Aboriginal Law and Legislation

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International Court of Justice Web Site
Statute of the International Court of Justice
World Court Digest (since 1986)
International Court of Justice Decisions (since 1996)

Multilateral Conventions at the Fletcher School (Tufts)

International Treaties Links
Draft Declaration on Human Rights and the Environment (1994) United Nations Scholars' Workstation

***Sublimus Dei* (1537)**
Bartolomé Las Casas
Cohen: The Spanish Origins of Indian Rights
ILO Convention on Indigenous and Tribal Peoples
UN Working Paper: Indigenous Land Rights
Draft Declaration on Rights of Indigenous Peoples (1994)
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CANADA

Legislation

Constitutional Enactments:

Charter of the Hudson's Bay Company (1670)
Treaty of Paris (1763)
The Royal Proclamation of 1763
The Quebec Act, 1774
Constitutional Act, 1791 (Quebec becomes Upper and Lower Canada)
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Federal Legislation:

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Canadian Court Decisions

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Union of NB Indians v. New Brunswick (June 18, 1998)

The issue in this case is provincial sales tax on purchases made by Indians off-reserve for use or consumption on-reserve. New Brunswick's *Social Services and Education Tax Act* exempted such sales until 1993, when the relevant provision was repealed. This challenge was brought as a test case and a majority of the Court upheld the tax.

The majority held that the purpose of section 87 of the *Indian Act* is to protect the property of Indians on reserves and prevent that property from being eroded. It applies only to property physically located on a reserve at the time of taxation or property whose paramount location is on a reserve at the time of taxation. The test for retail sales taxes is the "point of sale" test, not the "paramount location" test. Notwithstanding the statutory references to "consumers" and "consumption", it is the act of purchase that triggers liability for the tax. As the point of sale was off-reserve, the tax was validly imposed on the Indian purchasers.

Mr. Justice Binnie, in what I believe to be his first dissent on the Court, noted the match between the wording of the taxing statute -- "a tax in respect of the consumption of such goods" by a "consumer" who is a person who "utilizes or intends to utilize goods within the Province" -- and section 87 of the *Indian Act* which provides that no Indian or Band is subject to taxation in respect

of the "use of any property" situated on a reserve. The schemes of both enactments led him to the conclusion that personal property purchased by an Indian for consumption on reserve is tax exempt. He also noted the irony that neither social services nor education for Indians on reserve are funded by the province.

This decision has implications in every province which levies a sales tax including, for example, Ontario which presently has a statutory exemption from sales tax for goods and services to be consumed on reserve. On this authority, any such province could repeal such provisions and cast a broader tax net over Indians.

The majority also noted initiatives like the Cowichan tribes' to collect tobacco taxes on reserve notwithstanding section 87 of the *Indian Act*. That initiative in 1997, and a second by Kamloops in 1998, were implemented through appropriation bills and not by amendments to the Act. The majority of the Court said these initiatives were intended "to fill the tax void created by s. 87 and raise revenue for the community". They would, however, be frustrated if s. 87 could be used to purchase tobacco, for example, tax free off the reserve. This argument, while certainly supportive of new ways to tax Indians, ignores the possibility of tax differentials which would still make on-reserve purchases attractive.

Delgamuukw v. British Columbia (Dec. 11, 1997)

This decision, certainly the most important Aboriginal rights case since *Sparrow*, defies any brief annotation (another summary is online at LEXPERT). The Court's most important findings relate to the nature of unextinguished Aboriginal title in British Columbia and the means by which such title can be proven, including the degree of respect to be accorded to oral history and tradition. What this Aboriginal title means in practice and what the Court means as it develops its theory of reconciliation are subtle points not easily reconciled from the extensive reasons for decision. A sense of this is perhaps best developed from the headnote which precedes the actual reasons.

The case itself involved one of the longest civil trials in Canadian history, resulting in a trial decision which defeated the Git'Ksan/Wet'su'weton claim to Aboriginal title and jurisdiction in their traditional lands. The trial decision was much criticized for its approach to Aboriginal history, oral tradition and Aboriginal rights and title (see comment). After the case proceeded over the course of 7 years through the BC Court of Appeal to the Supreme Court of Canada, the actual decision of the Court is that there must be a new trial. The Court, however, emphatically encouraged the parties to reach a negotiated rather than a litigated settlement. This leaves open the question of whether the Court was intending to be at all definitive in its legal determinations on Aboriginal title or whether the Court was reminding all concerned that, as it said in *Sparrow*, section 35(1) "provides a solid consititutional base upon which subsequent negotiations can take place".

