THE SUPREME COURT OF CANADA'S RECOGNITION AND AFFIRMATION OF INDIGENOUS RIGHTS IN CANADA: A JURISPRUDENTIAL ANALYSIS

By

MACKENZIE VILLENEUVE

An Honours Project submitted in Partial Fulfillment of

the Degree requirements for the Degree of

BACHELOR OF ARTS

in

CRIMINAL JUSTICE

(*HONOURS*)

Principal Supervisor

Professor Doug King

Department of Economics, Justice, and Policy Studies

MOUNT ROYAL UNIVERSITY

April 2024

MOUNT ROYAL UNIVERSITY

CALGARY, AB, CANADA

Land Acknowledgement

My name is Mackenzie Villeneuve and I identify as a Dëne Sųłiné woman, Indigenous to the lands traditionally occupied by the Deninu K'ue First Nation, contemporarily referred to as the village of Fort Resolution, Northwest Territories, Canada. For the past four years, I have had the privilege of learning and working at Mount Royal University, an institution located on, and adjacent to, lands that encompass the hereditary territories of the Niitsitapi (Blackfoot), the Stoney Nakoda, and the people of the Treaty 7 region in Southern Alberta, which includes the Siksika, the Piikani, the Kainai, the Tsuut'ina, and the Iyarhe Nakoda. The City of Calgary is also home to the Métis Nation (Region 3). With respect, I acknowledge that I breathe the air and drink the water that is theirs; I value the land and the beings that are part of their ancestral world. I pledge that the work I have completed at this institution, including this thesis, was done in a way that was of utmost respect to their traditions and epistemologies.

Abstract

In 1982, the Government of Canada enacted the *Constitution Act of 1982*. As part of their amendments to the existing *Act*, the federal government added a section that recognizes and affirms existing Indigenous rights in Canada: s. 35. Despite the growing importance of the provision, there is little scholarly research available to reference regarding the Supreme Court of Canada's role in implementing the section and bringing its intentions to fruition. Yet, the substantive, precedent-setting interpretations, empirical tests, and analyses provided by the Court in their landmark decisions directly influence society's perception and understanding of Indigenous rights in Canada. As an effort to minimize that academic gap, this thesis examines the Supreme Court of Canada's contribution to the recognition and affirmation of Indigenous rights in Canada. Throughout my analytical process, three noteworthy conclusions presented themselves. First, the rise in the magnitude of the Indigenous rights cases brought forth to the Supreme Court of Canada is remarkable; what was once about fishing nets, is now about land title. Secondly, the Supreme Court of Canada's progressive approach to Indigenous rights proceedings is notable and clearly illustrates their dedication to a reconciled, just society. Lastly, this project identifies a need for more accessible literature on the evolution of Indigenous rights in Canada.

Dedication and Acknowledgements

Foremost, to my sister who I am inexplicably grateful for. My very best friend, she is the one who inspires me to be the finest version of myself. Mentally, our hands are forever intertwined – I am not, without you.

To my parents, who raised me to have an insatiable thirst for education. Thank you for instilling me with confidence in my abilities; for crafting me into someone who understands the power that knowledge holds; and for making me do my homework every night.

To my ts'éni, who has continuously, and with grace, given me the space in every room to sort through my intricate, often illogical thoughts, and who encourages me to engulf myself in every project I recklessly commit myself to.

At last, to my project supervisor and mentor, Doug King: marsícho for reviving my passion for the rights and affairs of Indigenous peoples in Canada. I am beyond thankful to you for your priceless inspiration and education, for your meaningful dedication to the importance of my project, and for being a true, exemplary advocate of justice.

Table of Contents

The Supreme Court of Canada's Recognition and Affirmation of Indigenous Rights in Canada

Prior to the enactment of the *Constitution Act of 1982*, Canadian legislation was governed by the British North America Act (Hanson, 2009b). In the 1970s, former Prime Minister Pierre Trudeau initiated the process of patriating the governing document from British Parliament to Canadian legislature, in an effort to increase the country's independence (Hanson, 2009b; The Constitution Express, 2016). However, when the federal government's original proposal was publicized, many Indigenous peoples across Canada grew increasingly concerned over the document's lack of recognition of treaty rights (Hanson, 2009b). At the time, Aboriginal and treaty rights were solely recognized through decisions made by the courts (Centre for Constitutional Studies, n.d.). Therefore, from the Indigenous perspective, a cease of constitutionally recognized treaty rights, in the absence of an appropriate alternative, would essentially strip them of their protected status and act as yet another legal and political assimilative motion (The Constitution Express, 2016).

In 1980 and 1981, a group of Indigenous rights activists, led by George Manuel, travelled across Canada protesting for Aboriginal and treaty rights to be recognized and affirmed in the forthcoming *Act* (Hanson, 2009b). This Indigenous-led movement would be later referred to as the Constitution Express. By January 1982, after a long and hard-fought battle by Indigenous peoples championing for the constitutional recognition of their treaty rights, the federal government agreed to the demands of Indigenous organizations and added a provision recognizing Indigenous rights to the *Constitution Act of 1982*. Section 35 of the *Constitution Act, 1982* declares: **(1)** "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of

Canada are hereby recognized and affirmed. **(2)** In this Act, ***[A]boriginal peoples of Canada*** includes the Indian, Inuit, and Métis peoples of Canada."

As predicted, Indigenous peoples in Canada were deeply impressed with the Government of Canada's constitutional recognition of their existing Aboriginal and treaty rights. While the provision did not add any new, additional rights, it lawfully affirmed all Indigenous rights that existed at the time of enactment. Further, not only does the provision legally acknowledge their distinct status, but it has served as a ground-breaking tool for Indigenous peoples to challenge infringements and enforce their protected rights in the court system (Centre for Constitutional Studies, n.d.). Over the past 42 years, regardless of the magnitude of the infringement, Indigenous peoples across Canada have fiercely advocated for their traditionally practiced, treaty-recognized, constitutionally protected rights.

With respect to the decisions explored below, it is imperative to highlight the absolute weight that the Supreme Court of Canada holds with regard to Canadian jurisprudence. Since its establishment in 1875, the Supreme Court of Canada has had a profound impact on the lives of Canadians (Supreme Court of Canada, 2013). Each decision the Court makes holds substantial weight that inevitably affects the treatment of Canadians by the state, each other, and themselves. As the highest appeal court in Canada, the Supreme Court of Canada's word is final – unable to be overturned or disputed under any circumstance, by any court other than its own. Furthermore, the Court, as influential and binding as they are, is only logistically able to hear approximately 65-80 appeal cases per year (Supreme Court of Canada, 2013). Thus, only the most important appeals are accepted and heard before the Supreme Court of Canada.

As with all other legal matters in Canada, the Court's determinations directly impact the rights and lives of Indigenous peoples in Canada. However, Indigenous peoples have a long,

convoluted history regarding their relationship with the legal system in Canada. Therefore, the decisions held by the Supreme Court of Canada regarding Indigenous peoples' legal rights to practice their traditional cultural activities and continue their inherited lifestyle are inexplicably important to the survival of their culture.

Congruent with the terminology employed in s. 35 of the *Constitution Act, 1982*, the following thesis serves to explore and analyze the ways in which the Supreme Court of Canada has recognized and affirmed Indigenous rights in Canada since this enactment of the *Constitution Act* in 1982. Moreover, this project examines the rationales of seven foremost decisions, one pre-s. 35 and six post-s. 35, focusing on the Supreme Court of Canada's interpretations and wholly declarations found within each rationale.

