

The Evolution of Indigenous Rights:  
From *Connolly v. Woolrich* to *R. v. Van der Peet*

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## Introduction

The concept of 'right' has been interpreted differently by different societies, cultures, and governments throughout history, and this is especially evident when one compares the English-settler perspective to the general Indigenous perspective of 'right'. When one typically thinks of 'rights' from the dominant Western perspective, one typically thinks of human rights as they are defined in international law or in the *Charter of Rights and Freedoms*. However, when one thinks of Indigenous rights, the only clear thing that comes to mind is perhaps land claims due to a lack of education or awareness around the subject and because Indigenous rights have never fully acknowledged by the Canadian colonial state. Through the analysis of landmark court cases that have happened since the Confederation of Canada in 1867, such as *Connolly v. Woolrich* (1867), *Lavell v. Attorney General of Canada* (1973), *Guerin v. The Queen* (1984), *R. v. Sparrow* (1990), and *R. v. Van der Peet* (1996), one can clearly see that the issue of acknowledging Indigenous rights has always been present in the Canadian legal system. The Courts must walk along a tight rope when it comes to this issue; just giving Indigenous peoples enough rights legally to prevent outcry from the Indigenous and non-Indigenous populations alike, but also not giving Indigenous peoples enough to allow them to escape the oppressive environment that the Canadian colonial state has created for them environmentally, socially, financially, culturally, and legally in order to achieve the colonial state's assimilationist goals.

Through this analysis of landmark court cases concerning Indigenous rights, it is very clear that the Canadian colonial state does not respect Indigenous rights, nor do they acknowledge them. Even though the protection of Indigenous rights was entrenched in section 35(1) of the *Constitution Act, 1982*, court cases since have still dealt with issues of Canadian legislation contradicting the rights outlined in this section and have also ruled against protecting

those rights repeatedly.<sup>1</sup> It is through the analysis of these landmark court cases that one can determine that although Indigenous rights have come along way over the past century, they are still not being respected nor protected by the Canadian colonial state today and Indigenous peoples must still fight for their constitutionally protected rights.

### **Defining Rights: What Are They & Who Do They Apply To?**

When one typically thinks of rights and what they are, one typically thinks of those listed in the *Charter of Rights and Freedoms*, such as freedom of expression, freedom of conscience, and freedom of religion.<sup>2</sup> However, there are much more to the concept of ‘rights’ than simply being able to freely practice whichever religion one chooses or being able to peacefully protest, especially when one considers another society’s perspective on this concept.

Indigenous rights comprise the inherent and collective rights of the First Peoples of Turtle Island (i.e., First Nations, Métis, and Inuit) and includes such things as the right to their ancestral territories and lands, the right to self-determination and self-government, and overall autonomy as distinct nations. In simpler terms, Indigenous rights are derived from Indigenous laws, practices, governance, customs, and traditions.<sup>3</sup> Furthermore, Indigenous rights are unlike any other forms of rights that exist in Canadian law and society today for several reasons. First, they were not extinguished when the British and French were asserting their sovereignty over this land in the XVIII and XIX centuries or during the establishment of the current governmental authority that we recognize in Canada today.<sup>4</sup> Second, they are apart of both Canadian common law and

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<sup>1</sup> R. v. Sparrow, [1990] 1 SCR 1075 (Supreme Court of Canada 1990); R. v. Van der Peet, [1996] 2 SCR 507 (Supreme Court of Canada 1996); Attorney General of Canada v. Lavell, [1974] SCR 1349 (Supreme Court of Canada 1973).

<sup>2</sup> Federal Government of Canada, “Part I Canadian Charter of Rights and Freedoms,” Government of Canada: Justice Laws Website, August 7, 2020, <https://laws-lois.justice.gc.ca/eng/const/page-12.html>.

<sup>3</sup> John Borrows and Leonard Ian Rotman, “Chapter 2: Aboriginal Rights,” in *Aboriginal Legal Issues : Cases, Materials & Commentary*, Fifth (Toronto, Canada: LexisNexis Canada, 2018), 1125.

<sup>4</sup> *ibid.*

Canadian constitutional law, although they did not arise from either of these institutions.<sup>5</sup> And third, Indigenous rights continue to be protected and reflected in Indigenous legal systems today.<sup>6</sup> Finally although Indigenous rights are technically protected legally in the *Constitution Act, 1982*, they are still often infringed upon by provincial, territorial, and federal governments when they view Indigenous peoples and their communities as ‘in the way’ of their economic goals, such as with the Wet’suwet’en First Nations and the pipeline that Coastal GasLinks is attempting to build.<sup>7</sup>

