishing license. This conviction was appealed to the BC County Court, which ruled in the same manner as the Provincial Court. Musqueam then appealed to the BC Court of Appeals and won their appeal. In 1988, the case was heard in the Supreme Court of Canada and in 1990, 6 years after Ronald Sparrow’s arrest, the court ruled in favour of the Musqueam. The Supreme Court’s decision ruled that, despite nearly a century of governmental regulations and restrictions on Musqueam’s right to fish, their Aboriginal right to fish had not been extinguished. This decision was arrived upon by the Court’s interpretation of the phrase “existing Aboriginal and treaty rights are hereby recognized and affirmed” in Section 35.

Section 35 had been added to the Constitution in 1982 to protect Aboriginal rights. However, those rights had yet to be explicitly defined. The Supreme Court of Canada ruled that Musqueam’s Aboriginal right to fish had not been extinguished prior to the 1982 Constitution and that, as such, Mr. Sparrow had an “existing” right to fish at the time of his arrest.  The Court also ruled that the words “recognized and affirmed,” as they appear in Section 35, mean that the government cannot override or infringe upon these rights without justification. This point essentially upheld the then-recent *R. v. Guerin* decision that the government has a fiduciary duty to First Nations.

Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise.  The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

R. v. Sparrow, [1990] 1 S.C.R. 1075

**The Sparrow Test**

The Court’s ruling resulted in what is known today as the “Sparrow test”, which sets out a list of criteria that determines whether a right is existing, and if so, how a government may be justified to infringe upon it.

The Sparrow test first seeks to define whether or not a right has been infringed upon. A government activity might infringe upon a right if it:

* Imposes undue hardship on the First Nation;
* Is considered by the court to be unreasonable;
* Prevents the right-holder from exercising that right.

The Sparrow test then outlines what might justify an infringement upon an Aboriginal right.  An infringement might be justified if:

* The infringement serves a “valid legislative objective.” The court suggested a valid legislative objective would be conservation of natural resources, in which First Nations interest would come second only to that;
* “There has been as little infringement as possible in order to effect the desired result;”
* Fair compensation was provided, and,
* Aboriginal groups were consulted, or, “at the least… informed.”

The Supreme Court also acknowledged that other considerations may be taken into account, depending on the circumstances of the infringement.

The Sparrow case has elicited mixed reactions amongst those concerned with Aboriginal rights. Although many recognize the Sparrow case as “a significant victory for those interested in the affirmation of Aboriginal rights,”2  it also confirms that these rights are not absolute, and can be infringed upon providing the government can legally justify it. Further, the Court also did not outline what would qualify as adequate consultation or compensation regarding rights infringement. Outstanding questions regarding adequate consultation with First Nations would eventually be examined in the Supreme Court decisions *Taku River Tlingit (2004)* and *Haida Nation (2004)*.

By Tanisha Salomons & Erin Hanson

From: <http://indigenousfoundations.arts.ubc.ca/sparrow_case/>

**Delgamuukw Case**

The Delgamuukw case (1997) (also known as Delgamuukw v. British Columbia) concerned the definition, the content and the extent of Aboriginal title (i.e., ownership of traditional lands). The Supreme Court of Canada observed that Aboriginal title constituted an ancestral right protected by Section 35(1) of the Constitution Act, 1982. Influenced by the Calder case (1973), the ruling in the Delgamuukw case had an impact on other court cases about Aboriginal rights and title, including in the Tsilhqot’in case (2014).

**Context**

Since the arrival of Europeans, [First Nations](http://www.thecanadianencyclopedia.ca/en/article/first-nations/) in [British Columbia](http://www.thecanadianencyclopedia.ca/en/article/british-columbia/) have sought to make the provincial authorities recognize [Indigenous peoples](http://www.thecanadianencyclopedia.ca/en/article/aboriginal-people/)’ title (i.e., ownership) to [traditional territory](http://www.thecanadianencyclopedia.ca/en/article/indigenous-territory/). The [Gitxsan](http://www.thecanadianencyclopedia.ca/en/article/gitksan/) and Wet’suwet’en (*see* [Dakelh](http://www.thecanadianencyclopedia.ca/en/article/carrier/)) nations tried to negotiate on ownership with the province, as well as with the [federal government](http://www.thecanadianencyclopedia.ca/en/article/federal-government/), but their efforts were always ignored.