Methodology

As this thesis aims to explore and interpret the philosophical grounds that informed decisions regarding the rights of Indigenous peoples in Canada, it is necessary to acknowledge the approach taken when determining which cases to incorporate and analyze. I chose the following seven cases, via a purposive sampling methodological approach, based on their fundamental contribution to the rights that the majority of Indigenous peoples in Canada possess or have the potential to possess. As this project does not involve any research beyond unobtrusive data collection, ethical approval was not required nor sought. Further, each case was manually acquired via the Supreme Court of Canada: Decisions and Resources database based on its precedent-setting impact and the frequency in which it has been referred to since its release.

To be included in my project, each case must have satisfied the following criteria: (1) the decision must have been heard and decided by the Supreme Court of Canada, (2) the decision

must have either set precedent for future hearings or significantly altered the existing law surrounding Indigenous and treaty rights, and (3) the decision must have been heard and decided following the enactment of the *Constitution Act of 1982* (with the exception of *Calder et al. v. Attorney-General of British Columbia* [1973]).

Through the employment of both a historical analysis and descriptive research design, this thesis aims to describe and inform seven landmark Supreme Court of Canada decisions, as well as their respective impacts on Canadian jurisprudence. Furthermore, the objective of this project is to educate Indigenous and non-Indigenous peoples on the development of Indigenous rights in a digestible manner. Therefore, the following project intends to tell a chronological account of the legal evolution of Indigenous rights in Canada since the enactment of s. 35 of the *Constitution Act, 1982*. Specifically, this thesis examines and analyzes the following seven cases; *Calder et al. v. Attorney-General of British Columbia* [1973], *R. v. Sparrow* [1990], *R. v. Van der Peet* [1996], *Delgamuukw v. British Columbia* [1997], *R. v. Morris* [2006], *R. v. Kapp* [2008], and *Tsilqot'in Nation v. British Columbia* [2014].

Proceeding are seven summaries and analyses of the aforementioned decisions. Guiding the investigative manner of this project is the following overarching inquiry: How has the Supreme Court of Canada recognized and affirmed the rights of Indigenous peoples in Canada since the enactment of the *Constitution Act of 1982*?

Pre-Constitution Act of 1982

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

Case Overview and Majority Decision

On behalf of himself, numerous Nisga'a elders, the Nisga'a Tribal Council, and the Nisga'a Nation, Frank Calder sued the provincial government of British Columbia in 1967,

arguing that Nisga'a title to their ancestral lands had never been lawfully extinguished (*Calder et al. v. Attorney-General of British Columbia*, 1973; Salomons, 2009). The ancestral land in question consisted of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet, and the Portland Canal, all located in northwestern British Columbia.

The initial action was dismissed at trial, and both the British Columbia Supreme Court and the Court of Appeal for British Columbia rejected the appeal. Thus, Calder et al. appealed to the Supreme Court of Canada for recognition of their Aboriginal title to their traditional lands (Salomons, 2009). From November 29th to December 3rd, 1971, Calder et al. presented their case to the Court. Present at the hearing were Supreme Court Justices Martland, Judson, Ritchie, Pigeon, Hall, Spence, and Laskin. 424 days later, on January 31st, 1973, the Supreme Court of Canada released their decision on the *Calder et al. v. Attorney-General of British Columbia* case.

In a four-three split, the Supreme Court of Canada dismissed the appeal. Representing himself, Martland, and Ritchie JJ., Judson J. dismissed the appeal on the basis that while Aboriginal title does exist as a legal concept, it has not been historically, nor legally recognized to pertain to Nisga'a territory specifically. In concurrence, Pigeon J. dismissed the appeal on the basis of a legislative technicality regarding the appellant's legal proceedings.

Rationale

In their analysis of the case, the Supreme Court of Canada considered various aspects they had yet to make an official judgement on, including Aboriginal title, its entrenchment within the Royal Proclamation of 1763, and its relevance regarding contemporary legal proceedings. Specifically, the Court considered and answered the following two questions: Does the Royal Proclamation of 1763 recognize Aboriginal title? Further, if the Royal Proclamation of 1763 does recognize Aboriginal title, where does Aboriginal title apply?

Concerning Calder et al.'s assertion that the acknowledgement of Aboriginal title within the Royal Proclamation of 1763 pertained to Nisga'a territory, the Court disagreed. As the specific land in question was not under British Sovereignty in 1763, when the Royal Proclamation was signed and instated, the Court determined that the provisions within the document could not be applied to Nisga'a land in that context. The Court acknowledged that its control was eventually negotiated to be under British Sovereignty by way of the Treaty of Oregon in 1846. However, Judson J. noted that there was no mention of Aboriginal title in the Treaty of Oregon and that, further, the mention of it in the Royal Proclamation of 1763 did not automatically extend to that jurisdiction once the areas were jurisprudentially adjoined. As the appellant's argument rested on the Royal Proclamation's mention of Aboriginal title, and the Court deemed that reference to be inapplicable, Calder et al.'s appeal was dismissed with no costs.

Dissenting Decision

Representing himself, Spence, and Laskin JJ., Justice Hall delivered the rationale of the dissenting opinion. As per their interpretation of the Royal Proclamation of 1763, the text pertaining to Aboriginal title was unequivocally "intended to include the lands west of the Rocky Mountains" (*Calder et al. v. Attorney-General of British Columbia*, 1973, p. 398). Furthermore, succeeding his assertion that Aboriginal title does pertain to Nisga'a lands, Hall J. highlighted the notion that no extinguishment of the Nisga'a's inherent legal right to land, via surrender to the Crown, has since occurred. For those reasons, Hall J. concluded that he would allow the appeal with costs assigned to the respondent and declare the appellants' right to possession of their respective territory.

Analysis

The significance of the *Calder et al.* case lies in its ground-breaking acknowledgement of Aboriginal title for the first time in Canadian jurisprudence. While preceding courts had only ever denied the existence of the concept, the Supreme Court of Canada ruled that Aboriginal title does indeed exist and can be affirmed through reference to the Royal Proclamation of 1763. For reference, the Royal Proclamation of 1763 reads:

> 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.

Although the Nisga'a did not win their case, their efforts resulted in a monumental breakthrough for Indigenous legal proceedings. *Calder et al.* was the first case to approach the negotiation of land claim settlements and more importantly, the Court's ruling – declaring that Indigenous people have an inherent right to their ancestral lands – paved the way for future Indigenous nations to seek legal title to their territory.

Post-Constitution Act of 1982

R. *v.* Sparrow [1990]

Case Overview and Majority Decision

On May 25, 1984, Ronald E. Sparrow, a member of the Musqueam Indian Band in British Columbia, was caught fishing with a drift net longer in length than the legal limit as set out in his fishing license (*R. v. Sparrow*, 1990). Mr. Sparrow was subsequently charged under s. 61(1) of the *Fisheries Act*. In court, Mr. Sparrow admitted to the offence, yet defended his actions on the

basis that the *Fisheries Act* provision is inconsistent with s. 35(1) of the *Constitution Act*. Mr. Sparrow deemed the violation charges invalid. However, the provincial court judge held that an individual cannot claim an existing Aboriginal right under s. 35(1) unless it can be explicitly supported by a document that stipulates the right's existence.