### ***Two Categories of ‘Rights’: Contingent/Positive Rights versus Inherent/Natural Rights***

To better understand the concept of ‘rights’ and their evolution regarding Indigenous Peoples, one can break down the concept into two categories: positive rights and natural rights.<sup>8</sup> Positive rights as those “property, contractual or statutory rights [one] imagine[s] to be purely creatures of law”.<sup>9</sup> One can consider the assignment of such rights or ‘powers’ to persons in order to ensure to necessary and smooth functioning of society.<sup>10</sup> Furthermore, these types of rights can be considered neutral because they are neither immoral nor moral.<sup>11</sup> They simply exist to regulate the actions of civilians within society and to ensure the smooth functioning required for a society to operate properly. The second category, natural rights, “posits a much closer connection with morality in those rights [one] calls human rights”, which suggests that these rights are inherent in

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<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> Jorge Barrera, “RCMP Arrest 14, Clear Road on Wet’suwet’en Territory in Ongoing Dispute over Land Rights, Pipeline,” *CBC*, November 18, 2021, <https://www.cbc.ca/news/canada/british-columbia/rcmp-wet-suwet-en-pipeline-resistance-1.6254245>; Matt Simmons, “Land Defenders Arrested on Wet’suwet’en Territory as RCMP Enforces Coastal GasLink Injunction,” *The Narwhal*, November 18, 2021, <https://thenarwhal.ca/rcmp-arrests-wetsuweten-coastal-gaslink/>; Matt Simmons, “Why Tensions Are Escalating on Wet’suwet’en Territory over the Coastal GasLink Pipeline,” *The Narwhal*, October 14, 2021, <https://thenarwhal.ca/wetsuweten-coastal-gaslink-explainer/>; The Canadian Press, “Timeline of Wet’suwet’en Solidarity Protests and the Dispute That Sparked Them,” *Global News*, February 7, 2020, <https://globalnews.ca/news/6560125/timeline-wetsuweten-pipeline-protests/>.

<sup>8</sup> Daniel J Gormley, “Aboriginal Rights as Natural Rights,” *The Canadian Journal of Native Studies* IV, no. 1 (1984): 29–49.

<sup>9</sup> Gormley, 30.

<sup>10</sup> Gormley, “Aboriginal Rights as Natural Rights.”

<sup>11</sup> *ibid.*

human beings because they pre-exist legal or positive rights.<sup>12</sup> Natural rights are those rights that have always been inherent to human beings since before their emergence from the State of Nature, such as the right to preserve one's life.

To further understand the concept of Indigenous rights, one can break it down even further by analyzing the debate between Chief Justice Davey and Justice Hall of the Supreme Court of Canada.<sup>13</sup> Chief Justice Davey promoted a contingent rights approach when it came to Indigenous rights. This approach views "the existence or non-existence of aboriginal rights to be contingent upon the exercise of state authority", therefore assuming that the executive and legislative authority of the colonial state over Indigenous peoples is legitimate.<sup>14</sup> In other words, this approach views Indigenous rights as being dependant upon the colonial state recognizing the Indigenous right to freedom from state interference as valid.<sup>15</sup> Furthermore, since this view does not acknowledge the existence of Indigenous rights unless the colonial state recognizes them as being free from state interference, this view also does not recognize the existence of Indigenous sovereignty and self-government.<sup>16</sup> From this approach, Indigenous sovereignty "would not exist as a constitutional right until expressed by way of constitutional amendment" and until such a thing would happen, it would only exist in the capacity given by legislative or executive action from the colonial state.<sup>17</sup> In summary, the contingent theory of Indigenous rights views Indigenous sovereignty as non-existent because the existence of Indigenous rights, including those to self-

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<sup>12</sup> Gormley, "Aboriginal Rights as Natural Rights," 30.

<sup>13</sup> Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow," *Alberta Law Review* XXIX, no. 2 (1991): 498–498, <https://doi.org/10.29173/alr1571>.

<sup>14</sup> Asch and Macklem, 501.

<sup>15</sup> Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty."

<sup>16</sup> *ibid.*

<sup>17</sup> Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty," 502.

government and self-determination, are dependent upon the executive action of the Canadian colonial state.<sup>18</sup>

On the other hand, Justice Hall criticized Chief Justice Davey's view on Indigenous rights and sovereignty by proposing an opposing approach: inherent rights.<sup>19</sup> Inherent rights "view [Indigenous] rights as existing independent of any legislative or executive action" from the Canadian colonial state, although they do require at least judicial recognition in Canadian law for their enforcement.<sup>20</sup> Furthermore, this approach views Indigenous sovereignty as "the totality of powers and responsibilities necessary or integral to the maintenance and reproduction of [Indigenous] identity and social organisation".<sup>21</sup> The reasoning behind this is that the means by which Indigenous identity and social organization are reproduced pre-exist the colonial settlement of Canada by British and French colonizers and they continue to exist despite the opposition and attempts of assimilation from the Canadian colonial state.<sup>22</sup> In summary, Indigenous people's right to sovereignty and self-government is key in this approach, however, unlike the contingent rights approach, the recognition of this right from the Canadian colonial state through any executive, legislative or judicial action is not necessary for the existence of Indigenous sovereignty.<sup>23</sup>

### ***A Recap of the Concept of 'Rights'***

In summary, Indigenous rights are those inherent and collective rights of First Nations, Métis, and Inuit. It comprises their right to self-determination and self-government, and overall autonomy as distinct, separate nations from the Canadian colonial state.<sup>24</sup> For one to fully

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<sup>18</sup> Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty."

