

Legal Decisions Dealing with First Nations in Canada

PURPOSE

This presents a number of Canadian legal decisions dealing with Aboriginal law. The full text of Supreme Court decisions is linked from the excellent site at the University of Montreal which contains decisions from 1983 to date. I have included the head notes for the various cases listed on the site. The decisions on this site are arranged as follows:

- a) **online decisions** (arranged chronologically with the most recent first)

Last Updated November 2004

[Ross River Dena Council Band v. Canada](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0816.html) [2002] 2 SCR, 816

(http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0816.html)

Norman Sterriah, on behalf of all members of the Ross River Dena Council Band, and the Ross River Dena Development Corporation (**Appellants**) v. Her Majesty The Queen in Right of Canada and the Government of Yukon (**Respondents**) and The Attorney General of British Columbia and the Coalition of B.C. First Nations (**Interveners**)

Indians -- Reserves -- Creation of reserves in non-treaty context -- Indian Band occupying lands in Yukon Territory since 1950s -- Lands set aside by officials -- Legal requirements for establishment of a reserve -- Whether lands set aside have reserve status -- Indian Act, R.S.C. 1985, c. I-5, s. 2(1) "reserve" -- Territorial Lands Act, R.S.C. 1952, c. 263, s. 18(d).

[R. v. Marshall](http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol3/html/1999scr3_0456.html) [1999] 3 SCR, 456 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol3/html/1999scr3_0456.html)

[R. v. Marshall](http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol3/html/1999scr3_0533.html) [1999] 3 SCR, 533 (**Rehearing and Stay of Implementation**) (http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol3/html/1999scr3_0533.html)

Indians -- Treaty rights -- Fishing rights -- Accused, a Mi'kmaq Indian, fishing with prohibited net during close period and selling fish caught without a licence in violation of federal fishery regulations -- Whether accused possessed treaty right to catch and sell fish that exempted him from compliance with regulations -- Mi'kmaq Treaties of 1760-61 -- Maritime Provinces Fishery Regulations, SOR/93-55, ss. 4(1)(a), 20 -- Fishery (General) Regulations, SOR/92-53, s. 35(2).

[Delgamuukw v British Columbia](http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_1010.html) [1997] 3 SCR, 1010

(http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_1010.html)

Constitutional law -- Aboriginal rights -- Aboriginal land title -- Claim made for large tract -- Content of aboriginal title -- How aboriginal title protected by s. 35(1) of Constitution Act, 1982 -- What required to prove aboriginal title -- Whether claim to self-government made out -- Whether province could extinguish aboriginal rights after 1871, either under own jurisdiction or through the operation of s. 88 of the Indian Act (incorporating provincial laws of general application by reference) -- Constitution Act, 1982, s. 35(1) -- Indian Act, R.S.C., 1985, c. I-5, s. 88.

Constitutional law -- Aboriginal rights -- Aboriginal land title -- Evidence -- Oral history and native law and tradition -- Weight to be given evidence -- Ability of Court to interfere with trial judge's factual findings.

Courts -- Procedure -- Land claims -- Aboriginal title and self-government -- Claim altered but no formal amendments to pleadings made -- Whether pleadings precluded the Court from entertaining claims.

[St. Mary's Indian Band v Cranbrook \(City\)](http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol2/html/1997scr2_0678.html) [1997] 2 SCR, 678
(http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol2/html/1997scr2_0678.html)

Indians -- Reserves -- Definition of "reserve" amended to include "designated lands" released or surrendered "otherwise than absolutely" -- Reserve lands surrendered at market value for airport but with the proviso that land would revert to reserve if not used for public purposes -- Whether lands surrendered for airport "designated lands" -- Whether common law real property principles apply to surrender of Indian reserve lands -- Indian Act, R.S.C. 1952, c. 149, ss. 2(1) "reserve", "surrendered lands", 37(1), 38(1), (2) -- Indian Act, R.S.C., 1985, c. I-5, ss. 2(1) "designated lands", "reserve", 37(1), (2), 38(1), (2), 83(1)(a).