This decision has far-reaching and profound effects, not the least of them being an extensive re-thinking of options and strategies by First Nations and by governments for the BC Treaty Process and litigation alternatives. While that occurs, the short-term effect of this decision has been to put the whole process apparently on hold. It remains to be seen what the long-term effects will be.

St-Mary's Indian Band v. Cranbrook (June 22, 1997)

This case arose out of the 1988 amendments to the *Indian Act* which created a distinction between

absolute surrenders for sale of reserve land and designations for leasing purposes. The former version of the Act stated only that a surrender of any interest or for any purpose "may be absolute or qualified, conditional or unconditional". The 1988 "Kamloops" amendments deemed anything other than an absolute surrender for sale to be a designation. They also made designated lands potentially subject to taxation by Bands.

In 1966 the Band surrendered part of its reserve for full market value to the Federal Crown for use as a municipal airport and subject to the stipulation that it would revert to the band if it ceased to be used for public purposes. Arguing that the stipulation made the original surrender less than absolute, and therefore a designation, the Band levied a tax to be paid by the municipality of Cranbrook which now operates the airport. Cranbrook refused to pay.

On its face, the transaction looks like a transfer of all interests defeasible on the occurrence of a condition subsequent. The Court, however, rejected such common law notions as inconsistent with the *sui generis* nature of Indian title. Whatever that might mean, the Court added to its growing line of authority for the proposition that if an Indian intention to alienate can be discerned, the Indian interest is gone regardless of formalities: see in this vein *Bear Island*, *Howard* and *Apsassin* (all noted below). The Court found the requisite intent. First, the band surrendered the land for sale. Second, the band entered into negotiations with full understanding that the impugned lands were to be sold for use as an airport. Third, the Crown paid the full market value of the land. The mere fact that the Band included a rider in its surrender did not necessarily mean that the surrender was other than absolute. "Absolute" and "conditional" are not mutually exclusive terms -- either conceptually or under the scheme of the *Indian Act*. Since the land was not designated land, the Band could not tax it.

Opetchesaht Indian Band v. Canada (May 22, 1997)

The issue in this case was a "permit" for a hydro line across the appellants' reserve "for such period of time as the . . . right-of-way is required for the purpose of" a transmission line. Under the scheme of the *Indian Act*, the Minister can grant a permit for one year or, with the consent of Council for "any longer period". Council had consented to the permit in 1959. The Band now argued that such a permit could not be used to grant rights for an indeterminable period. The majority of the Court held that the permit granted neither exclusive rights nor rights in perpetuity. The end point of the permit was not a calendar date but arises when the easement is no longer required for power transmission. Because the duration of the easement is bounded by an ascertainable event, that duration is a period. There was no permanent disposition of any Indian interest.

Two dissenting justices held that the easement was granted for an indeterminate period and has the potential to continue in perpetuity. Consistent with the other provisions of the Act, and the The Royal Proclamation of 1763, an interest in reserve land which possesses the potential to continue in perpetuity can only be authorized by an absolute surrender or by expropriation under s. 35 of the Act.

The Court was aware that the Minister had granted a large number of permits of the same type. While the majority said it was affording respect for the autonomy of Council in making its decision to consent, it is reasonable to consider a permit as authorizing the least intrusive use of reserve land for a relatively short period, however ascertained. Leases, with or without the consent of the Band, are clearly intended to grant greater rights if not necessarily for a longer time. An alienation intended to be, or capable of being permanent must fall at the other end of the *Indian Act* hierarchy:

see ss. 28, 58, and 37-41. The Court did not discuss the mysteries of Perpetuities in its analysis of this case.

R. v. Adams (Oct. 3, 1996)

R. v. Côté (Oct. 3, 1996)

These companion decisions deal with aboriginal fishing rights in Quebec. In its reasons, the Court develops the concept of site-specific rights -- less than aboriginal title -- but still protected in their exercise by section 35(1) of the *Constitution Act, 1982*.