<sup>19</sup> *ibid.*

<sup>20</sup> Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty," 502.

<sup>21</sup> Asch and Macklem, 503.

<sup>22</sup> Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty."

<sup>23</sup> *ibid.*

<sup>24</sup> William B. Henderson and Catherine Bell, "Rights of Indigenous Peoples in Canada," The Canadian Encyclopedia, February 7, 2006, <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-rights>.

understand what Indigenous rights are, one may break down this concept into two general categories: positive rights and natural rights, which can be further broken down into contingent rights and inherent rights to gain a better understand of this complex concept. Positive rights are those laws that are created to ensure the smooth and necessary functioning of civil society.<sup>25</sup> These rights are neither immoral nor moral because they exist simply to regulate the actions of civilians within society.<sup>26</sup> Natural rights are those rights which are inherent to human beings.<sup>27</sup> These rights pre-exist legal and positive rights and are those rights that human being had while living in the State of Nature, such as the right to preserve one's life.<sup>28</sup>

To break it down even further, one can understand Indigenous rights from the point of view of contingent rights and inherent rights.<sup>29</sup> The contingent rights approach is similar to positive rights as it views "the existence of non-existence of [Indigenous] rights to be contingent upon the exercise of state authority".<sup>30</sup> This approach therefore views the existence of Indigenous rights as being dependant or contingent upon being given legal validity from the Canadian colonial state and does not view Indigenous sovereignty as existent unless the colonial state recognizes it through executive or legislative action.<sup>31</sup> On the contrary, the inherent rights approach views Indigenous rights as being independent from the executive and legislative action of the Canadian colonial state.<sup>32</sup> Overall, Indigenous rights are inherent in the very meaning of indigeneity, and therefore can and should exist independently from the Canadian colonial state.<sup>33</sup>

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<sup>25</sup> Gormley, "Aboriginal Rights as Natural Rights."

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty."

<sup>30</sup> Asch and Macklem, 501.

<sup>31</sup> Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty."

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

## The Evolution of Indigenous Rights Through Landmark Court Cases

Since European colonizers travelled across the Pacific Ocean and made contact with the Indigenous Peoples of North America, they have been attempting to ‘civilize’ and assimilate them into the then-emerging and now-dominant Euro-Canadian culture. The most notable of these tools of assimilation that have been used by the Canadian colonial state is the *Indian Act*, which was enacted in 1876 and promotes the disenfranchisement and assimilation of Indigenous Peoples into the colonial state.<sup>34</sup> Some notable policies and institutions that came out of the *Indian Act* include the residential school system, the reserve system, and section 12(1)(b) where Indigenous women would lose their status and would not be able to return to their reserves if they married a non-Indigenous or a non-status man, among many other things.<sup>35</sup> Indigenous Peoples as a whole have had to fight for their rights as human beings within the Canadian colonial state and are still fighting for them. One can witness the evolution of this fight for Indigenous rights through the following landmark cases.

### ***Connolly v. Woolrich (1867)***

This is one of the first landmark cases in Canadian history that recognizes Indigenous customary law over colonial European law. To give some context to this case, William Connolly, a fur trader, married a Cree woman named Suzanne by custom of the country in the early-19<sup>th</sup> century, meaning that they married using Cree customary laws of marriage.<sup>36</sup> William and Suzanne were married for nearly thirty years and had at least six children together.<sup>37</sup> However, when

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<sup>34</sup> Department of Indian and Northern Affairs, “Indian Acts and Amendments, 1868-1975,” accessed October 6, 2021, [https://publications.gc.ca/collections/collection\\_2017/aanc-inac/R5-158-2-1978-eng.pdf](https://publications.gc.ca/collections/collection_2017/aanc-inac/R5-158-2-1978-eng.pdf).

<sup>35</sup> Department of Indian and Northern Affairs; Wendee Kubik, Carrie Bourassa, and Mary Hampton, “Stolen Sisters, Second Class Citizens, Poor Health: The Legacy of Colonization in Canada,” *Humanity & Society* 33, no. 1–2 (February 1, 2009): 18–34, <https://doi.org/10.1177/016059760903300103>.

<sup>36</sup> John Borrows and Leonard Ian Rotman, “The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?,” *Alberta Law Review* 36, no. 1 (December 1, 1997): 9–45, <https://doi.org/10.29173/alr1018>; Brenda Macdougall, “EAS 3102-A Week 6.1 Lecture.”

<sup>37</sup> Macdougall, “EAS 3102-A Week 6.1 Lecture.”