After years of failed negotiations with the provincial government, in 1984, the hereditary chiefs of both First Nations filed a land title action with the Supreme Court of British Columbia. The suit claimed title to over 58,000 km2 of land in northwestern British Columbia. The Indigenous nations wanted to protect the land from logging and to have the province officially recognize their title as well as award compensation for any loss of land. The two First Nations jointly launched the action against the government but they each claimed title over distinct lands. The trial began in 1987.

This case is commonly referred to as the *Delagmuukw* case because Earl Muldoe (or Muldon) Delagmuukw, a Gitxsan man from Kispiox, was one of the claimants. An art instructor in the years before the first lawsuit began, Muldoe is a master carver whose works include masks, [totem poles](http://www.thecanadianencyclopedia.ca/en/article/totem-pole/) and bentwood boxes (*see* [Indigenous Art in Canada](http://www.thecanadianencyclopedia.ca/en/article/aboriginal-art-in-canada/)). He was awarded the [Order of Canada](http://www.thecanadianencyclopedia.ca/en/article/order-of-canada/) in 2010 for his art and his role in establishing oral history as valid evidence in Canadian courts. The name Delagmuukw is a hereditary chief name, passed down from generation to generation to new Gitxsan chiefs. Earl Muldoe held the title of Delgamuukw when the trial began in 1987. Another commonly cited claimant of the case is Dini ze’ Gisday’ wa (also known as Alfred Joseph) of the Wet’suwet’en nation. Born in 1927, Joseph was a hereditary chief, carver and advocate for Indigenous cultural education, helping to create courses for the University of Northern British Columbia. He was granted an honorary doctorate from UNBC in 2009.

**Court Cases and Rulings**

During the trial before the Supreme Court of British Columbia, Gitxsan and Wet’suwet’en elders testified about their land using oral histories and in their own languages (*see* [Indigenous Languages in Canada](http://www.thecanadianencyclopedia.ca/en/article/aboriginal-people-languages/)). Judge Allan McEachern ruled on 8 March 1991, determining that any title the Gitxsan and Wet’suwet’en may have had was extinguished (i.e., taken away) when British Columbia joined [Confederation](http://www.thecanadianencyclopedia.ca/en/article/confederation/).

The Gitxsan and Wet’suwet’en appealed McEachern’s ruling to the Court of Appeal of British Columbia. On 25 June 1993, the appeal court concluded that the government has a duty to consult with Indigenous peoples before they begin any projects that may infringe upon [Indigenous rights](http://www.thecanadianencyclopedia.ca/en/article/aboriginal-rights/). However, the appeal court ultimately agreed with McEachern that the Gitxsan and Wet’suwet’en did not have title to the land in question.

Following an abandoned attempt at treaty negotiations with the province of British Columbia, the claimants decided to appeal to the [Supreme Court of Canada](http://www.thecanadianencyclopedia.ca/en/article/supreme-court-of-canada/), which heard their case on 16 and 17 June 1997. Six months later, on 11 December 1997, the court’s ruling addressed a number of issues, including the extinguishment of Aboriginal title, the use of oral history in testimony and the content and extent of Aboriginal title.

The court found that the provincial government had no right to extinguish the Indigenous peoples’ rights to their ancestral territories. Reaffirming the decision in the [*Van der Peet* case](http://www.thecanadianencyclopedia.ca/en/article/van-der-peet-case/) (1996), the court deemed that oral history is an important type of evidence that courts must treat as equal to other types of evidence.

The court also clarified the content and definition of Aboriginal title, as previously explored in the [*Calder* case](http://www.thecanadianencyclopedia.ca/en/article/calder-case/) (1973). It defined Aboriginal title as Indigenous peoples’ exclusive right to the land, and affirmed that Aboriginal title is recognized as an “existing aboriginal right” in section 35 of the [*Constitution Act, 1982*](http://www.thecanadianencyclopedia.ca/en/article/constitution-act-1982/).

However, the court also acknowledged some limitations with Aboriginal title. Traditional lands cannot be used in a manner that is “irreconcilable with the nature of the claimants’ attachment to those lands.” For example, a nation with ancestral claims to fishing rights may not use the waters in a way that would destroy its value for fishing. If Indigenous people wished to use the lands in ways that Aboriginal title did not permit, then the lands must be surrendered. Aboriginal title cannot be transferred to anyone other than the [Crown](http://www.thecanadianencyclopedia.ca/en/article/crown/).