In *R. v. Adams*, the fisher was a Mohawk from Akwesasne fishing for food, but without a licence, in Lake St. Francis. He was charged and claimed constitutional protection. The Court found an existing, aboriginal, site-specific right to fish where he did for food purposes. Such a right met the *Van der Peet* test (see below) and did not require express recognition from either the French or British regimes. The purpose of section 35 is to protect practices, customs and traditions central to the distinctive culture of Aboriginal societies prior to contact with Europeans. Regulatory limits on the exercise of rights must be informed by the same principles that underlie constitutional entrenchment. The fishery regulations were invalid because they subjected the exercise of the right to Ministerial discretion without express guidelines for the exercise of such discretion. Furthermore, they failed to make provision for a priority allocation for the Aboriginal food fishery and could not be justified. Appeal from conviction allowed.

In *R. v. Côté*, three Algonquins from Maniwaki were convicted of entering the Desert Lake "zone d'exploitation controlée (ZEC) without paying a fee and one of them convicted for fishing without a licence. The Court found an existing right to fish and, as in *R. v. Adams*, struck down the fishing charge. The Court held, however, that the fee for entering the ZEC did not infringe the appellants' right to fish for food. The fee, rather than constituting a revenue-generating tax for the provincial government or the Z.E.C. administration, represented a form of user fee dedicated to the upkeep of the facilities and roads. By improving the means of transportation within the zone, the fee effectively facilitates rather than restricts the constitutional rights of the appellants. The charges for failing to pay the fee were upheld.

R. v. Pamajewon (Aug. 22, 1996)

The Shawanaga First Nation and the Eagle Lake First Nation both passed by-laws dealing with lotteries. Neither by-law was passed pursuant to s. 81 of the *Indian Act* and neither First Nation had a provincial licence authorizing gambling operations. The Shawanaga First Nation asserted an inherent right to self-government and the Eagle Lake First Nation asserted the right to be self regulating in its economic activities. Essentially, they asserted that that s. 35(1) of the *Constitution Act, 1982* recognizes and affirms their rights to participate in, and to regulate, gambling activities on their respective reserve lands.

This was the first case in which the Court was asked to assess a stand-alone claim to self-government rights and it became clear that gaming may not have been the most propitious choice. The appeal was dismissed from the bench and these reasons delivered later. The Court held that Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. As the evidence did not demonstrate that gambling, or that

the regulation of gambling, was an integral part of the distinctive cultures of the Shawanaga or Eagle Lake First Nations at the time of contact. The activity was therefore not protected by s. 35(1) and the trial convictions were upheld.

R. v. Van der Peet (Aug. 21, 1996)

R. v. Gladstone (Aug. 21, 1996)

R. v. N.T.C. Smokehouse Ltd. (Aug. 21, 1996)

The annotations for this trilogy of BC fishing cases are being updated.

Lewis v. The Queen (April 25, 1996)

Three members of the Squamish Indian Band were convicted for violations of the *British Columbia Fishery (General) Regulations* for net fishing on the Squamish River alongside their reserve. All claimed authorization by Band By-law to fish "upon Squamish Indian Band waters", defined as "water situate upon or within the boundaries of Reserves". The issue was whether the fishery or the river formed part of the reserve. The Court held that the fishery itself is not part of the reserve although it was originally set apart as a fishing station. There was no grant of an exclusive fishery. Assuming without deciding that the *ad medium filum aquae* presumption (that ownership of land abutting a watercourse extends to the middle of the stream) applies to Indian reserves, in western Canada at least it does not apply to navigable rivers. Since the Squamish River is navigable, the presumption cannot apply. The definition of "Band waters" in the By-Law, and the intention of section 81 of the *Indian Act* under which it was made, led to the conclusion that such a fishing by-law can have no extra-territorial effect. The appeals were dismissed.

Nikal v. The Queen (April 25, 1996)

The appellant was a Wet'suwet'en Indian living on reserve at Moricetown. He was charged with fishing without a licence while gaffing salmon on the Bulkley River which flows through the reserve. For the reasons set out in *Lewis*, above, the river was held not to form part of the reserve. At issue was his constitutional right to fish for food and whether the licencing requirement was an invidious intrustion upon the exercise of that right. The Court held that a licence may in fact be the least intrusive way of establishing the existence of an individual's aboriginal right as well as preventing non-aboriginals from exercising aboriginal rights. A licence by itself is nothing more than a form of identification. Conditions of the licence can, however, infringe the right and must be justified by the Crown as prescribed in *Sparrow* (see note below). The infringing conditions on the applicable licence in this case included notations providing that fishing time was subject to change by public notice, that Indian food fishing outside set dates must be separately licensed and a restriction to fishing salmon for the fisher and his or her family only. The holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of the right. The government adduced no evidence to justify the conditions of the licence and did not meet the onus to do so. As the applicable licence was considered non-severable from its conditions, the appeal from conviction was allowed.