[St. Mary's Indian Band v Cranbrook \(City\)](http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol2/html/1997scr2_0657.html) [1997] 2 SCR, 657 (*deals with costs*)
(http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol2/html/1997scr2_0657.html)

Costs -- Costs not awarded in original judgment -- Re-hearing sought to determine issue of costs -- Extension of time granted for making application for re-hearing -- Re-hearing granted -- Costs awarded at re-hearing.

[Opetchesht Indian Band v R.](http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol2/html/1997scr2_0119.html) [1997] 2 SCR, 119
(http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol2/html/1997scr2_0119.html)

Indians -- Reserves -- Permits to use Indian reserve lands -- Right-of-way -- Validity of permit granting public utility right-of-way for electric power transmission lines across Indian reserve -- Right-of-way granted for such period of time as required for purpose of transmission line -- Nature and duration of rights granted under permit -- Whether rights

granted within scope of s. 28(2) of Indian Act -- Whether permit valid -- Indian Act, R.S.C. 1952, c. 149, ss. 28(2), 37.

[Goodswimmer v Canada](http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol1/html/1997scr1_0309.html) (Min of Ind Aff & N Dev) [1997] 1 SCR, 309
(http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol1/html/1997scr1_0309.html)

Appeals -- Appeals to Supreme Court of Canada -- Mootness -- Court not exercising discretion to hear appeal notwithstanding mootness -- Appeal quashed.

[R. v Cote](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol3/html/1996scr3_0139.html) [1996] 3 SCR, 139 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol3/html/1996scr3_0139.html)

Constitutional law -- Aboriginal rights -- Natives teaching traditional fishing techniques -- Charge of fishing without licence laid -- Incident occurring in traditional fishing area -- Whether an aboriginal fishing or other right must be necessarily incident to a claim of aboriginal title in land -- Whether an aboriginal right may exist independently of a claim of aboriginal title -- Constitution Act, 1982, s. 35(1).

Constitutional law -- Aboriginal rights -- Quebec -- Aboriginal law not recognized by French colonial regime prior to transition to British sovereignty -- Whether constitutional protection extends to aboriginal practices, customs and traditions of Quebec natives -- Constitution Act, 1982, s. 35(1) -- Quebec Act, 1774, R.S.C., 1985, App. II, No. 2 -- Royal Proclamation, 1763, R.S.C., 1985, App. II, No. 1.

Constitutional law -- Aboriginal rights -- Treaty right to fish -- Division of powers -- Natives entering a provincial controlled harvest zone by motorized vehicle -- Provincial regulation requiring payment of fee for such entry -- Fee directly tied to cost of roads and infrastructure -- Entry by other modes of transportation free -- Whether a provincial regulation infringing a treaty right to fish was of no force or effect given the overlapping statutory and constitutional protection extended to treaty rights from provincial legislation under both s. 35(1) of the Constitution Act, 1982, and s. 88 of the Indian Act -- Constitution Act, 1982, s. 35(1) -- Indian Act, R.S.C., 1985, c. I-5, s. 88 -- Regulation respecting controlled zones, R.R.Q. 1981, 370 (supp.), ss. 5, 5.1.

Practice -- Defective information -- Amendment -- Information indicating wrong section -- Parties aware of infraction notwithstanding defect -- Whether the information should be amended by this Court -- Criminal Code, R.S.C., 1985, c. C-46, s. 601 -- Summary Convictions Act, R.S.Q., c. P-15, ss. 66(1), 82, 90, 101 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 48.

[R. v Adams](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol3/html/1996scr3_0101.html) [1996] 3 SCR, 101 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol3/html/1996scr3_0101.html)

Constitutional law -- Aboriginal rights -- Native fishing on traditional fishing area without a licence -- Licence only available on application for exercise of ministerial

discretion -- Title alleged to be extinguished either by flooding or by treaty -- Whether aboriginal rights are inherently based in claims to land -- Whether claims to land are simply one manifestation of a broader-based concept of aboriginal rights -- Constitution Act, 1982, ss. 35(1), 52 -- Quebec Fishery Regulations, C.R.C., c. 852, ss. 4(1), 5(9) -- Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.