William retired from the fur trade to Montreal, he soon thereafter left Suzanne and their children for his richer and whiter second-cousin, Julia Woolrich; whom he married in 1832 through the Catholic Church and had two more children with.<sup>38</sup> In 1849, William died and left his entire estate to his second wife, Julia. After Suzanne dies in 1862 and Julia in 1865, Julia leaves William's entire estate to the two children that she had him, leaving nothing for the six children he had with Suzanne.<sup>39</sup> This, quite obviously, did not sit right with William and Suzanne's children and they challenged their father's will in court, arguing that his first marriage to Suzanne was legal through custom of the country and asking for 1/16 of their father's estate. After listening to the arguments, Quebec's Lower Court and the Superior Court ruled in favour of Suzanne's children and upheld the validity for William's first marriage to Suzanne.<sup>40</sup>

In upholding the legality of this marriage that was conducted according to Cree customary law, the Court set a far-reaching precedent and "advanced a complex and far-reaching theory of legal pluralism".<sup>41</sup> This decision recognized the fact that Indigenous laws were valid whether or not they conformed with traditional European common law principles, and it also ensured the continuity of Indigenous law in the new legal and political order that was forming around the time of Confederation.<sup>42</sup>

***Bill C-31: Lavell v. Attorney General of Canada, R. v. Bédard & Lovelace v. Ontario***

A central element of the *Indian Act* was section 12(1)(b) which promoted the disenfranchisement of Indigenous women if they married a non-Indigenous or non-status man and ensured that they could never return to their reserve after losing their status, nor would her children

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<sup>38</sup> Macdougall.

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> Mark D Walters, "The Judicial Recognition of Indigenous Legal Traditions: Connolly v Woolrich at 150," *Review of Constitutional Studies* 22, no. 3 (2017): 347; Macdougall, "EAS 3102-A Week 6.1 Lecture."

<sup>42</sup> Borrows and Rotman, "The Sui Generis Nature of Aboriginal Rights"; Borrows and Rotman, "Chapter 2: Aboriginal Rights."

be able to attain status.<sup>43</sup> Furthermore, if an Indigenous man married a non-status or non-Indigenous woman, he and his children would be able to retain their status and the non-Indigenous woman would be able to gain status under the *Indian Act*.<sup>44</sup> This section of the *Indian Act* directly affected approximately 12,000 Indigenous women and it severely restricted their civil and political rights.<sup>45</sup> Fortunately, in 1985 when Bill C-31 was passed, these 12,000 Indigenous women plus approximately 40,000 of their descendants had their status and band membership restored.<sup>46</sup> This is but one of many of the assimilation tactics and policies that the Canadian colonial state used to assimilate Indigenous peoples in Euro-Canadian society.

In 1971, Jeanette Corbière Lavell and Yvonne Bédard challenged section 12(1)(b) of the *Indian Act* in court when Lavell's name was removed from her band's list after she married her non-status husband and Bédard was not allowed to move back to her reserve after she divorced her non-status husband.<sup>47</sup> The cases were merged together as they were dealing with the same subject but, unfortunately, they both lost in 1973 in the Supreme Court of Canada.<sup>48</sup>

These cases, however, went on to inspire others, such as Sandra Lovelace in 1977 who challenged this sexist section of the *Indian Act* by filing a complaint with the United Nation's

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<sup>43</sup> Kubik, Bourassa, and Hampton, "Stolen Sisters, Second Class Citizens, Poor Health"; Department of Indian and Northern Affairs, *Indian Acts and Amendments, 1868-1975*; Sharon D. McIvor, "Aboriginal Women's Rights as 'Existing Rights' (Canada)," *Canadian Woman Studies* 15, no. 2/3 (1995): 34–38.

<sup>44</sup> Kubik, Bourassa, and Hampton, "Stolen Sisters, Second Class Citizens, Poor Health"; Vic Satzewich and Terry Wotherspoon, *First Nations: Race, Class and Gender Relations* (Scarborough, ON: Nelson Canada, 1993).

<sup>45</sup> McIvor, "Aboriginal Women's Rights as 'Existing Rights' (Canada)."

<sup>46</sup> *ibid.*

<sup>47</sup> James S. Frideres, René R. Gadacz, and James Frideres, *Aboriginal Peoples in Canada: Contemporary Conflicts*, 7th ed. (Toronto: Pearson Education Canada, 2005); Kubik, Bourassa, and Hampton, "Stolen Sisters, Second Class Citizens, Poor Health"; Julia Skelly, "Bedard Case," *The Canadian Encyclopedia*, February 20, 2020, <https://www.thecanadianencyclopedia.ca/en/article/bedard-case>; *Attorney General of Canada v. Lavell*, [1974] SCR 1349.

<sup>48</sup> Kubik, Bourassa, and Hampton, "Stolen Sisters, Second Class Citizens, Poor Health"; *Attorney General of Canada v. Lavell*, [1974] SCR 1349; Skelly, "Bedard Case."

