

R. v. Sparrow [1990]

R v. Sparrow was a precedent-setting decision made by the Supreme Court of Canada that set out criteria to determine whether governmental infringement on [Aboriginal rights](#) was justifiable, providing that these rights were in existence at the time of the [Constitution Act, 1982](#). This criteria is known as the Sparrow Test.

History of the Sparrow Case

Musqueam have inhabited the Fraser River delta and neighbouring areas since time immemorial. As coastal peoples, the Musqueam have depended on this river and fishing for sustenance for generations. Following European settlement in the Lower Mainland, the Musqueam saw their rights to the land and its resources infringed upon as non-Aboriginal fishers took increasing control of the fishing industry. New regulations set up by the government introduced fishing licenses and restricted Aboriginal peoples to food fishing, -- fishing strictly for their own personal consumption. Despite these restrictions, the Musqueam continued to exercise what they deemed to be their inherent and unextinguished right to maintain their culture and ways of life, particularly in relation to fishing.

In 1984, Musqueam band member Ronald Sparrow was arrested for fishing with a net longer than was permitted by his food fishing license. His arrest and subsequent court case led to one of the most defining decisions by the Supreme Court of Canada regarding [Aboriginal rights](#). Musqueam community members recognized Sparrow's arrest as a threat to their collective rights, and to the rights of Aboriginal people across Canada. As such, the Musqueam band decided to defend to the charge against Sparrow. They outlined five main arguments:

That the Musqueam retained the right to fish on the territories they had inhabited and fished on for centuries;

That Musqueam's rights to the land and its resources had never been extinguished by treaty;

That [Section 35](#) of the 1982 Constitution Act reinforced Musqueam's right to fish;

That any infringement on Aboriginal fishing rights was invalid, as evidenced by Section 35, unless justified as being a necessary measure of conservation, and

That a restriction on net length infringed on Musqueam's fishing rights and was not justified by reason of conservation.¹

The case was first heard in the British Columbia (BC) Provincial Court, which found Sparrow guilty of violating the terms of his fishing license. This conviction was appealed to the BC County Court, which ruled in the same manner as the Provincial Court. Musqueam then appealed to the BC Court of Appeals and won their appeal. In 1988, the case was heard in the Supreme Court of Canada and in 1990, 6 years after Ronald Sparrow's arrest, the court ruled in favour of the Musqueam. The Supreme Court's decision ruled that, despite nearly a century of governmental regulations and restrictions on Musqueam's right to fish, their Aboriginal right to fish had not been extinguished. This decision was arrived upon by the Court's interpretation of the phrase "existing Aboriginal and treaty rights are hereby recognized and affirmed" in Section 35.

Section 35 had been added to the Constitution in 1982 to protect Aboriginal rights. However, those rights had yet to be explicitly defined. The Supreme Court of Canada ruled that Musqueam's Aboriginal right to fish had not been extinguished prior to the 1982 Constitution and that, as such, Mr. Sparrow had an existing right to fish at the time of his arrest. The Court also ruled that the words "recognized and affirmed," as they appear in Section 35, mean that the government cannot override or infringe upon these

rights without justification. This point essentially upheld the then-recent *R. v. Guerin* decision that the government has a fiduciary duty to First Nations.

Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

R. v. Sparrow, [1990] 1 S.C.R. 1075

The Sparrow Test

The Court's ruling resulted in what is known today as the Sparrow test, which sets out a list of criteria that determines whether a right is existing, and if so, how a government may be justified to infringe upon it.

The Sparrow test first seeks to define whether or not a right has been infringed upon. A government activity might infringe upon a right if it:

- Imposes undue hardship on the First Nation;
- Is considered by the court to be unreasonable;
- Prevents the right-holder from exercising that right.

The Sparrow test then outlines what might justify an infringement upon an Aboriginal right. An infringement might be justified if:

The infringement serves a valid legislative objective. The court suggested a valid legislative objective would be conservation of natural resources, in which First Nations interest would come second only to that;

There has been as little infringement as possible in order to effect the desired result;

- Fair compensation was provided, and,
- Aboriginal groups were consulted, or, at the least informed.

The Supreme Court also acknowledged that other considerations may be taken into account, depending on the circumstances of the infringement.

The Sparrow case has elicited mixed reactions amongst those concerned with Aboriginal rights. Although many recognize the Sparrow case as a significant victory for those interested in the affirmation of Aboriginal rights,² it also confirms that these rights are not absolute, and can be infringed upon providing the government can legally justify it. Further, the Court also did not outline what would qualify as adequate consultation or compensation regarding rights infringement. Outstanding questions regarding adequate consultation with First Nations would eventually be examined in the Supreme Court decisions *Taku River Tlingit (2004)* and *Haida Nation (2004)*.

By Tanisha Salomons & Erin Hanson

Recommended Resources

Supreme Court of Canada, *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<http://scc.lexum.org/en/1990/1990scr1-1075/1990scr1-1075.html>

Kulchyski, Peter. Ed. Sparrow, in *Unjust Relations: Aboriginal Rights in Canadian Courts*. Don Mills:

Oxford University Press, 1994. 212-237.

Musqueam Band, Sparrow (1990). <http://www.musqueam.bc.ca/Sparrow.html>

Endnotes

1 Musqueam. Sparrow (1990)." www.musqueam.bc.ca/Sparrow.html

2 Peter Kulchyski, Ed. *Unjust Relations: Aboriginal Rights in Canadian Courts*. Don Mills: Oxford University Press, 1994. 212.