

The Sparrow Test: Justifying Infringements of Aboriginal or Treaty Rights

[Section 35 Aboriginal and treaty rights](#)^[1] are not part of the *Charter of Rights and Freedoms*, so they are “not subject to [section] 1 of the nor to legislative override under [section] 33.”^[2] Section 1 of the *Charter* allows governments to [justifiably limit](#) a *Charter* right, and section 33 establishes the [notwithstanding clause](#), which allows governments to pass laws “notwithstanding” their impact on certain *Charter* rights.

Although neither section 1 nor section 33 may be invoked to override or diminish Aboriginal or treaty rights, Aboriginal and treaty rights are not absolute. Under certain circumstances, the Crown may limit or infringe Aboriginal or treaty rights. In *R v Sparrow*, the Supreme Court of Canada established a two-step test — the *Sparrow* test — for justifying an infringement of an Aboriginal right.^[3] The test is highly contextual,^[4] which means that the standard of justification varies with the facts of each case.^[5]

The *Sparrow* test comprises two steps:

1. The complainant must establish that the impugned law “[has the effect of interfering with an existing \[A\]boriginal right.](#)”^[6] Here, the courts ask a series of questions to understand the characteristics and scope of the right at stake, and in what manner the law might have infringed that right.^[7] The courts seek to determine whether “the purpose or effect” of the impugned law “unnecessarily infringes” the claimant’s ability to exercise their section 35 right.^[8] If so, the court will find a *prima facie* infringement of that right and the Crown will bear the burden of justifying that infringement.^[9]
2. The Crown must then [justify the infringement by showing that:](#)
 1. The law has a valid objective. Here, the Court held that valid objectives are “compelling and substantial.”^[10] For example, conservation and natural resource management, as well as public safety, are valid objectives. ^[11] However, the “public interest” is not sufficient because it is too vague and broad a concept to justify limiting a constitutional right.^[12]
 2. The limit is justified in light of the principle of the [honour of the Crown](#) and the Crown’s fiduciary duty to Aboriginal peoples.^[13]

This analysis attracts questions like whether the infringement is necessary to achieve the Crown's purpose,^[14] whether the law is minimally impairing on the protected right, whether fair compensation was made available for an expropriation of land, or whether the Aboriginal group was consulted with respect to the regulatory measures.^[15]

If a court finds that the infringement is justified, the law remains valid and applicable to that Aboriginal group. If not, the impugned law would be found to be contrary to section 35(1) of the *Constitution Act, 1982* and of no force and effect as it relates to the Aboriginal group whose rights were infringed.

The courts have applied the *Sparrow* test to justify infringing [Métis rights](#)^[16] and [treaty rights](#),^[17] and as the basis of the test for infringing Aboriginal title.^[18] In *R v Côté*, the Supreme Court of Canada confirmed that the *Sparrow* test applies equally to federal and provincial laws.^[19]

^[1] [Constitution Act, 1982](#), s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35(1).

^[2] See [R v Sparrow](#), 1990 CanLII 104 (SCC) at 1106 .

^[3] *Ibid*.

^[4] See eg [R v Gladstone](#), 1996 CanLII 160 (SCC) at paras 57-68 .

^[5] *Sparrow*, *supra* note 2 at 1110-11.

^[6] *Ibid* at 1111 (emphasis added).

^[7] *Ibid* at 1111-12.

^[8] *Ibid* at 1112.

^[9] *Ibid* at 1112-13. See also *Gladstone*, *supra* note 4 at para 43.

^[10] *Sparrow*, *supra* note 2 at 1113.

^[11] *Ibid*. See also *Gladstone*, *supra* note 4 at para 72. The Court clarifies that objectives which are "compelling and substantial" are "those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or ... at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown" (para 72). The pursuit of economic and regional fairness may satisfy this standard under the right circumstances (para 75).

^[12] *Ibid*.

[13] *Ibid* at 1114. See also [Delgamuukw v British Columbia](#), 1997 CanLII 302 (SCC) at paras 161-164 . Courts must consider what form the Crown's fiduciary duty takes, and what the Crown must do in its fiduciary capacity to justify infringing the protected right. The degree of scrutiny required must vary according to the nature of the Aboriginal right at issue and the form that the Crown's fiduciary duty takes.

[14] *Ibid* at 1121.

[15] *Ibid* at 1119.

[16] [R v Powley](#), 2003 SCC 43 at para 48.

[17] See [R v Badger](#), 1996 CanLII 236 (SCC) at para 79.

[18] See *Delgamuukw*, supra note 13 at para 165.

[19] See *R v Côté*, 1996 CanLII 170 (SCC) at para 74.