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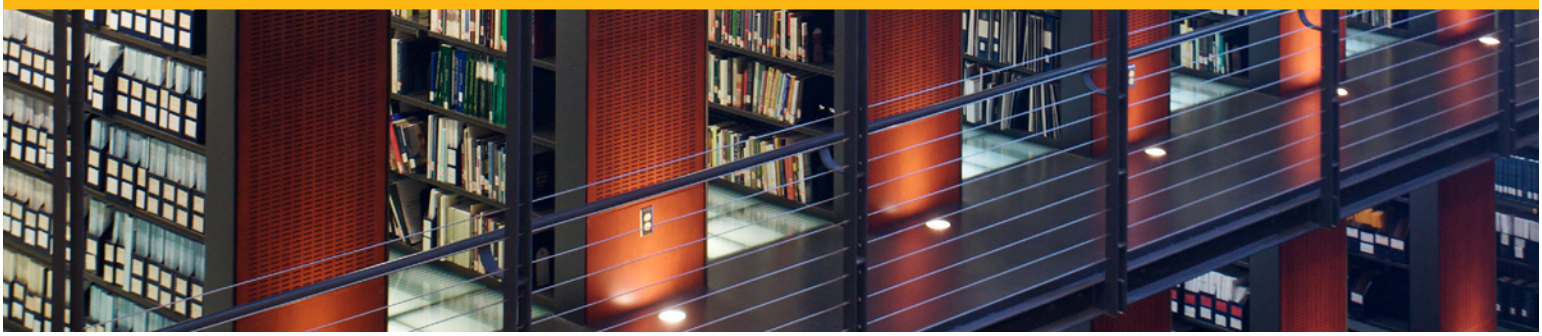

Commercial Fishing Under Aboriginal and Treaty Rights: Supreme Court of Canada Decisions

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(Background Paper)

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COMMERCIAL FISHING UNDER ABORIGINAL AND TREATY RIGHTS: SUPREME COURT OF CANADA DECISIONS*

1 INTRODUCTION

In *R. v. Sparrow*,[1] the Supreme Court of Canada considered for the first time the scope of section 35(1) of the *Constitution Act, 1982*,[2] which recognizes and affirms the Aboriginal and treaty rights of the Indigenous peoples of Canada.[3] Significantly, the Supreme Court made it clear that the rights recognized and affirmed by section 35 are not absolute and outlined a test whereby the Crown may justify legislation that infringes on Aboriginal rights. In 1996, the Supreme Court, in a trilogy of cases dealing with commercial fishing rights (*R. v. Van der Peet*,[4] *R. v. N.T.C. Smokehouse Ltd.*[5] and *R. v. Gladstone*[6]), laid further groundwork on how Aboriginal rights should be defined. The Supreme Court decreed that a purposive approach must be applied in interpreting section 35 of the *Constitution Act, 1982*; in other words, the interests that section 35 was intended to protect must be identified. To define an Aboriginal right, one must first identify the practices, traditions and customs central to Indigenous societies that existed in North America prior to contact with the Europeans; to be recognized as an Aboriginal right, the practice, tradition or custom must also be an integral part of the distinctive culture of Indigenous peoples. The Supreme Court reiterated that section 35 did not create the legal doctrine of Aboriginal rights but emphasized that these rights already existed under common law. The Crown can no longer extinguish existing Aboriginal rights but may only regulate or infringe on them consistent with the test laid out in the *Sparrow* decision.

The following is a summary of the cases mentioned above, as well as the decisions of the Supreme Court in *R. v. Marshall*,[7] which considered a treaty right to a small-scale commercial fishery, and *Lax Kw'alaams Indian Band v. Canada (Attorney General)*,[8] which examined the evolution of pre-contact commercial fisheries.