Badger v. The Queen (April 4, 1996)

Three treaty Indians in the Treaty 8 area of Alberta were charged with violations of the provincial

Wildlife Act while hunting for food. One was hunting on scrub land near a run-down, but occupied house; one was hunting in a snow-covered field that had been harvested earlier in the year; one was hunting over uncleared muskeg. The constitutional question raised in the context of the *Natural Resources Transfer Agreement (Constitution Act, 1930)* was whether, under Treaty No. 8, Indians have a right of access to hunt for food on privately owned land. The Court applied the concept of visible land use incompatible with hunting and, on this basis, upheld the first two convictions but directed a new trial on the third. The third charge was hunting without a licence. The Court said that the public safety requirements for gun safety courses and hunter competency tests did not infringe upon the treaty right, but that the conditions of the licence relating to hunting method, hunting areas, seasons and limits were a *prima facie* infringement. *Sparrow* principles apply. The Crown had led no evidence to justify these conditions at trial and a new trial was ordered.

Blueberry River Indian Band v. The Queen (Dec. 14, 1995) ("Apsassin Case")

Land claim alleging improper surrender of three reserves during WW II for soldier settlement and loss of mineral rights for no consideration. The action was foreclosed in the lower courts by a 30-year limitation period, which was challenged. Issues also included whether the surrender was proper and whether it included mineral rights previously surrendered for leasing purposes. The majority decision determined that the intent was to surrender all rights and effect was given to that intention despite defects of process (dissenting minority would not have included mineral rights in the surrender). When the inadvertent loss of these rights -- by transfer to Veterans Affairs -- was discovered in 1949, the Minister of Indian Affairs should have cancelled that part of the sale and recovered them. By that time approximately 80% of the lands had been granted to veterans and those grants included mineral rights. Calculating from the later date of discovery, the action was brought within the 30-year limitation period, which otherwise applied. The practical result is a valid claim to the mineral rights the Minister could have recovered to 20% of the lands in 1949.

The fiduciary standard the Crown had to meet was that of an ordinary person exercising prudence in the management of his or her own affairs with a reasonable result for the beneficiary bands. This is an important decision because of the application of limitation periods to an Indian claim against the Crown and because of the relatively low standard of fiduciary duty prescribed by the Court.

(Note: A negotiated resolution of this claim was reached in 1998)

Canadian Pacific Ltd. v. Matsqui Indian Band (Jan. 26, 1995) (176K)

Several First Nations, acting on their taxation by-laws, assessed the respondents' rights of way through their reserves. CP moved for judicial review of the First Nations' internal appeal procedures and challenged First Nations jurisdiction on the basis fee simple interest ownership of the assessed lands. Judicial review was refused by the Federal Court judge due to the alternative appropriate procedure of the internal appeal. The Court upheld this exercise of discretion with comments about general principles of institutional bias and institutional independence in split reasons. This decision is an important reference for First Nations establishing their own tribunals for any purpose.

Native Women's Association v. Canada (October 27, 1994) (96K)

Whether the federal government was required to fund the participation of NWAC in the Charlottetown Accord constitutional discussions and invite them as Aboriginal representatives to

the negotiating table. The Court held that, on the facts in this case and the lack of an evidentiary basis for the alleged discrimination, there was no requirement based on the *Canadian Charter of Rights and Freedoms* to do so.