Committee on Human Rights instead of going through the Canadian legal system.<sup>49</sup> And, unlike Lavell and Bédard, Lovelace was successful. On July 30, 1981, the United Nation's Committee on Human Rights ruled in favour of Lovelace, finding Canada in violation of international law.<sup>50</sup> In response, Canada passed Bill C-31 in 1985, "stating that [Indigenous] women could no longer lose status through marriage and those who had lost status were re-instated (as well as their children)".<sup>51</sup> Although Bill C-31 greatly helped bring Indigenous women onto more equal footing with their male counterparts in the *Indian Act*, it still did not effectively resolve the issue of discrimination that Indigenous women continue to face today, but in fact just compounded the problems.<sup>52</sup>

### ***Guerin v. The Queen (1984)***

*Guerin v. The Queen* was a landmark court case in 1984 that established Indigenous rights as *sui generis* by the Supreme Court of Canada.<sup>53</sup> *Sui generis* quite literally translates to "of its own kind or class" and connotes a sense of uniqueness and difference, which is why the term was given to describe Indigenous rights because they have always been different and unique from other common law rights since they originate from a different source.<sup>54</sup>

Although differences tend to be greatly emphasized in *sui generis*, it does not ignore the similarities between Indigenous and non-Indigenous peoples in Canada. Both Indigenous and non-Indigenous peoples in Canada share territories, economies, ecosystems, environments, ideologies, and institutions, among many other things, and it is these similarities that allow these two groups

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<sup>49</sup> Kubik, Bourassa, and Hampton, "Stolen Sisters, Second Class Citizens, Poor Health"; Lovelace v. Ontario, [2000] 1 SCR 37 (Supreme Court of Canada 2000).

<sup>50</sup> *ibid.*

<sup>51</sup> Kubik, Bourassa, and Hampton, "Stolen Sisters, Second Class Citizens, Poor Health," 22.

<sup>52</sup> Kubik, Bourassa, and Hampton, "Stolen Sisters, Second Class Citizens, Poor Health"; Native Women's Association of Canada, "Bill C-31 Amendment Literature Review," n.d., accessed November 27, 2021.

<sup>53</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 (Supreme Court of Canada 1984); Borrows and Rotman, "The Sui Generis Nature of Aboriginal Rights."

<sup>54</sup> Borrows and Rotman, "The Sui Generis Nature of Aboriginal Rights."

of people to live with their differences.<sup>55</sup> Furthermore, it is these points of similarities that need to be highlighted when engaging on the issues of difference in order to create more productive and peaceful relations between Indigenous and non-Indigenous peoples in Canada.<sup>56</sup>

In summary, *Guerin v. The Queen* is important because it establishes, for the first time ever, Indigenous rights as *sui generis*; establishing Indigenous rights as different from other common law rights and yet still as important.<sup>57</sup> Furthermore, since the *Guerin* decision, “judicial decision-making has extended the *sui generis* appellation from more conventional subjects, such as hunting, fishing, and land rights, to issues like [...] treaties and the relationship between the Crown and [Indigenous peoples]”.<sup>58</sup>

### ***R. v. Sparrow (1990)***

*R. v. Sparrow* was a dispute in the early 1990s that dealt with “the nature and [the] scope of [Indigenous fishing] rights and the Crown’s ability to interfere with those right through legislative initiatives”, before which these issues had never been adequately dealt with before at the judicial level.<sup>59</sup> The appellant of this particular case was a member of the Musqueam band in British Columbia and was charged for using a drift net while fishing that was longer than permitted by the terms of the Musqueam’s food fishing licence, and was therefore charged under the federal *Fisheries Act*.<sup>60</sup> The appellant contended that he was exercising his Indigenous right to fish under section 35(1) of the *Constitution Act, 1982*, and that his Indigenous right to fish should be limited

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<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*

<sup>57</sup> Borrows and Rotman, “The Sui Generis Nature of Aboriginal Rights”; *Guerin v. The Queen*, [1984] 2 SCR 335.

<sup>58</sup> Borrows and Rotman, “The Sui Generis Nature of Aboriginal Rights,” 10.

<sup>59</sup> Borrows and Rotman, 24; John Borrows, “Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism,” *Canadian Historical Review* 98, no. 1 (March 2017): 114–35, <https://doi.org/10.3138/chr.98.1.Borrows>.