[R. v Pamajewon](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0821.html) [1996] 2 SCR, 821 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0821.html)

Constitutional law -- Aboriginal rights -- Self-government and high stakes gambling -- First nations passing lotteries by-laws -- By-laws not passed pursuant to s. 81 of Indian Act -- Criminal charges laid for alleged breach of gambling provisions -- Whether an aboriginal right to gamble -- Whether an aboriginal right to self-government which includes the right to regulate gambling activities -- Constitution Act, 1982, s. 35(1) -- Criminal Code, R.S.C., 1985, c. C-46, ss. 201(1), 206(1)(d), 207 -- Indian Act, R.S.C., 1985, c. I-5, s. 81.

[R. v Gladstone](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0723.html) [1996] 2 SCR, 723 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0723.html)

Constitutional law -- Aboriginal rights -- Natives approaching buyer with sample of fish product to determine if "interested" in buying -- Regulations requiring specific licence for harvesting and sale of fish product -- Natives not having proper licence to sell fish product -- Evidence indicating large scale trade in fish product prior to contact with Europeans -- Whether an aboriginal right to harvest and trade in fish product -- Whether the aboriginal right extinguished -- Whether aboriginal right infringed by regulations -- Whether any infringement justified -- Constitution Act, 1982, ss. 35(1), 52 -- Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) -- Pacific Herring Fishery Regulations, SOR/84-324, s. (3).

Commercial law -- Attempt to sell -- Natives approaching buyer with sample of fish product to determine if "interested" in buying -- Whether conduct amounting to attempt to sell.

[R. v N. T. C. Smokehouse Ltd.](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0672.html) [1996] 2 SCR, 672 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0672.html)

Constitutional law -- Aboriginal rights -- Right to sell fish (salmon) -- Food processor charged for selling salmon contrary to regulations -- Large quantities of salmon purchased from natives -- Natives catching salmon under food fishing licence -- Regulations prohibiting sale or barter of fish caught under food fishing licence -- Whether an aboriginal right to sell salmon -- Whether the aboriginal right extinguished -- Whether aboriginal right infringed by regulations -- Whether any infringement justified -- Constitution Act, 1982, ss. 35(1), 52 -- British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4(5), 27(5) -- Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1).

[R. v Van der Peet](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0507.html) [1996] 2 SCR, 507 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0507.html)

Constitutional law -- Aboriginal rights -- Right to sell fish on non-commercial basis -- Fish caught under native food fish licence -- Regulations prohibiting sale or barter of fish caught under that licence -- Fish sold to non-aboriginal and charges laid -- Definition of "existing aboriginal rights" as used in s. 35 of Constitution Act, 1982 -- Whether an aboriginal right being exercised in the circumstances -- Constitution Act, 1982, s. 35(1) -- Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) -- British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5).

[R. v Nikal](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol1/html/1996scr1_1013.html) [1996] 1 SCR, 1013 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol1/html/1996scr1_1013.html)

Indians -- Aboriginal rights -- Fishing rights -- Appellant charged with fishing without a licence -- Whether licensing scheme infringing appellant's aboriginal rights and therefore not applying to him -- Constitution Act, 1982, ss. 35(1), 52 -- British Columbia Fishery (General) Regulations, SOR/84-248, s. 4(1).

[R. v Lewis](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol1/html/1996scr1_0921.html) [1996] 1 SCR, 921 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol1/html/1996scr1_0921.html)

Indians -- Fishing -- Management of fish "on the reserve" -- Indian band members charged with contravening fishery regulations -- Indian band by-law permitting fishing on Indian band waters at any time -- Indian Act authorizing band council to make by-laws for management of fish "on the reserve" -- Whether by-law affords defence to charges -- Whether fishery adjacent to reserve included as part of reserve -- Whether river bed or any part of river bed "on the reserve" -- Presumption ad medium filum aquae -- Indian Act, R.S.C., 1985, c. I-5, s. 81(1)(o) -- Squamish Indian Band By-law No. 10.