R. v. Howard (May 12, 1994) (18K)

This is the only case where Indians have been held to have voluntarily and completely surrendered their hunting, fishing and trapping rights. The Court ruled that by the 1923 Williams Treaty the Hiawatha First Nation gave up hunting and fishing rights reserved to them under an 1818 Treaty with the Crown. These rights, under the earlier Treaty, had not been acknowledged in law until the decision of the Ontario Court of Appeal in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, a much cited case on the honour of the Crown. *Howard* tested the effect of the later Treaty, an argument the Crown had abandoned before the Court of Appeal in *Taylor and Williams*. The burden was on the Crown to prove extinguishment of Treaty rights, and while there were several irregularities in the 1923 process, the Court said that the burden of proof was met. Favourable rules of treaty interpretation were held not to apply to these "modernized" and "urban" Indians, who lived on a rural reserve in 1923 and had the treaty translated to them.

While the Court held the federal government to be constitutionally responsible for Indian treaties, federal fisheries regulations are enforced in Ontario by the province. The government of Canada did not intervene in this case at any level on the meaning and construction to be given to the 1923 Treaty. As of the date of this annotation, Canada has not intervened in an Indian Treaty harvesting case in the province of Ontario in more than 60 years.

(In 1997, an attempt to involve Canada in a rehearing of this appeal failed when Canada again refused to take part and the Court rejected the application)

Re Williams and The Queen (1992) (50K)

In this decision, now the leading case on taxation of Indians, the Supreme Court continues to narrow the broad and liberal approach to interpretation of treaties and statutes as set out in its earlier *Nowegijick* decision, [1983] 1 S.C.R. 29, already narrowed with respect to statutes in *Mitchell v. Peguis Indian Band*. While the unemployment insurance benefits in this case were held not to be taxable, the Court set out several "connecting factors" that will, in future, be applied to determine whether income is sufficiently connected to the reserve and to the purposes of sections 87, 89 and 90 of the *Indian Act* to be exempt from tax.

This case has profound implications for Indians who do not both live and work on a reserve. Individuals whose work takes them regularly off-reserve may be taxable for some portion of their income. Others who live off-reserve but whose work takes them regularly on reserve may be exempt for some portion of their income. "Connecting factors" seem to imply that less Indian income will be connected to the reserve and more Indian income will be taxable. Under the *Nowegijick* rule, an Indian had only to arrange for his or her pay cheque to originate from an employer's office on reserve and the full income would be exempt. Such arrangements may no longer be effective tax planning.

(Note: There are no statutory tax exemptions for Inuit or Métis equivalent to the *Indian Act* provisons reviewed in this case.)

Bear Island Foundation v. A.G. Ontario (August 15, 1991)

The longest civil trial in Ontario court history resulted in one of the shortest Supreme Court of Canada decisions. This was the case of the Teme Augama Anishnabay (Temagami Ojibway) who argued that they had an unextinguished aboriginal title to more than 2,000 square miles of northern Ontario. The trial judge found, not resoundingly, that they did have such an interest as of 1763 but that it was extinguished by the Robinson Huron Treaty in 1850. No one from Temagami signed the Treaty, but it was held that another prominent Indian had represented them and that the reserve he secured was intended for them. In any event, after Treaty annuities began to paid to them in the late 1880's, they were held to have adhered to the Treaty even though there was no written adhesion either. Ontario had surveyed lands on Lake Temagami for them early in this century, but these were never confirmed as reserve lands. In the 1960's a small island in the lake was set aside as a reserve. The Supreme Court upheld the factual findings at trial but briefly disagreed with some of the legal reasoning. The Court confirmed the unwritten adhesion to the Treaty and held that the claimants had a Treaty claim to unfulfilled Treaty obligations which the Crown, as a fiduciary, was bound to honour.

(Note: While the Court noted that negotiations were underway in 1991, as of the date of this annotation the Teme Augama claim has still not been settled)

Sparrow v. The Queen (1990) (99K)

The most important Aboriginal law decision of the decade, and the first time the Supreme Court considered the meaning of section 35 of the Constitution Act, 1982 which recognized and affirmed "the existing aboriginal and treaty rights of the Aboriginal peoples of Canada". Existing rights were not frozen in their pre-1982 state, but are simply those which have never been extinguished. Regulation of rights, without an express intent which will not be lightly implied, does not extinguish them.

The Court ruled that section 35 does not exempt Aboriginal peoples from government regulation -- in this case the restriction of an Aboriginal fishing right -- but government operates in the context of the historic fiduciary relationship between the Crown and Aboriginal peoples and bears the burden of justifying any regulation that limits the exercise of Aboriginal rights. Regulation of fishing rights may be justifiable for conservation or safety reasons, but must be justified within a scheme of management which makes a priority allocation for the exercise of Aboriginal rights. The Court does not directly address Treaty rights in this case, but the same principles have been held to apply: see, e.g. *Badger*, noted above.