In order to clarify how Indigenous nations must demonstrate Aboriginal title, the court created a test based on three key points: sufficient, continuous and exclusive evidence of territorial occupation.

**The Delgamuukw Test: Demonstrating Aboriginal Title**

According to the *Delgamuukw* ruling, Indigenous people seeking to prove their title to ancestral territories must provide evidence of the existence of Aboriginal title in respect of the following requirements:

1. The Indigenous nation must have occupied the territory before the declaration of sovereignty.This means that the Indigenous nation must have demonstrated to other First Nations and to Europeans that it clearly used and occupied the land. This is different than the ruling in the *Van der Peet* case (1996), which established that Indigenous peoples need to prove that their traditional rights were integral to their culture when Europeans arrived. In the *Delgamuukw* test, it is sufficient to say that occupied land was integral to their culture at the time of contact.
2. If present occupation is invoked as evidence of occupation before sovereignty, there must be a continuity between present occupation and occupation before the declaration of sovereignty. In other words, there must be evidence of a continuous ownership of the land. However, it is not necessary to prove a perfect continuity; the demonstration of a substantial maintenance of the bond between the people and the territory is sufficient. In this respect, the Supreme Court held that oral evidence could be admitted as proof.
3. At the time of declaration of sovereignty, this occupation must have been exclusive. This means that the land had to have been the exclusive territory of an Indigenous nation, although they could have shared it with another Indigenous nation.

**Significance**

The *Delgamuukw* case is an important one in Canadian law because it provides information about the definition and content of Aboriginal title. The ruling also clarified the government’s duty to consult with Indigenous peoples, and affirmed the legal validity of oral history. After the case, other First Nations, most notably the [Tsilhqot’in](http://www.thecanadianencyclopedia.ca/en/article/chilcotin-tsilhqotin/) people in 2014, used the *Delgamuukw* decision in their own [land claims](http://www.thecanadianencyclopedia.ca/en/article/land-claims/) cases.

Despite the importance of the case, treaty negotiations between the two nations, the province and the federal government continue. Various companies operate in their traditional territories without permission, and there is division within the Gitxsan community over participation in large energy projects, such as the LNG pipeline that is planned to run through Gitxsan traditional territory. Therefore, the *Delgamuukw* case raised and clarified issues relating to Aboriginal title, but it did not outright resolve them.

From: <http://www.thecanadianencyclopedia.ca/en/media/9198/>

**Indian status: changing the status quo**

By John Rowinski - September 25 2009 issue

How is an individual’s ethnic identity determined? This question lies at the root of a B.C. case that, outside of the aboriginal Bar, has escaped widespread scrutiny.

In McIvor v. Canada (Registrar of Indian and Northern Affairs), [2009] B.C.J. No. 669, the B.C. Court of Appeal declared that s. 6 of the Indian Act is of no force and effect as it infringes the equality rights guaranteed by s. 15 of the Charter, and cannot be saved by s. 1. Parliament was given a deadline of April 6, 2010 to amend the Act.

Sharon McIvor is a status Indian pursuant to 1985 amendments to the Act. McIvor’s children also have status, even though their father is a “non-Indian.” Her son Charles married a non-Indian woman. As a result of what has been dubbed the “second generation cut-off,” Charles’ children do not have Indian status. Conversely, the children of Charles’ sister have status because their father is an Indian.

McIvor claims that the denial of status to Charles’ children is discriminatory on the basis of gender. The problem arises from the 1985 amendments, which reinstated women who lost their status as a result of marrying non-Indian men (Indian men who married non-Indians kept their status and their wives gained status as well).

The second generation cut-off therefore operates differently for those who trace their Indian heritage maternally versus those who trace it through their paternal lineage. McIvor’s family provides a stark manifestation of this inequality, as some of her grandchildren are status Indians, because of their father, and some are not.

At trial, McIvor won a complicated remedy in which the trial judge struck s. 6 of the Act immediately. The ruling granted Indian status to all individuals who could demonstrate that somewhere in their ancestry a female person lost status by marrying a non-Indian.