<sup>60</sup> Borrows and Rotman, “The Sui Generis Nature of Aboriginal Rights”; *R. v. Sparrow*, [1990] 1 SCR 1075.

by legislation that conflicted with this section of the *Act*.<sup>61</sup> The Supreme Court of Canada, “[i]n following its own injunction[,] the Court did not interpret the Musqueam right to fish by reference to traditional property rights” but rather recognized that Indigenous rights originated from a difference source than Canadian common law did.<sup>62</sup> This consideration of Indigenous legal understandings allowed the Supreme Court to conclude a new *sui generis* consideration, “that the [Indigenous] right to fish for food, social and ceremonial purposes existed for reasons connected to their cultural and physical survival, which could be exercised in a contemporary manner”, thus acknowledge the unique and difference source that Indigenous rights originate from.<sup>63</sup>

In summary, this case accomplished four important things: (1) it protected Musqueam rights to fish for food, as well as for social and ceremonial reasons; (2) it prohibited the unilateral extinguishment of Indigenous rights after 1982 when the *Constitution Act* was adopted; (3) it made it a requirement for the federal government to justify any attempts they make to infringe upon the section 31(1) rights of Indigenous peoples in the *Constitution Act, 1982*; and ultimately, (4) it constrained the Crown’s sovereignty.<sup>64</sup> This landmark case is critical in the evolution of Indigenous rights in Canada for the reasons listed above and because it constitutionalized a new and more flexible interpretation of *sui generis* for existing Indigenous rights. Furthermore, this case allows Indigenous rights to exist in contemporary society and allows them to evolve over time as well.<sup>65</sup> Overall, through this case’s focus on section 31(1) of the *Constitution Act, 1982*, it opened an entirely new discussion about the protection of Indigenous rights in Canada.<sup>66</sup>

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<sup>61</sup> *ibid.*

<sup>62</sup> Borrows and Rotman, “The Sui Generis Nature of Aboriginal Rights,” 24; R. v. Sparrow, [1990] 1 SCR 1075.

<sup>63</sup> Borrows and Rotman, “The Sui Generis Nature of Aboriginal Rights,” 24.

<sup>64</sup> Borrows, “Challenging Historical Frameworks.”

<sup>65</sup> Borrows and Rotman, “The Sui Generis Nature of Aboriginal Rights.”

<sup>66</sup> Borrows and Rotman, “Chapter 2: Aboriginal Rights.”

### ***R. v. Van der Peet (1996)***

This last landmark case concerns *R. v. Van der Peet* from 1996 and it continues to build off the momentum that *R. v. Sparrow* generated for *sui generis* and Indigenous rights. In this case, the appellant was charged with selling ten salmon that they had caught using their Indigenous food fish licence.<sup>67</sup> However, under section 27(5) of the *British Columbia Fishery (General) Regulations*, the act of selling or bartering fish caught under this type of licence was illegal.<sup>68</sup> The appellant alleged, in their defense, that the selling and bartering restrictions imposed by section 27(5) infringed upon their Indigenous right to sell fish and, furthermore, should be considered invalid because they violate section 35(1) of the *Constitution Act, 1982*.<sup>69</sup> The Court “held that the [Indigenous] right to fish for food and ceremonial purposes did not include the right to sell such fish” and subsequently found the appellant guilty.<sup>70</sup> With this verdict, the Court created a very narrow interpretation of Indigenous rights where only those practices, customs, and traditions that were “integral to the distinctive culture” of the particular Indigenous group prior to colonial contact were to be protected.<sup>71</sup>

By creating this extremely narrow interpretation of Indigenous rights, the Court essentially stated that these practices, customs, and traditions must be “one of the things which made the society what it was” before colonialism rather than simply an aspect of Indigenous society; therefore, establishing colonialism as the defining moment in history that determines Indigenous rights.<sup>72</sup> Furthermore, by giving colonialism this sense of importance in terms of Indigenous rights,

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<sup>67</sup> *R. v. Van der Peet*, [1996] 2 SCR 507.

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

<sup>70</sup> *R. v. Van der Peet*, [1996] 2 SCR 507 paragraph 2.

<sup>71</sup> Borrows, “Challenging Historical Frameworks,” 120.

<sup>72</sup> Borrows, “Challenging Historical Frameworks”; *R. v. Van der Peet*, [1996] 2 SCR 507; John P. McEvoy, “Aboriginal Activities and Aboriginal Rights: A Comment on *R. v. Sappier*; *R. v. Gray*,” *Indigenous Law Journal* 6, no. 2 (2007): 2.

it has conscripted Indigenous lawyers, historians, and communities into the Supreme Court of Canada's quest for the 'origins of Indigenous rights'.<sup>73</sup> Consequently, this process centers Indigenous rights on what happened in the past rather than on the fact that Indigenous rights are inherent human rights.<sup>74</sup>

In summary, *R. v. Van der Peet* is important in the evolution of Indigenous rights because it created an extremely narrow interpretation of what Indigenous rights are.<sup>75</sup> The verdict of this case and the Supreme Court of Canada held that only those Indigenous practices, customs, and traditions that were "integral to the distinctive culture" of the particular Indigenous group before colonial contact were to be protected under constitutional law.<sup>76</sup> This narrow interpretation essentially places the weight of what Indigenous rights can be construed as in the past, forcing Indigenous lawyers, historians, and communities to search for evidence that their practices, customs, and traditions existed before they had any contact with European colonizers.<sup>77</sup> This interpretation is extremely hurtful to Indigenous communities because it essentially classifies Indigenous peoples, their communities, and societies as past-tensed, as no longer existing, even though Indigenous peoples, their societies, cultures, and traditions still very much exist today. Furthermore, due to this past-tensed classification, Indigenous peoples have not been able to easily gain their rights to self-government and self-determination.<sup>78</sup>

### **Conclusion: The Fight for Indigenous Peoples Rights Continues**

Through the analysis of these landmark cases, one can clearly see that the Canadian colonial state has never fully acknowledged nor fully respected the rights of Indigenous peoples.