Guerin v. The Queen (1984) (132K)

The leading case of the previous decade, ruling for the first time that the Crown was restricted in its dealings on behalf of Indians by its conduct and by enforceable fiduciary obligations. In this case, the Crown took a surrender of valuable reserve lands for leasing purposes, entered into a lease less favourable to the Band than the lease the Band had been willing to approve, and concealed the actual lease from them for nearly 15 years. The Crown was held liable for $10 million in damages. The issue in dealing with fiduciary duties is conduct, not contract. The actual wording of the formal documents in this case did not absolve the Crown, whose officials had created them; it was their conduct which was found to amount to "equitable fraud" and a breach of fiduciary obligation. The Court stopped short of finding that the Crown was a trustee for the Indians or their lands.

St. Catherine's Milling & Lumber Co. v. The Queen (1888) (28K)

This decision of the Judicial Committee of the Privy Council is the starting point for an understanding of the nature of Aboriginal title in Canada and the respective rights of the Crown federal and Crown provincial in natural resources. The ruling was that there is no inconsistency under the *Constitution Act, 1867* between Parliament's powers to legislate in respect of "Indians and Lands reserved for the Indians" (s. 91 (24)) and the beneficial interest of the Province to all rights and royalties (s. 109) whenever the estate of the Crown is freed of the Indian title. In this case, the Indian or Aboriginal title attached to lands reserved to them under the Royal Proclamation of 1763 but was ceded to the Crown by Treaty No. 3. Administration and control of those lands was thereafter under the authority of the Crown in right of Ontario. This decision created problems, still unresolved in some parts of Canada, in terms of establishing reserves pursuant to a treaty promise and dealing with them for the benefit of the Indians if they are later surrendered for sale: see, e.g. *Smith v. The Queen*, [1983] 1 S.C.R. 554.

UNITED STATES

Legislation

Constitution of the United States of America
Title 25 US Code: Indians
Native American Arts & Crafts Act, 1990
List of Major Indian Legislation
NAGPRA Documents and Regulations
Native American Free Exercise of Religion Bill (1993)
House of Rep. Library: Indians and Tribes
THOMAS: Legislative Information on the Net

Search Tribal Laws Database
FindLaw: American Indian Law
U.S. Indian Law
Selected Sources on Indian Law
Cohen: Original Indian Title
Constitution of the Iroquois Nations
Constitution of the Miccosukee Tribe
Constitution and By-Laws of the Seminole Tribe
California's Indian Act of 1850

US Court Decisions

Search US Supreme Court Decisions (1990-date)

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995)

Decided June 14, 1995 : | Headnote | Opinion | Other |

Absent clear congressional authorization, a State is without power to tax reservation lands and reservation Indians. If it is a tribe or tribal members inside Indian country who bear the tax burden, the tax cannot be enforced absent federal legislation permitting it. The motor fuels tax issue is determined by whether the tax rests on the Tribe as retailer, on the wholesaler who sells to the Tribe or the consumer who buys from the Tribe. The Court of Appeals' ruling that the fuels tax's legal incidence rests on the retailer is reasonable and the tax cannot be applied. On the income tax issue, Oklahoma may tax the income of tribal members who work for the Tribe but reside in the State outside Indian country.

Department of Taxation & Finance of New York v. Milhelm Attea & Bros., 114 S. Ct. 2028 (1994)

Decided June 13, 1994 : | Headnote | Opinion |

Enrolled tribal members purchasing cigarettes on Indian reservations are exempt from a New York cigarette tax, but non-Indians making such purchases are not.

Hagen v. Utah, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994)

Decided February 23, 1994 : | Headnote | Opinion | Dissent |

Petitioner, an Indian, was charged in state court with distribution of a controlled substance in the town of Myton, which lies within the original boundaries of the Uintah Indian Reservation on land that was opened to non-Indian settlement in 1905. Because the Uintah Reservation has been diminished by Congress, the town of Myton is not in Indian country and the Utah courts properly exercised criminal jurisdiction.