In contrast, the Court of Appeal for British Columbia held that while s. 35(1) applies to the circumstance, the trial judge's finding of facts did not sufficiently support an acquittal. Mr. Sparrow appealed that decision to the Supreme Court of Canada on the basis that the British Columbia Court of Appeal (1) failed to accurately recognize the scope of s. 35(1) and (2) failed to acknowledge the inconsistency between the *Fisheries Act* and s. 35(1) of the *Constitution Act*. Present during the hearing was Chief Justice Dickson, as well as Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

On May 31, 1990, representing the entirety of the Supreme Court of Canada, Chief Justice Dickson and La Forest J. held that the appeal and cross-appeal should be dismissed. Rather, a re-trial shall be held, where the analysis set out in this examination can provide a necessary foundation for the original constitutional question to be appropriately considered.

Rationale

At the forefront of the Court's rationale was their response to the following two inquiries: What criteria determine the applicability of s. 35(1) of the *Constitution Act, 1982*? Also, what is the meaning of "existing [A]boriginal and treaty rights"? To begin their analysis of the case, Dickson C.J. and La Forest J. provided a detailed account of their understanding of the term "existing" used in the constitutional provision. The Court determined that the terminology does not permit the revival of rights previously extinguished. Furthermore, and of equal importance, the word "existing" does not imply the notion that active rights are frozen at the time of the

enactment of the *Constitution Act*. Rather, Aboriginal rights are capable of flexibility and evolution.

Following that assertion, the Court acknowledged the constitutional, purposive nature of the provision. In contrast to what the respondent's argument was grounded in, an Aboriginal right is only considered to be extinguished by a legal stipulation when the intention is clear and plain to do so. For reference, Aboriginal title refers to the "inherent Aboriginal right to land or a territory" (Hanson, 2009a, para. 1). Therefore, the Court intended to clarify that imposing a sovereignty does not automatically extinguish an Aboriginal title.

In conclusion, Chief Justice Dickson and La Forest J. affirmed the inherent commitment that s. 35(1) is grounded in. The provision is designed to promote negotiations between Indigenous parties and constitutional bodies, not to extinguish Aboriginal rights nor to automatically serve as an exception to governed regulations. Lastly, *Sparrow* confirmed that s. 35(1) is not subject to s. 1 of the *Charter*.

Analysis

The importance of *R v. Sparrow* lies in its assertion of the intended design of s. 35(1) of the *Constitution Act*. Further, Dickson C. J. and La Forest J.'s analysis of the case provided lower courts with set criteria to use for evaluation when it comes to the determination of whether an action or proceeding is protected under s. 35. As the Court had yet to comment on the subject, this case served as the precedent for all future cases related to Indigenous rights.

In addition, the *Sparrow* case set out clear criteria to reference when government bodies and legislation infringe upon rights protected by s. 35. Dickson C.J. and La Forest J. enforced a two-step justification analysis upon a *prima facie* interference consisting of the following inquiries. Known as "the Sparrow Test", the infringement must (1) present a valid legislative

objective and (2) account for the interest, advisement (if not consent), and compensation of the Indigenous person or nation in order to be justified (Salomons & Hanson, 2009). Lastly, the Supreme Court of Canada acknowledged the *sui generis* nature of Indigenous rights cases, stating that other considerations may be taken into account if warranted.

R. *v.* Van der Peet [1996]

Case Overview and Majority Decision

On September 11, 1987, Dorothy Van der Peet, a member of the Stó:lō First Nation, a part of the Coast Salish Nation in British Columbia, was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with violating s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248 (*R. v. Van der Peet*, 1996). The charges arose following Ms. Van der Peet's engagement in the vending of 10 salmon caught by her common-law partner and his brother under the authority of an Indian food-fishing licence. At the time of the offence, such a food-fishing licence prohibited Indigenous people from selling fish to non-Indigenous people.

Although both parties accepted the agreed statement of facts, Ms. Van der Peet contested the nature of the charges against her on the basis that the act of selling fish is an Aboriginal right protected under s. 35(1) of the *Constitution Act*.

At trial, the provincial court judge ruled that Ms. Van der Peet was guilty as charged, asserting that selling fish is not an "existing" Aboriginal right and therefore not protected under s. 35(1). Selbie J. of the Supreme Court of British Columbia overturned Scarlett Prov. Ct. J.'s ruling, declaring that the provincial court judge erred in their evaluation of the evidence. The Supreme Court of British Columbia held that Aboriginal societies had no evidentiary prohibition against the sale of fish, therefore the evidence cannot affirm that the right is not protected. The Crown appealed that decision to the Court of Appeal for British Columbia, where Macfarlane

J.A. held that an Aboriginal right is only recognized and protected under s. 35(1) when the evidence unequivocally establishes that the practice arose from the Aboriginal society. The J.A. reinstated the provincial court judge's original decision, restoring the guilty verdict. Ms. Van der Peet appealed that decision to the Supreme Court of Canada and presented her case to Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci, Major, L'Heureux-Dubé and McLachlin JJ. in the last week of November 1995.

In their assessment of the case facts, the Court ruled on August 21, 1996, that the exchange of fish for money is not an integral practice central to the Stó:lō First Nation's culture; therefore, it was determined that Ms. Van der Peet's actions were not protected under s. 35(1) of the *Constitution Act*. Representing seven out of nine Justices, Chief Justice Lamer dismissed the appeal and affirmed the Court of Appeal's decision to restore the trial judge's conviction of Ms. Van der Peet. For reasons inspected below, L'Heureux-Dubé and McLachlin JJ. were in dissent of the majority's determination.

Rationale

Informing the Court's determination to dismiss Ms. Van der Peet's appeal was their newly constructed Integral to a Distinctive Culture Test, also referred to as the Van der Peet Test. As *Sparrow* (1990) did not exhaustively define what is or is not constituted as an Aboriginal right, Chief Justice Lamer took *Van der Peet* (1996) as an opportunity to develop a set of criteria for the subject. As per their judgement, the Court determined ten criteria that must be met for a practice to be protected under s. 35(1):

1. Courts must take into account the perspective of Aboriginal peoples themselves.
2. Courts must precisely identify the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right.

3. In order to be integral a practice, custom or tradition must be of central significance to the Aboriginal society in question.
4. The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact.
5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims.
6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis.
7. For a practice, custom or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists.
8. The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct.
9. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.
10. Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.

Evidently, the Court held that Ms. Van der Peet's claim, being that the exchange of fish for money is an Aboriginal right affirmed by s. 35(1), did not satisfy the above criteria.

Dissenting Decision

From L'Heureux-Dubé J.'s perspective, Aboriginal rights should be assessed through a "dynamic right" approach, as opposed to a "frozen right" approach. The Justice held that regarding practices as integral to a distinctive culture only when they existed before European contact aligned with an outdated, static approach. Furthermore, L'Heureux-Dubé felt that the

case was not an issue of commercial fishing but rather, an issue of trading and bartering for livelihood, support, and sustenance. In this regard, Justice L'Heureux-Dubé felt that Ms. Van der Peet's actions met the criteria for protection under s. 35(1).

From McLachlin J.'s perspective, Aboriginal rights should be defined through an empirical approach, specifically through the reference to historical ways of use. Indigenous peoples have both historically and traditionally used fishing as a means of sustenance; that is an empirical fact proven time and time again. Further, the Justice argued that the exercise of trading or commerce can justifiably be regarded as a modern form of sustenance. McLachlin J. held that the evidence presented favoured the notion that the appellant was exercising her traditional Aboriginal right to fish for sustenance, thus Ms. Van der Peet's actions should be protected under s. 35(1).