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<sup>73</sup> Borrows, "Challenging Historical Frameworks."

<sup>74</sup> *ibid.*

<sup>75</sup> *R. v. Van der Peet*, [1996] 2 SCR 507; Borrows, "Challenging Historical Frameworks"; McEvoy, "Aboriginal Activities and Aboriginal Rights: A Comment on *R. v. Sappier*; *R. v. Gray*."

<sup>76</sup> Borrows, "Challenging Historical Frameworks," 120; *R. v. Van der Peet*, [1996] 2 SCR 507.

<sup>77</sup> Borrows, "Challenging Historical Frameworks."

<sup>78</sup> *ibid.*

The Canadian colonial state has taken every possible step imaginable to ensure that Indigenous peoples do not have any constitutional protected rights unless they are required to do so by another body, such as when the United Nation’s Committee on Human Rights ruled in favour of Lovelace in *Lovelace v. Ontario (1977)* and forced Canada to pass Bill C-31 in response.<sup>79</sup> Another example of when this happened would include the combined cases of *Lavell v. Attorney General of Canada (1973)* and *R. v. Bédard (1971)* where Lavell and Bédard challenged section 12(1)(b) of the *Indian Act* because of its sexist nature and the Supreme Court of Canada ruled against both women.<sup>80</sup> Yet another example would include *R. v. Van der Peet (1996)* where the Supreme Court of Canada ruled against the appellant and created an extremely narrow interpretation of Indigenous rights that essentially classified Indigenous peoples as part of a society of the past, as no longer a modern-day, distinct group of peoples.<sup>81</sup>

Over the past century, there have been very few cases where the Courts ruled in favour of Indigenous peoples and their rights. A handful of these cases include *Connolly v. Woolrich (1867)* where the Court recognized the validity of Cree customary law when it came to the marriage of William Connolly and Suzanne.<sup>82</sup> Another example would include *Guerin v. The Queen (1984)* and *R. v. Sparrow (1990)* where the Court established Indigenous rights as *sui generis* in *Guerin* and subsequently made the understanding of *sui generis* more flexible and further cemented it in Canadian law in *Sparrow*.<sup>83</sup>

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<sup>79</sup> *Lovelace v. Ontario*, [2000] 1 SCR 37; Kubik, Bourassa, and Hampton, “Stolen Sisters, Second Class Citizens, Poor Health.”

<sup>80</sup> *Attorney General of Canada v. Lavell*, [1974] SCR 1349; Skelly, “Bedard Case”; Kubik, Bourassa, and Hampton, “Stolen Sisters, Second Class Citizens, Poor Health.”

<sup>81</sup> *R. v. Van der Peet*, [1996] 2 SCR 507; Borrows, “Challenging Historical Frameworks.”

<sup>82</sup> Macdougall, “EAS 3102-A Week 6.1 Lecture”; Walters, “The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150.”

<sup>83</sup> *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow*, [1990] 1 SCR 1075; Borrows and Rotman, “The Sui Generis Nature of Aboriginal Rights”; Borrows, “Challenging Historical Frameworks.”



This back-and-forth decision-making in landmark cases about entrenching and protecting Indigenous rights clearly demonstrates that the Canadian colonial state does not truly care about Indigenous rights and that their only goal is to assimilate the Indigenous peoples of Canada into the dominant Euro-Canadian society. From the analysis of the landmark court cases, one can see that the Canadian colonial state only took action to cement and protect Indigenous rights when another body forced them to do so or when there was no way around it. And even then, the Canadian colonial state would go back on their words and actions in the next case and rule against protecting those very rights that they'd just 'established'. In conclusion, although Canada and Indigenous peoples have come a long way in the past century to entrenching Indigenous rights in the Canadian Constitution, racism towards Indigenous peoples is still very much alive today and one can clearly see it in the government's continued attempts to assimilate Indigenous peoples into dominant Euro-Canadian society. There is still much more work that needs to be done in regard to Indigenous rights, and it will require everyone from all sides to come together and to finally accept the fact that Indigenous rights are inherently human rights.