[R. v Badger](http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol1/html/1996scr1_0771.html) [1996] 1 SCR, 771 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol1/html/1996scr1_0771.html)

Indians -- Treaty rights -- Hunting on privately owned land in tract ceded by treaty -- Violations of Wildlife Act -- Whether status Indians have right to hunt for food on privately owned land lying within tract ceded by treaty -- Whether hunting rights extinguished or modified by Natural Resources Transfer Agreement -- Whether licensing and game limitations apply to status Indians -- Constitution Act, 1982, s. 35(1) -- Treaty No. 8 (1899) -- Natural Resources Transfer Agreement (Constitution Act, 1930, Schedule 2), para.12 -- Alta. Reg. 50/87, ss. 2(2), 25 -- Alta. Reg. 95/87, s. 7.

[Blueberry River Indian Band v Canada](http://www.lexum.umontreal.ca/csc-scc/en/pub/1995/vol4/html/1995scr4_0344.html) (Min Ind Aff & N Dev) [1995] 4 SCR, 344 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1995/vol4/html/1995scr4_0344.html)

Indians -- Surrender -- Reserve -- Nature of duty owed by Crown prior to surrender -- Whether Crown under a fiduciary duty -- Indian Act, R.S.C. 1927, c. 98.

Indians -- Surrender -- Validity -- Indian chiefs not personally certifying surrender on oath -- Whether surrender invalid for failure to comply with s. 51 of Indian Act -- Whether s. 51 mandatory or directory -- Indian Act, R.S.C. 1927, c. 98, s. 51.

Indians -- Surrender -- Reserve -- Indian band surrendering reserve to Crown "to sell or lease" -- Indian band claiming that Crown breached its fiduciary duty -- Whether Crown should have leased land of former reserve rather than sell it -- Whether Crown sold land under value -- Whether Crown should have restored reserve to Band after surrender in view of Band's impoverished situation.

Indians -- Surrenders -- Mineral rights -- Reserve -- Indian band surrendering mineral rights on reserve to Crown in 1940 and surrendering reserve in 1945 -- Whether mineral rights included in 1945 surrender -- Indian Act, R.S.C. 1927, c. 98, ss. 2(e), (j), 51.

Indians -- Crown -- Fiduciary duty -- Mineral rights -- Indian band surrendering mineral rights on reserve to Crown "to lease" in 1940 and surrendering reserve "to sell or lease" in 1945 -- Department of Indian Affairs transferring land of former reserve to Department of Veteran Affairs in 1948 -- Department of Indian Affairs aware in 1949 that mineral rights had been erroneously transferred to Department of Veteran Affairs and of potential value of these rights -- Whether Crown breached its fiduciary duty by transferring mineral rights in 1948 -- Whether Crown breached its fiduciary duty by failing to correct its error in 1949 when it learned of erroneous transfer -- Indian Act, R.S.C. 1927, c. 98, s. 64.

Limitation of actions -- Breach of fiduciary duty -- Running of time postponed -- Indian band surrendering mineral rights on reserve to Crown in 1940 and surrendering reserve in 1945 -- Department of Indian Affairs transferring land of former reserve to Department of Veteran Affairs in 1948 -- Mineral rights inadvertently acquired by Department of Veteran Affairs in transfer -- Land and mineral rights subsequently sold to veterans between 1948 and 1956 -- Band learning of mineral rights' transfer in 1977 and commencing action in 1978 claiming that Crown breached its fiduciary duty -- Whether action barred by limitation periods -- Limitation Act, R.S.B.C. 1979, c. 236, ss. 3(4), 6(3), 8.

[Williams v Canada](http://www.lexum.umontreal.ca/csc-scc/en/pub/1992/vol1/html/1992scr1_0877.html) [1992] 1 SCR, 877 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1992/vol1/html/1992scr1_0877.html)

Income tax -- Exemptions -- Regular and enhanced unemployment insurance benefits received by Indian residing on reserve -- Indian qualifying for benefits for work done on reserve -- Test for situs of unemployment insurance benefits -- Whether benefits exempt from tax under Indian Act -- Indian Act, R.S.C. 1970, c. I-6, s. 87 -- Income Tax Act, S.C. 1970-71-72, c. 63, s. 56(1)(a)(iv).