Analysis

The significance of the *Van der Peet* case lies in the construction of the Integral to a Distinctive Culture Test, as the criteria outlined advanced the legal understanding of an Aboriginal right and clarified its application. Further, in his purposive analysis of s. 35(1), Chief Justice Lamer (1996) acknowledged and affirmed the doctrine of Aboriginal rights, asserting that:

> When Europeans arrived in North America, [A]boriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates [A]boriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status. (para. 30)

As expected, the *Van der Peet* decision gained criticism due to its inherent restrictive nature (Hanson & Salomons, 2009). By further defining what constitutes an Aboriginal right, the Supreme Court of Canada arguably manufactured a fixed avenue that allows for future potential rights to be extinguished, if the right in question does not fit within the limits set out in the Van der Peet Test. Furthermore, by situating Aboriginal rights as exclusively practices of the past, the Court perpetuated the notion that Indigenous cultures are static and unchanging, or that they must be in order for their rights to be protected under s. 35(1) of the *Constitution Act*. Nevertheless, the *Van der Peet* case significantly contributed to the understanding, recognition, and affirmation of Indigenous rights in Canada.

Delgamuukw *v.* British Columbia [1997]

Case Overview and Majority Decision

In 1984, Earl Muldoe, referred to as Delgamuukw, initiated proceedings against the Province of British Columbia (*Delgamuukw v. British Columbia*, 1997; Hurley, 2000). On behalf of himself, 35 Gitxsan and 12 Wet'suwet'en Chiefs, and their respective Houses, the plaintiff sought ownership and resulting jurisdiction over certain portions of land in northwest British Columbia, totalling 58,000 square kilometres (Hurley, 2000). The Province of British Columbia counter-claimed, asserting that the plaintiffs have no right or interest in and to the territory and that their cause of action ought to be for compensation from the federal government.

At trial, Delgamuukw's evidence put forth was largely based on the respective historical use, "ownership", adaawk (oral histories), kungax (spiritual performances), and the existence of a feast hall where the Gitxsan and Wet'suwet'en peoples share stories relating to their identification with and to the land. The trial judge declined Delgamuukw's evidence, asserted

that any title that the Gitxsan and Wet'suwet'en may have previously had has since been extinguished, and dismissed the claim and the province's counterclaim.

On appeal, the plaintiffs altered their original proceedings to instead seek Aboriginal title and self-government. Further, the individual claims by each House were amalgamated into two communal claims put forward on behalf of each of the two nations involved. The Court of Appeal for British Columbia dismissed Delgamuukw's appeal on similar grounds as the trial judge. Delgamuukw subsequently appealed to the Supreme Court of Canada. Present at the appeal and a part of the judgement were Chief Justice Lamer and Justices Cory, McLachlin, Major, La Forest, and L'Heureux-Dubé.

In a unanimous decision, Lamer C.J. held that the appeal should be allowed in part and the cross-appeal should be dismissed. Further, the Court determined that a new trial be held on the basis that (1) the defects in the pleading prevented a wholly assessment of the appeal and (2) the trial judge's errs of fact concerning the evidence put forth impeded the proceedings.

Rationale

Within their assessment of Delgamuukw's appeal, the Supreme Court of Canada explored numerous topics branching from the realm of Aboriginal title. Among those topics were the content of Aboriginal title, infringements of Aboriginal title, and extinguishment of Aboriginal rights. Additionally, the Court reaffirmed the legal definition of Aboriginal title: "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 [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures" (*Delgamuukw v. British Columbia*, 1997, p. 1014).

To begin their analysis, the Court identified the collective nature of Aboriginal title, asserting the fact that it is held communally, as "a collective right to land held by all members of an [A]boriginal nation" (*Delgamuukw v. British Columbia*, 1997, para 115). Further, Lamer C.J. highlighted an important aspect concerning the limitations of Aboriginal title: "The content of [A]boriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands" (p. 1015). In saying this, the Chief Justice asserted the fundamental responsibility that Indigenous nations have concerning the sustainability of the land. Moreover, the Court clarified that the "right to occupy and possess" is purposely put in broad terms, as the nature of claims related to Aboriginal title is often broad and complex and cannot be restricted to a descriptive definition.

Most significantly, the Supreme Court of Canada created a test that can be referenced when examining whether an Indigenous nation has adequately demonstrated Aboriginal title. Consisting of three requirements, the Court held that Indigenous nations must prove the following:

1. The land must have been occupied prior to sovereignty;
2. If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and
3. At sovereignty, occupation must have been exclusive.

In closing, the Chief Justice declared the inability of a provincial law of general application to extinguish Aboriginal rights, reminding readers of the definitive standard "of clear and plain intention" required to extinguish Aboriginal rights.

Concurring Decision

With only a slight deviation from their colleagues' rationale, La Forest and L'Heureux-Dubé JJ. held that the inconsistencies noted between the pleadings and the ultimate goal of the appellants rendered the need for a new trial. Further, La Forest J.'s analysis was founded on the acknowledgement of the inherent contextual nature of cases addressing Aboriginal title.

Analysis

Aboriginal title has been and continues to be a convoluted topic in Canada. *Delgamuukw* is regarded as a significant case in Canadian jurisprudence as it strengthened the understanding and scope of Aboriginal title. Furthermore, the case clarified the government's duty to consult with Indigenous nations, criticized the extinguishment of Aboriginal rights, and affirmed the legal validity of oral history.

R. *v.* Morris [2006]

Case Overview and Majority Decision

On November 28, 1996, Ivan Morris and Carl Olsen were arrested on Vancouver Island for breaching three prohibitions contained in the *Wildlife Act*: hunting with a firearm during prohibited hours (s. 27(1)(d)); hunting with the aid of a light or illuminating device (s. 27(1)(e)); and hunting without reasonable consideration for the lives, safety, or property of other persons (s. 29).

Both Mr. Morris and Mr. Olsen are members of the Tsartlip Band of the Saanich Nation. At trial, they claimed they were being charged for doing what the Tsartlip have done from time immemorial; hunting at night with the aid of illuminating devices. Mr. Morris and Mr. Olsen justified their actions as being treaty-protected rights. For reference, the North Saanich Treaty of 1852 recognizes the Saanich Nation to be "at liberty to hunt over the unoccupied lands; and to

carry on [their] fisheries as formerly" (*R v. Morris,* 2006, para. 2). The Crown recognized Mr. Morris and Mr. Olsen's treaty right to hunt but contended that that right did not extend to hunt at night in an unsafe manner, hence the *Wildlife Act*'s regulations. Mr. Morris and Mr. Olsen countered that they were practicing safely and further, that provincial regulations cannot dishonor their treaty right.

At trial, the judge concluded that although night hunting with illumination was proven to be a historical practice of the Tsartlip people, the exercise was inherently unsafe. Thus, the trial judge convicted the accused for hunting during prohibited hours (s. 27(1)(d)), acquitted the counts of hunting without reasonable consideration for the lives, safety, or property of other persons (s. 29), and conditionally stayed the charges of hunting with an illuminating device (s. 27(1)(e)). The convictions were upheld by both a summary conviction appeal judge and by the Court of Appeal for British Columbia. Therefore, Mr. Morris and Mr. Olsen appealed to the Supreme Court of Canada, where they presented their case to Justices Binnie, Deschamps, Abella, Charron, Bastarache, and Fish, and Chief Justice McLachlin on October 14, 2005.