2 COMMERCIAL FISHING RIGHTS: A QUESTION OF FACTS

2.1 *R. v. Sparrow*

Ronald Sparrow, a member of the Musqueam Indian Band in British Columbia, was charged with fishing with a net longer than was permitted by his food fishing licence, in contravention of the *Fisheries Act*. Mr. Sparrow did not dispute the facts; on the contrary, he argued in his defence that he was exercising an existing Aboriginal fishing right, constitutionally protected under section 35. While agreeing that members of the Musqueam Indian Band, including Mr. Sparrow, had an Aboriginal right to fish, particularly for food and for social and ceremonial purposes, the Supreme Court of Canada ordered that certain constitutional questions be referred back to the trial court, and established the criteria that the trial judge should take into account while reviewing these matters. The Supreme Court strongly hinted that the

government should enter into negotiations with Indigenous peoples regarding the management of the fisheries, to avoid future litigation.

Some general principles were established in *Sparrow*. First, the Supreme Court ruled that section 35 of the *Constitution Act, 1982* applies only to rights that existed at the time this provision came into force. In other words, the term "existing" means "unextinguished in 1982."[9] The Supreme Court specified, however, that the way in which the right had been regulated until that time does not dictate the extent of that right; on the contrary, the term "existing aboriginal rights" must be interpreted flexibly to allow these rights to evolve over time. It categorically rejected the "frozen rights" doctrine. The Supreme Court emphasized that section 35 must be given a generous, liberal interpretation in light of its objectives.[10]

As mentioned earlier, the Supreme Court concluded that members of the Musqueam Indian Band had an Aboriginal right to fish, particularly for food and for social and ceremonial purposes. It also concluded that the Crown had been unable to demonstrate that this right had been extinguished by the regulations under the *Fisheries Act*. To extinguish an Aboriginal right, the Crown must demonstrate a clear and plain intention to do so. The Supreme Court noted that neither the Act nor the regulations revealed the required intent to extinguish a constitutionally protected Aboriginal right. The fact that the Department of Fisheries and Oceans had issued licences to individuals at its own discretion indicated only an intent to manage the fisheries, rather than an attempt to define Aboriginal fishing rights.

The Supreme Court ruled that, when a legislative measure limits the exercise of an existing Aboriginal right, there is *prima facie* infringement of section 35 of the *Constitution Act, 1982*. To determine whether there is indeed infringement, the following three questions must be asked:

- Is the limitation unreasonable?
- Does the regulation impose undue hardship?
- Does the regulation deny to the holders of the right their preferred means of exercising that right?[11]

Once it is proved that an infringement has taken place, the next step is to determine whether the infringement was justified.[12] Although the Supreme Court stated that Aboriginal rights are not subject to the justification test (the *Oakes* test[13]) as set out in section 1 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court nevertheless applied a similar test, which requires, first, a valid legislative objective (for example, a valid objective of a regulation would be to ensure the proper management and conservation of a natural resource). Second, the justification test requires consideration of the federal government's fiduciary duty toward Indigenous peoples, an essential factor in resource allocation. The Supreme Court indicated the need for guidelines to solve resource allocation problems that would certainly arise in the future. The Supreme Court noted that subsistence fishing by Indigenous peoples should be given priority, after conservation requirements are met.

The Supreme Court refused to draw up an exhaustive list of factors in the justification test, but noted several points that a court should consider, including:

- whether there had been as little infringement as possible of the Aboriginal right;
- whether fair compensation had been made to the Indigenous group concerned in cases of expropriation; and
- whether the Indigenous group concerned had been consulted about the conservation measure imposed.[14]

In summary, the *Sparrow* doctrine requires a court to answer three main questions:

- Is there an Aboriginal or treaty right?
- If so, does the regulation or legislation in question infringe on this right?
- If there is infringement of a right, is the infringement justified?

The Supreme Court noted that Indigenous peoples have the burden of proving the existence and infringement of their rights. The Crown, on the other hand, has the burden of proving justification; that is, it must demonstrate that the legislative measures are both valid and justifiable. The Supreme Court suggested that, in light of the government's fiduciary duty toward Indigenous peoples, it must limit the exercise of its legislative authority. The Supreme Court also specified that the final outcome would depend entirely on the findings of fact in a specific case. That essentially means that Aboriginal rights will be determined on a case-by-case basis.