## Works Cited

- Asch, Michael, and Patrick Macklem. "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*." *Alberta Law Review* XXIX, no. 2 (1991): 498–498. <https://doi.org/10.29173/alr1571>.
- Attorney General of Canada v. Lavell, [1974] SCR 1349 (Supreme Court of Canada 1973).
- Barrera, Jorge. "RCMP Arrest 14, Clear Road on Wet'suwet'en Territory in Ongoing Dispute over Land Rights, Pipeline." *CBC*, November 18, 2021. <https://www.cbc.ca/news/canada/british-columbia/rcmp-wet-suwet-en-pipeline-resistance-1.6254245>.
- Borrows, John. "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism." *Canadian Historical Review* 98, no. 1 (March 2017): 114–35. <https://doi.org/10.3138/chr.98.1.Borrows>.
- Borrows, John, and Leonard Ian Rotman. "Chapter 2: Aboriginal Rights." In *Aboriginal Legal Issues : Cases, Materials & Commentary*, Fifth., 1125. Toronto, Canada: LexisNexis Canada, 2018.
- . "The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?" *Alberta Law Review* 36, no. 1 (December 1, 1997): 9–45. <https://doi.org/10.29173/alr1018>.
- Department of Indian and Northern Affairs. Indian Acts and Amendments, 1868-1975. Accessed October 6, 2021. [https://publications.gc.ca/collections/collection\\_2017/aanc-inac/R5-158-2-1978-eng.pdf](https://publications.gc.ca/collections/collection_2017/aanc-inac/R5-158-2-1978-eng.pdf).
- Federal Government of Canada. "Part I Canadian Charter of Rights and Freedoms." Government of Canada: Justice Laws Website, August 7, 2020. <https://laws-lois.justice.gc.ca/eng/const/page-12.html>.
- Frideres, James S., René R. Gadacz, and James Frideres. *Aboriginal Peoples in Canada: Contemporary Conflicts*. 7th ed. Toronto: Pearson Education Canada, 2005.
- Gormley, Daniel J. "Aboriginal Rights as Natural Rights." *The Canadian Journal of Native Studies* IV, no. 1 (1984): 29–49.
- Guerin v. The Queen, [1984] 2 SCR 335 (Supreme Court of Canada 1984).
- Henderson, William B., and Catherine Bell. "Rights of Indigenous Peoples in Canada." *The Canadian Encyclopedia*, February 7, 2006. <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-rights>.
- Kubik, Wendee, Carrie Bourassa, and Mary Hampton. "Stolen Sisters, Second Class Citizens, Poor Health: The Legacy of Colonization in Canada." *Humanity & Society* 33, no. 1–2 (February 1, 2009): 18–34. <https://doi.org/10.1177/016059760903300103>.
- Lovelace v. Ontario, [2000] 1 SCR 37 (Supreme Court of Canada 2000).
- Macdougall, Brenda. "EAS 3102-A Week 6.1 Lecture." University of Ottawa Lecture, October 12, 2021.
- McEvoy, John P. "Aboriginal Activities and Aboriginal Rights: A Comment on *R. v. Sappier*; *R. v. Gray*." *Indigenous Law Journal* 6, no. 2 (2007): 29.
- McIvor, Sharon D. "Aboriginal Women's Rights as 'Existing Rights' (Canada)." *Canadian Woman Studies* 15, no. 2/3 (1995): 34–38.
- Native Women's Association of Canada. "Bill C-31 Amendment Literature Review," n.d. Accessed November 27, 2021.
- R. v. Sparrow*, [1990] 1 SCR 1075 (Supreme Court of Canada 1990).
- R. v. Van der Peet*, [1996] 2 SCR 507 (Supreme Court of Canada 1996).

- Satzewich, Vic, and Terry Wotherspoon. *First Nations; Race, Class and Gender Relations*. Scarborough, ON: Nelson Canada, 1993.
- Simmons, Matt. "Land Defenders Arrested on Wet'suwet'en Territory as RCMP Enforces Coastal GasLink Injunction." *The Narwhal*, November 18, 2021. <https://thenarwhal.ca/rcmp-arrests-wetsuweten-coastal-gaslink/>.
- . "Why Tensions Are Escalating on Wet'suwet'en Territory over the Coastal GasLink Pipeline." *The Narwhal*, October 14, 2021. <https://thenarwhal.ca/wetsuweten-coastal-gaslink-explainer/>.
- Skelly, Julia. "Bedard Case." The Canadian Encyclopedia, February 20, 2020. <https://www.thecanadianencyclopedia.ca/en/article/bedard-case>.
- The Canadian Press. "Timeline of Wet'suwet'en Solidarity Protests and the Dispute That Sparked Them." *Global News*, February 7, 2020. <https://globalnews.ca/news/6560125/timeline-wetsuweten-pipeline-protests/>.
- Walters, Mark D. "The Judicial Recognition of Indigenous Legal Traditions: Connolly v Woolrich at 150." *Review of Constitutional Studies* 22, no. 3 (2017): 32.