On December 21, 2006, the Supreme Court of Canada released their decision on the *Morris* case. Based on the evidence demonstrating that the Tsartlip's historical Indigenous practice of hunting at night with an illuminating device has never resulted in a single known incident, coupled with the assertion that s. 27(1)(d) and (e) of the *Wildlife Act* conflict with the exercise of a protected treaty right, the Supreme Court of Canada, in a four-three split decision, allowed the appeal, set aside the convictions, and entered acquittals.

Rationale

On behalf of Justice Binnie, Justice Charron, and themselves, Deschamps and Abella JJ. divided their analysis into two categorical parts: the first being the determination of whether the

Wildlife Act provisions conflict with the accused's treaty rights and the second being the analysis of whether the provisions are applicable under ss. 91 and 92 of the *Constitution Act, 1867* and s. 88 of the *Indian Act*, R.S.C. 1985, c I-5. As no treaty right authorizes the right to hunt dangerously, the Supreme Court of Canada was only concerned with the issues regarding s. 27(1)(d) and (e) of the *Wildlife Act*.

As was made very clear in antecedent cases, the Court is united and unwavering on the notion of Indigenous rights being regarded as dynamic, evolving stipulations. Concerning the first topic of the analysis, Deschamps and Abella JJ. maintained that stance once again: "From 1852 to present, the tools used by the Tsartlip in hunting at night have evolved. From sticks with pitch to spotlights and from canoes to trucks, the tools and methods employed in night hunting have changed over time. These changes do not diminish the rights conferred by the Treaty" (*R. v. Morris*, 2006, para. 30). Furthermore, the Justices noted that all hunting has the potential to be dangerous, regardless of the time of day. As Mr. Morris and Mr. Olsen had adequately proven their existing treaty right, and the Crown could not reasonably prove why they should be prohibited from exercising that right, the Court determined that it was unnecessary to limit Morris and Olsen's treaty rights in the name of s. 27(1)(d) and (e).

To preface the second category of the Court's rationale, an understanding of the constitutional framework is helpful. For context, ss. 91 and 92 of the *Constitution Act, 1867*, are, respectively, concerned with the legislative authority of the Parliament of Canada and the exclusive powers of provincial legislatures. Deschamps and Abella JJ. upheld the Court's determination in a previous case, asserting that when a provincial law impairs federal jurisdiction over Indigenous affairs, it will be "inapplicable to the extent of the impairment" (*R v. Morris*, 2006, para. 42). Furthermore, s. 88 of the *Indian Act* concerns the general provincial laws as they

apply to Indigenous peoples residing within their corresponding province. S. 88 reads, "Subject to the terms of any treaty… all laws of general application… in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act" (*Indian Act*, R.S.C. 1985, c I-5). As the first seven words of the provision suggest, the Court held that the protection of the treaty rights is preserved and thus, the provincial legislation cannot be incorporated under s. 88 of the *Indian Act*.

Dissenting Decision

In complete dissent, McLachlin C.J., as well as Bastarache and Fish JJ., held that the provincial legislative ban on night hunting with a firearm (s. 27(1)(d)) ought to apply to the accused. The three argued that the provision's intent was to apply to all British Columbians to ensure the safety of the province's hunters and residents. Further, from their point of view, the treaty right to hunt does not, and was never intended to, include the right to hunt in a hazardous manner. It was for those reasons that McLachlin C.J., Bastarache J. and Fish J. dissented from the majority's resolution.

Analysis

As expected, the majority's decision on *Morris* received considerable backlash from inhabitants of Vancouver Island (Martin, 2015). However, regarded as a seemingly unsafe encouragement to some, the Supreme Court of Canada's decision yielded a much more important message than to refrain from night-time hiking. What is considered abnormal, unpopular, and even unsafe to some individuals, is a grasp on pre-colonial traditions to others. As Mr. Morris and Mr. Olsen successfully proved in court, their traditional way of hunting and harvesting has never knowingly harmed another individual. While being proactive is undeniably important, especially regarding safety, respecting treaty provisions and providing Indigenous peoples the

freedom to exercise them appropriately is incredibly important as well. The Supreme Court of Canada has arguably never appealed to popularity. Rather, a rational, comprehensive analysis of the situation continues to inform the majority's determination. *Morris* was no exception.

R. *v.* Kapp [2008]

Case Overview and Majority Decision

In 1992, the federal government introduced the Aboriginal Fisheries Strategy in an attempt to give Indigenous peoples a fair chance to participate in commercial fishing. As part of that initiative, three pilot sales programs were introduced, one of which allowed designated Indigenous members to fish for salmon in the mouth of the Fraser River for a 24-hour period, during which all other commercial fishers were prohibited from doing so.

On August 19, 1998, from 7:00 a.m. to August 20, 1998, 7:00 a.m., only designated band members were permitted to fish for salmon at the mouth of the Fraser River. However, Mr. Kapp and several other commercial fishers, who were excluded from the fishery during this period, participated in a protest fishery to express their concern that the pilot sales program was unconstitutional due to its discriminatory nature. As a result, the protestors were charged for fishing at a time when the fishery was closed to them. In defence of the charges, they filed a notice of a constitutional question seeking declarations that the regulations violated their s. 15(1) *Canadian Charter of Rights and Freedoms, 1982* rights based on a race-based distinction. For reference, s. 15(1) of the *Charter* affirms, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (1982).

The Provincial Court of British Columbia found that the license granted to the designated fishers did indeed infringe on the non-designated fishers' s. 15(1) equality rights. The Court stayed proceedings on all charges. The Crown initiated a summary convictions appeal to the Supreme Court of British Columbia, which held that there was no discriminatory nature apparent as the pilot sales program did not promote the idea that those excluded from the fishery for that period were less worthy or valued members of Canadian society. The Court lifted the stay of proceedings and entered convictions against the appellants.

Mr. Kapp appealed the decision to the British Columbia Court of Appeal. The Court dismissed the appeal over several sets of concurring reasons. While the majority of the Court of Appeal Justices felt that the s. 15(1) claim was insufficiently filed in that there was no denial of s. 15(1) benefits or discriminatory nature apparent, Kirkpatrick J.A. dismissed the s. 15(1) infringement claim due to the existence of s. 25 of the *Charter*, which he felt protected and insulated the program from a s. 15(1) investigation. Mr. Kapp appealed this decision to the Supreme Court of Canada and presented his case to Chief Justice McLachlin and Justices Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, and Rothstein on December 11, 2007.

In a unanimous decision, the Supreme Court of Canada dismissed Mr. Kapp's appeal on June 27, 2008, on the basis that the communal fishing license was indeed constitutional. The majority of the Court dismissed the appeal as the program was protected from s.15(1) infringement by s. 15(2) of the *Charter*. In concurrence, Bastarache J. dismissed the appeal as he felt that the program was protected from s. 15(1) infringement by s. 25 of the *Charter*. By reason of that decision, Mr. Kapp faced the initial convictions ordered by the Supreme Court of British Columbia.

Rationale

As prepared by Chief Justice McLachlin and Abella J., the majority based their decision on the foundation that s. 15(2) of the *Canadian Charter* is capable of working independently of s. 15(1). Thus, due to the Crown's ability to sufficiently prove that the Aboriginal Fisheries Strategy was applicable under s. 15(2), the Court determined that the pilot sales program was protected from a s. 15(1) investigation. Regarding its relevance, s. 15(2) of the *Charter* declares that "[s]ubsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (1982).

To preface their analysis, the Court highlighted that substantive equality, as opposed to formal equality, is at the core of equality claims. This means that the Court, in upholding the *Charter*, focuses on promoting a society in which all are treated as human beings equally deserving of concern, respect, and consideration under the law. However, the Court clarified that this does not equate to the notion that everyone is treated in an equal, identical manner, as that approach can perpetuate increased inequality.