South Dakota v. Bourland, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993)

Decided June 14, 1993 : | Headnote | Opinion | Dissent |

Congress, in the Flood Control and Cheyenne River Acts, abrogated the Cheyenne River Sioux Tribe's rights under the Fort Laramie Treaty to regulate non-Indian hunting and fishing on lands taken by the United States for construction of the Oahe Dam and Reservoir.

Lincoln v. Vigil, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993)

Decided May 24, 1993 : | Headnote | Opinion |

The Indian Health Service receives yearly lump-sum appropriations from Congress, and had funded the Indian Children's Program, which provided clinical services to handicapped Indian children in the Southwest. In 1985, the Service announced that it was discontinuing direct clinical services under the Program in order to establish a nationwide treatment program. Respondents, Indian children eligible to receive services under the Program, filed this action alleging, inter alia, violation of the federal trust responsibility to Indians, and the Fifth Amendment's Due Process Clause. The Court held that it is a fundamental principle of appropriations law that where Congress merely appropriates lump-sum amounts without statutory restriction, a clear inference may be drawn that it does not intend to impose legally binding restrictions. As long as the agency allocates

the funds to meet permissible statutory objectives, courts may not intrude.

Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993)

Decided May 17, 1993 : | Headnote | Opinion |

The Sac and Fox Nation brought this action seeking a permanent injunction barring petitioner Oklahoma Tax Commission from, among other things, taxing the income of tribal members who work or reside within tribal jurisdiction, and imposing the State's motor vehicle excise tax and registration fees on tribal members who live and garage their cars principally on tribal land and register those cars with the Tribe. Absent explicit congressional direction to the contrary, it must be presumed that a State does not have jurisdiction to tax tribal members who live and work in Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.

Negonsott v. Samuels, 113 S. Ct. 1119, 122 L. Ed. 2d 457 (1993)

Decided February 24, 1993 : | Headnote | Opinion |

A member of the Kickapoo Tribe, and a resident of reservation, was convicted by state jury for shooting another Indian on the reservation. A lower court set aside the conviction on the ground of exclusive federal jurisdiction to prosecute under the Indian Major Crimes Act, 18 U. S. C. 1153. The Court restored the conviction, ruling that the Kansas Act explicitly confers jurisdiction on Kansas over all offenses involving Indians on Indian reservations. Congress has plenary authority to alter the otherwise exclusive nature of federal jurisdiction and has done so by that Act.

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)

Decided June 24, 1991 : | Headnote | Opinion | Dissent |

Several Alaska Native villages, brought suit seeking an order requiring payment to them of money allegedly owed under a state revenue-sharing statute. The Court ruled that the Eleventh Amendment bars suits by Indian tribes against States without their consent. The argument that traditional principles of sovereign immunity restrict suits only by individuals, and not by other sovereigns, was rejected.

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991)

Decided February 26, 1991 : | Headnote | Opinion | Concur |

For many years, the Tribe sold cigarettes at a convenience store that it owned and operated in Oklahoma on land held in trust for it by the Federal Government. It has never collected state cigarette tax on these sales. In 1987, the Oklahoma Tax Commission served the Tribe with an assessment letter, demanding that it pay taxes on cigarette sales occurring between 1982 and 1986. Under the doctrine of tribal sovereign immunity, a State may not tax sales of goods to tribesmen occurring on land held in trust for a federally recognized Indian tribe, but is free to collect taxes on such sales to nonmembers of the tribe. The Tribe did not waive its inherent sovereign immunity

from suit merely by seeking an injunction against the tax assessment.

U.S. v. Boyle (US Dist. Ct. (NM), 1991)

Opinion
The rights of adherents of the Native American Church to use peyote as part of their worship are upheld.

Fools Crow v. Gullet, 706 F.2d 856 (8th Circ. C.A., 1983)

Annotated Opinion

Plaintiff spiritual leaders of the Lakota and Tsistsistas Nations, brought suit for declaratory and injunctive relief and damages in relation to the state'sactions in developing and regulating public use of Bear Butte. This was said to violate the free exercise of religious rights under the first amendment, the American Indian Religious Freedoms Act, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The lower court found the plaintiffs' interests to be outweighed by compelling state interests in preserving the environment and the resource from further decay and erosion, protecting the health, safety, and welfare of park visitors, and improving public access to this unique site. On the ground that the court below had not erred in fact or law, the appeal was dismissed.