In *Sparrow*, the Supreme Court refused to examine the question of an Aboriginal right to fish for commercial purposes since the issue had not been properly debated before the lower courts. The Supreme Court chose instead to restrict the scope of its analysis to the Musqueam people's constitutional right to fish for food and for social and ceremonial purposes. The Supreme Court did not rule out the possibility that an Indigenous group could one day successfully claim a commercial fishing right; on the contrary, it intimated that such a claim would be a contentious issue in the future.

In 1996, the thorny question of whether there existed a constitutionally protected Aboriginal right to sell fish was once again before the Supreme Court (the *Van der Peet*, *Gladstone* and *Smokehouse* trilogy). This time, the Supreme Court did not hesitate to examine the issue thoroughly.

2.2 *R. v. Van der Peet*

Dorothy Van der Peet, a member of the Sto:lo Nation, was charged with illegally selling fish caught under an Indian food fish licence, contrary to fisheries regulations. As in similar constitutional challenges, Ms. Van der Peet did not contest these facts but argued in her defence that the regulations infringed on her Aboriginal right to sell fish and were therefore invalid. The trial judge held that the Sto:lo people's Aboriginal right to fish for food and for ceremonial purposes did not include the right to sell the fish; consequently, he convicted Ms. Van der Peet. The majority of the Supreme Court upheld the conviction. In sum, the majority concluded that the Aboriginal rights of the Sto:lo people did not include the right to exchange fish for

money or other goods. Both Justice McLachlin and Justice L'Heureux-Dubé issued dissenting opinions in which they expressed the opposite conclusion: the dissenters would have recognized that the Sto:lo people retained an Aboriginal right to sell, trade and barter fish for sustenance purposes.

In the majority ruling, general principles governing the legal relationship between the Crown and Indigenous peoples were reiterated. Given the fiduciary obligation the Crown owes Indigenous peoples, the Supreme Court restated that section 35(1) of the *Constitution Act, 1982* should be given a generous and liberal interpretation. Any doubt or ambiguity as to the scope and definition of section 35(1) must be resolved in favour of Indigenous peoples. The majority of the Supreme Court then went on to find that the purpose of section 35(1) is to recognize the prior occupation of North America by Indigenous peoples. To help define Aboriginal rights, the majority enunciated a test: to be recognized as an Aboriginal right, an activity must be characterized as an element of a practice, custom or tradition integral to the distinctive culture of the Indigenous group claiming the right.[15] The majority further specified that practices, customs and traditions that constitute Aboriginal rights are those that show continuity with the traditions, customs and practices that existed prior to the arrival of Europeans in North America.[16] It was underlined, however, that pre-contact practices, customs and traditions that have evolved into modern forms may be still protected as Aboriginal rights.

The majority highlighted several guiding factors that a court must consider in its assessment of Aboriginal rights, including:

- the perspective of Indigenous peoples themselves;[17]
- the precise nature of the claim being made;[18]
- the central significance of the practice, custom or tradition to the Indigenous society in question;[19]
- the relationship of Indigenous peoples to the land;[20] and
- the distinctive societies and cultures of Indigenous peoples.[21]

The majority further noted that a court must be flexible in applying rules of evidence, given the special nature of Aboriginal claims.[22] This is in recognition of the fact that the history of Indigenous peoples has been passed from one generation to another through oral traditions. Thus, the only "evidence" of past traditions, practices and customs may come in the form of Elders' oral accounts. In addition, the majority stressed that Aboriginal rights must be adjudicated on a specific rather than general basis. In other words, whether an Aboriginal right exists will depend entirely on the traditions, customs and practices of the particular Indigenous community making the claim.

In light of these guiding principles, the majority felt it must defer to the trial judge's findings of fact, since there were no palpable or overriding errors on his part. It therefore accepted his conclusion that the appellant had failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society that had existed prior to European contact.

2.3 *R. v. N.T.C. Smokehouse Ltd.*

In this case, a company operating a food processing plant was convicted of purchasing and selling fish caught without the authority of a commercial fishing licence. The company had illegally purchased fish caught under the authority of Indian food fish licences. The appellant did not dispute these facts but raised the constitutional argument that the impugned fisheries regulations infringed on the Aboriginal rights of the Tseshaht (formerly known as the Sheshaht) and Hupacasath (formerly known as the Opetchesaht) peoples, from whom it had purchased the fish. Once again, the Supreme Court was divided on the issue: a majority affirmed the conviction, while Justice McLachlin and Justice L'Heureux-Dubé would have granted the appeal.

