

R. v. Van der Peet, [1996] 2 SCR 507 – definition of

Indigenous rights

Facts:

Dorothy Van der Peet, a member of the Sto:lo Nation in British Columbia, sold 10 salmon for \$50. The salmon had been caught by her common law partner under an Indian food fish license. Van der Peet was charged for violating section 27(5) of the *British Columbia Fishery (General) Regulations*.

At trial, Van der Peet claimed she had an Indigenous right to sell fish under section 35(1) of *The Constitution Act, 1982*. The provincial court judge heard evidence from members of the Sto:lo, as well as anthropological experts, and decided that the Sto:lo had historically fished for sustenance and ceremonial purposes, but only traded salmon occasionally and incidentally. The Sto:lo did not have a way to preserve fish long-term, and did not trade or sell fish as a commodity. The judge therefore found that the Sto:lo's right to fish did not include the ability to sell the fish they had caught.

On appeal, the Supreme Court of British Columbia reversed the decision, saying that the Sto:lo did have the right to sell fish under section 35(1). Since the Sto:lo had no historical prohibition against selling fish, once a fish was caught a Sto:lo person could have done whatever they wished with it, including selling it. Therefore, that right should continue.

The B.C. Court of Appeal restored the provincial court's decision, in a 3-2 ruling. This court found that a practice is protected as an Indigenous right under section 35(1) if it was integral to the Indigenous society at the time Canadian sovereignty was asserted. However, the practice in question must have arisen out of the Indigenous society itself, not out of European influence. Therefore, even though there was evidence that the Sto:lo had traded fish commercially with the Hudson's Bay Company before English sovereignty in the region in 1846, this trade was different in nature than traditional Sto:lo activities.

However, two justices of the Court of Appeal dissented. Justice Lambert felt that practices should be viewed in the context of their significance to the culture. If the Sto:lo had historically fished to provide themselves with a moderate livelihood, then he felt that is the right that section 35(1) should protect. He therefore would have ruled that the right to sell fish was protected under 35(1). The other dissenting justice, Justice Hutcheon, felt that since there was evidence the Sto:lo were trading fish commercially before sovereignty, the right to sell fish should be protected under 35(1).

The Decision:

The Supreme Court dismissed the appeal, affirmed the Court of Appeal's decision, and restored Van der Peet's conviction.

Discussion Questions:

- 1) Each level of court in this case thought about Indigenous rights in different ways. Which ruling do you find most persuasive?
- 2) Some scholars have remarked that the Supreme Court's decision freezes Indigenous rights at a distant point in the past, and does not take into account what is important to Indigenous culture and ways of life today. Do you agree or disagree? Why?

Relevant Law:

The Constitution Act, 1982, section 35(1)

British Columbia Fishery (General) Regulations, section 27(5) (**now repealed**)

Resources:

You can read the entire case at:

<https://canlii.ca/t/1fr8r>

You can read *The Constitution Act, 1982* at:

<https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-39>

The law of Indigenous rights is not English, nor is it Indigenous. It comes from the longstanding practices that linked the two societies, whose ideas about the law and justice were very different. Since the purpose of 35(1) is to affirm the rights of Indigenous peoples, any doubt or ambiguity about what section 35(1) encompasses must be resolved in favour of Indigenous peoples.

When identifying an Indigenous right under 35(1), the test must look at whether a practice or tradition was integral to the distinctive culture of the Indigenous group in question before they had contact with Europeans. The Court set out ten factors to consider when making this decision:

- 1) **The perspective of Indigenous peoples themselves.** How does the person or group claiming the right feel about the practice?
- 2) **The precise nature of the claim.** The court must understand what is actually being claimed as an Indigenous right. Looking at the significance of the practice to the culture is important, but the significance on the culture cannot be used to identify the practice itself.
- 3) **The practice, custom, or tradition must be of central significance to the society in question.** The practice must be something that made the society what it was, not just something they did occasionally.
- 4) **Indigenous rights must have continuity to practices that existed before European contact.** The practice must have existed before Europeans arrived in North America (not before sovereignty was declared, as the B.C. Court of Appeal said). Practices can evolve over time, but there must be a link from the current practice to the pre-contact practice. There does not need to be an unbroken chain of the practice stretching all the way back, but there does need to be a connection.
- 5) **Courts must take evidentiary problems into account.** Indigenous societies did not always keep written records of their practices and traditions, so judges must keep this in mind when making their decisions and not undervalue other forms of evidence (for example, an oral history given by an elder).
- 6) **Claims must be specific, not general.** Just because one Indigenous group has a particular right, this does not mean all Indigenous groups have that same right. Different Indigenous societies lived in different ways before European contact, and each group has rights specific to that group.
- 7) **The practice must be of independent significance to the group.** The practice itself must be something that is central to the group's identity, and not just an incidental practice that happened alongside a more important practice.
- 8) **The practice must be distinctive.** The practice must be a key part of what makes the society what it is. It does not need to be a totally unique practice that no other society takes part in, but it does need to be a characteristic part of the culture.
- 9) **European influence is only relevant if the practice is integral to the Indigenous society because of that influence.** If an existing

practice adapted because of European influence, that does not have an effect on whether it is an Indigenous right. However, if the practice only began because of European influence, it cannot be an Indigenous right under section 35(1).

10) The relationship of Indigenous peoples to the land and their cultures. Indigenous title to land is a sub-category of Indigenous rights. Courts must look at both the Indigenous group's relationship to the land and the practices, customs, and traditions arising from their society.

The Court felt that the right in question was a simple right to exchange fish for money or goods. The low number of fish sold, and the lack of evidence that this was ongoing behaviour, meant that it was not an issue of fishing on a "commercial basis". Van der Peet had claimed her right as catching sufficient fish "to provide for a moderate livelihood", but the Court felt that this would be identifying the practice by its significance rather than identifying it by its nature. The Court also found that there was not strong enough evidence to show that the practice of Sto:lo exchanging fish for money or goods was integral to their society's ability to make a moderate living.

Furthermore, the Court felt that the trade between the Sto:lo and the Hudson's Bay Company was different than the type of trade the Sto:lo took part in pre-contact. This type of trade arose only because of Europeans' presence.

Since there was not enough evidence to show that the Sto:lo had exchanged fish as an integral part of their pre-contact society, the Supreme Court of Canada agreed with the Court of Appeal's decision and restored Van der Peet's conviction.

Relevant Law:

The Constitution Act, 1982

35 (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

British Columbia Fishery (General) Regulations, SOR/84-248 (**repealed**)

27 (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.