Through examination of the present issue, the Court revisited and determined the following necessary tests:

1. Concerning s. 15(1), discrimination can be determined through a two-step test:
    a. Does the law create a distinction based on an enumerated or analogous ground?
    b. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

If yes to both, discrimination is likely present.

2. Concerning s. 15(2), a law, program, or activity does not violate the s. 15(1) equality guarantee if the government can demonstrate that:
    a. the program has an amelioration or remedial purpose; and
    b. the program targets a disadvantaged group identified by the enumerated or analogous grounds.

If the government cannot adequately demonstrate the above criteria, the issue is subject to a formal s. 15(1) investigation.

Further, Chief Justice McLachlin and Abella J. rendered that a program need not have the ameliorative purpose as its sole object but may be one of several to align with s. 15(2)'s grounds; neither restriction nor punishment constitutes ameliorative efforts; and that "disadvantage" relates to vulnerability, prejudice, and negative social characterizations. As the Aboriginal Fisheries Strategy met all the requirements outlined above, the Court concluded that the program was constitutionally sound and applicable under s. 15(2), and thus dismissed Mr. Kapp's appeal.

Concurring Decision

Differing from the majority in his logic, Bastarache J. thought that a s. 15(1) analysis was not necessary nor applicable to the question posed in the appeal. In agreeance with Kirkpatrick J.A. from the British Columbia Court of Appeal, Bastarache J. would dismiss the appeal solely on the application of s. 25. S. 25 of the *Charter* asserts: "The guarantee in the Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any [A]boriginal, treaty or other rights or freedoms that pertain to the [A]boriginal 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" (1982).

Through an examination of the role of s. 25, Bastarache J. determined that the purpose of s. 25 is to protect the rights of Aboriginal peoples, "where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an [A]boriginal group" (*R. v. Kapp*, 2008, p. 487). In essence, Bastarache J. expressed his view that s. 25 necessarily shielded the freedoms the pilot sales program provided from being subject to a s. 15(1) inquiry. Finally, Justice Bastarache acknowledged his stance on the scope of "other rights or freedoms" in s. 25, a topic not yet adjudicated by the Court. While the majority of the Court understood this phrase to invoke the rights or freedoms of a constitutional character, Bastarache J. argued that a broader approach was more appropriate.

Analysis

As per Sharpe and Roach's (2021) discussion in "Chapter 15: Equality", it is evident that the Supreme Court of Canada's decision on *R. v. Kapp* significantly impacted the legal system's approach to s. 15 equality cases. Initially, the Court reiterated the importance of an insistence on substantive equality rather than formal equality. As this is the primary goal of s. 15 as a whole, the Court identified the relevance of s. 15(2) and how it works to contribute to the substantive equality objective. As mentioned in the rationale section, the Chief Justice and Abella J. highlighted that the underlying focus of the *Charter* provision is to uphold a society where all human beings are regarded with concern, respect, and consideration.

Foremost, the test for equality was established for the third time in *R. v. Kapp*. In their analysis, the Court recognized the contribution made by *Law v. Canada* [1999] to the equality test yet understood the confusion and burden that the case's resolution caused lower courts. The Court decided to revise the test for equality to one that aligned more closely with the original *Andrews v. Law Society of British Columbia* [1989] test while still keeping the significance of

Law's decision in mind. Rather than employing human dignity as part of the legal test, the Court went back to focusing on whether a distinction based on an enumerated or analogous ground has been made and whether the distinction creates a disadvantage by perpetuating prejudice or stereotype. Consequently, this decision changed the precedent for all equality guarantee challenges thereafter.

Tsilhqot'in Nation *v.* British Columbia [2014]

Case Overview and Majority Decision

The *Tsilhqot'in Nation* v. *British Columbia* case was set in motion in 1983 when the Province of British Columbia issued a forestry license for land pertaining to the territory at issue. The Xeni Gwet'in First Nation, one of the six bands that make up the Tsilhqot'in Nation, objected the license and sought to prohibit commercial logging on the land. The land sought constitutes approximately five percent of what the Tsilhqot'in regard as their traditional lands. The conversations on the claim seized when the Xeni Gwet'in requested a right of first refusal to logging.

In 1998, the proceeding was revised to include a claim for Aboriginal title on behalf of all Tsilhqot'in Nation peoples, in part as a result of the traction since made by other Indigenous bodies on the leverage of s. 35. In 2002, the trial was heard before the British Columbia Supreme Court. Vickers J., the trial judge, found that the Tsilhqot'in people were, in principle, entitled to a declaration of Aboriginal title, but denied the Nation a declaration of title on procedural grounds. In 2012, the British Columbia Court of Appeal held that the claim to Aboriginal title had not been established; however, granted the possibility of a future claim to title concerning specific sites within the territory originally sought. The Tsilhqot'in Nation, represented by the Chief of Xeni Gwet'in First Nation, Roger William, appealed the British Columbia Court of Appeal's

decision to the Supreme Court of Canada and presented their case to the Court on November 7th, 2013 (Lamb-Yorski, 2023).

Present at the hearing and a part of the decision-making was Chief Justice McLachlin, as well as LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ. Principally, the main legal questions to be decided by the Supreme Court of Canada were as follows: What is the test for Aboriginal title to land? If title is established, what rights does it confer? What are the constitutional constraints on provincial regulation of land under Aboriginal title? Finally, how are the broader public interests to be reconciled with the rights conferred by Aboriginal title?

In a unanimous decision delivered by Chief Justice McLachlin on June 26th, 2014, the Supreme Court of Canada allowed the appeal and ruled that the Tsilhqot'in Nation did have a claim to Aboriginal title over the area requested. Further, the Court advanced a declaration that the Province of British Columbia breached its duty to consult and thus granted one owed to the Tsilhqot'in Nation.

Rationale

To preface the Court's justification behind their decision on the *Tsilhqot'in* case, Chief Justice McLachlin acknowledged and reviewed prior landmark decisions, including *Sparrow*, *Van der Peet*, *Guerin v. The Queen* [1984], *R. v. Marshall* [1999], and *Delgamuukw*. In support of the determinations previously made, McLachlin C.J. applied *Delgamuukw*'s three-step test on Aboriginal title to the present case. However, before subjecting the appellants to the test, McLachlin C.J. added an extra detail to the first requirement of the test: the occupation sought to be proven must be *sufficient* to ground Aboriginal title. The Chief Justice elaborated: "What is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question – its laws, practices, size, technological ability

and the character of the land claimed – and the common law notion of possession as a basis for title" (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 41). Upon an expansive review of the claim, the Court concluded that Tsilhqot'in Nation successfully and sufficiently proved exclusive occupation at the time of sovereignty.

In response to the remaining inquiries, the Court asserted: "Aboriginal title confers…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 proactively use and manage the land" (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 73). Further, McLachlin C.J. reiterated the inherent restriction on Aboriginal title, being that the land in question cannot be alienated by the possessing Indigenous nation as Aboriginal title is collective and meant to be preserved for succeeding generations. Lastly, the Court clarified the three components necessary for the government to justify an infringement of Aboriginal title in the name of the public's interest:

1. that it discharged its procedural duty to consult and accommodate;
2. that its actions were backed by a compelling and substantive objective; and
3. that the governmental action is consistent with the Crown's fiduciary obligation to the group.