The majority applied the test it had earlier enunciated in *Van der Peet*. It considered the right claimed in this case to be at first glance a right to fish commercially, given the volume of fish being caught and sold. The majority stated that the claim to an Aboriginal right to fish commercially would be far more difficult to establish than the claim to an Aboriginal right to exchange fish for money or other goods: to establish the former right, the claimant group would have had to demonstrate that the exchange of fish for money or other goods, on a commercial scale, formed an integral part of the distinctive culture of the Tseshaht and Hupacasath peoples.[23] In light of this onerous evidentiary hurdle, the majority decided to frame the claim at the outset as the right to exchange fish for money or other goods. Only if the appellant had been successful on this first claim would the majority then have proceeded to an examination of the right to exchange fish on a commercial basis. This second step of the analysis was never undertaken, however, since the appellant failed to convince the majority of the Supreme Court that the Tseshaht and Hupacasath peoples had a right to exchange fish for money.

Once again, the majority endorsed the trial judge's conclusions; these were that since sales of fish were "few and far between" and "incidental" to potlatches and ceremonies, they did not constitute an Aboriginal right to sell fish. The majority saw no compelling reason to overturn the trial judge's findings of fact that the exchange of fish for money or other goods did not form an integral part of the distinctive cultures of the Tseshaht and Hupacasath peoples.[24]

2.4 *R. v. Gladstone*

The *Gladstone* decision clearly illustrates that the recognition of an Aboriginal right comes down to findings of fact as assessed by the trial judge. At issue at the Supreme Court was whether section 20(3) of the *Pacific Herring Fishery Regulations*, which prohibited the sale of any herring spawn on kelp without a proper licence, was invalid since it violated the Aboriginal rights of the appellants. The majority (including Justice McLachlin and Justice L'Heureux-Dubé, who issued concurrent reasons) recognized and endorsed the findings of the trial judge that the commercial trade in herring spawn on kelp had been an integral part of the distinctive culture of the Heiltsuk people prior to European contact.[25] The evidence presented at trial established that trade was not an incidental activity for the Heiltsuk people but rather a central and defining feature of their society.[26] The majority ruled that the disputed

regulations (both past and current) did not express a clear and plain intention on the part of the Crown to extinguish the Aboriginal rights of the Heiltsuk people to fish commercially.[27] The Crown had demonstrated only that it had intended to control the fisheries. The majority also found that the disputed regulatory scheme impinged on the rights of the appellants and constituted a *prima facie* infringement of their Aboriginal rights.[28] Because of the lack of evidence on the issue, the Supreme Court felt it could not properly assess whether the regulations could be justified as a reasonable limitation of these rights. That matter was sent back to be determined at trial.

2.5 *Lax Kw'alaams Indian Band v. Canada (Attorney General)*

The unanimous 2011 decision of the Supreme Court of Canada in *Lax Kw'alaams* clarified the role of the courts in characterizing the Aboriginal fishing rights claimed by Indigenous peoples.[29]

In *Lax Kw'alaams*, the appellants, several Tsimshian First Nations with traditional territories along the northwest coast of British Columbia, claimed an Aboriginal right to commercially harvest all species of fish located within their traditional waters. The historical evidence suggested that pre-contact, the First Nations in the region did in fact fish for a multitude of species, but only traded in the grease of the eulachon fish, which was used as a preservative and as candles. Other species were used in low volume for sporadic gift exchanges.

