

DO YOU HAVE A RIGHT TO CATCH AND SELL FISH COMMERCIALY?

How are you claiming this right?

**As an
Aboriginal Right**

PROVE IT!

Is catching, trading and exchanging fish something you did before the settlers came? Was it something your ancestors did?

YES

OK, but was it something you just did casually or was it integral to your culture? In other words, was it A Very Big Deal?

NO

The Supreme Court of Canada established in the Van Der Peet decision that not all parts of Indigenous culture, even the old ways, can be considered "distinctive" and "integral."

Alongside the "continuity" requirement - i.e. that you are the descendent of people who did the thing pre-contact - you have to prove that, without access to the economic right you are claiming, your culture would be seriously compromised.

Plus, don't claim the right to harvest all the fish in your waters unless you can definitively prove you fished one or more species pre-contact!



NOTABLE CASES

Ahousaht Indian Band and Nation v Canada (Attorney General) 2018 BCSC 633; Lax Kw'alaams Indian Band v. Canada (Attorney General), 2011 SCC 56, [2011] 3 SCR 535).

NOTABLE CASES

The courts dialled back the strict definition of "integral" a bit in R. v. Sappier and R. v. Gray in 2006.

**As a
Treaty Right**

Now everything will depend on (1) the interpretation of your treaty by the court and (2) the Sparrow and Gladstone requirements and tests.

NOTABLE CASES

Sparrow (1990) was the first case heard in the Supreme Court of Canada on Aboriginal rights since these rights were recognized in the new 1982 Constitution.

R. v. Sparrow said that when Ronald Sparrow went out fishing with a bigger net than regulation allowed, he was breaking the law. He argued he had an Aboriginal right to fish, but the Crown tried to say that it wasn't in the "public interest" to let Aboriginal people violate federal fishing regulations. The courts were like, nah, "public interest" isn't a good enough reason to violate these rights.

Then in R. v. Gladstone (1996), where the Heiltsuk argued the right to the herring fishery, the courts dialled that back and said, actually, in this case, the regional economic rights of non-native fishers are important, and the Crown should have discretion to distribute these resources in a "fair" way that need not completely prioritize Aboriginal rights.



PROVE IT!

Is the legislation really that unreasonable?

Does it really impose that much undue hardship?

Is there no other way you could exercise this right that did not violate the legislation?

Now the government must prove it is justified in infringing Aboriginal rights. There are two parts to this test:

(1) Is there a pressing legislative need to violate Aboriginal rights?

(2) Can the govt show that there is as little infringement as possible taking place?

If any appropriation causing financial loss is involved, is fair compensation being paid?

Has the Aboriginal group been consulted regarding conservation measures?

Is the Aboriginal resource use being prioritized over non-Aboriginal resource use?



**As part of
my Aboriginal
Title**

PROVE IT!

Once you have proven your title, you have the full beneficial interest in your land. You have exclusive hunting and fishing rights on your land.

BUT...

Can you catch and sell fish commercially? Yes, you do have this right to fish and to regulate it.

BUT...

Exercising this right depends on whether federal fishery legislation or regulation applies in your area. If so, you have to argue these regulations infringe your rights. And you are bounced back to the infringement and justification tests.



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