AUSTRALIA

Legislation

Native Title Act 1993
Commonwealth Legislation and Regulations
Australasian Legal Information Institute
Constitution of Australia

Mabo v. Queensland (No. 2; 1992) (590K)

Decided June, 1992 : Summary of Decision
In this leading case, the High Court of Australia held, for the first time, that the common law of Australia recognised the prior land rights of Australian Aboriginal people. This decision, (1992) 175 CLR 1, overturned the earlier decision in *Milirripum v Nabalco*, (1971) 17 FLR 141, that Aboriginal title to land had not survived British settlement of the continent.

The *Native Title Act 1993* was enacted to give effect to the principles of the *Mabo* decision. The act provides a regime for determining whether native title exists over particular areas of land or waters, for validating certain past acts of government and for regulating future acts which may affect Aboriginal rights in land. Claims for compensation are also provided for. The Act is administered by the **National Native Title Tribunal**, essentially a negotiating and mediating body whose

decisions are not binding. Provision is made in the Act for contested claims to be determined by the Federal Court.

The National Native Title Tribunal

Right to Negotiate Procedures (30k)
Singleton Determination (unopposed) (19k)
Clarkson Determination (unopposed) (38k)

Waanyi Decision (173k)

Original occupying tribe extinct by end of 19th century; present claimants successors by Aboriginal custom. Native title extinguished by Crown grant of pastoral lease in 1883.

Yass Determination (32k)

Discussion of *Mabo* principles and nature of occupation necessary to show native title. Actual determination made on basis of application deemed unopposed.

Other Court Decisions

Native Title Cases from UWA (no longer being updated)
Search Australian Cases (1950-date)

Western Australia v Commonwealth (1995) (233k)

If any communal, group or individual rights or interests of the nature referred to in the *Native Title Act 1993* existed in Western Australia at a time prior to European settlement in Western Australia, had such rights or interests come to an end by extinguishment or otherwise by the establishment of Western Australia as a colony, or by the time of the establishment of Western Australia as a self-governing colony or later? (Answer: No). Is the Act invalid? (Answer: The Act was constitutionally enacted; section 12 is invalid but wholly severable).

Mason v Tritton (Aug. 30, 1994) (112k)

Whether traditional and customary right to fish for abalone a defence to breach of regulation? Whether *Mabo* claim established? The accused did not give evidence. It was open to the magistrate to infer that he could not deny that his purpose of fishing and shucking abalone was outside his native title rights. It was not open to the Court of Appeal to reverse that finding in an appeal.

Walker v NSW (Aug. 16, 1994) (8k)

Plaintiff charged charged with an offence against the laws of New South Wales which allegedly occurred within the area of the Bandjalung nation of Aboriginal people. Plaintiff a member of the

Noonuccal nation. Statement of claim alleges that the common law is only valid in its application to Aboriginal people to the extent to which it has been accepted by them. Statement of claim struck out.

Coe v Commonwealth (Wiradjuri Claim; Aug. 17, 1993) (49k)

Statement of claim to Aboriginal title, sovereignty, etc. struck out. The annexation of the east coast of Australia by Captain Cook and the subsequent acts by which the whole of the Australian continent became part of the Dominions of the Crown were acts of state whose validity could not be challenged. The allegation that the Wiradjuri are a dependent domestic nation, entitled to self-government and full rights over their tribal lands, is another way of putting the sovereignty claim and has no basis in domestic law. Claims in respect of genocide, lack of legislative competence, fiduciary obligation and damages are insufficiently pleaded. Plaintiff given leave to file an amended statement of claim.

Pareroultja v Tickner (June 2, 1993) (60k)

The Aboriginal applicants claimed land which the government intended to recommend for grant to a Land Trust pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976*. They argued that such a grant would be an unlawful extinction, impairment, interference with or restriction upon their native title and stated several legal questions to the court, including the following: Would a grant of land under the Land Rights Act in trust for an Aboriginal tribe amount to an improper preference under the *Racial Discrimination Act 1975*? (Answer: No). Does the former statute create a situation where there is a difference of rights on the basis of race for purposes of the second statute? (Answer: No). Is such a grant unlawful without the consent of the holders of the native title? (Answer: No).

NEW ZEALAND

Waitangi Tribunal Reports
Maori Law Review
New Zealand Law Resources