In essence, the Court asserted that government infringements must prove a rational connection between the incursion and the overarching goal, follow a minimal impairment principle when doing so, and ensure the benefits to be expected outweigh the adverse effects on the Indigenous interest in order to be justified.

In closing, McLachlin C.J. briefly discussed the limitations that provincial governments have on certain regulations as a result of Aboriginal title presence. The Court determined that

there is no place for the application of the doctrine of interjurisdictional immunity (a legal doctrine to insulate the activities of one level of government from another) in the present case, as the Province of British Columbia had advanced, and thus declared its irrelevance. Rather, the Court contended that provincial regulation of general application will apply to Aboriginal rights, subject to the s. 35 infringement and justification framework.

Analysis

Tsilhqot'in Nation v. British Columbia (2014) was another groundbreaking decision in Canada. In an all-encompassing, powerful manner, Chief Justice McLachlin articulated the significance and distinctiveness of cases like *Tsilqot'in Nation* stating:

> The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title. (para. 14)

Moreover, not only did the Court apply the principles outlined in preceding cases like *Delgamuukw*, but they granted an Indigenous nation title to a portion of their ancestral lands for the first time in Canadian legal history. As Lawrence (2015) identifies, the *Tsilhqot'in* case clarified the framework for claiming Aboriginal title, and conversely, how title can be justifiably infringed upon; thus, easing the process for future Indigenous nations to pursue title to their own unceded territory if they desire.

Purposive Analysis

Throughout the course of the research, the amalgamation of data accumulated, the analytical process, and the contemplation of information required to produce this descriptive analysis, numerous key takeaways concerning the meaningfulness of this project have presented themselves. In adherence to the scope of this thesis, I will discuss below the three central ideas that I have realized throughout this academic exercise: the growth of the topics at stake regarding the impact they have on individuals and nations alike, the evolution of the legal approach to the topics addressed, and the lack of accessible information currently available in this field of study.

From Fishing Nets to Aboriginal Title

Upon reflection on the research obtained throughout this process, a foremost theme has emerged. In *Sparrow*, an Indigenous fisherman fought for his right to fish with the desired net length of his choosing. Twenty-four years later, in *Tsilqot'in Nation*, an Indigenous nation fought for absolute ownership of a portion of their traditional, historically occupied land. At first glance, those two proceedings are of very different magnitudes. However, upon a closer look, it is evident that one could not have succeeded without the other's determined attempt. Evidently, the substantive constitutional issues being approached today are all rooted in the seemingly less significant cases. Tsilqot'in Nation would not have been warranted the opportunity to challenge their circumstances had it not been for the efforts of Mr. Sparrow, Ms. Van der Peet, Delgamuukw, and many others. Likewise, Chief Justice McLachlin would not have been in the position to grant Tsilqot'in Nation title to their ancestral lands, had it not been for the ground-breaking, precedent analysis by Chief Justice Dickson in *Sparrow*.

Evolution of the Supreme Court of Canada

In addition to acknowledging the significance of contemporary proceedings, it is necessary to address the establishment of the Supreme Court of Canada regarding their approach to Indigenous rights in Canada. Five decades ago, in *Calder et al.*, an Indigenous case on Aboriginal title was ultimately decided on the basis of a technicality. Presently, the Supreme Court of Canada is more experienced and proficient when it comes to Indigenous rights-related cases. Arguably, the Court, as a body, is less concerned about the legalities and more aware of the implications of their determinations. Rather than approaching Indigenous rights cases as they would with any other, typically through a standard colonial lens, the Court recognizes the *sui generis* nature, gravitates toward the principal issue, and makes an informed determination based on the applicable information. As observed in *Delgamuukw*, the revisions to the plaintiff's initial proceedings did not automatically cause for dismissal. Rather, the Court made a decision based on the evidence presented and proceeded with the case accordingly.

Moreover, the Supreme Court of Canada's development of stipulations regarding what constitutes evidence is notable. In *Delgamuukw*, lower courts declined the evidence presented by the Indigenous nations, deeming oral history unfit for the desired outcome. When the case was brought forth to the Supreme Court of Canada, Chief Justice Lamer articulated, "Given that the [A]boriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or… pre-sovereignty occupation, those [oral] histories play a crucial role in the litigation of [A]boriginal rights" (*Delgamuukw v. British Columbia*, 1997, para. 84).

In light of recent decisions released by the Supreme Court of Canada (*Dickson v. Vuntut Gwitchin First Nation* [2024]; *Reference re* An Act respecting First Nations, Inuit, and Métis children, youth and families [2024]; *Shot Both Sides v. Canada* [2024]), it is worth noting the

marked effort demonstrated by the Court to address Indigenous rights in Canada. As mentioned above, the Supreme Court of Canada is only capable of accepting approximately 65 to 80 appeals per year; therefore, only the most pressing of appeals are received. Thus, another element of the Court's progression is its commitment to addressing issues relating to the rights of Indigenous peoples in Canada. Acknowledging and responding to the notion that Indigenous rights appeals are to be met with equal levels of concern and respect as all other appeals is an act of reconciliation, and it is evident that the Supreme Court of Canada is aware of that.

A Call for Accessibility

Finally, it is necessary to address the lack of comprehensible, accessible literature when it comes to academia surrounding the topic of Indigenous rights in Canada. Although any internet-bearing individual can indeed access the Supreme Court of Canada's database, the nature of the language and legal terms referenced in decisions can be quite foreign to most individuals, to the point where individuals are unable to fully grasp the logical thought process behind the decision. Furthermore, as discovered throughout my research process, a majority of the second-hand, intelligible literature on the decisions and their implications is either approached through a reportative perspective or an opinion-driven perspective. While both approaches are appreciated in their respective ways, neither truly depicts the cases and their ramifications in a just, educational manner. On the contrary, there appears to be a gap in the research concerning wholly, objective evaluations of the Supreme Court of Canada's recognition and affirmation of Indigenous rights in Canada. Not only is it relevant for non-Indigenous peoples to be educated on Indigenous treaty rights, as was exemplified in *Kapp*, but it is especially relevant for Indigenous peoples to understand how their treaty rights have gradually developed. More importantly, it is relevant for Indigenous peoples across Canada to recognize those *who* fought for their right to

exercise certain traditional practices. Thus, it would be highly valuable for a greater emphasis to be placed on the production of more accessible literature concerning this topic.

Discussion and Conclusion

Initially, the objective of this project was to produce an article on the Supreme Court of Canada's contribution to the rights exercised by Indigenous peoples across Canada. As an Indigenous person in Canada, I have a profound interest in the development of the rights I exercise. From when the rights were discerned to be infringed upon, to who proceeded to challenge the current legal framework, to what the thought process behind the grant or denial of the rights was, I am perpetually dedicated to learning and knowing when it comes to landmark decisions, and I presume I am not the only one. As previously noted, the promotion of reconciliation as a response to past injustice aligns with a commitment to the administration of knowledge in ways that are accessible and able to be synthesized by individuals who are not necessarily familiar with legal jargon. I hope that this project has served to narrow the gap of research in this field and can be used as a reference for individuals interested in learning about the evolution of Indigenous rights in Canada, both scholarly and non-scholarly alike.