Indians -- Taxation -- Exemptions -- Regular and enhanced unemployment insurance benefits received by Indian residing on reserve -- Indian qualifying for benefits for work done on reserve -- Test for situs of unemployment insurance benefits -- Whether benefits exempt from tax under Indian Act -- Indian Act, R.S.C. 1970, c. I-6, s. 87 -- Income Tax Act, S.C. 1970-71-72, c. 63, s. 56(1)(a)(iv).

[Ontario \(Attorney General\) v Bear Island Foundation](http://www.lexum.umontreal.ca/csc-scc/en/pub/1991/vol2/html/1991scr2_0570.html) [1991] 2 SCR, 570
(http://www.lexum.umontreal.ca/csc-scc/en/pub/1991/vol2/html/1991scr2_0570.html)

Indians -- Aboriginal rights -- Land claims -- Title -- Treaties -- Appellate court unable to interfere with findings of fact -- Legal findings based on facts subject to appellate review -- Indians found to exercise sufficient occupation to establish aboriginal right.

Courts -- Appellate courts -- Jurisdiction -- Appellate courts unable to interfere with findings of fact of lower courts -- Appellate courts able to deal with legal findings based on those facts.

[Mitchell v Peguis Indian Band](http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol2/html/1990scr2_0085.html) [1990] 2 SCR, 85
(http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol2/html/1990scr2_0085.html)

Indians -- Personal property on reserve given under an agreement between the band and Her Majesty -- Property not subject to attachment at suit of non-native -- Provincial government agreeing to rebate provincial sales tax to Indian bands -- Action pending for payment of contingency fee by negotiator acting on behalf of bands -- Pre-judgment garnishment order granted -- Whether or not moneys owed by province personal property on reserve -- Whether or not term "Her Majesty" extending to Crown in right of the province -- Indian Act, R.S.C. 1970, c. I-6, ss. 89(1), 90(1)(b).

[R. v Sparrow](http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_1075.html) [1990] 1 SCR, 1075 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_1075.html)

Constitutional law -- Aboriginal rights -- Fishing rights -- Indian convicted of fishing with net larger than permitted by Band's licence -- Whether or not net length restriction inconsistent with s. 35(1) of the Constitution Act, 1982 -- Constitution Act, 1982, ss. 35(1), 52(1) -- Fisheries Act, R.S.C. 1970, c. F-14, s. 34 -- British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12, 27(1), (4).

Indians -- Aboriginal rights -- Fishing rights -- Interpretation -- Indian convicted of fishing with net larger than permitted by Band's licence -- Whether or not net length restriction inconsistent with s. 35(1) of Constitution Act, 1982.

[R. v Sioui](http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_1025.html) [1990] 1 SCR, 1025 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_1025.html)

Indians -- Treaty -- Rights -- Customs and religion -- Huron band Indians charged with cutting down trees, camping and making fires in places not designated in Jacques Cartier park contrary to provincial regulations -- Whether regulations applicable to Hurons practising customs and religious rites -- Whether document signed by General Murray in 1760 guaranteeing them free exercise of their customs and religion is a treaty -- Whether treaty still in effect -- Whether territorial scope of treaty extends to territory of park so as to make regulations unenforceable in respect of accused -- Indian Act, R.S.C., 1985, c. I-5, s. 88 -- Regulation respecting the Parc de la Jacques Cartier, (1981) 113 O.G. II 3518, ss. 9, 37.

R. v Horseman [1990] 1 SCR, 901 (http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_0901.html)

Indians -- Hunting rights -- Treaty Indian killing bear in self-defence and later selling hide -- Alberta Wildlife Act prohibiting trafficking in wildlife without a licence -- Whether prohibition applies to Treaty 8 Indians -- Whether Treaty 8 hunting rights limited by 1930 Natural Resources Transfer Agreement -- Wildlife Act, R.S.A. 1980, c. W-9, ss. 18, 42 -- Treaty No. 8 -- Natural Resources Transfer Agreement, 1930, para. 12.