The appellants claimed that before characterizing the Aboriginal right being claimed, courts must first inquire and make findings about the pre-contact practices of the Indigenous group, in what the Supreme Court described as the "commission of inquiry" model.[30] The Supreme Court rejected this argument stating that the statement of claim in a case requires that the right or issue be characterized. To embark on a voyage of discovery would be illogical, contrary to the *Van der Peet* analysis, and the rules of civil procedure, which ensure that opposing parties have fair notice of the case they must meet.[31]

Justice Binnie, writing for the Court, rejected the appellant's submission that the Tsimshian people have an Aboriginal right to trade in all species of fish, noting that this practice did not form an integral part of the pre-contact culture of the Tsimshian people.[32] While the appellants argued that the historic trade in eulachon evolved into a modern right to trade in all fish, Justice Binnie recognized that although Aboriginal fishing rights may evolve (e.g., using modern technology), trade in fish beyond eulachon "could *not* be described as integral to their distinctive culture."[33] Again, as in *Gladstone*, the Supreme Court turned to the findings of fact. It noted that if, for example, the Tsimshian people traded in any fish species caught during the pre-contact period, they may be able to claim such a right, even if there were changes in fish species due to warming oceans or changing migration patterns.[34]

3 COMMERCIAL FISHING RIGHTS UNDER TREATY

Section 35 of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights. While the cases above set out the Supreme Court of Canada's approach to Aboriginal rights, the Supreme Court also pronounced on rights included in historic treaties. Unlike in Aboriginal rights cases, treaty rights derive from the negotiated agreements set out in treaties and land claims agreements between the Crown and Indigenous peoples.[35] In 1996, the Supreme Court in *R. v. Badger*, a decision concerning hunting rights under treaty, set out that ambiguous provisions of treaties should be interpreted in favour of Indigenous peoples.[36] Furthermore, the fiduciary duties and honour of the Crown should always be reflected in treaty interpretation.[37] The Supreme Court in *Badger* also adapted the *Sparrow* justification test to the context of treaty rights.[38] The Supreme Court had its first opportunity to rule on fishing rights under treaty in *R. v. Marshall.*

3.1 *R. v. Marshall*

The 1999 Supreme Court of Canada *Marshall* decision concerned the case of the appellant, Donald Marshall, Jr., a Mi'kmaw person in Nova Scotia who was charged with offences under the *Maritime Provinces Fishery Regulations* for having sold $787.10 worth of eels caught out of season off the coast of Antigonish County. The appellant admitted to selling the eels but relied on the Mi'kmaq treaties of 1760 and 1761 signed with the British Crown, specifically a clause that stated that Mi'kmaq peoples could sell commodities at "truckhouses" to be established by the Crown and established their right to trade for "necessaries."

In interpreting the 1760 and 1761 Mi'kmaq treaties, Justice Binnie, writing for the majority, rejected using a strict approach to the exclusion of outside sources in treaty interpretation, noting the following:

- In modern contract law, external evidence can be used to demonstrate the written contract does not include all its terms.
- Historical and cultural context can be used to interpret treaties, even absent ambiguities, and even if the treaty purports to include all its terms.
- When a treaty was concluded orally, and then written up by the Crown (as was done in this case), it would be "unconscionable" to ignore the oral terms.[39]

While the treaties appeared to restrict the sale of commodities to the "truckhouses" established by the British, Justice Binnie concluded that interpreting a positive right of sale into a restrictive covenant for the Mi'kmaq people is inconsistent with the honour of the Crown.[40] He further concluded that the trading arrangement must be given an interpretation that reflects the meaning of the promises made by the Crown.

Justice Binnie writing for the majority found that the Treaty gave the Mi'kmaq people the right to sell fish to secure "necessaries," which he considered to be the equivalent of a "moderate livelihood."[41] This was defined in *Gladstone* as including "food, clothing, and housing, supplemented by a few amenities," but notably "not the accumulation of wealth."[42] Justice Binnie wrote that while this right may be subject

to regulation, it must meet the requirements of the *Sparrow* test for infringement. The lack of accommodation of the treaty rights of the Mi'kmaq in the regulations led to a *prima facie* infringement of those rights.[43] Furthermore, unless contemplated in the Treaty, the seasonal restriction and the imposition of a discretionary licensing system could not be imposed on the Mi'kmaq people, as no justification for the infringement was provided by the Crown.[44] Justice Binnie therefore found that the appellant was not subject to the federal fisheries legislation and that he was entitled to an acquittal.