The appeal court agreed that s. 6 of the Act was discriminatory, but determined that the trial judge’s characterization of the Charter violation was too broad. The court held that “The 1985 legislation violates the Charter by according Indian status to children

1. who have only one parent who is Indian (other than by reason of having married an Indian),
2. where that parent was born prior to April 17, 1985, and,
3. where that parent in turn only had one parent who was Indian (other than by reason of having married an Indian), if their Indian grandparent is a man, but not if their Indian grandparent is a woman.”

The court determined that the grandchildren of a “hypothetical brother” of McIvor would have Indian status by s. 6 of the Act. It accordingly held that the source of the inequality arising from the 1985 amendments was the fact that it granted “enhanced status” to the grandchildren of a male who married before 1985 when compared to a female in the same circumstances. In other words, the appeal court found that it is not cutting off status based on generational lines that is discriminatory, but rather the preferential treatment afforded to Indian men who married prior to 1985.

McIvor has sought leave to appeal the decision to the Supreme Court. If leave is granted, Canada has sought leave to cross-appeal, and to delay the deadline for amending the Act.

The nature of the relationship between Indians and the Crown requires Parliament to “define” the identity of “Indians” for purposes of administration and delivery of resources and services. Now Parliament, and potentially the Supreme Court, must determine how to define a group of people. The underlying effect of McIvor’s characterization of the Charter breach is to validate the antiquated notion that “blood quantum” provides a valid measure of “Indianness.”

A generational cut-off is the same as a blood quantum, or racial, definition of “Indian” (for example, concluding that someone who is less than one-quarter blood is not not an Indian). Sociologists criticize this methodology as being an arbitrary social construct. Indeed, this methodology could ultimately lead to the eradication of all status Indians over the course of several generations.

A more progressive definition would be a form of self-identity based on ethnicity, factoring in ancestry, culture and lifestyle, the same way a person might describe themselves as Jewish-Canadian or Irish-Canadian. The difference is that Indian status creates rights and entitlements to limited lands and resources. An increase in the number of Irish-Canadians does not have the same administrative or economic repercussions as an identical increase in the number of status Indians.

Whether or not leave is granted by the Supreme Court, McIvor will influence how Canada defines individuals or groups for the purposes of the delivery of resources and services. Its potential impact goes far beyond the realm of aboriginal law, and for that reason the case merits far greater attention than it has so far been afforded.

From: <http://media.knet.ca/node/7330>

**R. vs. Marshall 1999**

In August 1993, Donald Marshall jr., a member of the Membertou First Nation, was stopped for fishing in Pomquet Harbour in Antigonish County, Nova Scotia, and his equipment was seized. Marshall caught 210 kilograms of eels, which he sold for $787.10 and was then charged with fishing without a licence, selling eels without a licence and fishing during a closed season. He claimed he was allowed to catch and sell fish by virtue of a treaty signed with the British Crown.   
Marshall said he was catching and trading fish just as the Mi'kmaq people had done since Europeans first visited the coast of what is now Nova Scotia in the 16th century.

In September 1999, the Supreme Court of Canada confirmed that Donald Marshall Jr. had a treaty right to catch and sell fish. The Court found that Mi'kmaq and Maliseet people on the East Coast continue to have treaty rights to hunt, fish and gather to earn a moderate livelihood. These rights flow from the Peace and Friendship Treaties signed in 1760 and 1761 between the British Crown and the ancestors of the Mi'kmaq and Maliseet. As the Supreme Court described it, earning a "moderate livelihood" didn't mean an open-ended accumulation of wealth, rather it was securing the "necessaries." Further, the Supreme Court noted that these treaty rights are held by the community as a whole. This is because the treaties were negotiated by groups of Aboriginal peoples, not by individuals.

On November 17, 1999, the Supreme Court provided further clarification of its first ruling. The Court stated that Mi'kmaq and Maliseet treaty rights were not unlimited and the fishery could be regulated, including Aboriginal fishing activities. This means regulations can be introduced, if they can be justified for conservation or other important public objectives.

The Supreme Court also stated that the "gathering" referred to in the September judgement was not meant to include logging, minerals or offshore natural gas deposits, but that Aboriginal groups could continue to present these arguments in other court cases.

There are 34 Mi'kmaq and Maliseet First Nations in Nova Scotia, New Brunswick, Prince Edward Island and the Gaspé region of Quebec who are potentially affected by the Marshall decision.

<https://www.aadnc-aandc.gc.ca/eng/1100100028614/1100100028615>