In regard to a subjective analysis of the Supreme Court of Canada's progress concerning Indigenous rights in Canada, two key conclusions arise. With respect to the jurisprudential approach to Indigenous rights-related cases, the Court's acknowledgement of the distinctive nature of Indigenous issues is appreciated. By definition, the promotion of justice is the commitment to the administration of equal concern and respect for all persons (Miller, 2023). Being committed to upholding and enforcing justice starts with recognizing and responding to existing injustice, including the wrongful initiatives administered by the federal government and the legal system unto Indigenous peoples for centuries in Canada. Through their recognition of

oral history, storytelling, spiritual performances, and other cultural practices as satisfactory evidence in a court setting, it is clear that the Supreme Court of Canada is committed to equitable justice.

Furthermore, the substantive impact that early interpretations have on modern proceedings deserves great respect and recognition. If it were not for the expertise and intellectual contributions of the honourable former Chief Justices Laskin, Dickson, Lamer, and McLachlin, as well as Canada's current Chief Justice Wagner, the approach to and status of Indigenous rights in Canada may very well be tremendously different.

Limitations

In adherence with the relatively limited scope of this thesis, this project does not posit itself as a comprehensive, exhaustive critical analysis of every case relating to the development of Indigenous rights in Canada since the enactment of the *Constitution Act of 1982*. Rather, if that were the aim, *Guerin v. The Queen* [1984], *R. v. Gladstone* [1996], *Corbiere v. Canada (Minister of Indian and Northern Affairs* [1999], *R. v. Marshall* [1999], *R. v. Powley* [2003], and numerous other innovative, precedent-setting cases would have been included. The objective of this project was to provide an introductory, foundational basis on the subject matter. Therefore, perhaps in a separate context, this thesis would have sought to explore supplementary literature, subjective analyses, political implications, and the future course of action, in addition to what is presently examined in this project.

Conclusion

The Supreme Court of Canada's impact on Indigenous rights in Canada since the enactment of the *Constitution Act of 1982* is substantial. Through their production of exceptional analyses, interpretation of terminology, and willingness to listen to Indigenous peoples voice

their concerns, the Court's contribution is unparalleled. Although separate bodies have the ability to grant Indigenous peoples rights to exercise their traditional practices, the Supreme Court of Canada is the highest-ranking body capable of enforcing and waiving such permitting policies; therefore, their contributions are highly relevant.

Above all, the Supreme Court of Canada's acknowledgement of Aboriginal title in *Calder et al*. and rendering of the dynamic nature of existing Aboriginal and treaty rights in *Sparrow* laid the foundation for all subsequent cases and their respective determinations. Not only does the Court's discernments and conclusions serve as precedent for lower courts, but for future generations of legal proceedings, policy implications, and perceptions held by everyday citizens, as well. As identified throughout this article, the persistent efforts made by Indigenous peoples, coupled with the wisdom bestowed by the Supreme Court of Canada, have strengthened the understanding of Indigenous rights in Canada. Therefore, through the combined effort of both parties, the recognition and affirmation of Indigenous rights in Canada will continue to transpire.

References

Andrews *v.* Law Society of British Columbia, [1989] 1 S.C.R. 143

Calder et al. *v*. Attorney-General of British Columbia, [1973] S.C.R. 313

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Centre for Constitutional Studies. (n.d.). *Section 35*. https://www.constitutionalstudies.ca/the-constitution/aboriginal-rights/

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Corbiere *v*. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203

Dickson *v.* Vuntut Gwitchin First Nation, 2024 SCC 10

Guerin *v*. The Queen, [1984] 2 S.C.R. 335

Hanson, E. (2009a). *Aboriginal title.* The University of British Columbia First Nations and Indigenous Studies. https://indigenousfoundations.arts.ubc.ca/aboriginal_title/

Hanson, E. (2009b). *Constitution express*. The University of British Columbia First Nations and Indigenous Studies. https://indigenousfoundations.arts.ubc.ca/constitution_express/

Hanson, E., & Salomons, T. (2009). *Van der Peet case*. The University of British Columbia First Nations and Indigenous Studies. https://indigenousfoundations.arts.ubc.ca/van_der_peet_case/

Indian Act (R.S.C., 1985, c. I-5)

King, D. (2023). *Equality 15(1) and 15(2)* [Handout]. Mount Royal University D2L Brightspace. https://learn.mru.ca/

Lamb-Yorski, M. (2023, February 24). Roger William returns as chief of Xeni Gwet'in First Nation. *The Williams Lake Tribune*. https://www.wltribune.com/news/roger-william-

returns-as-chief-of-xeni-gwetin-first-nation-5551443#:~:text=William%20was%20front%20and%20centre,going%20to%20do%20with%20it.

Law *v*. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497

Lawrence, A. (2015). *Tsilhqot'in Nation v British Columbia (2014): An expansion of title and justification*. Centre for Constitutional Studies. https://www.constitutionalstudies.ca/2015/04/tsilhqotin-nation-v-british-columbia-2014-an-expansion-of-title-and-justification/#:~:text=Decision,-The%20Supreme%20Court&text=In%20this%20case%2C%20the%20Supreme,it%20issued%20a%20forestry%20license.

Martin, J. (2015, March 4). R v Morris: Night hikers beware. *CanLII Connects*. https://canliiconnects.org/en/commentaries/36089

Miller, D. (2023). Justice. In E. N. Zalta & U. Nodelman (Eds.), *The Stanford encyclopedia of philosophy* (Fall 2023 ed.). Metaphysics Research Lab, Stanford University. https://plato.stanford.edu/entries/justice/

R. *v*. Gladstone, [1996] 2 S.C.R. 723

R. *v*. Kapp, [2008] 2 S.C.R. 483, 2008 SCC 41

R. *v*. Marshall, [1999] 3 S.C.R. 456

R. *v*. Morris, 2006 SCC 59, [2006] 2 S.C.R. 915

R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43

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

R. *v*. Van der Peet, [1996] 2 S.C.R. 507

Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5

Salomons, T. (2009). *Calder case*. The University of British Columbia First Nations and Indigenous Studies. https://indigenousfoundations.arts.ubc.ca/calder_case/

Salomons, T., & Hanson, E. (2009). *Sparrow case.* The University of British Columbia First Nations and Indigenous Studies. https://indigenousfoundations.arts.ubc.ca/sparrow_case/

Sharpe, E., & Roach, K. (2021). *The Charter of Rights and Freedoms* (7th ed.). Toronto, Canada: Irwin Law Inc.

6 landmark rulings on native rights. (2013, January 8). CBC News. https://www.cbc.ca/news/canada/6-landmark-rulings-on-native-rights-1.1316961

Shot Both Sides *v.* Canada, 2024 SCC 12

Supreme Court of Canada. (2013). *The Supreme Court of Canada*. https://publications.gc.ca/collections/collection_2016/csc-scc/JU5-26-2013-eng.pdf

The Constitution Express and its role in entrenching Indigenous rights. (2016, October 17). *Indigenous Corporate Training Inc.* https://www.ictinc.ca/blog/the-constitution-express-and-its-role-in-entrenching-indigenous-rights

The University of British Columbia First Nations and Indigenous Studies. (2009). *Royal Proclamation, 1763*. https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/

Tsilhqot'in Nation *v*. British Columbia, 2014 SCC 14, [2014] 2 S.C.R. 256

Walsh, J. (2023, September 20). *Supreme Court of Canada cases involving Indigenous peoples*. Simon Fraser University. https://www.lib.sfu.ca/help/research-assistance/subject/criminology/legal-information/indigenous-scc-cases

Youngblood Henderson, J. (2010). Constitutional vision and judicial commitment: Aboriginal and treaty rights in Canada. *Australian Indigenous Law Review*, *14*(2), 24-48. https://www.jstor.org/stable/26423180