Justice McLachlin and Justice Gonthier dissented from the majority and argued that treaty interpretation should be a two-step process of first examining the words of a treaty to determine their meaning, and then examining how the meaning of those words should be considered in the treaty's historical and cultural context.[45] Their analysis concluded that the Mi'kmaq people did not possess a general right to trade, but rather gave up their trading autonomy in exchange for the "right to bring goods" to trade for European goods at the British "truckhouses," an arrangement that lasted until the 1780s. Justice McLachlin and Justice Gonthier asserted that once this arrangement ceased, the "right to bring goods" for trading purposes also died and would no longer confer a general trading right to the Mi'kmaq people that would exempt them from the fisheries regulation.

4 CONCLUSION

The decisions by the Supreme Court of Canada on Aboriginal fishing and treaty rights have been the focus of media attention and parliamentary study.[46] However, the Supreme Court has essentially left the issue open for further debate. It has clearly established the analytical framework for assessing future claims to an Aboriginal right to sell fish and has stressed that such an assessment will hinge on the particular customs, traditions and practices of the claimant group that existed prior to European contact or, in the case of treaty rights, on the textual, historical and cultural interpretation of the treaties themselves. Although the Supreme Court did recognize an Aboriginal right to fish commercially in *Gladstone*, the case law reiterates that future claimants will have a heavy evidentiary burden to show that the exchange of fish for money or other goods, on a commercial basis, formed an integral part of their distinctive culture.

NOTES

* This Background Paper is based on an earlier document prepared by Jane May Allain, formerly of the Library of Parliament.

1. *R. v. Sparrow*, [1990] 1 SCR 1075 (CanLII).

2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), s. 35.

3. The *Constitution Act, 1982* refers to First Nations, Inuit and Métis peoples collectively as the Aboriginal peoples of Canada. This paper uses the term "Aboriginal" in relation to rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and "Indigenous" in relation to the First Peoples of Canada.
4. *R. v. Van der Peet*, [1996] 2 SCR 507 (CanLII).
5. *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 SCR 672.
6. *R. v. Gladstone*, [1996] 2 SCR 723.
7. *R. v. Marshall*, [1999] 3 SCR 456.
8. *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] 3 SCR 535.
9. *R. v. Sparrow*, p. 1092.
10. Ibid., p. 1106.
11. Ibid., p. 1111.
12. Ibid., p. 1113.
13. *R. v. Oakes*, [1986] 1 SCR 103.
14. *R. v. Sparrow*, p. 1119.
15. *R. v. Van der Peet*, para. 46.
16. Ibid., para. 59.
17. Ibid., para. 49.
18. Ibid., para. 51.
19. Ibid., para. 55.
20. Ibid., para. 74.
21. Ibid.
22. Ibid., para. 68.
23. *R. v. N.T.C. Smokehouse Ltd.*, para. 20.
24. Ibid., para. 26.
25. *R. v. Gladstone*, paras. 26–29.
26. Ibid.
27. Ibid., para. 34.
28. Ibid., paras. 39–53.
29. *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, para. 46.
30. Ibid., para. 40.
31. Ibid., paras. 41–43.
32. Ibid., para. 56.
33. Ibid., para. 52.
34. Ibid., para. 57.
35. Jack Woodward, *Native Law*, Release 2, Carswell, Toronto, 2017, para. 5§190.
36. *R. v. Badger*, [1996] 1 SCR 771, para. 9.

37. Ibid., para. 41. Justice Sopinka writes:

> [T]he honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises.

The honour of the Crown was further detailed in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, paras. 16–19.

38. *R. v. Badger*, para. 78.

39. *R. v. Marshall*, paras. 10–12.

40. Ibid., para. 52.

41. Ibid., para. 7.

42. Ibid., para. 59.

43. Ibid., para. 64.

44. Ibid., para. 66.

45. Ibid., paras. 81–83.

46. See, for example, House of Commons, Standing Committee on Fisheries and Oceans, *The Marshall Decision and Beyond: Implications for Management of the Atlantic Fisheries*, 2nd Session, 36th Parliament, December 1999; and Larry Pynn, "First Nations' economic clout the result of decades of court decisions," *Vancouver Sun*, 30 May 2015.